Death Sentence

142/70

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.

PUELA DHLAMINI & ANR.
Appellant.

versus/teen

THE STATE
Respondent.

Appellant's Attorney James B. M. & C *Respondent's Attorney* Dep. A.G. (Pmb.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate L.R.G. Serrurier *Respondent's Advocate* M.E. Tucker
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 19-11-70.
Op die rol geplaas vir verhoor op
2.3.7

N.L.D. Coram: Ogilvie Thompson, Jansen JJ.A. et de Villiers A.J.A

9.45 am ——— 11.00 am
11.15 am ——— 11.45 am

c.a.v.

APPEAL DISMISSED.

14/12/70

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PUKUZA DHLAMINI

AND

SEKHALENI DHLAMINI ..... APPELLANTS

AND

THE STATE ..... RESPONDENT

Coram: Ogilvie Thompson, Jansen, JJ.A., et
De Villiers, A.J.A.

Heard: 19th November, 1970.

Delivered: 14th December, 1970

JUDGMENT

JANSEN, J.A. :-

On the 30th of October 1969, at about 6.10 p.m., the body of Mrs. Sonia Cohen was found in her flat in Carmia Heights, Bellevue, Johannesburg. An elderly woman, she had been manually strangled to death, sustaining an inward fracture of the left wing of the hyoid bone and a

fracture ..... /2

fracture of the thyroid cartilage on the right lower aspect. Medical opinion established the time of death as between 8.30 a.m. and 2.30 p.m., but the murder could only have been perpetrated somewhat later than 8.30 a.m., as the deceased's husband had spoken to her over the telephone some time between 9 and 10 a.m. She had obviously been attacked in the entrance hall of the flat. The carpet there was disturbed, and on the floor were the deceased's dentures and spectacles, as also a shoe that had come off her left foot. The body itself was lying on its back in the hall, with head and shoulders protruding through a doorway into the kitchen. The jewellery she had been wearing, including a gold wrist watch, [redacted] gone; the bedroom had been ransacked and left in utter confusion; a cardboard box containing a collection of South African and foreign coins, valued at between R300 and R400, and other articles were missing.

The two appellants and a certain George Ngubai, were subsequently indicted in the Witwatersrand Local Division for the murder of Mrs. Cohen and for robbing her of a purse, a men's wrist watch and the collection of coins. her wrist watch, ^ They were tried by Irving Steyn, J., and

two assessors, who were unanimous in acquitting George Ngubai on both counts [redacted] convicting the appellants on both counts. They found aggravating circumstances in respect of the robbery and no extenuating circumstances in respect of the murder. The appellants were consequently sentenced to death for the [redacted]. The learned Judge considered it unnecessary in the circumstances to pass sentence in respect of the robbery, but he stated, however, that had he been called upon to do so, he would, in the exercise of his discretion, have imposed the same penalty. The present appeal is, by leave of the Court a quo, against the convictions and the sentences.

The main attack on the convictions is directed at the reliance by the Court upon confessions alleged to have been made by the appellants. In effect the contention is that the Court [redacted] failed to apply its mind to whether such confessions had in fact been made, and in so doing, [redacted] committed a fatal irregularity; alternatively, that the learned Judge committed an irregularity in ruling the alleged confessions admissible in evidence, inasmuch as

he had ..... /4

he had not considered whether they had been made "freely and voluntarily" by the appellants "in their sound and sober senses without having been unduly influenced thereto", in terms of section 244 (1) of Act 56 of 1955. If, so baldly stated, these contentions appear somewhat surprising as a result of the radical nature of the errors alleged to have been committed, the explanation must be sought in the circumstances under which the trial within a trial relating to these alleged confessions came to be held, and the course which it took.

After the State had called a number of witnesses at the trial, Major van der Merwe of the Brixton police, entered the witness box. He testified that he was ex officio a justice of the peace and that on the 14th of November 1969, at about 6.30 p.m., Detective Sergeant Thom had brought the second appellant to his office. Thom left the second appellant with the witness, the only other person present being Bantu Constable Alpheus Mothabeni, who then acted as interpreter. At this point in his evidence Major van der Merwe referred to a record that he had kept of what

had ..... /5

had transpired, and he commenced to read from it. It was the usual form, setting out the usual preliminaries. The second appellant appeared to be in his sound and sober senses; he was informed that he was in the presence of a justice of the peace and he was warned in the usual [redacted] that he was not obliged to make a statement. The answers to the usual questions disclosed inter alia that he understood the warning, that no one had assaulted him or made any promises or issued any threats or in any way influenced him to make a statement, that he expected no benefit as a result of making a statement, that he had already told all he knew to Detective Sergeant Thom and that he desired to repeat his statement because "Sersant Thom het aan my gesê dat hy nie my verklaring in die hof kan uitlees nie en ek wil die waarheid in die hof hoor". Major van der Merwe had also noted on the form that the appellant had no apparent injuries.

As Major van der Merwe was about to read out what the second appellant thereafter told him, he was stopped, and counsel for the appellants (who appeared at the

trial ..... /6

trial for all three accused) stated that "I am objecting to the admissibility of this confession on the grounds that it was either not freely and voluntarily made or else that it was procured by undue influence". Questioned by the learned Judge counsel then explained:

> "..... briefly my objection is, insofar as this confession is concerned, that the accused was assaulted by an unknown white policeman and a Bantu Constable Mtembo. That he was forced to place his finger-mark on the confession".

