

J MORE

D MLAMBO

AND

THE STATE

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

J MORE 1st Appellant

D MLAMBO 2nd Appellant

AND

THE STATE Respondent

CORAM: Rabie, CJ, Trengove, Nicholas JJA, Smuts et
Grosskopf, AJJA

HEARD: 20 March 1984

DELIVERED: 28 March 1984

J U D G M E N T

NICHOLAS, J A

The two appellants were charged as accused Nos 1

and

and 2 respectively with the attempted murder on 17 March 1982 of Aaron Mlambo (count 1), with the murder on 26 March 1982 of the same Aaron Mlambo (count 2), and, as alternatives to counts 1 and 2, with conspiracy to commit murder and incitement to commit murder. They pleaded not guilty. A court consisting of a judge and assessors found them guilty: in the case of accused No 1, of conspiracy to commit murder; and in the case of accused No 2, of attempted murder as charged in count 1, and murder with extenuating circumstances as charged in count 2. Accused No 1 was sentenced to 10 years imprisonment. Accused No 2 was sentenced to 5 years imprisonment on count

1, and 10 years imprisonment on count 2, the sentences to run concurrently.

They now appeal to this court, No 1 accused with the leave of the Chief Justice, and No 2 accused with the leave of the trial judge.

The State case depended on the evidence of three witnesses (Michael Berk, Dr Banai and Maria Zulu) and on the confessions made respectively by the two accused.

Michael Berk was a final year medical student at the University of the Witwatersrand in part-time employment at the Alexandra Clinic near Johannesburg.

At about 18h50 on 17 March 1982 a man named

Aaron

Aaron Mlambo walked into the clinic, with a history of having been shot in the head. He had what Berk described as a "half centimetre entrance wound in the centre of the forehead". No exit wound was seen. The patient was not shocked and there were no signs of neurological damage. He was referred to Hillbrow Hospital for more detailed assessment and treatment.

On the evening of 26 March 1982 Mlambo was again seen at the clinic. He was in a shocked condition. There were three stab wounds in the left side of the chest and signs that the lung had been penetrated. There was a ten centimetre stab wound in the left side of the

abdomen

abdomen from which omentum was escaping. He was given resuscitative treatment and taken by ambulance to the Hillbrow Hospital.

Dr Banai gave evidence as to his treatment there. He died a few days after his admission. The cause of death was purulent peritonitis and pleurisy resulting from his injuries.

Maria Zulu said that she lived near accused No 2, who was the wife of Aaron Mlambo. At about 19h45 on 26 March 1982, she left her house in order to throw a bucket of dirty water into a furrow over the road. There she met accused No 2, who was washing her hands at a nearby

tap

tap. Accused No 2 told her that her husband had locked her out of the house. They walked back together and as they entered the yard, she heard someone screaming "Jo, jo" from the Mlambo house. The deceased was standing on the stoep, with blood coming from the left side of his chest. He was shouting, "Take me to the clinic, I have been stabbed". Accused No 2, who appeared to be very much upset, "wrapped her husband with his clothes and took him to the clinic".

Alice Mlambo was another witness called by the State. She was the 25 year old daughter of accused No 2 by a former marriage. The deceased Aaron Mlambo

was

was her step-father. In giving evidence she departed from a statement she had made to the investigating officer. As a result the trial court paid no attention to her evidence.

There was therefore nothing in the evidence of the three witnesses which connected either of the accused with the killing of the deceased. Any such connection could be shown only by their confessions.

Confession by No 1 accused.

On 29 April 1982, No 1 accused made a confession before a magistrate, Mr. Mandelstam. It read as follows:

My

"My maat wat in White City Soweto woon het my genooi om saam met hom na Alexandra te gaan. Ons is na 'n sekere huis, daar het ons gesit. Toe sien ek 'n vet meisie gaan na my maat, hulle fluister, daarna gaan hulle saam uit na buite. Na 'n ruk kom die vet meisie die huis binne en sê my maat roep my buitekant. Buitekant vertel my maat dat die meisie sy meisie is, hulle het 'n liefdesverhouding. Hy vertel verder dat by die meisie se huis is daar iemand wat hulle pla, wat die lewe swaar maak vir hulle. Hy vertel dat as ons daardie persoon uit die weg sal ruim gaan hulle ons betaal. Ek het saam met die maat gesels en gesê ons sal 'n plan maak. Hy vertel my verder hy weet van iemand wat 'n vuurwapen het. Hy sê dit is beter dat hy my by die bushalte agterlaat, dan gaan hy na die persoon met die vuurwapen. My maat het my by die bushalte gelaat en hy is toe weg na die persoon wat hy sê 'n vuur-

wapen

wapen het. Ek het al die tyd vir hulle gewag by die bushalte en om en by 5 nm toe sien ek hom daar met die persoon wat hy sê die vuurwapen het. Hulle kon my nie sien nie, ek het hulle aandag getrek deur hulle te roep. Hulle kom na my toe en my maat vertel my dat daar staan die persoon wat ons moet vankant maak, hy wys hom vir my, hy wys my 'n swart man langs 15de Laan naby 'n brug, hy wys daardie persoon uit as die man wat ons moet vankant maak.

