Bub 68/94

Case No 568/92
/mb

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

GLADYS MILA ..... FIRST APPELLANT

PRISCILLA NTOMBODIDI LUTHULI .. SECOND APPELLANT

MIRIAM LINDELWA GROOTBOOM .... THIRD APPELLANT

BENJAMIN KANANA ..... FOURTH APPELLANT

and

THE STATE .....RESPONDENT

CORAM : HEFER, KUMLEBEN et VAN DEN HEEVER JJA

HEARD : 19 MAY 1994

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA

These are the reasons the court undertook to furnish when allowing the appeal of each appellant.

On 14 December 1985 at Jansenville a woman, Gladys Febana, was forcibly taken from her home and murdered. During the early evening of that day she was at home with her mother, the State witness Mrs Katy Yantolo, when a large and aggressive group of young people arrived. Both women fled to the house of a neighbour. The deceased was caught by the mob and dragged off. The next morning her body was found some distance away. The cause of death was third degree burns: in fact her entire body had been reduced to a charred mass. This was achieved by placing her within a tyre and igniting it with the aid of some inflammable substance. The motive for the killing

was apparently that her assailants had decided that she was a police informer.

In due course six accused, all teenagers, stood trial on a murder charge in the Graaff-Reinet Circuit Local Division of the Supreme Court before R Kruger AJ and two assessors. Four of the accused, the present appellants, were found guilty as charged and sentenced to life imprisonment. The convictions were based principally, indeed decisively, on the evidence of Yantolo. Her evidence identifying those convicted was found to be reliable and the alibis of those who testified were rejected.

Leave to appeal was granted (per Cooper J) against the convictions and sentences. The primary ground of appeal was that the trial judge had conducted himself in such a manner that the appellants were not accorded a fair trial. In

addition, with reference to the merits, the acceptance of the evidence of Yantolo and the rejection of the alibi defences were challenged; and, as regards the fourth appellant, it was submitted that his failure to give evidence was insignificant in deciding upon his conviction. Finally, it was submitted that in any event the sentences were unduly severe.

The circumstances in which untoward conduct, or worse, on the part of a judicial officer may in itself vitiate a verdict have been considered from time to time by this court. S v Rall 1982(1) SA 828(A) was concerned with excessive cross-examination of an accused by the court and the manner of such questioning, the latter aspect conveying the presiding judge's disbelief or scepticism of the accused's evidence. Certain general observations (per Trollip JA) are pertinent

to this case. It was said at 831H - 832B that a trial judge

> "must ensure that 'justice is done'. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (see, for example, S v Wood 1964 (3) SA 103 (O) at 105G; Rondalia Versekerings-korporasie van SA Bpk v Lira 1971 (2) SA 586 (A) at 589G; Solomon and Another NNO v De Waal 1972 (1) SA 575 (A) at 580H). The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression (cf Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd 1976 (2) SA 565 (A) at 570E-F; Jones v National Coal Board (1957) 2 All ER 155 (CA) at 159F)."

Similar views are expressed in a more recent judgment of this court, with citations from some of its earlier decisions. In S v Tyebela 1989(2) SA

22(A) 29G - 30C Milne JA stated that:

"It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial. S v Alexander and Others (1) 1965 (2) SA 796 (A) at 809C-D; S v Mushimba en Andere 1977 (2) SA 829 (A) at 842B and 844H. This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires. S v Meyer 1972 (3) SA 480 (A) at 481F and S v Rall 1982 (1) SA 828 (A). In the latter case Trollip AJA said at 833B:

> 'Of course, if the offending questioning of witnesses or the accused by the Judge sustains the inference that in fact he was not open-minded, impartial, or fair during the trial, this Court will intervene and grant appropriate relief (cf for example S v Meyer 1972 (3) SA 480 (A)).'