Later he explained; "The defence contention is that the defence made no statement" and that the assault had "nothing to do with it whatsoever". Believing that there might be some misunderstanding, the learned Judge adjourned for a while to enable counsel to obtain further instructions from the second appellant. At the resumption counsel stated: "My instructions are that accused No. 2 made no statement and disclosed no information to the police and that his thumb-mark was pressed upon the document which purports to be his confession". Some argument was then addressed to the learned Judge and he finally suggested that the State should [redacted] first

lead ..... /7

lead the "formal evidence" in regard to any other alleged confession as well. Major van der Merwe then gave further evidence, about George Ngubai being brought to him on the 17th of November and continuing, broadly, on the same lines as in the case of the second appellant. At the appropriate time counsel for the appellants intervened, stating "I am objecting to this statement in question on the same lines as the previous one". Thereafter the State called Captain van der Linde, also of the Brixton police and ex officio a justice of the peace, who testified that Detective Sergeant Thom had brought the first appellant to his office at approximately 1.35 p.m. on the 14th November 1969. Thom left the first appellant with the witness, the only other person present being Bantu Constable Alpheus Mothabeni who acted as interpreter. Van der Linde's evidence then proceeded on the same lines as that of Major van der Merwe in relation to the second appellant. The same warning was given. The same questions were put, eliciting answers to the same effect. The first appellant said inter alia that he had made a statement to Thom and desired to repeat it because "Ek wil die waarheid praat".

Captain ..... /8

Captain van der Linde also testified that he had noted that the first appellant had no apparent injuries, and that he had himself typed the record of the interview as it was proceeding. At this stage of Van der Linde's evidence counsel for the appellants then again intervened.

For a proper understanding of the proceedings that followed it is necessary to refer to the record at this juncture:-

> "MR. SERRURIER: My Lord, I am objecting to this confession on similar grounds as the last two, that is that no admissions or confession was made by the accused, that a document was written out in his presence by Sgt. Thom but not on information supplied by him. He was then taken into the presence of this witness who typed the present exhibit from the document handed to him by the sergeant. The sergeant remained present whilst this took place, it was not read back to him and again his finger was placed upon it by Sgt. Thom.
> MR. TUCKER: My Lord, those are the statements which I intend leading, the preliminaries to these statements that have been led and My Lord, my learned friend applies for a trial within a trial. I submit, My Lord, that on the allegations as set out by my learned friend there is nothing about freely and voluntarily, it is merely a question of credibility. (MR. TUCKER CONTINUES TO ADDRESS THE COURT.)
> HIS LORDSHIP: Well an objection has been

lodged ..... /9

lodged as to the admissibility of the statements on the grounds that it was never made. If that is true then it is a perfectly valid objection.
MR. TUCKER: Yes, My Lord.
HIS LORDSHIP: How can I decide it excepting by hearing evidence and isn't that a trial within a trial at which the assessors must not be present?
MR. TUCKER: Yes, My Lord, in my submission it can be done that way, it is then just an issue to be decided on credibility, even if it is within a trial - a trial within a trial.
HIS LORDSHIP: In anticipation that something unfortunate and detrimental might emerge in this trial within a trial, isn't it better that the assessors be not present when I hear it? One never knows what an accused is going to say and it may have a bearing on the merits of the case. Then I shall hear the matter at 2 o'clock in the absence of my learned assessors. By agreement you say the accused will be called first and then you will lead rebutting evidence.
MR. TUCKER: As Your Lordship pleases.
MR. SERRURIER: That is so, My Lord".

At this stage it may be remarked that, strictly speaking, the question of fact whether an accused has made or not made an alleged confession is not directly relevant to the question of law whether or not that alleged confession is admissible in evidence. Further, if at the end of the trial it is still an issue whether the accused had in fact made the alleged statement, tendered in evidence

consequent ..... /10

consequent upon the presiding Judge ruling it admissible, it is for the Court, consisting of judge and assessors if so constituted, in considering the question of the guilt or innocence of the accused on the totality of the evidence, to decide whether it has been proved that the accused had made the confession, as is its function in respect of every other alleged factum probans (cf. R. v. Manjonjo, 1963 (4) S.A. 708 (F.C.); R. v. Schaube-Kuffler, 1969 (2) S.A. 40 (R, A.D.).). Nevertheless, however clear the distinction between the making of a confession and the circumstances under which it is alleged to have been made, as reflecting upon its admissibility, may be in theory, the line is not always so easily drawn in practice. (Cf S. v. Mkwanazi, 1966 (1) S.A. 736 (A.D) at 743C). In view of this, the learned Judge in the instant case could hardly be faulted for embarking upon a trial within a trial. Counsel for the accused applied for this procedure to be followed; he had stated, initially, that his objection was that the alleged confession by the second appellant had not been made freely and voluntarily; evidence of assault was adumbrated

as also ..... /11

as also of thumbprints being placed on documents, apparently against the will of the appellants. In view of the learned Judge's experience that "one never knows what an accused is going to say and it may have a bearing on the merits of the case", the adoption of this procedure appears to have flowed from commendable prudence.

After the lunch adjournment the proceedings were resumed in the absence of the assessors. As arranged, the two appellants and George Ngubai then gave evidence.

