109/94

CASE NOS 341/92 & 728/92

/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

M P JANUARY — APPELLANT

and

THE STATE — RESPONDENT

and

PROKUREUR-GENERAAL: NATAL — APPELLANT

and

S M KHUMALO — RESPONDENT

CORAM : VAN HEERDEN, SMALBERGER, NIENABER, VAN DEN HEEVER et HARMS JJA

HEARD : 22 AUGUST 1994

DELIVERED : 8 SEPTEMBER 1994

JUDGMENT

VAN HEERDEN JA/...

VAN HEERDEN JA:

These two matters were heard together because the same point of law arose in each.

In January v The State the appellant was one of five accused who stood trial in the Eastern Cape Division on inter alia two charges of murder. These related to the death of two young men who had been abducted from a house in the district of Uitenhage during the evening of 8 November 1989. For some 16 days thereafter their whereabouts remained unknown to the police and their families. In the early hours of 24 November the appellant and others were arrested. They were taken to a building known as the Ford Centre where the appellant was questioned by Warrant Officers Noyo and Moshara. Eventually the appellant told his interrogators that he wished to point something out. The upshot was that the appellant and Warrant Officers Fourie and

Odendaal proceeded in a motor vehicle to a spot in an open area in the district of Uitenhage. They arrived there because the Warrant Officers had followed directions given by the appellant. After the vehicle had stopped the appellant pointed out a manhole with a heavy lid. When the lid was removed the decomposed bodies of the two young men were found inside the manhole. It was later established that they had been murdered before their bodies were dumped into the hole.

On 25 November 1989 the appellant made a statement to a police captain. The admissibility of this statement and the pointing out was contested by the appellant on the ground that they had been induced by assaults on him by Noyo and Moshara at the Ford Centre. Predictably they denied that they had assaulted the appellant. At the end of a trial-within-a-trial the presiding judge (Kannemeyer JP) ruled that the statement was inadmissible because of the State's failure to discharge

the onus of proving that it had been freely and voluntarily made. He held, however, that the evidence relating to the pointing out was admissible even if it had taken place as a result of assaults on the appellant.

In the main judgment the court a quo drew certain inferences from the pointing out and, for reasons not material to this appeal, found the appellant guilty as an accessory after the fact on the two capital charges. Subsequently the appellant was sentenced to five years' imprisonment of which a period of two years was conditionally suspended on the two charges treated as one for purposes of sentencing. With the leave of Kannemeyer JP the appellant then appealed to this court against his convictions.

At the hearing of the appeal it was rightly common cause that, if it was necessary to do so, the State failed to prove that the

pointing out had not been induced by the assaults testified to by the appellant, and that if the evidence relating to that conduct of the appellant was inadmissible the appeal must succeed. The crisp, but by no means easy, question therefore is whether proof of an involuntary pointing out by an accused is admissible in a criminal matter if something relevant to the charge is discovered as a result thereof. (Since the assaults in question were allegedly committed by policemen, I shall confine myself to a pointing out which is involuntary because of something said or done by a person in authority.)

Although we have been referred to various authorities, only two require detailed consideration. They are the decisions of this court in R v Samhando 1943 AD 608, and S v Sheehama 1991(2) SA 860(A). In Samhando the accused had been convicted on a charge of murder. Shortly after the death of the deceased two so-called "policeboys" by the

use of considerable violence forced the accused to admit that he had killed the deceased. The accused then showed them inter alia where the blood-stained clothing of the deceased was concealed in the branches of an orange tree. The presiding judge refused to allow evidence as to the accused's admission to be put before the jury, but allowed the policemen to testify about the pointing out.

The matter came before this court after the presiding judge had reserved a question of law, i e whether the evidence of the pointing out was admissible. Having referred to the general rule of the English law of evidence which excludes a statement made by an accused person unless it is shown by the prosecution to have been freely and voluntarily made, Watermeyer ACJ said that there had arisen in England a modification of that rule, based upon what might be called the theory of confirmation by subsequently discovered facts. He explained it as

follows (at p 613):

> "The fundamental reason why admissions by an accused person made under an inducement are not admitted as evidence against him is because they are untrustworthy as testimony. If, therefore, such admissions can be proved to be true by other evidence, the reason for their exclusion vanishes and they should be admitted as evidence. Pushed to its logical conclusion that reasoning would lead to the admission of the whole of an otherwise inadmissible confession if it be confirmed in material particulars by subsequently discovered facts, but the English Courts, while admitting a partial application of this reasoning, have stopped short of carrying it to its logical conclusion. At first only the facts discovered by reason of an inadmissible confession were allowed to be proved in evidence, but subsequently the rigidity of the exclusionary rule was somewhat relaxed."