In Meyer's case Kotzé AJA said at 484D:

> 'Wanneer 'n regterlike beampte optree soos hierbo aangedui gaan hy, na my mening, redelike perke te buite. Hy skep dan nie die indruk dat die doel van sy ondervraging is om duidelikheid te vind nie. Veel eerder word die indruk gewek dat die geskil vooraf beoordeel word en dat reg en geregtigheid nie geskied nie

(Solomon and Another NNO v De Waal 1972 (1) SA 575 (A) op 580). In die onderhawige geval het die optrede van die landdros, volgens my mening, in sy geheel gesien, en veral sy gedrag teenoor die appellant terwyl hy getuig het, sulke afmetings aangeneem dat dit nie gesê kan word dat hy 'vleklose onpartydigheid' gehandhaaf het nie (Rondalia Versekeringskorporasie van SA Bpk v Lira 1971 (2) SA 586 (A) op 589). Bygevolg moet bevind word dat hy nie sy funksie as regspreker na behore uitgeoefen het nie.

Afgesien van die meriete in hierdie saak is 'n bevinding onvermydelik dat die landdros nie deurgaans 'n onbevange oordeel bewaar het nie (Lira se saak op 589) en dat sy optrede so ernstig afgewyk het van behoorlike en ordelike regspraak dat die verhoor en uitspraak ongeldig is.'

In such a case the Court will declare the proceedings invalid without considering the merits."

In the present case the unacceptable manner in which the judge conducted the trial was not restricted to questions he asked and comments made by him. In certain other respects his

approach was not a judicial one. The more important of these are the following.

During the course of the State case Mr Koetaan was called as a witness. He was an accomplice and was given the customary conditional indemnity after being sworn. He, however, reneged on his written statement by denying that he had made one, by saying that he knew nothing about the incident and by denying that he knew any of the appellants. The whole of his statement was then put to him and he continued to deny its contents. In it he had said that he received 33 pellet wounds that night from the discharge of a shotgun. This gave rise to the following questioning:

> "HOF: Wie het die 33 koeëls oor sy lyf gekry?
>
> MNR MOORE: U Edele, dit sal uit die verklaring verder blyk wanneer hy - dit kom later ook uit die verklaring uit, U Edele.

HOF: Wat hy gekry het?

MNR MOORE: Hy het 33 haelkorrels in sy lyf gehad.

HOF: Het jy ooit 33 haelkorrels in jou lyf gehad? Is jy raak geskiet en jy het 33 haelkorrels op jou lyf gekry, of nie? --- Nee meneer, ek het nooit so 'n ding gekry by my nie meneer.

Jy het nog nooit haelkorrels gehad nie? --- Nee meneer.

As ek die dokter vra om jou te ondersoek sal hy nie die plekke kry nie - merke kry nie? --- Nee meneer."

The witness had not been declared hostile. The proceedings following upon his denial of having made the statement were, or ought to have been, governed by the provisions of s 190(2) of the Criminal Procedure Act 51 of 1977. All that was necessary, in the light of his denial, was to identify the statement and prove that it was in fact made (cf S v Dolo 1975(1) SA 641 (THC) 642).

However, the questions by the judge amounted to cross-examination and were plainly intended to establish that the witness was involved in the incident and that his denials were false. The impression was inevitably created in the minds of the appellants, indeed of any listener, that the judge regarded the contents of the statement as true with every likelihood of his taking it into account. An extensive cross-examination along these lines ensued on the part of State counsel and the judge which served to confirm this impression. This irregularity needs to be mentioned but is largely by the way. The real complaint related to what followed upon this cross-examination:

> "HOF: Ja. Sal hy vandag arresteer word?
>
> MNR MOORE: Ja, U Edele die getuie is reeds in 'n Verbeteringskool in die Kaap. Die Staat sal nog besluit of dit die moeite werd sal wees om hom werklik van meineed ook aan te kla, alhoewel ek dit sal aanbeveel. Hy is tans in

(tussenkoms)

HOF: Maar ek dink u moet 'n bietjie kyk na artikel 189 (onduidelik) geskied, dat ons miskien hierdie hele verhoor kan uitstel vir 2 jaar - al ses van hulle in die gevangenis aanhou, vir hom aanhou vir 2 jaar en oor 2 jaar terug te roep en vra of hy nie wil getuienis gee nie. Kyk 'n bietjie na artikel 189.

MNR MOORE: Soos dit u behaag U Edele. U Edele, ek is ietwat onverwags gevang met die optrede vandag in die Bank, dis hoekom ek my (tussenkoms)

HOF: Ek dink ook vandag dis my funksie om hom te straf vandag as hy 'n onwillige getuie is.