The story the first appellant told was the following. During the morning of the 14th of November he was taken to the office of Detective Sergeant Thom. As soon as he entered he was assaulted and struck down; he apparently lost consciousness: "After I got up we were all still in the office". Those present were Thom, a Bantu constable (apparently Mothabeni), Detective Warrant Officer Maree and a European policeman he did not identify. The latter put some questions to him, but he (the appellant) simply denied that he knew anything. He noticed that Thom was busy writing and that he continued to do so although ..... /12

although no further questions were being put to him (the appellant). When Sergeant Thom had finished writing, they all went to Captain van der Linde's office. Sergeant Thom "handed a long piece of paper" to Captain van der Linde, apparently the same paper Thom had been writing on in his own office. They all sat down and Van der Linde started typing. Nobody talked to appellant or questioned him. Van der Linde finished typing and told the appellant to get up, took hold of his hand by the wrist, asked him to push his thumb out and took his thumb-print. In cross-examination first appellant emphasized that in the office with Van der Linde, the others had spoken among themselves and not at all to him, the appellant: "I never uttered one Zulu word in that office". He also said that Bantu Constable Mothabeni loosened his handcuffs prior to his thumbprint(s) being taken.

The second appellant's evidence was to the following effect. He was arrested on the 14th of November and taken to Brixton where he was interviewed by a European policeman and a Bantu policeman, who acted as interpreter.

He ..... /13

He identified them as being Detective Sergeant Horricks and Bantu Constable Johannes Mtembu. The appellant told Sergeant Horricks that he knew nothing about the case. Horricks asked him where he had obtained two watches he had handed in for repair at two jeweller's shops, and the appellant explained that he had got one from the first appellant and the other from his girl friend. According to the second appellant that is all that he told Horricks. The appellant's handcuffs were then taken off and Horricks asked him whether he could write his name. He answered affirmatively and was asked to write it down on a piece of paper. He did not do so. Horricks "then seized my thumb and pressed it on the peper, that is my thumbprint". He later explained that his thumbprint was placed on a number of papers similar to those constituting the confession the State sought to introduce in evidence. He said that he had never spoken to Major van der Merwe or Alpheus Mothabeni.

It is unnecessary to refer in detail to what George Ngubai said.

In rebuttal the State called every member of the police mentioned and identified by the appellants, and

thus ...../14

thus completely controverted the appellants' evidence, and gave a full picture of the sequence of events from arrest to appearance before Captain van der Linde and Major van der Merwe respectively (a sequence to which reference will be made in greater detail at a later stage in this judgment). The learned Judge rejected the evidence of the appellants (and George Ngubai) - "Their evidence was so unsatisfactory that I reject it out of hand as being completely false" - and accepted that of the police witnesses. He had every justification for so doing.

The trial within a trial was terminated by the following ruling:-

> "..... the objection to the admissibility of these statements is overruled, and the State will be permitted to lead such evidence regarding the admissibility of their statements and the contents thereof, as the State sees fit to do".

At this point it would be convenient to revert to the contention, on behalf of the appellants, that at the end of the trial, the Court (i.e. as constituted by Judge and assessors) had failed to apply its mind to the

question ..... /15

question whether the alleged confessions had in fact been made. This failure, it is suggested, flows from the fact that after the ruling on the question of admissibility it was simply assumed that the confessions had in fact been made by the appellants, without any proper proof being placed before the Court. It is true that in rejecting the appellants' evidence and accepting that of the State in the trial within a trial, the learned Judge in effect found that the appellants had made the statements to Major van der Merwe and Captain van der Linde respectively, but there is not the slightest indication that he ever considered this to be a finding binding upon his assessors. The wording of the ruling, quoted above, is, perhaps, not as felicitous as it might have been, but at least it makes it abundantly clear that he intended to do no more than open the door for the State to place before the Court (constituted by Judge and assessors) such evidence as it saw fit in respect of the alleged confessions.

In considering the further proceedings, reference may usefully be made to what Williamson, J.A., said

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in S. v. Mkwanazi (supra at 743 E-H):-

> "Generally speaking it is quite unnecessary for the State to repeat before the full Court all the evidence which was produced before the Judge sitting alone; in some cases it may even be undesirable to do so because of possible prejudice to the accused. Such prejudice could arise in several ways not difficult to visualise and presently necessary to specify. Once the statement is ruled admissible, all that it required is that it be duly tendered in evidence; it could probably then be handed in by consent. If it be decided that it is in the interests of an accused to raise again issues which were placed before the Judge sitting alone - issues which were probably determined against him and in respect of which he may have been found to be untruthful - then it should be left to the defence to do so. If they are so raised, there must of course usually be an opportunity afforded the State to meet such issues. .... In a case in which such issues of fact are in any event going to be raised by the defence in the trial proper and are so raised, ... then any tarnishing of his general credibility caused by his being disbelieved on those issues, results from his own act; but by specifically again raising the same issues, the State should not 'force' an accused into the position of having to try and impress the full Court with the truth of a story discarded by the Judge sitting alone".

