m.p.
(54/81)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EDMOND NYEMBE — Appellant

and

THE STATE — Respondent

CORAM: WESSELS, DIEMONT et CILLIÉ, JJA

HEARD: 2 November 1981

DELIVERED: 24 November 1981.

J U D G M E N T

DIEMONT, JA

The appellant was convicted in the Witwatersrand Local Division of robbery with aggravating circumstances.

After .....

After the trial judge, NESTADT, J, had sentenced the appellant to eight years imprisonment he was given leave to appeal against both conviction and sentence.

The facts relating to the robbery are straightforward and for the most part not in dispute. Much of the evidence in the trial court and the whole of the argument in this Court revolved round the admissibility of two written statements - a confession made to a magistrate and admissions recorded while certain places were being pointed out by the appellant to a police officer.

It is common cause that a firm known as Corobrik, which carries on business as a manufacturer of bricks, pays its employees their monthly wage at its business premises near Bedfordview in the district of Germiston. On the morning of Friday, 26 February 1979, cash in excess of R52 000 was delivered by fidelity guards in a locked metal box and placed in a room on the premises called the pay office. Sometime later at about noon, two of the company's employees,

a Mrs Fuller and a Mrs Buytendag, entered the pay office in order to pay out the money to the employees who were preparing to line up at the office window. Mrs Fuller unlocked the steel door which gave access to the office and as she and Mrs Buytendag were entering the room two black men forced their way through the door. One man carried a firearm which he pointed at them. The other man hit Mrs Buytendag on the head with his fist, seized the box and ran out of the room. The man with the gun then hit Mrs Fuller on the forehead with his fist and ran towards a Valiant motor car which was parked in the street outside the company*s premises. In making their escape the robbers ran past the office of another company employee, a Mr Ball, who with more courage than discretion followed them and hurled rocks at the vehicle. A second employee, a Mr Scheepers, heard the alarm being given, ran to his car for his revolver and fired several shots, two of which struck the Valiant. Shots were fired back but neither Scheepers nor Ball was hit. At 12.30, that is approximately half an hour after the robbery, the metal box, together with its

contents,

contents, R52 156,28 was recovered by the police. The car was abandoned some 3 kilometres from Corobrik on the Pretoria-Heidelberg highway and the metal box was found on a high grass bank approximately 8 metres away. Two men who were attempting to open the box were arrested. They were municipal employees who had come across the box by chance and who had played no part in the robbery. They were able to establish their innocence and were soon released. In the meantime the robbers had disappeared leaving no trace of their identity.

Two or three weeks after the robbery a man, Joel Letlatla, was arrested. He made a confession in which he appears to have implicated the appellant but whilst awaiting trial he escaped from prison and was not seen again. The search for the appellant continued and a year after the robbery, on 18 February 1980 he was found in his grandmother's house in Soweto. The arrest took place in the early hours of the morning and was made by the investigating officer,

lieutenant .....

lieutenant Viljoen, who was accompanied by four other policemen Modise, Mamaroba, Zulu and Manja. Various other places were visited during the night and in the morning at about 9 a.m. the police team returned with the appellant to the Brakpan Police Station.

The investigating officer, lieutenant Viljoen, had several interviews with the appellant and on the Tuesday following his arrest, that is on 19 February 1980, arranged for him to be taken to a magistrate in Benoni. The appellant then made a statement which was recorded in writing by the magistrate. A week later on 26 February 1980, an identification parade took place but nobody was able to identify the appellant. Later on the same day a captain van Rensburg accompanied by an interpreter (Modise) and the appellant visited the scene of the robbery and the place where the money was recovered. The appellant pointed out the Corobrik premises and the place where the escape car had stood near the entrance. He also pointed out the place where the car

was abandoned and where the metal box had been hidden and made a statement which was typed by captain van Rensburg.