Watermeyer ACJ proceeded to quote a passage from East, Pleas of the Crown, and to refer to two English cases decided in 1809 and 1840. Without further analysis of the ambit of the exception to the general rule, he then held that the evidence of the policemen had been rightly admitted. It was no doubt for this reason that in R v Duetsimi

1950(3) SA 674(A) 678A Schreiner JA said that the true ratio decidendi of Samhando was not easy to discover.

Watermeyer ACJ based his judgment solely upon the common law. He therefore found it unnecessary to express an opinion on the ambit of s 274 of the Criminal Law and Procedure Act 31 of 1917 ("the 1917 Act"). That section was the predecessor of s 218(1) of the Criminal Procedure Act 51 of 1977 ("the 1977 Act") to which I shall return at a later stage.

In Duetsimi, Schreiner JA said the following (at p 678 F-G):

> "On the whole it seems to me that the true basis of the decision in Samhando's case is that, in relation to statements not amounting to confessions ..., the fact that the statements have not been shown to have been freely and voluntarily made does not prevent proof by the Crown not only of facts discovered in consequence of such statements (including the whereabouts of things connected with the crime), but also of the fact that the accused pointed out such

things."

It will be observed that Schreiner JA did not specifically refer to the situation where something connected with a crime is discovered not as a result of a pointing out, but of information given by the accused in a statement. In Samhando, however, Watermeyer ACJ (at p 614) referred to two English cases which "permitted evidence to be received of the words used by the accused in relation to the articles discovered in consequence of an inadmissible confession".

As has often been pointed out, Duetsimi gave rise to the amendment of s 274 of the 1917 Act by s 42 of the Criminal Procedure and Evidence Amendment Act 29 of 1955. (The existing s 274 became s 274(1) and a new subsection (2) was introduced.) In the same year the amended section became s 245 of the Criminal Procedure Act 56 of 1955 ("the 1955 Act"). With minor amendments it was re-enacted as s 218 of

the 1977 Act.

In R v Tebetha 1959(2) SA 337 (A) the question arose whether s 245(2) of the 1955 Act applied to all pointings out or only to those as a result of which something had been discovered. For convenience I quote s 218(2) of the 1977 Act which, as said, is in substantially the

same terms as s 245(2) of the 1956 Act:

> "(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings."

In a majority judgment this court held that a pointing out fell within the ambit of s 245(2) of the 1956 Act whether or not it led to the discovery of something material to the charge. However, the question

whether the subsection rendered admissible evidence of an involuntary pointing out, did not arise and was therefore not considered.

No purpose would be served by dealing with a number of decisions, handed down since 1965, in which the above question was expressly or implicitly answered in the affirmative. They were all referred to by this court in Sheehama. It is important to mention, however, that a new s 219A was inserted in the 1977 Act by s 14 of the Criminal Procedure Amendment Act 56 of 1979. The introductory provision ("the main provision") of subsection (1), which is subject to a proviso not material to this appeal, is in these terms:

> "Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence."

In Sheehama it was held that the following two categories of post 1964 decisions were clearly wrong:

(a) decisions that a relevant pointing out did not constitute an extra-curial admission, and

(b) decisions that evidence of an involuntary pointing out was admissible under s 218(2) of the 1977 Act.

The main reasoning of F H Grosskopf JA which led to the first of these conclusions appears from the following passages in the judgment:

> "In 1979 is art 219 A in die Strafproseswet opgeneem. Die gemeenregtelike vereiste dat 'n buitegeregtelike erkenning vrywillig en sonder dwang moet geskied, is in hierdie artikel bevestig." (At p 878 H - I.)
>
> "'n Aanwysing is in wese 'n mededeling deur gedrag en as sodanig 'n verklaring van die persoon wat iets aanwys." (At p 879B.)
>
> "Na my oordeel kan 'n aanwysing in 'n gepaste geval dus wel 'n

buitegeregtelike erkenning wees, en as sodanig moet dit in die lig van die gemene reg, soos bevestig deur die bepalings van art 219A van die Strafproseswet, ongedwonge en vrywilliglik geskied." (At p 879 H - I.)