In the present case there was no express agreement that the confessions should merely be handed in. The State recalled Major van der

Merwe and Captain van der Linde, who resumed their evidence from where they had left off when the objections were raised originally. It must be remembered that they had by then given all the introductory evidence necessarily preceding the reading of the statements, which they now proceeded to do. In respect of each of the appellants each witness also read out inter alia "die verklaarder het bostaande verklaring vrywillig afgelê", no doubt being a record of his own observation at the time, now confirmed under oath. The confessions were then handed in. Neither Van der Merwe nor Van der Linde were cross-examined by counsel for the appellants, and counsel was then also prepared to admit that the statements were correctly interpreted from the Zulu language into Afrikaans. So far from assuming that he had decided the issue once and for all whether the confessions had been made (as argued for the appellants), the learned Judge addressed the following to the prosecutor:-

> "Mnr. Tucker, u sal moet oor die volgende aspek dink tussen een en twee. Hoewel u geleerde vriend bereid is om hierdie erkenning te maak, druis dit nie direk in op sy instruksies dat daar geen verklarings gemaak is nie? Wat bereik die beskuldigdes deur te erken dat dit

korrek ..... /18

korrek vertolk is, wanneer die Verdediging se getuienis sal wees dat hulle ook geensins enige ~~verklarings gemaak~~ het wat moontlik reg kon vertolk gewees het nie"?

After the lunch adjournment the State called Alpheus Mothabeni, who testified that he had correctly interpreted what transpired between Major van der Merwe and the second appellant, and between Captain van der Linde and the first appellant. (In respect of George Ngubai, Piet Matamela was called). They were not cross-examined and the State closed its case.

It is clear that at this stage of the proceedings, so far as the Court, (constituted by the learned Judge and the assessors), was concerned, the defence was apparently not challenging the evidence of Captain van der Linde and Major van der Merwe that the two appellants and George Ngubai had made confessions to them. When, however, the two appellants and George Ngubai subsequently gave evidence on the merits, they inter alia denied making the confessions, as foreseen by the learned trial Judge. But this was in such direct conflict with the credible evidence of the police officers, and Bantu Constable Mothabeni, who had not

even been cross-examined (before the Court consisting of Judge and assessors), that it is not surprising that in the judgment of the Court a quo the question of the making of the confessions is not dealt with at length. A careful reading of the judgment however, clearly discloses that this aspect was indeed considered. After dealing with the circumstantial evidence, the learned Judge set out the evidence of Major van der Merwe and Captain van der Linde as to the making of the confessions. In the course of his judgment he later said:-

> "..... I may state immediately that the interpretation of the language by the interpreter concerned of these three confessions was not challenged by the defence, which in addition to the necessary evidence which was led to prove the correct interpretation, admitted that the statements had been correctly interpreted. All three statements were therefore properly before the Court and there has been abundant proof that they were made by the three accused and correctly interpreted ..... ".

Elsewhere the learned Judge said:-

> "I want it clearly understood that in dealing with the confessions, and the question of the truth or falsity thereof, we in no way intend to call in question the fact of whether the confessions were duly and properly made by the accused, as we find that they were".

The appellants' main contention in regard to the reliance by the Court a quo on the confessions, must,

therefore, fail. Without reference to the evidence given in the trial within a trial, there was in any event ample evidence before the Judge and his assessors that the appellants had made the confessions attributed to them and the Court was fully justified in so finding on that evidence.

I now turn to the alternative contention relating to the confessions, viz. that the learned Judge committed an irregularity in ruling them admissible in evidence, inasmuch as he had not considered whether the prerequisites to their admission, in terms of sec. 244 (1) of act 56 of 1955, were present. It is trite law that the onus rests upon the State to prove beyond reasonable doubt, as a condition precedent to the admissibility of tendered confessions, that the requirements of the section have been met, and counsel for the appellants suggests that the learned Judge had overlooked this fundamental rule. There are, indeed, passages in the learned Judge's reasons for dismissing the objection to the admissibility of the confessions which lend some support to counsel's contention. I am, however, not fully persuaded that the true interpretation

of these ..... /21

of these passages is that the learned Judge completely overlooked and disregarded ~~that fundamental rule;~~ but in order to avoid a lengthy analysis in this regard, I am prepared to assume, in favour of the appellants, that the learned Judge so misdirected himself and that the question now to be answered is whether this Court considers, on the evidence and the findings of credibility unaffected by such irregularity or defect, that there is proof beyond reasonable doubt that the confessions were made by the appellants "freely and voluntarily ..... and without having been unduly influenced thereto". (Cf S. v. Tuge, 1966 (4) S.A. 565 (A.D.) at 568).

The learned Judge, in the trial within a trial, believed Major van der Merwe, Captain van der Linde and Bantu Constable Alpheus Mothabeni, who acted as interpreter in both instances. Their evidence, taken in isolation, would be quite sufficient to establish beyond reasonable doubt that the appellants, in their sound and sober senses, freely and voluntarily, without having been unduly influenced thereto, made the confessions. The warning they received, the nature of the questions put to them and the answers they gave, all confirm this. Moreover, the appellants by producing a completely

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false story of their thumbprints having been placed against their will upon documents, the contents of which were not even derived from them, have in no sense provided an evidential basis for arguing the contrary. The appellants would have been the best witnesses as to whether they had acted otherwise than freely and voluntarily and whether any undue influence had in fact been brought to bear upon them; they did not claim that this had happened, but falsely denied having made the statements. They thus failed to provide the evidential basis for what would otherwise be mere hypothetical possibilities, [redacted] insufficient to raise a reasonable doubt in the face of the evidence of Van der Merwe, Vander Linde and Mothabeni. (Cf. R. v. Anaias, 1963 (3) 486 (S.R.) at 488 A-D, 489 H - 490; R. v. Manjonjo, 1963 (4) 708 (F.C.) at 713 A-B; R. v. Sibanda, 1965 (1) S.A. 236 (S.R., A.D.) at 238 B-F; S. v. Mkwanazi, 1966 (1) S.A. (A.D.) at 747). If the proceedings before Van der Merwe and Van der Linde, in a sense, dropped a veil concealing what had gone before, (cf. R. v. Gumede and Another, 1942 A.D. 398 at 433), ... /23

at 433), except for what was disclosed by answers then given by the appellants, the appellants could reasonably have been expected to raise that veil, or at least have attempted to do so, and thus bring to light any threats or promises or other forms of moral pressure which could have constituted undue influence or have deprived them of the capacity to act freely and voluntarily, if such were indeed the case.

