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N v H

ALFRED PHUZUKUVELA MSANI — First Appellant

MUHLEPHETHWE KING GUMEDE — Second Appellant

and

THE STATE — Respondent

SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALFRED PHUZUKUVELA MSANI — First Appellant

MUHLEPHETHWE KING GUMEDE — Second Appellant

and

THE STATE — Respondent

CORAM: RABIE, CJ, JANSEN, et SMALBERGER, JJA

HEARD: 5 SEPTEMBER 1986

DELIVERED: 16 SEPTEMBER 1986

J U D G M E N T

SMALBERGER, JA :-

Shortly before 8 p.m. on 29 August 1985

Sikhosiphi Sixtus Msani (the deceased) left the premises of the Zakheni Bottle Store in Umlazi, of which he was the owner,

and proceeded towards his motor vehicle which was parked a short distance away. On reaching his vehicle he was attacked by two men. In the course of being assaulted the deceased was fatally shot. The later post-mortem examination of his body revealed that he had been shot five times, and that the cause of his death was multiple gunshot wounds. The nature and circumstances of the attack on the deceased were such as to permit of no doubt that his assailants intended to kill him.

As a sequel to these events the two appellants, together with five other accused, were charged in the Durban and Coast Local Division with the murder of the deceased, alternatively, with conspiring to murder him. At the con= clusion of the trial the Court, consisting of BROOME, J, and

two assessors, convicted both the appellants of murder. The other five accused were acquitted on both the main and alternative counts. Extenuating circumstances were found to be present in respect of the first, but not the second, appellant. The first appellant was sentenced to 15 years imprisonment; the mandatory death sentence was imposed on the second appellant. With leave of the Court a quo both appellants appeal against their convictions. The second appellant also appeals against his sentence, including the finding that there were no extenuating circumstances present in his case.

The only evidence connecting the two appellants with the killing of the deceased consists of statements, amounting to confessions, made by the appellants to two

magistrates / .....

magistrates together with, in the case of the first appellant, certain incriminating evidence given by him during a bail application in the magistrate's court. It is common cause that as the requirements laid down in section 217(1)(b) of Act 51 of 1977 for their admissibility were satisfied, the confessions are presumed to have been freely and voluntarily made, subject to proof to the contrary by the appellants on the requisite balance of probabilities. The trial Court held that the appellants had failed to discharge the onus upon them in this respect. The present appeal is concerned mainly with the question whether the trial Court was correct in so concluding. This involves a consideration of the evidence given at the trial in relation to this issue.

The gist / .....

The gist of the first appellant's evidence was as follows. He was arrested at his home in Umlazi by Sergeant Mbambo on the afternoon of 19 February 1985. In response to questioning he denied all knowledge of the deceased's death. He was thereafter detained at the Umbumbulu police station. The following day he was again questioned by Mbambo and told, inter alia, that he would be shot if he did not speak the truth. On the morning of the day thereafter (the 21st), when the first appellant persisted in his denial of any knowledge of the deceased's death, he was told by Mbambo that he would be taken to C R Swart Square in Durban where, in the words of the first appellant, "there were some people who were going to make me speak the truth". He was duly taken to C R Swart Square where he was interrogated by a number of

policemen. They fired questions at him simultaneously and persistently to the point where, according to the first appellant, "I could not cope". He was threatened with assault if he did not tell the truth. Because he did not co-operate, he was struck in the face, and fell to the floor, where he was stood upon and trampled or kicked. Later he accompanied the police when they went to arrest the second appellant and two of the other accused. On their return to C R Swart Square he was lodged in the cells there. He was later taken from his cell, and taken to a magistrate with instructions to make a statement admitting that he had con= spired with the deceased's wife to kill the deceased. According to the first appellant, on his arrival at the magistrate's office, "I did not speak because I was not able

to speak properly. My head was sore and I felt cold."