That a robbery had taken place was not disputed. The substantial issue in the case was whether the State had proved that the appellant was one of the robbers. None of the eye-witnesses to the robbery was, as I have said, able to identify the appellant and the prosecutor's case rested on the written statement made to the magistrate on the day after his arrest and the pointing out accompanied by certain admissions made to the police captain on the 26 February 1980.

There can be no doubt that the statement made to the magistrate constitutes a confession. It was handed in by the State in terms of section 217(1)(b)(i) of Act 51 of 1977 as exhibit "C" with the interpreter's certificate attached thereto. Annexure A to the exhibit was the accused's statement and annexure B the questions by the magistrate and the answers given in elucidation of the statement. They read as follows:

'Annexure A .....

'Annexure A

Edmund Nyembe states:

On the date which I can't remember, but it was February 1979, a friend of mine came to my home with another friend of him. They asked would I like to join them, they are going to Germiston. I joined them because I was not busy that day.

On the way to Germiston they told me they are on their way to rob one of the company's where they know there is money. Then I told them that I don't want to get into trouble. They say there will be no trouble because both of them have firearms.

Then we reached the place where they are going to pull the job. Then they show me the office where they have been there before. Then they could not succeed when they were there before but I was not there before. They show me the pay office where the paymaster will come. Then the paymaster came. A friend of mine produced a firearm and he said I must follow him, then he showed me the money while he had them on gun-point. Then I took the money and we ran away.

Then on our way to the car some people chase us. Then when they tried to chase us a friend of mine fired some shots back at them - I

cannot remember how many shots he fired. Then we got to the car, then we pulled off. On our way the car could not pull any more, so we went off the car and decided to hide money next to the highway in the veld. Then we went at my place. We went until it became dark, then we went back again where we hide the money. We could not find the money. That is the end of the story.'

'Annexure B.

Q. Do you know the names of the friends of yours?

A. No, I know the name of the friend of mine, Joel Letlatla, and he introduced me to the other one.

Q. Did this happen February 1979 not February 1980?

A. Last year.

Q. Did they come to your home by car and did you all then travel by car to Germiston?

A. Yes.

Q. When did you get to this company office and then when did everything happen?

A. Right in the middle of the day.

Q. Did the paymaster come alone?

A. There were two ladies.'

It appears from the record that counsel for the appellant, Mr Pandya, challenged the admissibility of the statement in evidence and objected to the document being handed in by the State. Pressed by the Court he conceded that the document was admissible by its mere production and that it must be presumed in terms of section 217 (1)(b)(ii), unless the contrary be proved, to have been freely and voluntarily made. Counsel contended that while the onus of proof was on the appellant to show that the confession was not made freely and voluntarily the onus was on the State to show that the evidence of the pointings out to the police and the statements linked therewith was admissible. It would follow that there would have to be two separate trials within a trial. But as some of the witnesses would be involved in both enquiries, counsel submitted that there should be only one trial within a trial, and that it would be convenient if the appellant led his evidence first and the State then led evidence in rebuttal. The trial judge adopted this procedure and held one "mini-trial".

While .....

While this is a practical course for a trial judge to adopt it may lead to error. The onus of proof that the confession was not made freely and voluntarily is, as I have said, on the appellant. But when it comes to the statement to the police and the pointing out the prosecution is not assisted by any statutory presumption and the onus is then on the State to prove that the appellant acted freely and voluntarily and that his version of the facts cannot reasonably be true. "The result could well be" as the trial judge stated, that

> '.....in a given case, in these circumstances, that a confession subject to the presumption created by Section 217 is admitted (because the accused has failed to rebut it) but a confession made say to a Justice who is not a magistrate ruled inadmissible because on the basis of the same facts the State has not discharged its onus of proving that it was freely and voluntarily made.'

It is clear from the judgment that the Court a quo was alert to the pitfalls inherent in the procedure adopted and

recognised .....

recognised that it was necessary to consider the admissibility of the confession separately.

