143/70

143/70

Death Sentence

G.P.-S. J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellant DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

JOSEPH SEGELE

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Pro deo *Respondent's Attorney* Dep. A.G. (Jhb.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate J A [illegible] *Respondent's Advocate* A [illegible]
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 17 – 11 – 70
Op die rol geplaas vir verhoor op

1. 6. 11

[illegible] van Blerk A.C.J., Smit & [illegible] A.J.A.

W.L.D.

[illegible]

Notes on [illegible]-12-70 per Smit A.J.A. – appeal succeeds, conviction and sentence set aside

[signature]

REGISTRAR, APPEAL COURT, [illegible]
BLOEMFONTEIN.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:-

JOSEPH SEGELE.....Appellant.

and

THE STATE..... Respondent.

CORAM:- VAN BLERK, A.C.J., SMIT, et MULLER, A.JJ.A.

HEARD:- 17th November, 1970. DELIVERED:- 9th December, 1970

JUDGMENT.

SMIT A.J.A: Appellant was convicted in the Witwatersrand Local Division, on three separate counts, of murdering Sylvia Grys, of raping her and of assaulting one Khumalo with the intention of murdering him. All this was done ~~on 13th February, 1967, at South Hills, in the district~~ of Johannesburg.

Sylvia Grys, the deceased, and Khumalo were

2/lovers.....

lovers and had been living together in South Hills for approximately three years before her death. On the 13th February, 1967, at about 4 p.m. they went to visit her mother. On their way there they took a short-cut and walked across the veld. This piece of ground is open veld for about 300 yards, then there is a wooded area of bush for approximately a further 200 yards with a stream running through it. It is referred to as the glen. Khumalo's evidence is that while walking across the veld they were accosted by two Bantu males. One of them he knew by sight, having seen him previously in South Hills. It was subsequently established that his name was Clegman. The other person was to Khumalo a complete stranger. When accosted by these men the deceased and Khumalo stopped. They were asked whose wife the deceased was. Before Khumalo could reply Clegman asked him for his reference book. When this

3/was.....

was handed to him, he looked inside and put it in his pocket. Clegman then took hold of Khumalo's belt. This he removed and tied Khumalo's wrists with it. The appellant was then standing next to the deceased. After tying up Khumalo's hands, Clegman pushed him towards the bush, and the appellant caught hold of the deceased and pushed her towards the bush. In the bush Clegman took out of his pocket a length of wire with which he tied Khumalo's hands over the belt. He then searched him and removed from his pockets money, handkerchiefs and a pocket book. These he placed in his pocket. Appellant was present all the time. Clegman ordered Khumalo to sit down and told appellant to guard him. Clegman then caught hold of the deceased and pushed her about 4-5 paces away. He ordered her to lie on her back, which she did. He then pulled down her bloomers and had intercourse with her. She was not

willing, according to Khumalo. Both she and Khumalo were obviously so scared that they put up no resistance. When he had finished, Clegman came towards Khumalo and appellant went to the deceased, where she was still lying. He also raped her. While this was going on Clegman was undressing Khumalo, leaving him with only his vest and trunks. When appellant finished having intercourse with the deceased, he came to where Khumalo was and Clegman returned to her and again had intercourse with her, while appellant guarded Khumalo. This time Khumalo heard Clegman say, that if she made a noise he would kill her. When he had finished with her the second time Clegman told deceased to get up. He grabbed hold of her shoulder and pushed her to where Khumalo and the appellant were. She and Khumalo were then ordered to sit with their backs to each other. When they were in this position Clegman said, according to Khumalo:

"We should not say anything, we should not speak, but we will speak in heaven with God."

While they were sitting like that Clegman and appellant walked away for a distance of approximately 3-4 paces. There they stood close together, whispering to each other. When they had finished whispering appellant said to Khumalo:

"Hey, don't you hear that the king is calling you."

