LL Case No 390/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

NDUMISO ZACHARIA MOLE Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, NESTADT JJA et FRIEDMAN AJA

HEARD: 19 FEBRUARY 1990

DELIVERED: 26 MARCH 1990

JUDGMENT

VAN HEERDEN JA:

On 20 June 1987 the body of Lynet Ngonyama was found in a ravine near Lamontville. She had been dead for some time. The cause of death was penetrating incised wounds which had inter alia severed the pulmonary artery.

Subsequently the appellant was arraigned in the Durban and Coast Local Division on a charge of having murdered the deceased on 5 June 1987. He was convicted and sentenced to death. With the leave of the trial judge his appeal is directed only against his conviction.

The main evidence implicating the appellant may be summarised as follows.

1) The father of the deceased, J.M. Ngonyama, testified that shortly before the discovery of her body the appellant made certain confessions to him. The gist of these was that the appellant and somebody else (apparently one Dube) had murdered the deceased and had concealed her body under some bushes.

The motive, according to the appellant, was that he had had sexual intercourse with the deceased and was afraid that she would prefer a charge against him. According to the witness the appellant also agreed to lead him and others who were present to the spot where the body had been hidden. In the presence of police officers the appellant then led a sizeable crowd to a ravine and pointed at a thick bush. The body of the deceased was indeed in or under that bush.

2) Two other witnesses, Mkhizi and Ncayinyana, said that at approximately 21.00 on 5 June 1987 they came across the appellant when walking along a road in Lamontville (in the vicinity of the spot where the body was later discovered). The appellant was hitting a young woman on her head with the handle of a knife whilst saying that she was a prostitute who had "eaten" his money.

3) On 22 June 1987 the appellant made a statement to a magistrate. Having said that he and a

friend had left his home on a Friday evening, the appellant continued:

> "When we were near a school at Gijama we met his girlfriend. He told me she was his former girlfriend and that she jilted him for reasons he could not understand. He suggested we took the girl away with us. Then I said why should we take her with us when she is no longer his girlfriend. Then I said to the girl, 'Do you hear what he says? Let us go.' The girl refused. When she refused I hit her in order to frighten her. After hitting her I escorted her away. He followed us and he showed us the way and we walked along a path which runs in between the houses. We stopped in some bushes. He had sexual intercourse with the girl. Thereafter he told me to do so as well. I did so. Then he said the girl would lay a charge against us because he was known to her and he said he had decided to stab her, and I left him and the girl in the bushes."

The evidence as a whole left no doubt that the girl mentioned by the appellant in his statement was the deceased, and that the occasion was the evening of 5 June 1987.

The appellant's evidence broadly followed the tenor of his statement. He denied that he killed the

deceased and said that she and his friend, Dube, were sitting next to each other - apparently on very good terms - when he left them and walked home. He also denied that he made the aforesaid confessions or that he assaulted the deceased with the handle of a knife on the evening in question.

The trial court (Nienaber J and assessors) accepted the testimony of Mkhizi, Ncayinyana and the deceased's father, and rejected the version of the appellant who was considered to be "an atrocious witness". The court's ultimate conclusion was that there could not be the slightest doubt that the appellant was "directly implicated in the death of the deceased, either on his own, or in concert with Dube".

Ngonyama's testimony that the appellant pointed out the precise spot where the deceased's body was found, was not only disputed by the appellant but, in the view of the trial court, was also in conflict with the evidence of constable Walthew. The latter

said that on 20 June 1987 he proceeded in the company of inter alia the appellant and Ngonyama to the scene where, according to the appellant, the body would be found. He continued as follows:

> "He [the appellant] showed me an area of ground where the body was - in the area, but he couldn't exactly remember where the body was. After searching one of the local people whistled and attracted my attention to show me that they had found the body. We then proceeded to the - myself and the accused then proceeded to the scene and we discovered the body."

The court remarked that the above passage was in conflict with Ngonyama's testimony that the appellant had pointed out the spot in question, but that in another respect Walthew's evidence contradicted the appellant's version. This was so because, according to Walthew, the appellant agreed to lead them not to the spot where he left Dube with the deceased - as the appellant would have it - but to the place where he left the body of the deceased. In view of Walthew's evidence the court accepted that Ngonyama was mistaken

when he denied that the body was discovered by one of the crowd, but took into account that the latter must have been shaken, distressed and under considerable emotional strain. But for this one point, the court found, Ngonyama gave his evidence "consistently, accurately and with a great deal of sincerity and conviction".