So far the problem has been approached on the basis of the evidence of three State witnesses in isolation, considered in the light of the appellants' evidence, the falsity and nature of which casts no reasonable doubt upon the prima facie impression derived from these witnesses. But, even in a case where an accused has failed to disclose under oath what actuated him in making, ostensibly freely and voluntarily and without having been unduly influenced thereto, a confession before a magistrate or a justice of the peace, it is conceivable that other evidence of what had gone before could point so strongly to e.g. the operation of undue influence, that such would no longer be merely a hypothetical possibility but a reasonable possibility. It is, therefore, necessary in

the ..... /24

the instant case not only to consider the evidence of Van der Merwe, Van der Linde and Mothabeni in isolation, but also in relation to other evidence which was before the learned Judge when he gave his ruling (which evidence would not only be that given during the trial within a trial, but would also include the evidence given up to the stage when the assessors were excused). That evidence disclosed inter alia the following:-

(i) At about 3 p.m. on the 13th November 1969, Detective Warrant Officer Maree (a member of the Brixton police) on information received, went to Guard Mansions, Hillbrow, and arrested the first appellant. The appellant had on his person a plastic purse and in it a R1 coin; in his possession were also 7 used foreign coins, found under a pillow in the servants' quarters. Maree returned to Brixton with the appellant and there Detective Sergeant Thom, the investigating officer, took his fingerprints. Thom then went to the local fingerprint bureau, leaving the appellant with Maree. Thom later telephoned Maree to inform him that the appellant's prints did not match those found at the scene of the crime. Maree then released the appellant and warned him to return the next morning.

(ii) The next morning, the 14th of November, at approximately 11 a.m., the first appellant was placed on an identification parade and he was pointed out by one Mgingo Khati, a cleaner at Carmia Heights, as a man that he had seen standing in front of the door of the deceased's flat at about 12 noon on the 30th of October 1969.

(iii) After the parade, from 11.40 a.m. to 1.30 p.m., the first appellant was interviewed by Detective Sergeant Thom. Bantu Detective Constable Pafarus Rakosoka acted as interpreter. The appellant was warned as follows:-

"Die bewerings was aan hom gestel, en hy was gewaarsku dat dit n ernstige saak is en dat hy versigtig moet wees wat hy sê. Hy is ook verwittig dat sekere vrae aan hom gestel gaan word met die doel dat hy deur die beantwoording daarvan sekere punte kan verduidelik waardeur hy moontlik sy onskuld kan bewys. Hy is gewaarsku dat dit nie vir hom nodig is om enige vrae te beantwoord nie, maar dat wat hy sê neergeskryf sal word en as getuienis mag aangevoer word. Dit het in aldrie die gevalle gebeur".

The appellant was prepared to speak and told his story, which was reduced to writing. At 1.30 p.m. Thom took the appellant to Captain van der Linde's office. The statement the appellant had made to Thom was substantially the same as the confession he made to Captain van der Linde

(iv) Meanwhile at about 1.15 p.m., that very afternoon, Captain Pieterse, also of Brixton, found the second appellant in Claim Street. On the latter's person were two cards issued by jewellers in respect of watches handed in for repair. The cards led, first, to an address in Von Wielligh Street, where a watch was produced on tender of one of the cards. It was a golden coloured, men's wrist watch, and it was established that it had been handed in for repair on the 30th of October, 1969. At that stage, it

seems ..... /26

seems, Pieterse was not interested in this watch and he did not take it into his possession. The second card led to a jeweller's shop in Kotze Street, Hillbrow, where it was ascertained that the card related to an uncommon type of ladies' watch with a gold bracelet attached, a watch, later to be described in evidence as follows: "It is a gold watch, an evening watch of a very, very high priced class". Mr. Westkamp of this shop, no doubt then gave the information which he was later to give under oath at the trial, namely, that the second appellant had brought the watch in for the repair about the 8th of November, 1969. Pieterse took possession of this watch and took the second appellant to Brixton. Pieterse asked the appellant whose watch it was, and the appellant replied that a girl friend had given it to him. Bantu Constable John Mtembu acted as interpreter for Pieterse. At Brixton, Pieterse handed the second appellant over to Detective Sergeant Thom.

(v) Detective Sergeant Thom interviewed the appellant from 5.45 p.m. to 6.30 p.m. Detective Constable Piet Mathemela acted as interpreter. After having been warned in the same manner as the first appellant, the second appellant was willing to talk and he made a statement, which was reduced to writing, a statement substantially the same as that which he made to Major van der Merwe, when taken to the latter at 6.30 p.m.