Khumalo was not certain whether he meant king or chief but he was referring to Clegman. Khumalo then got up and went to Clegman. When he did this appellant went to the deceased. Clegman got hold of Khumalo and pushed him for about 100 yards away from where the appellant and the deceased were. Clegman ordered Khumalo to sit on a stone. He did as he was ordered. Clegman then went behind him and struck him a blow

6/on.....

on the back of his head which felled him to the ground. Where he lay he felt something piercing his body. He lost consciousness. When he regained consciousness it was dark and raining and there was nobody there. He walked towards a house and met the witness Mac Donald, who phoned the police. Dr. Kemp who examined Khumalo at the trial, found injuries consistent with their having been caused three years ago. He saw a scalp wound and two stab wounds on "the back of his chest." Khumalo said that he had seen a knife in possession of Clegman when he and the appellant were whispering together. Dr. Kemp, however, did not think that the stab wounds were caused by a knife. He suggested a screw-driver or something similar. The wounds were three years old and no knife was shown to the doctor for him to see the type of knife which could have been used, so that I do not think one can exclude the probability that the

7/wounds.....

wounds were caused by the knife in possession of Clegman. Khumalo saw no other weapon in his possession.

The witness MacDonald, who lives not far from the glen where these assaults took place, said that he was working in his garden during the late afternoon and early evening, when he heard the screams of a woman coming from the direction of the glen. They started off very loud but slowly got softer and softer until they stopped. The rain had not yet started. He was afraid to go into the glen but kept looking in the direction from where the screams came. He then observed a Bantu coming towards him, dressed only in his underclothes. This was Khumalo. His arm was bound with a belt. MacDonald's mother phoned the police. When they came, they went into the glen, but it was dark and raining heavily, with the result that they found nothing. The next day MacDonald took his dogs and went into the

8/glen.....

glen to investigate. There he found the body of the deceased. Her head had literally been bashed in with a blunt instrument. There can be no doubt that the crimes of which appellant was convicted were in fact committed. The only question is whether the State has proved that appellant was one of the perpetrators of these crimes.

In cross-examination of Khumalo by Counsel for appellant, it was revealed that Clegman had been arrested and tried for this offence. In August, 1968, Khumalo was arrested on a charge of which he was later acquitted. He was detained in the same gaol where Clegman was being kept. In gaol he had a conversation with Clegman who told him that he was sorry for what they had done but that he, Khumalo, should put the blame more on the man Freddie, the person who was with him at the time. Clegman actually offered Khumalo a reward if

he would put the blame more on Freddie. He gave him an address where he could fetch the reward money. Khumalo did not know who this Freddie was and says that he only learnt that appellant's name was Freddie the morning of appellant's trial. This statement by Clegman to Khumalo that it was a person named Freddie who was with him, is not evidence against appellant that he was the Freddie referred to by Clegman. Khumalo reported his conversation with Clegman to the police. This information apparently did not assist to effect an immediate arrest of this Freddie, because it was only on the 30th October, 1969, that appellant was arrested by detective sergeant Zackiel Matoko.

Matoko testified that on that night he was on duty at Brixton, Johannesburg, where he was stationed. At about 10 p.m. he went to the servants' quarters of a house in Crosby, Johannesburg, where appellant was

10/pointed.....

pointed out to him by an informer. They spoke to each other in Sesuto, which both understood. He told appellant that he was arresting him for the murder of a girl named Sylvia, which was committed in 1967 at South Hills, during the month of February. He also warned him that he was not obliged to say anything but that whatever he said, should he say anything, would be taken down in writing and might be used in evidence against him. Matoko, in his evidence, says that when he told appellant of the allegations against him, he replied that it was not he who had murdered the deceased but one Clement or Climate. He was only in the latter's company. Matoko did not know who Clement or Climate was. Matoko did not write down what appellant had told him. He was severely criticised for not doing so, but notwithstanding the just criticism of his

conduct/.....

—

"considered especially the facts and features enumerated by Boshoff. J. in Mputing, 1960(1) S.A.L.R. at p. 785. This is an identification made after two years and 8 months of a single witness. It is, however, corroborated by the statement to detective sergeant Zackiel by the accused, that he, the accused, was on the scene of the crime."

