N.v.H.
107/78

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

CORNET KHOZA	First Appellant
ENOCH MOTZWENE	Second Appellant

and

THE STATE	Respondent

Coram: WESSELS, MILLER, JJ.A.
et TRENGOVE, A.J.A.

Heard: 10 November 1978

Delivered: 20 November 1978

J U D G M E N T

MILLER, J.A. :-

During the late afternoon of 18 May 1977, Mr Harold Clain, an employee of Transvaal Meat Supply Limited

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at Newtown, Johannesburg, was accosted by two men at the door of his office, as he was about to leave the premises. Each of the intruders wore a semi-masking balaclava cap and carried a pistol. They said that they wanted money. Defenceless as he was, his fellow-employees having already left the premises, Clain went back into the office and opened the strongroom safe, in which there was a canvas bag containing money. The two men took the bag, pushed Clain into a passage, tied his hands behind his back with wire and put a gag in his mouth and a sock over his head. They then entered other offices adjoining the passage, apparently in search of more money. While they were still so engaged Clain heard the footsteps of persons entering the premises and recognized the voice of one of the

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Directors of the company. He managed to get the gag out of his mouth and shouted a warning that there were robbers inside the offices. He then heard the two robbers rushing out of an office and heard a shot being fired. He ran towards the door giving access to the strongroom in order to close it, but was met at the door by one of the robbers who put a pistol to his neck. A bullet was discharged from the pistol, which penetrated the right side of Clain's neck. Thereafter he heard the shattering of glass and assumed that the robbers had escaped by jumping through a window. Clain was taken to hospital where he underwent surgery. He was discharged about a day or two later. The money taken by the two men amounted to R3 178; they also relieved Clain of his watch (worth about R100), his wallet (containing some R30), his false teeth and personal papers.

The first appellant was apprehended in connection with these happenings very soon thereafter. He was found under a motor car parked in the yard of the

premises. Also under the motor car were the plastic bag containing money, a blue overall, a pair of gum boots, a pair of dark glasses and a balaclava cap. There was blood on first appellant's face. The second appellant was arrested some days later as a result of information received by the police. The two men were charged in the Witwatersrand Local Division with (1) robbery, with aggravating circumstances as described in section 1 of Act 51 of 1977; (2) attempted murder of Clain; (3) being in possession of a firearm without holding the necessary licence and (4) being in possession of ammunition at a time when they were not in lawful pos= session of a firearm from which such ammunition could be fired. They pleaded not guilty to all the charges. After a fairly lengthy trial (before King, A.J., and two assessors) in the course of which many witnesses, including the appellants, testified, the first appellant was con= victed on all the counts and the second on the first three counts. First appellant, who was about 27 years old,

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was sentenced to 12 years imprisonment on the first count, 5 years on the second and on counts three and four, which were treated as one for the purpose of sentence, to six months imprisonment. Second appellant, aged about 24, was sentenced to 10 years imprisonment on the first count, 5 years on the second and three months on the third. In the case of each of the appellants, the sentences on counts other than the first were ordered to run concurrently with the sentence on the first count. With leave of the trial Judge, the appellants appeal against their convictions.

The commission of the offence charged on count one and described by Clain is not in issue. The defence was and is that the appellants are not the persons who robbed Clain. At the trial written confessions made by first appellant to Lt Kleynhans, a police officer, and by second appellant to a magistrate, Mr Zeelie, were tendered as evidence. Their reception was contested on the ground that the confessions had not been freely

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and voluntarily made, but under the influence of assaults and intimidation by the police. The trial Judge, sitting alone for that purpose, heard detailed evidence and argument concerning the circumstances in which the "confessions" came to be made. He thereafter ruled that the confessions were admissible as such and gave full reasons for his finding that they had been freely and voluntarily made. He rejected as false the evidence of the appellants that they were subjected to cruel and sustained assaults by the police and that what is contained in the confessions is what they were prompted by the police to say. The first appellant's confession was made and recorded on 22 May and the second appellant's on 8 July. First appellant's confession contains a detailed account of when and how the robbery was planned and of its execution, culminating in his being found under a parked motor car in the yard of the premises where the robbery took place. Second appellant's confession,

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though less detailed, gives a reasonably clear account of his part in the robbery and of what he saw and heard. In both instances the account given is very clearly identifiable with the robbery described by Clain.

On appeal Mr Hoffe, for the appellants, contended that the confessions were wrongly admitted. He pointed to several inconsistencies in the police evidence and advanced for consideration probabilities which he said served to detract from the weight of the police evidence. He particularly emphasized the fact that without the second appellant's "confession" there was virtually no admissible evidence to connect him with the crime; there ought, he said, to be grave suspicion concerning the authenticity and acceptability of a "confession" said by the police to have been voluntarily made by one against whom there was otherwise no evidence whatever. He could not advance this latter argument in regard to the first appellant's confession, because

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it is clear that quite apart from his confession, there was available to the police considerable and weighty direct and circumstantial evidence linking first appellant intimately with the crime. It needs to be observed, regarding second appellant's confession, that although there was no or very little admissible evidence available to the police to identify him with the crime, he would not necessarily have known that when he made his confession. What he almost certainly did know was that first appellant had been arrested and if he was involved in the crime he would be very likely to believe or at least to suspect, when the police arrested him some time later, that first appellant had told the police what had happened. Moreover, his evidence that what he said in his "confession" was what the police told him to say, is palpably false. The confession reveals details, often of minor importance, which could only have been related by one who participated in or witnessed the activities which he described.

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Second appellant's evidence at the trial was that he was not present at and knew nothing whatever about the robbery.