I therefore propose dealing first with the question as to whether the confession was rightly admitted in evidence. Before referring to the evidence the question of onus calls for further comment. Section 217 provides that a confession made to a magistrate and reduced to writing becomes admissible on its mere production and is presumed to have been freely and voluntarily made by a person in his sound and sober sence without having been unduly influenced (unless the contrary be proved) if it appears from the document that the confession was made by such person, freely and voluntarily, in his sound and sober sences and without having been unduly influenced thereto. There is no express mention in the document before the Court that the statement was "made freely and voluntarily". Nor is it stated in so many words that the deponent has not been "unduly influenced thereto". It does, however, record that Edmond Nyembe is "apparently in his sound and sober sences."

Nevertheless.....

Nevertheless the trial judge came to the conclusion, despite these apparent shortcomings in the document, that it was a necessary implication from the introductory questions and answers that the statement was made both freely and voluntarily and without the deponent being subjected to undue influence.

I find no fault with that conclusion.

The magistrate warned the deponent that he was not obliged to make a statement and that if he did it would be reduced to writing and might be used later as evidence against him. The reply was that he understood the warning and wished to make a statement. He said in answer to further questions that he had not been assaulted or threatened or influenced or encouraged by any person to make a statement, and that he just wanted to make a statement because "I want to explain what actually happened."

The fact that in reply to the question whether he expected benefits if he made a statement he said "Yes, I

expect .....

expect benefits. Things like bail and being warned for court" did not justify an inference of undue influence. No doubt the great majority of accused persons hope that they will be granted bail after making a confession. I am not persuaded that the hope of being granted bail, when read with the other answers given by the appellant, in any way detracts from the trial judge's conclusion that there was no question of undue influence. When the document is read as a whole the fair and compelling inference is that (a) he wished to speak to the magistrate and therefore spoke voluntarily (b) he had not been coerced to speak and was therefore speaking freely, and (c) that he had not been physically or in any other way influenced to speak and that he was therefore speaking without having been unduly influenced thereto. That being so I am satisfied that the onus was on the appellant to establish on a balance of probabilities that the confession was not made freely and voluntarily and was therefore inadmissible (S v Nene and Others (2) 1979 (2) SA 521 (N)).

The appellant stated in the witness box that

he .....

he was arrested on Sunday at midnight in February 1980. He said that he was assaulted on four separate occasions by the police before he made his confession on Tuesday morning. The first assault was in his grandmother's house in Soweto and was committed by five policemen. His assailants took turns at striking him with clenched fists and kicking him in the face and on the body. He was then taken in a motor car to the veld where he was assaulted in the same manner for over an hour. When they arrived at the Brakpan Police Station he was taken to a room called "the workshop" where he was stripped and four black policemen assaulted him. A wet plastic bag was put over his face so that he could not breathe and he was then kicked in the face and punched. The following morning he was again taken to "the workshop" and subjected to the same ill-treatment, after which the police lieutenant threatened to kill him. He finally agreed to make a statement and was then taken to the Benoni Magistrate's Court. He had no knowledge of the facts to which he

confessed; .....

confessed; the police had told him what to tell the magistrate and he had been warned not to say that he had been assaulted. He said that the police escort, one Sithole, waited outside the magistrate's office while he was making his confession. The door of the office was open and he could see Sithole while he was speaking. He told the magistrate what he had been instructed to say but he could not remember what he had said.

In rebuttal the State called the magistrate, Miss Wocke, before whom the confession was taken. She remembered the incident. She said that appellant was not harrassed, he admitted that he had no injuries on his person and she could see no signs of any injury. She said that the door of her office remained closed; and indeed it was standard practice for confessions to be taken in private. The appellant sat with his back to the door. The interpreter confirmed that the door remained closed.