The Court then dealt with the evidence of the appellant and came to the conclusion that he gave false evidence in a variety of material respects. This finding was attacked by Mr. Heher, in an able argument. He submitted that the learned Judge stressed the vagueness of appellant's evidence in some respects but lost sight of the fact that the vagueness related to trivial matters, and on the other hand he did not pay sufficient regard to appellant's admissions with regard to material and important aspects of the case. This criticism seems to me well-founded. The learned Judge criticises appellant

for being very vague about the date of his arrival in South Hills during 1966 and for not producing any document to establish this date. The crimes were only committed the following year. There is no onus on him to establish by date or document, when he arrived in South Hills. He is criticised for not still knowing the name of the firm or person who employed him and when this employment terminated. Also that he was equally vague about his hours of employment. This evidence about his employment and his evidence that he did not get to know South Hills, because he used to spend afternoons and week-ends sewing with a sewing machine, which his girl-friend had taught him to use, the Court found impossible to believe, without stating any reasons for the rejection. If it is remembered that appellant was called upon to give evidence about his way of life nearly three years before and at a time when these events were of no real consequence to him, then it does

14/seem.....

seem unfair that he should be criticised and not believed on matters of no real significance, when he does in fact, without prevarication, admit that he was living in South Hills at the time the crimes were committed.

There is a conflict between the evidence of Matoko and appellant about where the statement, which links the latter with the crimes, was made, and also the terms thereof. Appellant denies that he made any such statement at all and in particular that he spoke to Matoko at all in his room when he was arrested by the latter. The Court found that:-

> "About these events relating to his arrest and the statement by him, he gave so many versions that he just could not be believed."

It would appear, as Mr. Heher also submitted, that the trial Court misdirected itself on the facts in this regard. The trial Court finds that appellant gave a number of versions about what happened when the

statement referred to by Matoko was made. That at first he said that he did speak to Matoko at the room where he was arrested and thereafter changed his version by saying nothing like that happened at the room, but that Matoko had come to see him in the cells and there had questioned him about this person Clement or Climate. The trial Court was probably mislead by the ambiguity of the questions put to appellant, in finding that he had said that he did speak to Matoko in his room. Already in examination-in-chief appellant had said that Matoko questioned him at the cells. He said this:-

> "Now you've heard the policeman say that on your arrest you admitted that you were in company of a man named Climate and it was Climate who committed the offence?-- I never said that to him.
>
> What did you say to him? -- There is nothing I said to him, except that he questioned me whilst I was at the cells."

The questions put in cross-examination in this regard and the answers must be viewed in the light of the above evidence that appellant had already said that he was questioned at the cells and not in the room on the day of his arrest. One question put, was :

> "Now the day that you were arrested, the policeman came to you, what did he say to you? - I said nothing to him, he spoke to me."
> What did he say to you? -- He asked me whether I knew Clement."

This is certainly not an admission that this conversation took place in his room. He simply said that it was on the day of his arrest. Two things happened to him on that day: he was taken from his room and then removed to the cells at Brixton. His evidence is throughout that the conversation about Clement or Climate, took place at the cells at Brixton, when Matoko came to speak to him and put the charge to him. Appellant says that at the room, after a certain

man had pointed him out, he was told by Matoko to get up and get dressed. He said nothing further. The policeman then arrested him and took him to the car and ~~that~~ it was later at the cells that he was asked about Clement. According to the record there certainly was some confusion in the mind of the learned Judge with regard to where the alleged conversation took place. After appellant had testified in cross-examination, that when Matoko asked him about the charge against him, he denied it, Counsel asked him whether that took place in the room where he was arrested. Before he could reply there was an interjection by the Court to the effect:

> "No, that is not right, that is not his evidence. His evidence is that it was on a subsequent occasion when the charges were put to him."

This was correct, because in examination-in-chief, Khumalo had said it was at the cells. The answer to the next question made it clear that it was at the cells. A

little later, and still under cross-examination, Khumalo reiterated that it was at the cells that Matoko asked him about Clement , yet, notwithstanding his consistent attitude that it was at the cells that the conversation took place, and the Court's recorded acceptance that it was not at the room, we find the following interjection by the Court recorded:

> "What I don't understand now is, I think just a little while ago you told me that in the room where you were arrested, the policeman asked you if you knew a man by the name of Clement? -- That was just a little while ago?"

The answer from appellant was again that it was at he cells, and not in his room. Appellant never at any stage said that the conversation took place in his room. The trial Court was thus plainly wrong in finding that appellant had said that it did take place in the room.

19/This.....

This was a grave misdirection and one which obviously influenced the Court in deciding to accept Matoko's evidence rather than appellant's. There was thus a clear clash between Matoko and appellant about where the conversation took place. The Court made no finding on the demeanour of either of these two witnesses and accepted Matoko's evidence because appellant, with regard to the statement:

"Gave so many versions that he just could not be believed."