I do not find it necessary to deal specifically with each and every point raised by Mr Hoffe, who said everything that could reasonably be said in support of the appeal. He criticised the police for taking first appellant to Lt Kleynhans, rather than a magistrate, for purposes of his confession. (Cf. S v Dhlamini and Another, 1971 (1) SA 807 (A) at p 815.) He also said that it was undesirable to have as an interpreter a member of the very division of the police concerned with the investigation and to take the confession in the offices of that division. The criticism is justified. The procedure followed does not in itself, however, constitute an irregularity, although it is a factor which ought to be taken into account and ought especially to alert the Court to the possibility of unfair or improper influence in

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connection with the confession. The trial Judge took this into account and referred in some detail to judgments of our Courts in that regard. He was satisfied that notwithstanding the procedures followed there was no reason to doubt that the confession was freely and volun= tarily made. I find it impossible to say that he was wrong. I might mention that it was common cause that the confession was correctly interpreted (in so far as it needed interpretation at all, because the first appellant was reasonably fluent in Afrikaans) and correctly recorded.

A point requiring mention in regard to the second appellant is that when he made the confession to the magistrate, Mr Zeelie, it was observed by the magistrate that his right eye was red. He asked second appellant how that had come about. Second appellant said that a policeman has slapped him in the face with an open hand. The answer was duly recorded. For the rest, the second appellant, in answer to the question whether he had been

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assaulted or threatened to induce him to make a confession, answered "no". Mr Hoffe argued that it was likely that second appellant's answer that he had been slapped was true. I assume for present purposes that it was true. But on that assumption, that is the only assault said by second appellant, before the magistrate, to have been committed. This differs most remarkably from his evidence at the trial when, as I have said, he claimed to have been repeatedly and cruelly assaulted by several members of the police. The slap in the face by an unnamed policeman as told to Mr Zeelie, was not mentioned at all by second appellant at the trial. I did not under= stand Mr Hoffe to contend that such a slap would be indica= tive of intimidation or duress which induced the confession; he relied upon the "slap" incident merely as indicating that some unnamed policeman, if he was one of the policemen who testified, was not wholly credible in denying that there was any assault upon the second appellant.

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I need say only this much more concerning the confession made by second appellant. The learned Judge a quo considered the question of admissibility of the confession on the basis that the onus was on the State to prove beyond reasonable doubt that it was freely and voluntarily made. In truth, by virtue of the provi= sions of section 217 (1)(b)(ii) of Act 51 of 1977 and the circumstance that this confession was proved to have been made by second appellant to a magistrate, there was a presumption that it was freely and voluntarily made and the burden was upon second appellant to show otherwise. The learned Judge's conclusion that the State had dis= charged the onus relating to the confession by proof beyond reasonable doubt rested upon his assessment of the witnesses, his findings on credibility and the probabili= ties; we cannot say that, on the evidence, his conclusion was wrong or unjustified. So much the less can we con= clude that the second appellant showed on a balance of

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probabilities that his confession was not freely and voluntarily made.

It was common cause that if the confessions were rightly admitted, the guilt of the appellants on the first count was proved beyond reasonable doubt. Indeed, as I have indicated earlier, the first appellant's guilt was to my mind established even without the aid of his full confession.

Concerning the second charge (attempted murder) the Court a quo found that it was reasonably possible, having regard to the explanation given by first appellant in his confession, that the pistol shot which injured Clain's neck was fired accidentally, without intent by the first appellant to shoot. On that footing, the learned Judge concluded that "the situation was one of dolus eventualis". The reasoning appears to have been that the first appellant when he set out to rob with the aid of a pistol, ought to have realized that there "might

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well be a struggle and that the pistol might accidentally be fired". But if, in fact, the pistol was fired accidentally (and the case must, in the light of the Court a quo's finding, be considered on that basis) there does not appear to me to be room for a finding that the first appellant was guilty of attempted murder. There would be room for such a finding if the first appellant, although not directly intending to kill Clain, deliberately fired the pistol, reckless as to whether the bullet struck Clain or not. The second appellant was convicted on this count for a similar reason, namely, that he ought to have realized that first appellant's pistol might acci= dentally be fired. The conviction of the appellants on count two cannot stand. The conviction of first appellant on counts three and four and of second appellant on count three were not challenged on appeal, if it were found that they were the persons who committed the robbery.

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As to sentence, the question arises whether because of the setting aside of the conviction and sentence on count two, there should be any reduction of the period of imprisonment which each of the appellant's was required to serve. I do not think so. It is clear from the remarks of the learned Judge when passing sentence that he considered 12 years and 10 years imprisonment, respectively, to be proper sentences for the appellants on count one. It was a very serious robbery, with aggravating circum= stances, committed with the aid of a loaded pistol, and it was not contended on appeal that such sentences were unduly severe. (First appellant was more severely punished because of his previous convictions of robbery.) The reason why the sentences imposed on count two were ordered to run concurrently with those imposed in respect of the first count, was that the Court considered that if they did not run concurrently the cumulative effect of the

sentences would be oppressive. There is nothing to indicate or suggest that if the trial Judge had acquitted the appellants on count two, he would have imposed any lesser sentence than he did on count one, or that he would have suspended any part of such sentence. The appellants would still have been required to serve 12 and 10 years imprisonment, respectively.

In the result, save that the conviction and sentence in respect of each of the appellants on count two (i.e., attempted murder) are set aside, the appeal is dismissed.

S. MILLER

JUDGE OF APPEAL

WESSELS, J.A.)
TRENGOVE, A.J.A.)