If it be felt that certain aspects material to the present inquiry could have been clearer, it should be remembered that much of the aforegoing summary is based

on ..... /27

on evidence given by police witnesses merely incidentally, in the course of contraverting the appellants' version of how their thumbprints came to be on documents now, to their surprise, alleged by the State to be confessions, and not on evidence given with the specific object of rebutting any suggestion of, e.g., duress or undue influence giving rise to confession, a case which was never made out on behalf of the appellants, not even in cross-examination. The very nature of the appellants' stories no doubt hampered defending counsel and he was unable to allege and put specifically to any of the witnesses any such impropriety. Consequently, counsel is now in the unenviable position of largely having to make bricks without straw in an attempt to show that there is a reasonable possibility that, e.g., undue influence brought to bear earlier was still operative when the appellants appeared before Van der Linde and Van der Merwe respectively, and made their confessions.

I do not propose to deal with every minor submission made on behalf of the appellants in this regard, such as, e.g., that based on an alleged breach by Detective

Sergeant ..... /28

Sergeant Thom of Rule 4 of the Judges' Rules, which could not in the circumstances be decisive. The main contention is based on the fact that from the moment of arrest up to the making of the confessions before Van der Merwe and Van der Linde, the appellants remained throughout in the hands of members of the Brixton Murder and Robbery Squad or, at least, members of the police stationed at Brixton, to such a degree, that even when each of the appellants was informed that he was now in the presence of a justice of the peace, this was done on police premises at Brixton, through a constable (as interpreter), by an officer (as justice of the peace) stationed there. In this regard we were referred to the remarks of Colman, J., in S. v. Mofokeng and Another (1968 (4) S.A. 852 (W) at 858 B et seq.), with which I am in full agreement. It is not a question of impugning in any way the integrity of responsible police officers in carrying out their duties as justices of the peace; it is the fact that this procedure constitutes fertile earth, for an accused, in which to plant the seed of suspicion, which there readily sprouts and burgeons to the stature of a reasonable doubt

whether he, when making the confession to the police officer (as justice of the peace) was not still being actuated by an improper inducement that might have gone before. In the present case, however, the appellants have not planted that seed. They gave no evidence bearing any semblance of truth, derogating from the totality of evidence, originating with the police, to the effect that they were prepared to talk when Detective Sergeant Thom questioned them and that they thereafter freely and voluntarily and without being unduly influenced thereto, confessed to Captain van der Linde and Major van der Merwe respectively. It may be argued that it is surprising that the appellants were prepared to confess the moment they were questioned by Detective Sergeant Thom and that their willingness could be consistent e.g. with intimidation to such a degree that confession appeared the lesser of two evils. But this would amount to mere speculation. It could equally be argued, as a matter of speculation, that the deceased's husband may well have identified (as he purported to do at the trial) the purse and coins

found ..... /30

found in the possession of the first appellant, as belonging to the deceased, and that this, coupled with being pointed out at the identification parade, may have led the first appellant to believe that the game was up, a state of mind leading naturally to confession. Likewise, the second appellant may have fallen into the same frame of mind as a result of the card found in his possession leading to the discovery of the very high priced, gold evening watch (which the deceased's husband, later at the trial, also purported to identify). He may also have been informed of the arrest of the first appellant.

In the premises I come to the conclusion that there is proof beyond a reasonable doubt that the confessions were made by the appellants "freely and voluntarily ..... and without having been unduly influenced thereto". That proof was achieved by the State at the end of the trial ~~within the trial and the ruling~~ of the learned Judge a quo must stand. I may add that nothing that transpired after that stage in the proceedings disclosed any reason for reconsidering that ruling. In the result, the alternative

contention ..... /31

contention on behalf of the appellants in relation to the confessions ~~also fails~~.

Having thus disposed of the question of admissibility of the confessions, I now turn to the remaining contentions on behalf of the appellants. For their proper understanding it is, however, necessary, at the risk of some repetition, to set out very briefly the full nature of the State case, linking the two appellants with the murder and robbery which had admittedly been committed, the evidence given by the latter to meet this case and, finally, the findings of the Court a quo. George Ngubai may henceforth be left out of the picture, except insofar as he figures in the confessions of the two appellants. His confession was the only link established by the State between him and the crimes; he tendered evidence of an alibi, to some extent supported by a credible witness; and in the result the Court a quo gave ~~him the benefit of the doubt, for reasons not material to~~ this judgment.

The main features of the State case against the first appellant were:-

(i) ..... /32

(i) At about 11 a.m. on the 30th of October Susan Ngoi, a woman employed at Carmia Heights, saw a Bantu man in blue overalls walking down a passage towards the deceased's flat, and shortly afterwards she saw two Bantu men climbing the fire excape towards the deceased's flat; the man in the blue overalls she had also seen the previous day outside the building, looking up at the window of the deceased's flat. Susan Ngoi pointed out the first appellant at an identification parade on the 20th of November, as the man in the blue overalls.

(ii) At about 12 noon, that same day, Mgingo Khati, saw a Bantu man in blue overalls standing in front of the door of the deceased's flat; shortly thereafter he saw the same man running from the premises with two companions; the man was then carrying a stuffed paper bag. He had also seen this man entering the premises less than two weeks before. He pointed out the first appellant as this man at an identification parade on the 14th of November.