As regards the evidence of Walthew and Ngonyama counsel for the appellant made the following submissions:

1) Since Walthew conversed with the appellant through an interpreter who was not called as a witness, the court a quo was not entitled to take into account Walthew's hearsay contradiction of the appellant.

2) If - as the court found - Ngonyama was mistaken when he testified that the appellant pointed out the spot where the body was found, the emotional stress which caused his erroneous belief may well have

befogged his recollection of the import and extent of the appellant's "confessions". Ngonyama was moreover a single witness in regard to the confessions, and the well-known cautionary approach should therefore have been followed when the court evaluated his evidence.

It is, of course, trite law that evidence of a conversation conducted through an interpreter is to be regarded as hearsay - and thus inadmissible - unless the interpreter is called as a witness. (This rule is subject to exceptions which do not apply *in casu*.) It follows that Walthew's version of the interpreted *dicta* of the appellant was inadmissible. As will appear, however, this does not assist the appellant.

As regards the second submission, Ngonyama was clearly not a single witness to whom the cautionary rule applied. Viewed in the light of all the admissible evidence, including the appellant's statement, the testimony of Ncayinyana and Mkhize undoubtedly implicated the appellant and indirectly corroborated

Ngonyama's version of the confessions (cf. S v Snyman 1968 (2) SA 582 (A) 586-7).

Coming then to the criticisms directed at Ngonyama's testimony by counsel for the appellant, the inadmissibility of Walthew's aforesaid evidence presents this dilemma to the appellant: if Walthew did not understand what the appellant was saying on the scene, he was hardly in a position to contest Ngonyama's evidence that the appellant actually pointed out the spot in question. Moreover, it is not clear to me that Walthew's evidence contradicted that of Ngonyama in a material respect. As stressed by counsel for the respondent, Ngonyama's testimony was not that the appellant actually led the crowd to the spot, but rather that he pointed at the spot. However, I shall assume, in favour of the appellant, that the court rightly found that Ngonyama was mistaken when he said that the appellant pointed out the particular spot where the body of the deceased was found.

As already stated, the court found that Ngonyama was an impressive witness. Apart from the contradiction arising from Walthew's evidence, counsel for the appellant could not point to a single unsatisfactory feature of his evidence, and there does not appear to be any reason to question the court's asessment of its quality. It is true that in the view of the court that testimony was corroborated by Walthew's inadmissible version that the appellant agreed to lead Walthew and others to a ravine where the body was to be found, but I do not think that this misdirection was a material one. I say so because Ngonyama's evidence concerning the confessions was in any event strongly, albeit indirectly, corroborated by the other two State witnesses and by inferences to be drawn from other evidence, including the appellant's own testimony. So, for example, it seems clear that the appellant arrived back home in the company of Dube who, according to the former's version, must have

killed the deceased and spirited her body some 50 yards away from the spot where the appellant parted company with them.

The possibility that emotional stress on the part of Ngonyama might have led to a mistaken impression or recollection of the import of the appellant's "confessions", must obviously have been considered by the court a quo. Furthermore, according to the witness, the confessions were made on two separate occasions and their contents are such that it is unlikely that he misunderstood the limited import of the admissions which, on the appellant's version, had been made to Ngonyama.

It was furthermore submitted that Ncayinyana and Mkhize contradicted each other in a material respect. The submission is so clearly devoid of substance that it need not be spelled out. But, it was also contended, their evidence that the appellant made mention of the deceased having "eaten" his money for a

long time was improbable because it was common cause at the trial that the deceased had come out of prison shortly before 5 June 1987. I am not at all sure that this much was indeed common cause, but even if it were, it may well be that the appellant was incarcerated for a relatively short period and that the above accusation levelled against the deceased was intended to refer to a period before the appellant went to jail, or even to the period of his imprisonment.

Finally, whilst conceding that the appellant was an untruthful witness, counsel for the appellant submitted that an accused's lies are not necessarily irreconcilable with his innocence. As a general proposition no fault can be found with this submission. Obviously, however, much depends on inter alia the extent and nature of the untruths. In casu the accused's own evidence gives rise to such a strong inference that he and Dube planned and executed the death of the deceased, that the lies told by him are

indeed hardly compatible with his innocence. Having regard to the damning evidence given by the abovementioned three State witnesses, the court a quo therefore rightly convicted the appellant.

The appeal is dismissed.

H.J.O. VAN HEERDEN JA

NESTADT JA

CONCUR

FRIEDMAN AJA