Die persoon het langs 'n kar gestaan en was blykbaar besig om iets te verkoop. Ek en my maat stap na die man toe wat hy uitgewys het, ons makker met die vuurwapen het 'n paar treë agter ons geloop na die man toe.

Terwyl ons so aanstap toe hoor ek twee skote, ons makker met die vuurwapen het begin weghardloop, hy hardloop weg in een rigting, ek en my maat het aanhou stap want ons het verby die man wat doodgemaak moet word gestap voor daar geskiet

is

is.

Ons het verder geloop en by die naaste hoek gedraai tevrede dat die skote is geskiet en die man is nou dood. Toe gaan ons bushalte toe, ons het 'n bus gehaal en weggery. Dit is al.

Verklaring oorgelees.

Deponent verklaar: Ek wil net byvoeg dat 2 dae na die skietery het ek en my maat teruggegaan Alexandra toe om uit te vind wat die uitslag van die skietery was. Ons was gesê dat die man wat geskiet was was nie dood nie, hy was slegs beseer, hy is nog lewendig.

Die meisie vertel ons dat haar moeder het planne gemaak en na toordokters gegaan maar sonder sukses. Ek en my maat moet 'n ander plan maak en die man in sy huis gaan vankant maak. Ons het by die meisie se huis gaan wag. Voordat die meisie van die werk gekom het het die meisie se moeder vir my en my maat elk 'n mes gegee. Dit was by my maat se suster se huis waar die moeder van die

meisie

meisie die messe vir ons gegee het.

Dit was al laat gewees toe ons na die huis van die man wat ons van die gras af moes maak gaan. Ek en my maat is soontoe. By die betrokke huis het my maat vir my gesê aangesien ek slegs een oog het moet ek buite die huis staan en wag hou. Ek het toe gevoel en gedink dat my maat sal al die geld vir homself vat.

'n Ruk na hy in is toe gaan ek ook in. Toe ek die vertrek binne gaan kry ek ons slagoffer, die man wat ons moet doodmaak, se kop is met 'n laken toegedraai. Die laken was gedeeltelik om sy kop gedraai en my maat was besig om die man verder met die laken toe te maak. My maat het toe die man op die vloer neergegooi. Daar was 'n kers op die tafel wat gebrand het en ek sien 'n beursie, ek vat die beursie en sit dit in my sak en ek hardloop na buite. Ek het die man met my maat in die kamer gelaat. Buite het ek die geld in die beursie getel. Na 'n ruk kom my maat toe uit. Ons is toe saam weg."

The confession contains no reference to the name of the victim, or the date of the shooting, or the date of the stabbing, nor was there an identification of the house where the stabbing took place. And it appears that, in convicting the accused, the trial court did not proceed on the basis that this confession referred to the deceased named in the indictment.

In its original form the first alternative count in the indictment alleged:

"..... during or about the period 17 March 1982 to 26 March 1982 and at or near Alexandra in the district of Randburg, the accused or one of them unlawfully conspired with one another and other persons whose names are not

known-

known to the State, to aid or procure the commission of or to commit the crime of MURDER."

After the close of the defence case, and on the invitation of the trial court, counsel for the State applied for the amendment of this alternative count so that it read as follows:

"..... during or about the period March to April 1982 and at or near Alexandra in the district of Randburg, the accused or one of them unlawfully conspired with other persons whose names are not known to the State, to aid or procure the commission of or to commit the crime of MURDER."

The amendment was granted over the objections of defence counsel.

The

The effect of the amendment was two-fold.

It deleted the specific dates 17 March 1982 (the date of the shooting of the deceased) and 26 March 1982 (the date of the stabbing of the deceased) and substituted the period March to April 1982 - this presumably in order to bring the indictment into accord with the accused's answer when questioned by the magistrate as to the date of the occurrence to which his statement related: "Ek is nie seker nie, dit kon die begin van die maand (i.e. April 1982) gewees het."

In the second place the amended count charged that the accused conspired not with one another, but with other persons unknown to the State.

In

In convicting the accused, the trial judge said:

"Accused No 1's story, that he neither fired a shot nor did any stabbing is not rebutted and must therefore be accepted. But he was clearly an accomplice of some person in both shooting and stabbing a person, and he was present on both occasions to see that the deeds were carried out. He conspired to do or participate in doing, the killings for a reward, and eventually, in order to ensure that he received his reward, stole a purse of money for good measure. He is therefore guilty of conspiring with other persons whose names are not known to the State, to aid or procure the commission of or to commit the crime of murder in contravention of section 18(2)(a) of Act 17 of 1956 as charged in the first alternative count. That means of course that he is found not guilty on the two main counts and of the second alternative count." (My underlining.)