On his return to C R Swart Square he was told that if he did not make a statement he would be given treatment similar to that meted out to him previously. He was also told that the police would have access to any statement he made, and that if he complained of having been assaulted he would be dealt with appropriately. He was detained overnight in the Montclair police cells. The following morning (the 22nd) he was again taken to C R Swart Square where he was instructed to go and make a statement to a magistrate. He was schooled in regard to what to say in the statement. He was duly taken to a magistrate, where he made a confession along the lines prescribed to him. It is apparent from the first appellant's evidence (in keeping with what was put to the State witnesses

under cross-examination) that he made the confession in consequence of being assaulted, and because he feared further assaults. Furthermore, he claimed that the contents of the confession reflected what he had been told to say, and while true in part, was untrue in so far as it linked him to the death of the deceased.

I do not propose to detail the evidence given by the various State witnesses. Suffice it to say that they: denied having assaulted or threatened to assault the first appellant at any time; admitted that he had been interrogated in the presence of a number of policemen, but not for long, as he had been co-operative throughout, and his questioning had proceeded in an orderly and fair manner; claimed that on both occasions he went to a magistrate he was taken at his own

request / .....

request; conceded that he declined to make a statement on the first occasion, although he did so on the second; and denied that the first appellant had been schooled in any way, or told what to say to the magistrate. In addition Mbambo testified that the first appellant had not, as alleged by him, denied from the outset his involvement in the deceased's death, but had intimated that he was prepared to make a statement, but needed time to consider his position.

The trial Court found the first appellant to be "rather a poor witness". It held that the first appellant had not established, on a balance of probabilities, that he had been assaulted or told what to say in his confession. In finding that the first appellant had not discharged the onus of disproving that his confession was freely and volun=

tarily made, the trial Court was fully alive to the evidence given by the police witnesses concerning the manner in which the first appellant had been interrogated.

In the course of his judgment on the application for leave to appeal, the trial Judge said the following:

> "As regards accused No 1 (the first appellant), it is possible that the Appeal Court might, after having considered all the evidence, take the view that the methods employed by the investigating team, particularly the calling in aid of the additional members of the Durban Murder and Robbery branch, involving, as they did, a fairly long interrogation with questions being put to accused 1 by different people at different times - there was some evidence to suggest that he was hardly given an opportunity to answer one question before some other officer would direct a further question to him. That this had the effect of confusing him, of influencing his will, of making him feel overwhelmed and thereby affecting the ultimate question of admissibility. It seems to me that this is one of those cases where another Court might take a different view.

If the confession is found to have been improperly admitted, then of course the appeal would have to succeed."

These remarks were seized upon by the first appellant's counsel in support of an argument that the first appellant had been influenced against his will to make a confession as a con= sequence of prolonged, persistent and aggressive interrogation. Interrogation of such a kind may sufficiently overawe an accused person to negative his freedom of volition (S v Christie 1982(1) SA 464 (A) at 479 A; S v Chenisso 1983(4) SA 912 (T) at 914 A). Whether or not an accused person was so overawed will be a matter of fact or inference depending upon the circumstances of each case, in particular the nature and duration of the interro= gation, and the conduct of,and methods employed by those participa= ting therein. In the present instance the evidence for the

State was to the effect that the interrogation of the first appellant was neither prolonged, persistent nor aggressive as the first appellant had been co-operative throughout. The only suggestion to the contrary emanated from the first appellant in the course of recounting the events which culminated in his confession to the magistrate. What is significant, however, is that on a proper conspectus of the evidence it is apparent that the first appellant never relied upon his interrogation on the afternoon of 21 February, or the methods employed thereat, as the reason, or one of the reasons, why he made a confession the following morning. He sought in evidence to challenge the admissibility of the confession solely on the basis that it had been made as a result of assaults and threats of further assaults. The fact that the first appellant did

not claim to have been influenced into making a confession as a result of the manner in which he was interrogated deprives the argument that he was, or may have been, so influenced of any force (S v Gaba 1985(4) SA 734 (A) at 753 D - H). The evidence for the State does not justify an inference that the first appellant was unduly influenced by his interrogation. Accordingly counsel's argument that the first appellant's freedom of volition was negatived as a consequence of his interrogation falls away.

