REPORTABLE

CASE NO. SA 6/95

IN THE SUPREME COURT OF

NAMIBIA In the matter between

THE STATE SECOND APPELLANT

versus

ASSER SINGANDA SECOND RESPONDENT

CORAM: MAHOMED, C.J. et DUMBUTSHENA, A.J.A. et HANNAH, A.J.A.

Heard on: 1996.04.23 +

1996.04.24 Delivered on: 1997/03/20

JUDGMENT

HANNAH, AJA: The respondent to this appeal, Asser Singanda, appeared before the High Court (Strydom J.P.) together with a co-accused, Immanuel Shikunga, on an indictment which charged them with the murder of Ian Scheepers (to whom I shall refer as "the deceased") and with the robbery of the deceased. At the conclusion of a fairly lengthy trial Shikunga, (to whom I shall refer as "the second accused"), was convicted on both counts and was sentenced to life imprisonment on the first and to sixteen years imprisonment on the second. The respondent, (to whom I shall refer as "the first accused"), was acquitted on the first count but convicted on the second. He was sentenced to twelve years imprisonment.

The second accused was granted leave to appeal to this Court

against his convictions and sentences and after hearing argument on that appeal judgment was reserved. The Prosecutor-General also sought leave to appeal against the acquittal of the first accused pursuant to section 316 A of the Criminal Procedure Act, No. 51 of 1977, and leave was likewise granted. Argument on this appeal was heard immediately after the appeal of the second accused and this judgment is concerned solely with the acquittal of the first accused.

The State case, in a nutshell, was as follows. The second accused had been employed by the deceased who resided by himself at Omaruru. His employment was terminated on 5th January, 1993. On the evening of 30th July, 1993 the Omaruru police were alerted to the fact that the deceased's van had been abandoned outside Omaruru by two men who had run off into the veldt. There were various goods such as a television set and video recorders en the back of the van and bloodstains were found in the driver's compartment. The police went to the deceased's house and found him lying in a corner of the hall. He was covered in blood and was dead. A post mortem examination subsequently carried out revealed that he had been stabbed twenty three times cr. various parts of his body and chat death was due to exsar.guination from the multiple wounds inflicted. The various goods found on the back of his van had been removed from his house. The prosecution case was that the two accused set out that evening to rob the deceased and in the course of the robbery killed him. That having killed him,

they loaded his van with various items of hi-s oroo ertv and then made off. But

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when another motorist showed interest in the erratic manner in which the van was being driven they panicked, abandoned the van and made off into the veldt.

The second accused did not dispute that he was responsible for the death of the deceased. His defence was that he had visited the deceased that evening for the sole purpose of asking for money which the deceased owed him from his previous employment and for other services rendered. That the deceased reacted violently to his presence on his property and attacked him. And that he stabbed the deceased in self-defence and, in any event, lacked the requisite intent for the crime of murder. Ke took the deceased's goods in lieu of the amount owed.

The first accused did not dispute that he accompanied the second accused to the house of the deceased that evening. His defence, as it ultimately emerged, and I put it that way because his case, as put to the Court a cuo, was not always consistent, was that he took no part in the killing and in fact tried to prevent the second accused frcr?. stabbing the deceased. Also, that he played no par" in the theft of the deceased's procercv. While trying to prevent the second accused from stabbing the deceased he himself had been stabbed en the hand by the second accused ar.d he recreated outside and hid. While in hiding the second accused, unbeknown to him, loaded various items of the deceased's property onto the van and then insisted that he drive the van.

The learned judge in the Court a quo rejected the version of events given by both accused in the witness box. Ke was in no. doubt . that they had both lied about almost everything they had told the Court. Mr Christians, who appeared for the first accused both before this Court and the Court a cruo, did not seek to argue that the learned judge was wrong in so finding. Nor, in my view, could he have done so with any hope of success. On the material before the Court a quo both accused were clearly shown to be unmitigated liars from the time of their arrest onwards. The learned judge found that the two accused went to the deceased's house that evening with the incention of robbing him and did indeed rob him. Again Mr Christians did not seek to criticise that finding and, in my view, righcly so. There was ample material before the Court a cuo to support it and it comes as no surprise that the first accused did not seek leave to appeal against his robbery conviction. The learned judge then went on to find that the deceased was stabbed exclusively by the second accused. This finding also cannot be faulted and Mr Small, who appeared for the State both before this Court and the Court a cuo, conceded this to be the case. The learned judge then found that there could be

no doubt that while the deceased was being stabbed by the second accused he was ceir.cr held bv the first accused. This finding was based en what was said by the first accused both in a statement made to a magistrate and during a plea explanation made in proceedings held pursuant to section 119 of the Criminal Procedure Act. The voluntariness of both statements was challenged by the first accused but his evidence on this issue on the voire dire was rejected by the

learned trial judge and both statements were admitted in evidence. For reasons which will shortly become apparent Mr Christians did not argue that the statements were wrongly admitted.