F H Grosskopf JA went on to consider the provisions of s 218(2) of the 1977 Act and made the following findings (at pp 880 - 881):

> "Die artikel handel nie met die toelaatbaarheid van die getuienis van aanwysings as sodanig nie; dit verwyder slegs een bepaalde grond van ontoelaatbaarheid. Ander gronde van ontoelaatbaarheid word dus nie geraak nie. ....
> Na my oordeel was dit nooit die bedoeling van die Wetgewer in art 218(2) om getuienis van aanwysings wat andersins ontoelaatbaar is, toelaatbaar te maak sodra sodanige aanwysings deel uitmaak van 'n ontoelaatbare bekentenis of verklaring nie. Die artikel bepaal dat getuienis van 'n aanwysing toegelaat kan word as dit deel uitmaak van 'n ontoelaatbare bekentenis of verklaring, en nie dat dit toegelaat moet word nie. Deur gebruik te maak van die woord kan het die Wetgewer juis die moontlikheid oopgelaat dat getuienis van 'n aanwysing om gegronde redes geweier kan word, selfs al maak die aanwysing deel uit van 'n ontoelaatbare bekentenis of verklaring. Daardeur wil ek

> nie te kenne gee dat die artikel 'n diskresie aan die hof verleen om getuienis van 'n aanwysing toe te laat of te weier nie ..., maar dat die hof getuienis van 'n aanwysing kan weier omdat dit om gegronde redes ontoelaatbaar is. So gesien, bepaal die artikel dus dat getuienis van 'n aanwysing wat andersins toelaatbaar is, nie ontoelaatbaar sal wees bloot omdat dit deel uitmaak van 'n ontoelaatbare bekentenis of verklaring nie. Anders gestel: wanneer getuienis van 'n aanwysing andersins ontoelaatbaar is, sal dit nie toelaatbaar wees bloot omdat dit deel uitmaak van 'n ontoelaatbare bekentenis of verlaring nie.
>
> Indien dit in gedagte gehou word dat dit 'n kernbeginsel van ons reg is dat 'n beskuldigde nie gedwing kan word om selfbeswarende verklarings teen sy wil te maak nie, is dit na my oordeel inherent onwaarskynlik dat die Wetgewer, met die oog op gesonde regsbeleid, ooit die bedoeling kon gehad het om getuienis van gedwonge aanwysings ingevolge art 218(2) en sy voorgangers te magtig."

In Sheehama nothing was discovered as a result of the involuntary pointings out and F H Grosskopf JA was at pains to make it clear that he was leaving the Samhando exception out of consideration. Nevertheless, it is difficult to reconcile his reasoning at pp 878 - 879

with the recognition of that exception unless s 219A somehow preserved the common law as expounded in Samhando, or some other provision of the 1977 Act renders admissible an involuntary admission leading to the discovery of a relevant thing.

In S v Jordaan 1992(2) SACR 498(A) F H Grosskopf JA once again had occasion to deal with pointings out, but this time with such conduct which had led to the discovery of relevant objects. His comments upon the admissibility of the pointings out appear in the following terse passage (at p 502d):

> "Die appellant beweer nie dat die uitwysings as gevolg van dwang of onbehoorlike beïnvloeding gedoen is nie; hy ontken eenvoudig enige uitwysing. Bowendien is die versteekte gewere slegs as gevolg van die uitwysings deur die polisie ontdek, en is hierdie dus 'n uitsonderingsgeval waar 'n gedwonge uitwysing in elk geval toelaatbaar sou wees. (R v Samhando 1943 AD 608 te 611 - 15; S v Sheehama 1991 (2) SA 860 (A) te 877D - H en 878 D - H.) Die getuienis dat die appellant die gewere uitgewys het, was dus toelaatbaar."

Since the admissibility of the evidence of the pointings out was not in issue, the approval of the Samhando exception was undoubtedly obiter. It is not altogether clear, however, why reliance was placed on Sheehama since, as already said, in that case the learned judge deliberately refrained from expressing a view on the admissibility of evidence of a pointing out covered by the Samhando exception.

I now turn to the question whether that exception still applies. In S v Khumalo 1992(2) SACR 411(N) - the decision in which gave rise to the second appeal before us - Thirion J appears to have been of the view that Samhando was wrongly decided. After referring to a number of English authorities he said (at p 424c):

> "The 'theory of confirmation by subsequently discovered facts' which found favour in Samhando's case seems to me, again with great respect, to have been a rule of questionable growth which was authoritatively engrafted onto our law of evidence from England where it had never firmly taken root and where it might

well have become extinct before the turn of the century. It was accepted here in disregard of two principles deeply rooted in our law."