(iii) On the 13th of November the first appellant was found in possession of a purse, a number of used foreign coins and a R1 piece. Mr. Cohen, the husband of the deceased said that the purse was one his wife had obtained from an American tourist overseas and that she always kept a number of used foreign coins in it. The R1 piece, he said, was similar to an uncirculated coin he had given his wife a few days before her death.

(iv) The following confession by the first appellant:-

"Ons het geloop, toe gaan ons na Bellevue toe. Dit was ek, Skaleni (second appellant) en George (Ngubai?). Ons het geloop om te gaan bier drink en hulle het gesê dat hulle n ander man wil gaan sien.

Op..... /33

Op 'n Donderdagmiddag by laas maand het ek en George en Skaleni weer na Bellevue toe gegaan en ons het by die 'flats' ingegaan. Hulle het gesê daar is geld by een van die 'flats' wat ons moet gaan haal. Ons het aldrie ingegaan en ek het by die gang gestaan om te 'guard'. Hulle het vir my die 'flat' gewys waar hulle die geld wil gaan vat. George en Skaleni het na die 'flat' toe gegaan en ek het gehoor toe hulle die klokkie druk. Daar het iemand van binnekant af die deur oopgemaak. Ek het nie gesien wie die deur oopgemaak het nie. George en Skaleni het ingegaan by die deur. So 'n klein rukkie daarna het ek 'n vroumens gehoor skree binnekant by die 'flat'. Die vrou het tweekeer geskree. George en Skaleni het na 'n rukkie uitgekom. Elkeen van hulle het 'n bruin papier soos 'plastic' in hulle hand gehad. Ons het toe aldrie saam vinnig uitgeloop en na Bertrams se kant gegaan. Ons het gekom by ons plek waar ons werk, toe gaan sit ons. Ons het by George se kamer ingegaan. Daar het ek gesien daar is geld binne by die 'plastic' papiere wat lyk soos sakkies. Hulle het vir my £9.10.-. van die geld gegee. Ons het toe elkeen sy pad gevat en geloop. Ek het nou klaar gepraat".

The main features of the State case against the second appellant were:-

(i) On the 30th of October he was in possession of a men's wrist watch, said by Mr. Cohen to be similar to one missing from the flat; on or about the 8th of November he was in possession of an unusual, very expensive gold wrist watch

with ..... /34

with bracelet, said by Mr. Cohen to have been worn by his wife and found missing from her body.

(ii) ~~The following confession by the second appellant:~~

"Pukuza (first appellant) het na my gekom waar ek bly by Plummer Court in Pleinstraat. Pukuza het gesê ek moet saam met hom loop om geld te gaan haal. Ek het vir Pukuza gevra waar die geld is. Pukuza het gesê die geld is in Bellevue. Ons het geloop na George (Ngubai?) waar hy bly. Daar waar George bly is n nuwe gebou. Toe ons by George kom het ek ook vir hom gevra waar die geld is wat ons moet gaan haal. George het gesê die geld is by n ou miesies in Bellevue wat in n 'flat' bly. Ons het tot by die 'flat' geloop. George en Pukuza het vir my gewys waar die plek is. Ons het vir Pukuza in die gang gelos om te 'guard'. George het die bell gedruk. Die miesies het gekom en die deur oopgemaak. Ek en George het haar weggestamp en ek het die deur toegemaak. George het die miesies aan die arms gegryp. Sy het geskree, toe druk George haar mond toe. Sy het weer geskree en George het haar keel toegedruk. Die miesies het geval. Ek het toe vir George gesê hy moet haar nie los nie want ek soek nog die geld. Ek het in die hangkaste gesoek vir die geld. In die een laai het ek los geld gekry. Ek het dit in n 'carton box' gegooi. Ek het toe vir George gesê hy moet die miesies los, ek het klaar die geld gekry. Ek het ook n horlosie en ou geld gevat. George het die miesies gelos en ek en hy het uitgeloop. Ons het vir Pukuza in die gang gekry en ons het geloop na George se 'flat' waar hy werk. Ons het die geld daar by George se plek gedeel. My 'share' was £19 of £20. Ek het die

horlosie ..... /35

horlosie ook gevat. Ek het toe saam met Pukuza na Plummer Court geloop waar ons ~~altwee geslaap het~~".

The first appellant in evidence denied making the confession but conceded that he was in Carmia Heights near the deceased's flat on the morning of the 30th of October, between approximately 10 and 11 a.m. He had seen the witness Khati and two others enter the deceased's flat; he himself had nothing to do with the crime. The men's wrist watch before the court he had stolen from his former employer and given to the second appellant. [redacted], At a late stage in the proceedings the employer was called as a witness and he positively identified the watch as his.

The second appellant denied all knowledge of the crime and that he had made a confession; he affirmed that the first appellant had given him the men's watch, and ~~explained that the expensive gold watch had been given to~~ him by a girl-friend on or about the 4th of November. He named her and was allowed to go and point out her place of

employment ..... /36

employment. It was determined that a person of that name did perhaps work there at one time, but she could no longer be traced.

The Court a quo considered Susan Ngoi to be a very good witness and Khati credible, and found that the first appellant was lying throughout (except in regard to giving the watch to the second appellant). His evidence was rejected and it was inter alia accepted (as explained before) that he had in fact made the confession. The Court also designated the second appellant a lying witness and rejected his evidence (except in respect of the one watch). The Court found (as also explained above) that he had made the confession and, it would seem, accepted that the gold watch and bracelet were those of the deceased. The accepted evidence thus leading to the conclusion that the appellants were two of three persons involved in the crime, the first appellant standing guard at the door of the flat whilst the second appellant and another entered the flat, the Court found them guilty of robbery and murder on the basis ..... /37

basis of common purpose.