In view of the trial Court's misdirecting itself on this important aspect of the case this Court is at large to make its own finding. This is made easier by the fact that the trial Court made no finding on the demeanour of either of these two witnesses. It is of great importance to know whether Matoko's evidence could be accepted with regard to this statement which appellant is supposed to

20/have.....

have made to him and in which, according to Matoko, he admitted being at the scene of the crime. It is most important because the trial Court treated Khumalo's evidence as that of a single witness which required corroboration. This was found in the evidence of Matoko with regard to this statement. Appellant's evidence that he did not make any such statement to Matoko in his room but spoke to him later at the cells, seems to me not an improbable story. Matoko, accompanied by the informer, was sent to arrest appellant. Appellant says that after he had been pointed out as being "the man" Matoko told him to get dressed. He said nothing further, but arrested him and took him to the car. Although appellant did not speak to Matoko, he did speak to the man who had pointed him out and asked him what the matter was but got no reply. Later that same night and at the cells at the police station, he

21/says.....

says Matoko told him about the charge and asked him whether he knew Climate or Clement. He denied all knowledge of the charge and this man. Matoko's evidence in this regard is that he went to appellant's room at about 10 p.m., where he found him sleeping. He says that he told appellant he was arresting him for the murder of the girl Sylvia and then warned him:

> "I told him that he was not obliged to say anything, whatever he would say, should he say anything, it will be taken down in writing and may be used in evidence against him."

Thereupon appellant answered that it was not he who had murdered the deceased but one Clement, he was only in Clement's company. When Matoko was asked to repeat the name he said "Climate." He did not write this statement down. He denies that he on any occasion spoke to appellant in the cells. Matoko was not the investigating officer and could not explain why he

had warned appellant after the latter's arrest. Neither could he explain why he did not write down appellant's statement, especially after he had warned him that he would write down anything he said. Matoko is a detective sergeant and the man who had arrested Clegman the year before for this murder. He must have realized the impact of appellant's statement wherein he placed himself at the scene of the crime. For nearly three years the police had been looking for Clegman's associate. They find one who admits to having been present at the murder of Sylvia yet no record is made of this admission. After appellant's arrest, and at the police station, Matoko had every opportunity of writing down this statement or even of making a note thereof in his pocket book. He did not and says that he relied on his excellent memory. That he may have, but he admits it is his practice to write down statements, and since he was not the investiga-

23/ing....

investigating officer it would surely have been a great help to the latter to have such a written statement, especially since this case, to Matoko's knowledge, was being handled by another police station.

In the judgment it is stated that it is just not understood why Matoko should have questioned appellant about his association with one Climate or Clement. If Matoko had forgotten the name of Clegman whom he had arrested a year ago and only remembered it was something like Climate or Clement, then that is the name he would have asked about. It is more unlikely that appellant would have referred to his friend and associate Clegman, as Clement or Climate. It is also quite inconceivable that Matoko, the arresting sergeant, would not have asked appellant if he meant Clegman when he used those other names, or, if he did not connect Climate with Clegman, as he says, that he would not have asked him who this

24/Climate.....

Climate was, to whom he was referring, and where he could be found. And that the reason why there is no written statement is because appellant had denied any knowledge of a man by that name. A witness, and a detective sergeant at that, has only himself to blame if a Court does not accept an important statement, like this one, made in these circumstances and not written down. The statement was supposed to have been made eight months before Motoko gave evidence. In the meantime he handled many other cases. In the circumstances he could be mistaken, not only about whether appellant did make a statement, but also about the details thereof. The trial Court is not altogether correct when it says that the question before them was not whether Matoko had a faulty memory of the details of the statement, but whether he was a prejuror as to the whole of the statement, since appellant had denied making a statement.

25/This.....

This was a wrong approach - a witness can be honest yet unreliable, especially where the recollection of what was said, took place as long as eight months ago. Beadle, C.J. stressed this when he said in R. v. Schaube-Kuffler, 1969(2) S.A. at p. 46 that:-

> "a witness giving evidence of what he remembers having heard the accused say, perhaps months earlier, will seldom, if ever, be able to remember the ipsissima verba of what the accused actually said to him. He may even have some doubt as to what he actually heard."