The question whether or not the first appellant discharged the onus upon him of proving that his confession was made as a result of assaults or threats of assaults, and therefore not made freely and voluntarily, involves issues of credibility. Before dealing with this it would be appropriate

to consider the first appellant's allegation that the contents of the confession was prescribed to him by the police, and was false in certain essential details. In this respect it was, and is, permissible to have regard to the contents of the first appellant's confession for the purpose of assessing and testing his credibility. (S v Lebone 1965(2) SA 837 (A) at 841 H - 842 C; S v Talane 1986 (3) SA 196 (A)).

The confession made by the first appellant was a lengthy one, and I do not propose to burden this judgment with the full text thereof. It records how the first appellant and the deceased started a bottle store business in partnership in 1978; how problems arose over the taking of stock which led to a deterioration in the relationship between the first appellant and the deceased; that an attorney was consulted,

and a detailed discussion held, the upshot of which was that the deceased promised to set up the first appellant in business on his own; that the deceased delayed unduly in doing so, causing the first appellant to suspect that he would not honour his undertaking; how the first appellant became sexually involved with the deceased's wife; that she discussed with him her desire to rid herself of the deceased, and possible means of doing so; how after much persistence she eventually prevailed upon him to hire someone to shoot the deceased, and gave him money for this purpose; that although he initially baulked at the idea, because of her persistence he eventually did her bidding; that he located some persons who were prepared to shoot the deceased if they were paid R1 000-00; that they duly carried out their undertaking and

shot the deceased; and that he thereafter paid them for doing so.

The first appellant's contention that the police prescribed the contents of his confession to him is denied by the various police witnesses. When regard is had to the mass of circumstantial detail contained in the confession relating to events preceding the shooting of the deceased, much of which the first appellant admits is true, one is inexorably drawn to the conclusion that only the first appel= lant himself could have been the source thereof. This is particularly so when one considers the detail with which he recounted his dealings with the deceased and their attorney, and his attempts to excuse his conduct and exonerate himself as far as possible. Furthermore, the magistrate who

recorded / .....

recorded the confession gained the impression that it was made spontaneously, and did not detect any indication that it was being recited. The above conclusion is strengthened when account is taken of the evidence given by the first appellant a month later in the magistrate's court when applying for bail. His decision to apply for bail and give evidence was manifestly an act of his own volition. In his evidence he repeated the essential details of his involvement in the killing of the deceased, as set out in his earlier confession. It is unlikely that he could have retained such an accurate recollec= tion of the facts if, as he claimed, they had been prescribed to him a month earlier by the police. His suggestion that Mbambo's presence at court at the time of the bail application had something to do with the evidence he gave is lame and un=

convincing. In the circumstances the finding by the trial Court that "we just do not accept that he was repeating to the magistrate things about which he knew nothing, but which he had been told by the police to recite" is fully justified. Inevitably this finding casts grave doubts upon the first appellant's credibility.

The first appellant's evidence that he was assaulted and threatened with further assaults is denied by the police witnesses. As a mature adult with business experience one would have expected the first appellant, had he been assaulted, to complain thereof at the first available opportunity. Yet he never complained about being assaulted to either the magi= strate to whom he made his confession or the magistrate to whom he applied for bail. He first mentioned having been

assaulted by the police at a very late stage, indeed some time after he had first enjoyed legal representation. He was untruthful in suggesting that the police had prescribed to him what to say in his confession and, as previously mentioned, was found to be "rather a poor witness". The fact that the first appellant declined to make a statement on his first visit to a magistrate is a relevant consideration. In the context of the evidence as a whole, however, such conduct is equally consistent with his not feeling well for reasons unconnected with any assault upon him, or requiring further time to consider his position, as being the consequence of an earlier assault. In the circumstances I am unpersuaded that the trial Court erred in holding that the first appellant had failed to establish that his confession was made as a

result of assaults or threats of assaults.

The second appellant also alleged that he had confessed to a magistrate because of assaults upon him by the police. The gist of his evidence was as follows. He was severely assaulted by a number of policemen at the time of his arrest on 21 February 1985. The assault assumed such proportions that his whole body was swollen as a result thereof. He was later taken to C R Swart Square where he was further assaulted by being kicked and hit with fists - again by a number of policemen. Thereafter he was detained over= night at the Umlazi police station. The following morning he was again taken to C R Swart Square. He was once more assaulted by being hit and kicked. In addition a tube was placed over his face which caused him to collapse because he

was unable to breathe. He was told to go and make a statement to a magistrate, and he did so because of the assaults upon him. He also claimed that what he told the magistrate had been prescribed to him by the police.