~~Although counsel for the appellants did~~ not challenge the rejection of the first appellant's evidence (as he was well advised not to do), he submitted that the Court a quo erred in doing so in respect of the second appellant. It is true that in certain respects the reasons of the Court may be subject to criticism, but in the light of all the circumstances it is difficult to resist the conclusion that the Court a quo was right in rejecting his evidence. The second appellant obviously did not give the impression of a reliable witness, his denial of making a confession in the face of the clear and credible evidence of Major van der Merwe, Captain van der Linde and Bantu Constable Mothabeni, and the identification of the gold watch by Mr. Cohen, all point strongly to the untruth of his evidence. It is true that Mr. Cohen's identification of the watch was ~~not at all conclusive - at most he could only say that the~~ exhibit was similar to the watch his wife wore and he was shown to have been wrong about the other watch. But it

must ..... /38

must be remembered that this was a most unusual and expensive watch, in the possession of the second appellant shortly after the murder and robbery, and that he was on friendly footing with the first appellant, who admittedly knew Carmia Heights and was found in possession of foreign coins and a purse similar to that of the deceased, which had contained foreign coins. All these circumstances in conjunction serve to strengthen the original identification of the exceptional watch by Mr. Cohen. Taking a broad view of all the evidence I am not persuaded the Court a quo erred in this regard.

A further contention on behalf of the appellants is that the evidence does not justify the application of the concept of common purpose to arrive at a conviction of murder. The argument proceeds from the fact that it must be accepted as not proved that either of the two appellants actually throttled the deceased; and it was then suggested that the application by the Court a quo of a line of reasoning to be found in R. v. Sikepe and Others (1946 A.D. 745) and S. v. Mkomo (1966(1) S.A. 831 (A.D.)) was unjustified and subject to criticism. Whether, however, such reasoning may validly be applied in a particular case obviously must depend upon the particular facts. In..... /39

In the present case it is clear from the evidence as a whole that the appellants took part in the execution of a well planned operation. The selection of the deceased's flat was not fortuitous and they obviously knew that money was there to be found. The presence of the first appellant in the vicinity prior to the crime shows that he was spying out the lie of the land. It is an irresistable inference that the appellants knew that the deceased would be alone in the flat at noon, and realized that the principal obstacle to a successful operation would be the possibility that the deceased could raise an alarm, which would be fatal to their design in view of other persons, including various servants, being in the building. The possibility was of such importance that the three men involved must have considered and discussed the problem and have allocated to each his role, to enable the operation to be carried out rapidly and efficiently, as it was in fact done. During such discussion it would have been plain to the meanest intelligence that the swift

silencing of the .... /40

silencing of the deceased could involve physical violence, and that such violence to be most effective should be applied to the throat. Further, as said by Malan, J.A., in R. v. Lewis (1958 (3) S.A. 107 (A.D.) at 109 E-F):-

> "The inherent danger of the application of pressure to the throat and neck for even a very brief period must be present to the mind of even the most dull-witted individual....".

Once it is inferred, as it must be in the present case, that the operation was planned and, therefore, discussed, in relation to the imperative need to silence the deceased, those concerned must have foreseen (and, therefore, did foresee) the necessity of violence being applied to the deceased, probably to the area of her throat, and the possible danger to life involved, particularly in the case of an elderly woman. It would be utterly unrealistic to consider it possible that in so discussing and planning the operation those concerned would have thought of and agreed to any precautions against such an eventuality, or that they could mistakenly have believed that the silencing could and would be done with such measured precision that no risk to life

would ..... /41

A further contention on behalf of the appellants is that the Court erred in not finding extenuating circumstances. It is suggested inter alia that a factor that should have been considered was that the killing was not premeditated but arose "spontaneously". This, however, is not the true factual position. The common purpose embraced a risk to life, a risk foreseen by the appellants, which negatives any question of "spontaneity" in respect of the killing. A further submission is that the Court should have found extenuating circumstances to be present as the appellants did not participate physically in the strangling of the deceased and as their intent was at most dolus eventualis. It is, however, plain that the Court was fully aware of these circumstances and did not misdirect itself in any way in exercising its judgment of the moral guilt of the appellants. (Cf. S. v. De Bruyn en n Ander, 1968 (4) S.A. 498 (A.D.); S. v. Feleti, A.D. 3/12/68, unreported). It follows that this contention must also fail.

There remains only the contention that

the ..... /43

the trial Court erred in finding that aggravating circumstances were present in respect of the robbery of which the two appellants were convicted. It is suggested that this is so "in view of the fact that there is no evidence that either of the appellants inflicted grievous bodily harm or that such harm was inflicted by an accomplice", and as "on a proper construction" of the definition of "aggravating circumstances" in section (1) of Act 56 of 1955 "the element of causation linking the accused with the harm or threat must be proved". This however, in my view, would attach a forced meaning to "accomplice" in the definition, which is not justified in the context.

In the premises none of the contentions advanced on behalf of the appellants can be upheld.

The appeal is dismissed.

E.L. JANSEN, J.A.

Ogilvie Thompson, J.A.)
De Villiers, A.J.A.) Concurred.