Thirion J nevertheless recognised that he was bound by Samhando if the exception under consideration is still extant. In the event he found (at p 424h) that recognition of the exception would be inconsistent with s 219A(1) of the 1977 Act. (At p 418f Levinsohn J came to the same conclusion.)

For reasons which will appear, I find it unnecessary to consider whether the decision in Samhando was clearly wrong. I shall therefore assume, in favour of the respondent, that Samhando correctly gave effect to the English law of evidence - at least as far as an involuntary pointing out was concerned - and that that law did not change before 31 May 1961 (see s 252 of the 1977 Act).

S 219 A of the 1977 Act does not find a precursor in the

1917 and 1955 Acts. Nor did the 1977 Act as originally enacted contain a similar section. The main provision of s 219 A(1) is couched in unambiguous language. It says that evidence of an extra-judicial admission by an accused is admissible in evidence against him provided, inter alia, that it is proved to have been voluntarily made. Clearly, therefore, evidence of an involuntary admission is inadmissible. And as found in Khumalo, linguistically the subsection admits of no exception.

It may be that the legislature's main aim in enacting s 219 A was to cast an onus on an accused to prove, provided that certain requirements are met, that a written admission by him was not voluntarily made, and that there is room for a restrictive interpretation of the section in order to give effect to common law rules (cf S v Schultz, 1989(1) SA 465 (T) 468). However, a finding that s 219 A(1) does not preclude an application of the Samhando exception could not be

premised upon mere restrictive interpretation: it would have to involve a recasting of the wording of the main provision. And since that wording is unambiguous, the presumption that a statute alters the common law as little as possible cannot be invoked: Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (In Liquidation) 1981(1) SA 171 (A) 181 - 182.

Even if it were permissible to reformulate the subsection, it would be difficult to decide upon the words or phrases which would have to be read into it in order to save the Samhando exception. This is so because it is not at all clear whether the exception applies only to a pointing out. Assume that an accused made an involuntary statement to a magistrate in which he gave detailed directions as to the place where a deceased person had been buried. Assume further that following those directions the police dug up the body. If the theory of confirmation by

subsequently discovered facts is applied, there appears to be no logical reason for excluding proof of the admission implicit in the directions. It seems clear, however, that such a statement is hit by s 219 A(1) and therefore is inadmissible. That being so, there is no rational explanation why the legislature should have intended to exclude from the ambit of the subsection an involuntary pointing out, but to include involuntary directions, leading to the discovery of something connected with a crime.

In passing I should mention that a dictum in S v Yolelo 1981 (1) SA 1002(A) 1009 C, does not assist the respondent. It was there said that s 219 A(1) in essence constitutes a codification of a principle of the common law, i e that no admission or statement made by an accused may be admitted in evidence against him unless it is shown by the prosecution to have been freely and voluntarily made. The question whether this was an unqualified rule did not arise in Yolelo, and

it was certainly not suggested that s 219 A(1) codified the common law relating to admissions, in contradistinction to the above principle.

In the result I am of the view that s 219 A(1) does not preserve the Samhando exception. And since it renders inadmissible evidence of any involuntary admission, such exceptions as the common law may have recognised cannot be invoked by virtue of the provisions of s 252 of the 1977 Act.

I reach this conclusion without regret. In this century there has rightly been a marked shift in the justification for excluding evidence of involuntary confessions and admissions, and it is now firmly established in English law that an important reason is one of policy. It is thus explained by Lord Hailsham in Wong Kam-ming v The Queen [1980] AC 247 (PC) 261:

"I have stated elsewhere .... that the rule, common to the law of

> Hong Kong and that of England, relating to the admissibility of extra-judicial confessions is in many ways unsatisfactory, but any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

The final question in whether another section of the 1977 Act permits proof of an involuntary pointing out (or any other admission) leading to the discovery of a relevant thing. Counsel for the respondent submitted that s 218(1) does just that, as did the similarly worded s 274 of the 1917 Act to which Watermeyer ACJ referred in Samhando. S 218(1) is in the following terms:

"(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused."

Counsel's contention is met by the following passage in the minority judgment of Schreiner JA in R v Tebetha 1959(2) SA 337(A) 343A:

"All that sec 245(1) [of the 1955 Act], i e sec 274 [of the 1917 Act], does directly is to declare admissible evidence of a fact discovered in consequence of information derived from a confession or other statement that is inadmissible. In terms the provision would only cover proof that the clothing in Samhando's case was in the tree on a certain date."