MNR MOORE: Ja U Edele, soos ek sê ek is - miskien moet ek 'n verdaging vra om my net 'n bietjie voor te berei op die punt. Ek is 'n bietjie onverwags gevang, U Edele. Ek het dit nie verwag nie.

HOF: Kyk 'n bietjie daarna, want hy sal vinnig genoeg uitvind dat 'n tronk 'n ander plek as 'n verbeteringsgestig is.

MNR MOORE: Ja, dit is korrek, U Edele. Miskien op hierdie stadium moet ek net vra vir 'n verdaging. Ek wil net volledig voorberei om u te kan toespreek op hierdie punt.

HOF: Ja, ek dink Mnr Pienaar wat u betref moet u ook maar 'n bietjie in ag neem die

effek wat dit op jou kliënte gaan hê.

MNR PIENAAR: Ekskuus, U Edele?

HOF: Jy moet maar in ag neem wat die effek is op u kliënte.

MNR PIENAAR: Soos dit die Hof behaag.

HOF: Ek meen as ek nog 2 jaar leef, sal ek nie omgee om oor 2 jaar terug te kom (onduidelik).

MNR PIENAAR: Soos dit die Hof behaag."

The inference to be drawn from the words I have italisized is that the judge envisaged: sentencing the witness to the maximum period of imprisonment stated in that section (incidentally without first conducting the enquiry for which the section provides); ensuring, as far as he was able to do so, that the appellants during such period would be immured; and adjourning the trial for two years. He was bent upon punishing the appellants for the recalcitrance of a State witness. There was simply

no ground for involving the appellants in this issue except on the unwarranted and prejudicial assumption that they, one or more of them, were responsible for Koetaan not giving evidence in accordance with his statement.

At the close of the State case counsel applied for the discharge of two of the accused. The application was unopposed and its grant ought to have been a formality. Instead the judge saw fit to remark:

> "Daar is niks wat julle aan die misdaad verbind nie. Ons Reg het sekere reëls wat sê dat sekere getuienis nie toelaatbaar is nie. Daar was 'n stuk getuienis gewees wat ek glo, maar ek mag daar nie notisie van neem nie, naamlik dat no. 5 die vuur aan die brand gesteek het, maar ek mag nie daarvan notisie neem nie en julle kan dus die res van julle vonnisse gaan uitdien, maar ek gaan iets buitengewoons doen met julle twee. Ek gaan julle waarsku dat hierdie soort van barbarisme - hulle sê die gereg het 'n lang arm, maar as julle skuldig was en hy dink julle was, maar ek het nie getuienis nie, dan sal julle hardloop vir die res van julle lewens. Julle

> sal soos 'n honger bok dors word en hyg, maar julle sal moet hardloop want julle sal gejaag word vir die res van julle lewens. Het julle verstaan."

He in effect said that he believed the inadmissible evidence, which ought to have been genuinely ignored, and by referring to a rather obscure extra-curial punishment implied that he did not doubt the guilt of these two accused. If he could reach such a conclusion on untried inadmissible evidence, the appellants, against whom there was some evidence, would have had every reason to suppose that their fate had likewise been sealed prematurely and before they had entered upon their defence.

When it came to the defence case the questions put by the judge were frequently sceptical or sarcastic and his attitude was often one of impatience or intolerance. His attitude

created the impression that he was biased against the appellants and had prejudged their guilt. A few illustrations will suffice.

At the outset of the evidence of the third appellant, she was asked how far she lived from Yantolo. This caused the following questions to be put by the judge:

> "Hoe ver bly julle van mekaar af? --- Katy Yantolo bly in Draai-lokasie en ek bly in Bricksfield-lokasie, U Edele.
>
> Hoeveel is dit? Hoe ver soos die kraai vlieg? --- Dis baie ver, U Edele.
>
> Ja, Londen is ook baie ver. Wat is baie ver, praat asseblief moenie vir my die vrae so (onvoltooid). --- U Edele, dit sal my 'n lang tyd vat om soontoe te stap, want dis ver.
>
> Dit sal my 14 maande vat om Sahara toe te loop, vertel my nou hoe ver is dit. --- Dis ver, U Edele.
>
> Sal jy my vraag antwoord, of nie? Ek waarsku vir jou, as jy dit nie antwoord nie gaan daar probleme wees. --- Dit is mos ver, U Edele. Katy Yantolo bly in 'n ander lokasie en ek bly in 'n ander lokasie.