The police officer who arrested the appellant, lieutenant Viljoen, denied that either he or any of the men

under his command had assaulted the appellant. On arrival at the Brakpan Police Station he had taken the appellant to his office and questioned him. He told him that Letlatla had been arrested and that Letlatla had made a statement to the police implicating the appellant in the robbery. The appellant maintained that he did not know Letlatla but he seemed hesitant. It seemed to Viljoen that the appellant wanted to talk and he decided to give him time to think about the matter. On the following morning when he again interviewed the appellant in his office, the latter said "dit is nou groot moeilikheid". The appellant then made an oral statement and agreed to repeat it before a magistrate. Viljoen immediately arranged for him to be taken to a magistrate at Benoni. In this way exhibit "C" was made.

A number of police witnesses corroborated Viljoen's evidence. They stoutly denied that the appellant was assaulted at the time of his arrest, or that he was taken out into the veld and beaten up, or that he had been subjected to any maltreatment at the Brakpan Police Station.

It will be seen that the trial judge was faced with a sharp conflict between the testimony given by the appellant and that given by the police. The appellant claims that he was severely and brutally assaulted on four occasions by a number of policemen in a space of 36 hours, and that the confession which he made was dictated by the police. The police firmly deny that the appellant was assaulted, threatened or otherwise induced to confess or told what to say to the magistrate. This is a common situation. The court is faced with evidence which makes it uncertain whether the case is one in which the zeal of the police has led them into improper conduct, or one in which a guilty accused is telling a story fabricated in prison while awaiting trial. (S v Mefokeng and Another 1968 (4) SA 852 (W). A credibility finding goes to the heart of the problem, but in this case the trial judge recognised that there were difficulties and he very properly gave earnest and careful consideration to the conflicting statements before coming to a conclusion. He said that the black witnesses had given

evidence through an interpreter and he could for that reason place little reliance on findings of credibility based on demeanour. Nor was he disposed to give much weight to the appellant's failure to complain to the magistrate about his treatment; the appellant no doubt, realised that he would be returned to the Brakpan police cells. He also drew attention to the fact that the State case "was not without blemish" and that the police witnesses had contradicted each other in a number of respects which he detailed. Having analysed these contradictions he came to the conclusion that they did not warrant "either in isolation or cumulatively a credibility finding favourable to the accused or against the State." I can find no merit in counsel's criticism of this conclusion particularly when it is borne in mind that the contradictions related to events which had happened some eight months previously. Moreover the contradictions were of a trivial nature. I am always surprised that witnesses can, or think they can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they travelled

and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The wise trial judge knows that human memory is only too fallible; perhaps he should bear in mind the Spanish proverb "memory, like women, is usually unfaithful!"

After a careful analysis of the evidence the Judge a quo decided that the confession was admissible. I have no doubt that the decision is correct for the following reasons:

1. The appellant said that he was assaulted four times by four policemen; he was struck and kicked in the face and on the body; the men wore boots and the attacks were prolonged and brutal. But when appellant was seen by the magistrate an hour or two after the last assault he bore not a mark. There were no cuts, no bruises, no bloodstains, no abrasions. The magistrate took a close look at him but could find "no visible signs of injuries." Under cross-examination the appellant admitted that he had no visible injuries.

2. Counsel .....

2. Counsel sought to overcome the absence of injuries by arguing that the appellant was merely exaggerating. What degree of exaggeration must the Court allow for? The number of assaults? The number of blows? The number of policemen? The severity of the assaults? Exaggeration, after all, implies a statement in excess of the truth or an overstatement which is false. What credibility can the Court give to evidence which is admitted to be inaccurate?

3. The story of the assaults does not ring true in other respects. So for example, appellant claims that when the police visited his grandmother's house he was asked only his name before he was set upon:

> 'Now what happened during their entry? --- They knocked at the door and entered the house and they asked who is Edmond Nyembe. I told them that I am Edmond Nyembe. As soon as I told them I am Edmond Nyembe they attacked me and assaulted me in the house.
> COURT: Why did they do that? --- I asked them what had happened and they did not reply. They started searching the house ...
> No, but why did they attack you? --- They did not tell me why.

MR. PANDYE: .....