This passage, with which I agree, has to my knowledge not been questioned in any other case, and is not in conflict with anything

said in the majority judgment in Tebetha. On the contrary, Hoexter JA, who wrote that judgment commented at p 346 B - D:

> "When a person points out a thing, the pointing out is his act and proves that he has knowledge of some fact relating to that thing. In the case of the discovery by the police of a thing, there is no proof of knowledge of any fact in relation to that thing on the part of the person under trial unless there is proof that the discovery was made in consequence of information given by such person. In my opinion sec. 245 (1) by itself did not make it clear that evidence of knowledge on the part of the person under trial was admissible."

At the risk of repetition it must again be emphasized that s 218(1) of the 1977 Act does not differ in a material respect from s 245(1) of the 1955 Act or s 274 (later s 274(1)) of the 1917 Act. Hence s 218(1) also does no more than to declare admissible evidence of a fact discovered, or of which knowledge was obtained, in consequence of information given (whether by conduct or otherwise) by the accused, and not also of the information so given. In other words, the subsection does

not permit proof of a link between the accused and the discovery or knowledge gained of such a fact.

I need not deal with s 218(2) of the 1977 Act, for in Sheehama it was clearly decided that this subsection does not apply to an involuntary pointing out. Hence that subsection cannot accommodate the Samhando exception. It follows that January's appeal must be upheld.

I turn to the second appeal before us (Prokureur-Generaal, Natal v Khumalo). The circumstances which led to the respondent's conviction of the theft of two head of cattle in a regional court, and the reasons why the conviction and sentence were set aside on appeal to the Natal Provincial Division, appear from the judgments in Khumalo and need not be repeated. Subsequently, on 30 October 1992, the appellant was granted leave to appeal to this court after the following points of law

had been reserved:

"1. Is die beslissing van R v Samhando 1943 AA 608 met betrekking tot die toepassing van die leerstuk van 'confirmation by subsequently discovered facts' as gevolg van Artikel 219A van Wet 51 van 1977 nie meer van toepassing nie?

2. Is die Samhando beslissing by implikasie deur S v Sheehama 1991(2) SA 860(A) omvergewerp?"

These questions related to one of the reasons why the court a quo held that the State could not rely upon evidence of the respondent's pointing out of one neat ("the ox") to two policemen. The reason was that such a pointing out, if involuntary, is inadmissible. At the time of granting of leave to appeal it must therefore have been envisaged that should the questions be answered in favour of the appellant this court would in terms of s 311(1) of the 1977 Act partially restore the magistrate's verdict by substituting a conviction of theft of the ox, and

possibly reduce the sentence of five years' imprisonment.

In supplementary heads of argument filed by the appellant it was brought to our notice that the respondent had died on 25 September 1992. Counsel for the appellant nevertheless contended that the appeal should be heard and adjudicated upon. This contention is without substance. Had the court a quo known that the respondent had died, it would no doubt not have granted leave to appeal. The reason is that at the death of a convicted person all appeal proceedings lapse unless, possibly, the conviction detrimentally affects his estate. See e g Voet 49.13.2, S v P 1972(2) SA 513 (NC), S v Molotsi 1976(2) SA 404 (O); S v Van Molendorff, 1987(1) SA 135(T), and cf R v Rowe [1955] 2 All E R 234. Admittedly these authorities deal with the effect of the death of a convicted person on appeal proceedings initiated by him, but there is no logical reason why such proceedings brought by the State

should not also lapse at his death - save, possibly, should the State derive some pecuniary benefit in the event of the appeal being upheld. It follows that the granting of leave to appeal was a nullity.

In passing I should mention that fortuitously the questions of law reserved by the Natal Provincial Division have in effect been answered in this judgment.

Finally, I wish to record our appreciation of the fact that Mr Strachan, on behalf of Lawyers for Human Rights, was prepared to appear as amicus curiae in order to support the judgment of the court a quo.

The following orders are made:

(1) In the matter of January v The State the appeal succeeds and the appellant's convictions and sentence are set aside.

(2) In the matter of Prokureur-Generaal, Natal v Khumalo

the appeal is struck off the roll.

H J O VAN HEERDEN
JUDGE OF APPEAL

SMALBERGER	JA)	
NIENABER	JA)	- Concur
VAN DEN HEEVER	JA)	
HARMS	JA)	