Soweto is ver van hier af, né? Dis 'n ander lokasie van 'n ander lokasie af - nou praat.

Ek sal noteer, tensy Mnr Pienaar dit van haar gaan kry dat daar geen antwoord, of die antwoord is geweier op die vraag.

MNR PIENAAR: U Edele, kan ek net moontlik met haar opklaar een aspek?

Hoe lank sal dit jou vat om van jou huis te stap tot by Katy se huis? --- Ek kan nou nie 'n skatting maak van die tyd nie, U Edele.

HOF: Is u tevrede?

MNR PIENAAR: Soos dit die Hof behaag.

HOF: Sy wou nie die vraag beantwoord nie."

At another point in her evidence the third appellant explained her presence in the vicinity of the killing by saying that she was returning from a shop where she had made a purchase. In this connection the question was put to her by the prosecutor: "Nou het u nooit teruggegaan na daardie winkel toe die volgende dag

om goed te gaan koop nie?" To which she replied: "Nee." The judge erroneously noted her reply to read: "Ek is nooit terug na daardie winkel, ek het niks nodig gehad nie." (I emphasise in each case.) The following passage follows in this regard:

> [HOF:] "Nou hoekom het jy gesê dat jy is nooit terug nie? --- Ek kan nie onthou dat ek nou so gesê het nie, U Edele.
>
> Stry jy met my? --- Ek weet nie.
>
> Stry jy met my? - Is ek verkeerd as ek vir jou so sê? --- Ek het gedink dat u bedoel - U Edele bedoel dat ek nou weer daardie selfde Saterdag gaan koop het."

The judge was in fact wrong in what he put to her and she was entitled to say that she had no recollection of stating his version.

When the second appellant testified, she was asked by counsel:

> "Hoe ver was u van die groep af gewees? --- Ek sal sê miskien van waar ek staan in die

> getuiebank tot nou by die punt van hierdie kas.
>
> Ongeveer 2 meter, U Edele met verlof van die Hof. Ongeveer 2 meter? So u was reg by die groep gewees - is dit korrek? --- Nee, ek was nie by die groep gewees nie, ek was 'n entjie ver van die groep af.
>
> Ja, maar u was (tussenkoms)
>
> HOF: 'n Honderd mense staan hulle binne 2 meter van mekaar? --- Ek weet nie.
>
> .....
>
> HOF: Natuurlik weet jy. Moenie my met 'ek weet nie' vir die gek hou hier nie. Dit is wat u besig is om te doen. Sal jy 'n honderd mense in 2 meter - 2 vierkante meter hier neersit? --- Nee U Edele."

Thus it appears that the witness was unreasonably and intolerantly reprimanded for not knowing the answer to a question which by any standard is inscrutable.

Finally, it has to be remarked that the judge disclosed an obsession with the brutality of the crime at an early stage of the trial so as to

strongly suggest that at almost any price the conviction of the appellants would follow to provide the necessary retribution. The crime was self-evidently a cruel and callous one. When the condition of the corpse was described by the district surgeon, the judge unnecessarily laboured this point by saying inter alia:

> "Kan jy jou 'n wreder dood indink? --- Ek het ook 'n storie gehoor van iemand wat iemand stadig uitmekaar uit gesny het. Nou dit is ook seker wreder.
>
> Ja. Ek dink daar was 'n Duitse vrou wat wors gemaak het van (onduidelik) of so iets. --- So, maar is wreed is wreed."

This attitude bent upon harsh punitive action, is at the end of the trial reflected in the sentences imposed. A sentence of imprisonment for life is, broadly speaking, reserved for a hardened criminal who is likely to prove a continuing threat to the

community. The appellants, though deserving of severe punishment if correctly convicted, certainly do not fall within such category.

Thus it was that the irregular conduct of the trial was of so gross a nature as to per se vitiate the trial without reference to the merits. (See S v Naidoo 1962(4) SA 348(A) 354 D - F.) During argument on appeal Mr Pretorius for the State rightly and responsibly conceded this. For these reasons the appeal was allowed.

M E KUMLEBEN
JUDGE OF APPEAL

J J F HEFER JA

L VAN DEN HEEVER JA