That is why Rule 9 of the Judges' Rules is a salutary one which should be complied with strictly. In this case there was absolutely no excuse for Matoko's not complying with it. He should have taken the statement down in writing as he says he warned appellant he would do. (S. v. Sithole and Another, 1969(1) S.A. 108.)

26/In.....

In these circumstances the Court should have had a doubt about the reliability of Matoko's evidence and should not have rejected appellant's evidence with regard to the statement.

The trial Court also referred to the contents of the questions put by appellant to the witnesses at the preparatory examination where he suggested that Khumalo walked four times along the parade and was then "tipped off" by the police to identify him. At the trial he said that he had said that Khumalo had walked twice along the line and denied that he had said he was "tipped off." Even if appellant had asked these questions at the preparatory examination in cross-examination, I do not think one should hold that too strongly against him. If an innocent man were suddenly to be pointed out as a murderer, he might well think that there was something wrong with the identification parade. At the trial these imputations were not repeated.

In the result I am of the opinion that if the trial Court had not misdirected itself with regard to appellant's evidence and had realized fully the unreliable nature of Matoko's evidence, it would not have rejected appellant's evidence. The question for the trial Court was not whether it was convinced of the truth of appellant's evidence, but whether that evidence could possibly be reasonably true. Appellant's evidence must be assessed in the light of the fact that he was charged with having committed a crime nearly three years ago. It must have been very difficult for him to remember his movements at that time when they probably, if he is innocent, were of no significance to him at all. If he is in fact innocent, all he can do, is to deny the charge. The chances of his establishing an alibi after this lapse of time would be difficult. For this reason the trial Court should have been specially careful before it rejected his evidence.

But even if appellant's evidence is such that it cannot be accepted, the onus still rests upon the State

of proving the charge beyond a reasonable doubt. I have already dealt with Matoko's evidence and shown that the danger of its unreliability is so great that it cannot properly be considered as evidence corroborating that of Khumalo. If that corroborating evidence falls away, then I do not think any Court could reasonably have convicted appellant on the evidence of Khumalo alone. It would appear that the trial Court would not have done so since it looked for corroboration. Khumalo's evidence is in itself not very satisfactory. He had, of course, ample opportunity for observing his assailants during their various activities that day. It was broad daylight and their assailants were busy with them for about an hour and a half. It must have been a harrowing experience for Khumalo to see his girl-friend being raped three times and not to know what was going to happen to them. He says that the events made an

indelible impression on him and that he has no doubt, not even the slightest, that appellant is the man who was with Clegman that day. He says that although three years had elapsed since the crime, he has kept "a complete view or picture" in his memory all the time. He kept this picture alive because he says:

> "At all times in my life I was going about seeking and praying that this culprit be arrested."

It is passing strange that Khumalo, with the clear picture in his mind, should at the identification parade, have passed by appellant the first time without even hesitating when he got to him. I can understand that he walked down the whole line before he did the final pointing out, but one would have expected him at least to hesitate or stop when he got near the man who fitted this clear picture in his mind. And when Khumalo came back along the line, he did not walk straight up to

30/appellant.....

appellant. He again scrutinised each of the eight men he passed before he got to appellant, who was standing fourth from the head. Another unsatisfactory feature of Khumalo's identification of appellant is that he cannot remember giving a description of his assailants to the police. He could describe the clothes the associate of Clegman wore, but was unable to point to any physical feature of the assailant, notwithstanding the Court's finding that appellant is slenderly built with marked stooping shoulders. Another feature which affects the reliability of the identification, is the fact that appellant is a "sesotho" and speaks Sesuto, whereas Khumalo says that his assailants spoke Zulu to him.

In all these circumstances, and taking into account the unsatisfactory features of Khumalo's identification of appellant, the fact that he did not know appellant previously and that nearly three years had elapsed

31/since.....

since the crime was committed, the trial Court should have had a doubt about the reliability of his positive identification of appellant as one of the assailants. The trial Court was favourably impressed by Khumalo as a witness, but as van den Heever, J.A. said in R. v. Masemang, 1950(2) S.A. 488 at p. 493:

> "The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence."

The appeal succeeds and the conviction and sentence are set aside.

.....

AJ. SMIT.

VAN BLERK, A.C.J.

MULLER, A.J.A.