MR. PANDYA: Did they tell you what they were doing there, what the purpose of the visit was? --- They only asked who is Edmond Nyembe, I told them I am Edmond Nyembe and they attacked me without telling me what the purpose of their visit was.
Yes, go on? --- They then searched the house. I asked them what had happened and I did not get a reply.
COURT: How do you mean you asked them what had happened, I don't understand that? --- I asked them why am I being assaulted and why is this house being searched.
And what was the answer? --- I did not get any answer from them.'

What purpose would there be in assaulting the appellant without so much as asking him if he had knowledge of the crime? And is it likely that such an assault would be perpetrated in the grandmother's house where one or more witnesses might be present? And why, when it was pouring with rain, would the party proceed into the veld and for the space of an hour take turns at battering the appellant with

their fists and boots?

4. The appellant did not tell the truth when he said that the magistrate's office door was left open and that the policeman, Sithole, stood outside the door, presumably eavesdropping. The magistrate said that the appellant sat with his back to the door and that she was at pains to see that the confession was recorded in strict privacy. I do not believe that the magistrate would have allowed the police escort to overhear or witness the appellant's confession.

5. The appellant professed to have no recollection of the contents of the confession. He alleged that he had been told by the investigating officer, lieutenant Viljoen, what to say. When asked to be more explicit, he became vague and could not say whether the crime to which he confessed was murder, rape or robbery.

6. The contents of a confession are often significant and may give support for the inference that the accused person who made the statement was not relying merely on information

which .....

which he had been told by the police to repeat. In this case some of the facts to which the appellant referred would have been known to the police but I doubt whether they would have had knowledge of a previous attempt to enter the Corobrik pay office, or that they would have known that after the money was stolen the robbers had gone to appellant's house and returned to make an unsuccessful search by night for the money which they had hidden earlier in the day. Moreover, if the accused knew nothing about the crime, as he alleges, it seems strange that he would have been able to recite from memory the coherent story which appears in the confession, and even more strange, that important details which emerged from the magistrate's questioning (annexure B) were not included in the confession which he claims he was instructed to recount to the magistrate.

Counsel contended that the story told by the appellant was at least as probable and acceptable as the story told by the police officer and the men working with him. But that is not good enough. If the Court believes the State evidence and rejects the evidence given by an accused person

or cannot decide which story should be believed the onus on the accused is not discharged. There is no room for a finding equivalent to absolution. (S v Mkanzi and Another 1979(2) SA 757 (T)). In any event the appellant is now faced with an adverse finding on the admissibility of evidence. In order to succeed he must satisfy this Court that the trial judge erred, that he overlooked evidence, that his evaluation of the evidence was at fault or that there was some misdirection. Nothing said in argument persuades me that there is any reason for interfering with the conclusion that the confession was admissible and was properly admitted. That being so it may be said that that is an end to the case. However, Mr Pandya contended that the mere fact that the confession was admitted did not necessarily mean that the deponent must be convicted; the weight which attached to the confession must still be carefully considered. If the police sought to manufacture evidence in regard to the pointing out the State case was weakened and the value of the confession must be re-assessed.

So .....

So far as the pointing out is concerned the appellant testified that on the Tuesday morning, 26 February, he was taken by the investigating officer, lieutenant Viljoen and Modise to a place in Bedfordview where there was a big firm that made bricks. He was told to make careful observation. He was then taken on a highway and shown where a car had stopped and where money was lost. He was told he would be assaulted if he forgot to point out these places to the police captain. Less than an hour later he accompanied captain van Rensburg and pointed out the same places. The witness Modise went with them as interpreter.

Captain van Rensburg was called by the State. He produced a statement which had been reduced to writing and was signed by the appellant. It was dated 26 February 1980 (exhibit D) and the relevant part reads as follows:

> 'Vertrek om 12h42 van kantoor. Deel die beskuldigde mee om aan te toon waarheen ek moet ry. Beskuldigde sê ek moet na Bedfordview ry.
>
> Ek .....