As what v/as said *by* the first accused in both statements formed the basis for his acquittal it is necessary to set out parts of them. Having described how he and the second accused went to the deceased's house in order to rob him he continued:

> "We came to the house and Johnny [the second accused] walked ahead of me. Johnny then rang the door-bell. The white man opened the dcor. Then we burst into the house and grabbed the white man. It was only Johnny and I. I grabbed the white man from behind and we started to struggle. While I held the white man and struggled with him, Johnny took out the knife he had with him and started stabbing the white man. Johnny and I decided beforehand that we would only tie up the white man but Johnny took out his knife and stabbed rapidly. He stabbed the white man in the chest near the throat. While I held the white man Johnny stabbed me three times. Once it was in my left middle finger and twice in the palm of my hand. After he stabbed me I let go of the white man. The white man fell on his stomach. 3efore he fell he still had the power to struggle. When I let go of him he was still en his feet. Johnny then rushed at him and stabbed him once in the back of his neck. The white man then fell down on his stomach. I said to Johnny that we had agreed that we were going to tie up the white man and I asked him why he started stabbing the man. He said that the white man knew him and that he would ce able to trace him. He said that he was afraid of that and for that reason he stabbed him."

The first accused then went en to relate events which occurred after the stabbinc.

The plea explanation made in the section 119 proceedings was

to much the same effect. In answer to the question whether he had assaulted the deceased the first accused said that he had and when asked how he said:

> "We held him tight and stabbed him several times in the neck."

Ke then went on to describe the incident in more detail and coming to the actual scabbing said:

> "I held Dr Scheepers. There was a scufie between me and Dr Scheepers. Accused 2 pulled out a knife
> and stabbed Scheepers twice in his neck. Ke also cut me. I told accused 2 not to stab but he continued stabbing. I asked accused 2, he had said we must fastened the man, why did you stab him. Accused 2 said because Scheepers recognised him ...."

And in answer to a question whether he had foreseen the possibility that he might cause the death of the deceased the first accused replied:

> "Our intention was not to kill Scheepers. We only wanted money."

Returning new to the learned judge's judgment, he found that there was a reasonable possibility that the account given by the first accused in the two statements might be true. In particular that he and the second accused had gone to the deceased's house without weapons thinking that they would easily overpower him but that the second accused then acted contrary to their agreement and stabbed the deceased. The learned judge then found that the action of the second accused in stabbing the deceased was not

reasonably

foreseeable. The judge's reasons for this finding were firstly that the original agreement was that the deceased would be tied up, secondly that neither accused was armed and thirdly that the second accused described the deceased in a statement which he also made as being an old man.

Having found that the accion of the second accused was not reasonably foreseeable the learned judge then went on to consider whether a common purpose could nevertheless be inferred from the fact that the first accused was holding the deceased while the second accused stabbed him. In ocher words, whether a common purpose arose on the spur of the moment. He found that it could not. He was of the view thac the evidence did not establish that the first accused held the deceased so that the second accused could stab him and it may have been, in the view of the learned judge, that the first accused only became aware of the stabbing when he himself was stabbed in the hand. At that point the first accused, according to his statements, let go of the deceased. The learned judge concluded that on the information contained in the two statements it was not possible to find beyond reasonable doubt chat the first accused was aware of the scabbing prior tc releasing the deceased and thac accordingly the State had failed to prove that the first accused acted in common purpose wich the second accused when the latter killed the deceased. He also rejected an alternative submission made by Mr Small thac the first accused should be found guilty as an accessory after the fact to murder.