In this latter respect one may, in the case of the second appellant as well, have regard to the contents of his confession to assess and test his credibility. In his con= fession he recounted how he had been approached to kill the deceased; that he agreed to do so; that he went to the deceased's bottle store; that when he discovered the deceased was a relatively elderly person he refused to be a party to his killing and went home; that he was prevailed upon to return to kill the deceased; on this occasion a firearm was given to him at the scene of the killing; he used it to shoot the

deceased / .....

deceased; he was later thanked by Msani (the first appellant) for what he had done; the money (which by implication he had been promised earlier for killing the deceased) was subsequently paid to him.

As in the case of the first appellant, the detail and content of the second appellant's confession negatives the suggestion that he was told what to say by the police, a matter about which, in any event, he was surprisingly vague. His evidence that he was so told was rightly rejected by the trial court - a finding not seriously challenged on appeal. This adversely affects his credibility. In addition, he was found to be a garrulous, unimpressive witness who "indulged in extravagant generalities which just could not be true". A reading of his evidence bears out these findings to the hilt.

His / .....

His evidence concerning the assaults upon him smacks of gross exaggeration on his part. Notwithstanding his claim that he was seriously assaulted on a number of occasions he had no visible injuries when he made his confession. His allega= tions of assault were denied by the police witnesses about whom it was said by the trial court that "there was nothing patently unsatisfactory, patently false, about any of the evidence given by (them)". In the circumstances the trial court was fully justified in holding that the second appellant had not been assaulted as alleged by him.

On the totality of the evidence I am unpersuaded that the trial Court erred in holding that the two appellants had failed to discharge the onus upon them of proving that their confessions were not freely and voluntarily made.

Consequently / .....

Consequently the pre-conditions for the admissibility of their confessions were satisfied. It was suggested on behalf of the appellants that even if the confessions were found to be technically admissible, the trial Court had a discretion to exclude them, and should have exercised such discretion in their favour. Whether or not such a discretion exists (a matter open to considerable doubt) was left open in S v Mphahlele and Others 1982(4) SA 505 (A) at 513 E. It would be undesi= rable to express a final opinion on the matter in the present case, as the point was not fully canvassed in argument, and its determination is not essential to the just decision of the case. The discretion, if it exists, operates "to exclude evidence which, although legally admissible, may have very little proba= tive value but a strong potential of prejudice." (Mphahlele's

case at 513 D). This situation does not pertain in the present matter as both confessions have strong probative value. Accordingly, even if a discretion of the kind suggested exists, this was clearly not a proper case for its exercise in favour of the appellants.

The trial Court held that it could safely be accepted that the confessions made by the two appellants con= tained the truth, and they were both convicted on the strength of their confessions. It was not disputed that if the appellant's confessions were correctly admitted they were both guilty of murder - the first appellant because he arranged the killing of the deceased, and the second appellant because he carried it out. In the case of the first appellant, even without his confession the evidence given by him at his bail

application, /.....

application, in conjunction with the evidence for the State, would probably have been sufficient to establish his guilt beyond all reasonable doubt. In the result the appellants' appeals against their convictions must fail.

There remains the question of extenuating circum= stances in the case of the second appellant. The trial Court, in my view, correctly, found that he was a hired assassin, and that there were no circumstances which served to reduce his moral blameworthiness. It is true that the second appellant at one time apparently displayed reluctance to shoot the deceased, but ultimately he did so. He failed to take the trial Court into his confidence, and to provide any explanation for his conduct. No considerations emerge from the evidence which justify a finding of extenuating

circumstances. The second appellant consequently failed to discharge the onus upon him of establishing the existence of such circumstances.

The appeals of both appellants are dismissed.

J W SMALBERGER

JUDGE OF APPEAL

RABIE, CJ)
JANSEN, JA) CONCUR