Ek het die S12 snelweg na Bedfordview geneem. By die Edenvale-Germiston afrit het beskuldigde gesê ek moet daarlangs afry. Daarna beduie hy my na Corobrik in Edenvale. Hy wys die plek uit en sê hier het ons geld gevat. Hy wys ook 'n kar langs die ingang uit en sê hier het ons kar gestaan. Ek wys beskuldigde daarop dat dit Edenvale is en nie Bedfordview nie waarop hy my meegedeel het dat hy gedink het dit is Bedfordview.

Tyd 13h20. Daarna beduie beskuldigde my na die Jan Smuts-Johannesburg snelweg en links met die N3 wat van Pretoria na Heidelberg deur Bedfordview gaan. Regoor die Bedford Plaza sê hy hier het ons kar gaan staan. Hy wys 'n punt langs die heiningdraad aan die Plaza se kant uit en sê hier het ons die geld gelaat. Tyd 13h30.

Vraag: Waarheen moet ek nou ry?

Antwoord: Ek het nou klaar gewys. Daar is nie meer ander plekke wat ek wil wys nie. Daarna keer ons na my kantoor terug.'

Lieutenant Viljoen denied in evidence that he had given the appellant a preview of the places to be pointed out later in the morning to captain van Rensburg or that he

had .....

had had any part in "a plan" to deceive the court. Once more there was a sharp conflict between the police testimony and that given by the appellant, but this time the onus was on the State to prove that the statement made to the police captain was made freely and voluntarily. So far as the pointing out went, the evidence would be admissible by reason of section 218 even if the evidence of police threats were accepted (S v Ismail and Others 1965 (1) SA 446 (N) at 450) but clearly such evidence would have no probative value if the court believed that the appellant had shown van Rensburg places that he knew nothing about.

The trial judge accepted the evidence of the pointing out as valid and credible for a number of reasons of which one appears to be conclusive. A police sergeant, Momberg, who was in charge of the cells at Brakpan Police Station explained to the court that he kept a book in which an entry was made every time a prisoner entered the cells or was taken out of the cells. Refreshing his memory from the cell register he was able to say that appellant was admitted to the

cells .....

cells on 18 February 1980 at 9.40 a.m. He was brought there by Mamaroba. He was able to state further that at 12.20 p.m. on 26 February 1980 he was taken out of the cells by Modise and brought back at 15.10 p.m. Captain van Rensburg confirmed that lieutenant Viljoen requested him to accompany the appellant at 12.10 p.m., and that he, appellant and Modise departed at 12.42 p.m. (exhibit D). The significant fact is that there is no entry in the book to support appellant's allegation that he was taken out of the cells earlier that morning to accompany lieutenant Viljoen on a preliminary pointing out expedition. According to sergeant Momberg the appellant was taken out of the cells for the first time that day at 12.20 p.m. There is no support for the submission that the cell register may have been incorrect. I can therefore, find no good reason for rejecting the evidence that appellant was able, of his own knowledge, to point out where the robbery took place, where the escape car was parked, where the car was abandoned and where the money was hidden. Nor was

any satisfactory reason advanced for rejecting captain van Rensburg's evidence.

I have said that the evidence relating to the admissibility of the confession (exhibit C) should in the particular circumstances of this case be considered separately. It was argued that once the confession was admitted the court could have regard to the content of the confession as a factor in determining the admissibility of the statement made to the police. The submission is not without substance but I do not find it necessary to decide since, for the reasons I have given, I am satisfied that the trial judge rightly admitted the statement to the police and accepted the evidence of the pointing out as reliable and of strong probative value.

The appeal against the sentence was not supported in argument in this Court. The sentence imposed, one of eight years imprisonment, was in my view a fitting

and .....

and appropriate sentence.

I have accordingly come to the conclusion that the appellant was rightly convicted and the appeal must be dismissed.

M.A. DIEMONT, JA

WESSELS, JA)
CILLIÉ, JA) Concur