In support of the appeal by the State against the decision of the learned judge to acquit the first accused Mr Small launched a two-pronged attack. - Firstly/ he submitted that' the learned judge erred when he considered only the exculpatory parts of the first accused's statements. Had he had due regard to the statements as a whole then, so counsel submitted, the content of the statements, read with the objective evidence, would have driven him to the inexorable conclusion that the first accused actively associated himself with the killing of the deceased. Secondly, he submitted that the finding by the learned judge that it was reasonably possible that the first accused cr.ly became aware of the stabbing when he himself was stabbed in the hand and thereupon immediately disassociated himself from the actions of the second accused was noc based on any reasonable, solid foundation to be found in the positive evidence adduced before him. A third attack which v/as not pursued with any vigour v/as to the effect that the learned judge should have found that the first accused was an accessory after the fact to murder on the basis that he assisted the second accused to flee the scene of the crime and that he lied to the police in order to assist the second *accused* to evade liability fcr the crime.

Before considering these submissions it is necessary to make one or two observations concerning the role played by the two statements of the first accused at the trial. As mentioned earlier, the voluntariness of both statements was challenged in the Court a cuo but the evidence of the first accused on this issue was rejected and the

statements were

admitted. Statements made by the second accused were also challenged with a similar result and in the appeal of the second accused it was argued *that the Court a quo was wrong to hold, as it did, that the onus of proving that a confession was not voluntary rests on an accused. This argument was not advanced by Mr Christians in the present appeal for the obvious reason that the statements made by the first accused were used by the Court a cuo as a basis for his acquittal. For the reasons given when dismissing the appeal of the second accused I will proceed on the basis that although there can be no onus en an accused to prove that a confession was not voluntary, the onus being en the State, the statements made by the first accused were nonetheless proved by the State to be voluntary and were properly admitted in evidence.

The Appellate Division of the Supreme Court cf South Africa has consistently held that an extra-curial statement cf an accused, once adduced in evidence, must be viewed and evaluated in its entirety, inclusive of assertions and explanations favourable to the maker: R v Valachia and Another. 1945 AD 826 at 637; S v Felix and Another, 1980(4) SA 604 (A) at 609 H - 610 A; S v Xhoza. 1932(3) SA 1019 (A) at 103 9 A - 5; S v Yelani. 1939(2) SA 43 (A) at 50 A - F; ar.d S v Mduli and Others. 1993(2) SACR 501 (A) a: 5C5 f - h. In my view, the same principle should be applied by this Court. However, as was pointed out in Valachia[f]s case:

> "Normally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement

> favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency."

Similar sentiments were expressed in S v Nduli and Others (suora) at p. 505 f - g:

> "A statement made by a man against his own interests generally speaking has the intrinsic ring of truth; hue his exculpatory explanations and excuses may well strike a false note and should be treated with a measure of distrust as being unsworn, unconfirmed, untested and self-servinc."

As already indicated, the Court a cuo relied principally on the first accused's extra-curial statements in arriving at its decision to acquic. Having found that the two accused went to the deceased's house that evening with the intention to rob, that having entered the first accused grabbed the deceased from behind, that while the first accused held the deceased the second accused proceeded to stab him, that in the process the first accused was himself stabbed in the hand, no doubt accidentally, and that at that point in time the first accused released his grip on the deceased, the learned judge then found chat there was a reasonable doubt as to whecher che firsc accused was aware cf the scabbing prior to releasing the deceased. There was, as he put it in his judgment, inadequate information in the statements of the first accused for him co be satisfied beyond reasonable doubt that while holding the deceased the first accused was aware of the fact that he was being stabbed and that by holding him he was facilitating the continuing attack.

It is quite correct that in neither of his statements did the first accused deal explicitly with his awareness or non-•awareness of the stabbing prior to being stabbed himself. However, on my reading of the two statements, and in particular the first one, the only reasonable construction to be placed on the words used is that he was so aware. He said:

> "While I held the white man and struggled with him, Johnny took out the knife he had with him and started stabbing the white man."

The fact that he then said:

> "Johnny and I decided beforehand that we would only tie up the white man . . . ."

was certainly material which could form the basis for a finding that there may not have been a prior plan to kill the deceased but it was not, in my opinion, material which in any way qualified the plain import of the words used immediately before. The first accused then reiterated:

> "Johnny took cut his knife and stabbed He stabbed the white man in the chest

It was only after saying this that the first accused referred to himself sustaining stab wounds at which point he said he released the deceased. And in the second statement he began by saying:

> "We held him tight and stabbed him several times

in the neck."

Ke then went on to say:

> "I held Dr Scheepers. There was a scufie between me and Dr Scheepers. Accused 2 pulled out a knife and stabbed Scheepers twice in the neck. He also cut me. I told accused 2 not to stab but he continued stabbing."

It is true, of course, that in this statement the first accused mentioned only two stab v/ounds and said that he told the second accused not to stab but that he continued to do so. But I see no reason whatsoever for accepting what was said in this statement in preference to what was said in the first when it is borne in mind that its maker was found by the Court a quo to be an inveterate liar who had lied about almost everything and who even denied, falsely as it was found, that the contents of both statements bore any resemblance to the truth.

It is, in my view, of considerable relevance that in his first statement the first accused said that after he released the deceased the second accused rushed at him and stabbed the deceased once in the neck and the deceased then fell to the floor. It is to be clearly inferred from this that the other stab wounds found *cr^* the body cf the deceased were inflicted before the first accused released him and it is highly significant that according to the unchallenged evidence these numbered twenty two. The learned judge in the Court a cuo was not prepared to find as a fact that the first accused was holding- the deceased while these twenty

two wounds were inflicted because the first accused, in his view, had not given a suficiently detailed account of the attack in his statements. But whether his account was lacking in detail to my mind mattered not. It was, as I have said, clearly to be inferred from what he did in fact say that apart from the final blow to the neck all other stab wounds were inflicted before he released the deceased and the fact that he falsely denied that events occurred as set out in the statements so strongly reinforces this inference that it can be said to render it conclusive.

Once it is accepted, as on my view of the evidence it must be, that the first accused was holding the struggling deceased while the second accused stabbed him twenty two times on various parts of his body it would be totally unrealistic to find, as a reasonable possibility, that he might not have been aware of what v/as happening. Inflicting twenty two stab wounds on the body of another will obviously take some time especially when the victim is en his feet and struggling. The victim himself will inevitably react both visibly and audibly to the pain being inflicted. As a matter of logic and robust common sense a person holding the victim while such a multitude of stab wcur.esis being inflicted could hardly be unaware cf what is happening. And this conclusion is, in my view, unavoidable when account is taken of the fact that that person chose deliberately to

lie
about his involvement when he came to testify. In ail the
circumstances, the first accused must have been aware cf
the
fact that a savage knife attack was being perpetrated on
the
man he was holding and that by continuing to hold him he
was

facilitating the attack. And that more or less accords with what he said in the first statement. This being the case there could be no reasonable doubt that the first accused associated himself with, and assisted in, an attack which resulted in the death of the deceased.

Further, having regard to the first accused's knowledge of the weapon being used and the ferocity of the actack the only reasonable inference to be drawn is that he muse have realised that there was a possibility of the deceased losing his life as a result of the actack. And that inference is reinforced by his behaviour afcer the event. Evidence of behaviour afcer an event can, of course, serve as an indication as to state of mind at the time of the event: ▫ v Maiosi and Others, 1991(2) SACR 532 (A) at 538 b - c. Far from distancing himself from his co-accused after the coldblooded killing of the deceased the first accused remained a willing participant in their joinc venture to rcb him. That, in itself, tends to show that he was an active and a willing parCicipanC in what had taken place immediately before. His conduct, taken together with his state of mind at the time, made him party to the commission of the murder cf the deceased and chat, in my judgment, is the verdict which the Court a cuo should have reached. The benefit of doubt which the Court a cuo generously gave to the first accused was not, on a proper analysis, based upon a reasonable and solid evidential foundation.

3oth counsel are agreed, correctly in my view, that this Court should apply che same principles in an appeal by Che

State against an acquittal as those to be applied in an appeal by a convicted accused against his conviction. For the reasons I have given I am convinced that the learned trial judge v/as wrong in the conclusion he reached on the first count and accordingly I would allow the appeal, set aside the acquittal and substitute a conviction for murder.

The alteration to the verdict necessarily entails consideration of an appropriate sentence. That i-n my view is, in all the circumstances, an exercise best left to the trial Court.

In the result:

1. The appeal is allowed.

2. The acquittal on the first count is set aside.

3. There is substituted a verdict of guilty of murder on the first count.

4. The case is remitted to the trial court for sentence to be imposed on the first count.

HANNAH, ACTING JUDGE OF APPEAL

I agree

MAHOMED, CHIEF JUSTICE

I agree

DUMBUTSHENA, ACTING JUDGE OF APPEAL

ON BEHALF OF SECOND APPELLANT:	ADV D F SMALL
Instructed by:	Prosecutor-General
ON BEHALF OF SECOND RESPONDENT:	ADV W T CHRISTIANS
Instructed by:	Legal Aid Board