Thus

Thus, the trial court found that the accused was an accomplice of some person in the shooting and stabbing, not of the deceased Aaron Mlambo, but of "a person" - presumably some person unknown. If it had found that the confession related to the deceased it would, no doubt, have convicted the accused on both the main counts 1 and 2, and not of conspiracy.

Counsel for the State submitted that the accused's counsel admitted at the trial that the confession referred to the deceased.

After the accused had pleaded not guilty, his counsel informed the court as follows:

"Mag

"Mag dit die Hof behaag, die pleite van No 1 beskuldigde is in ooreenstemming met my opdrag. Wat Artikel 115 betref sal met goedkeuring 'n verklaring voorgelê word later wat hy aan die landdros gemaak het op die 29ste April 1982 waarin hy die hele relaas van die gebeure voorlê."

The statement was not at that stage placed before the court. It was subsequently put in by consent as part of the State case and in addition it was, on the insistence of the trial judge, proved by Mr. Mandelstam, the magistrate.

The plain object of s. 115 is to ascertain precisely what is placed in issue by the accused's plea of not guilty so that unnecessary evidence can be eliminated (S v. Seleke

en

en n Ander, 1980(3) SA 745(A) at 753 G).

In the

present case there was no attempt to achieve that object.

After the accused had, by his plea of guilty, placed in

issue every material allegation in the indictment, and

accused's counsel had referred to the statement without

producing it, the learned judge did not question the ac-

cused in terms of ss (2) of s. 115 in order to establish

whether any allegations in the charge were not in dispute.

Nor was the accused required, as provided in ss(3), to de-

clare whether he confirmed what his counsel had said.

It is clear from his statement that the accused's

counsel assumed that the confession related to Aaron Mlambo.

He

He may well have been led to make that assumption because of similarities between a number of the material facts contained in the confession and those set out in the "Summary of Substantial Facts" which accompanied the indictment - similarities which may be explained by the fact that, so far as no 1 accused was concerned, the confession was the source of the summary. It seems unlikely that the accused told his counsel that Mlambo was the victim referred to in the confession - it does not appear from that document that he knew who the victim was. There does not seem to be any basis for thinking that it was counsel's object, in saying what he did, to make an

admission

admission that the confession related to the deceased.

One cannot say what would have been the answer of the accused himself if, in the course of questioning under ss (2) and (3) of s. 115, he had been asked whether he admitted that his confession related to the deceased.

And it seems clear from what is stated above that the trial court did not proceed on the basis of any such admission.

In all the circumstances, I think it would be unsafe to rely on counsel's statement as an admission on behalf of the accused.

Counsel for the State further submitted that

it

it was clear on the internal evidence of the confession
itself, when viewed against the proved facts, that the
victim referred to in the document must have been Aaron
Mlambo.

Certainly there are striking common features.

A shot was fired at a man in Alexandra who was married and
had a nubile daughter. It hit him, but he survived.

Some

Some time later he was stabbed in his house in Alexandra and died as a result of the injuries he sustained.

In my opinion, however, there is, despite these similarities, a lack of that correspondence in matters of detail which might have justified the inference that the accused's confession referred to the series of events which culminated in the death of Aaron Mlambo.

In answer to a question by the magistrate as to the date of the incident to which his statement related, the accused said, "Ek is nie seker nie, dit kon die begin van die maand gewees het." (The month he was referring to was April 1982). It was proved that Aaron Mlambo

was

was shot on 17 March 1982, and stabbed on 26 March 1982.

There was no evidence as to the place where Mlambo was shot. In the confession the accused said that he saw the man shot in 15th Avenue near a bridge.

The accused spoke of a "vet meisie". There was no record that Alice Mlambo fitted that description, nor was there any evidence that a "vet meisie" lived at the deceased's house.

There was no evidence that the accused was asked by the police to point out the house where the stabbing referred to by him took place, nor was there anything else to connect that house with Mlambo's house.

The

The accused said that, after he was stabbed, the deceased's head and then his body were wrapped in a sheet, and he was thrown to the floor. Maria Zulu said that she saw Mlambo standing on the stoep, screaming and with blood coming down on the left side of his chest, and made no mention of any sheet.

It seems clear that the case against No 1 accused was not properly investigated. If it had been, the conclusion might well have been different, but on the case which was presented to the trial court it was not in my view possible to conclude beyond a reasonable doubt that the accused was in his confession referring to Aaron Mlambo.

Nor

Nor do I consider that accused's conviction on the basis on which he was found guilty by the trial court can be sustained. The requirements of s. 209 of the Criminal Procedure Act, 1977 were not satisfied. There was no proof, outside of the confession, that the offence of conspiracy to murder was committed; and the confession was not confirmed in any material respect.

Confession by Accused No 2

Accused No 2's confession was made before Mr Mandelstam in Randburg on 22 April 1982. Its admissibility was challenged on the ground that it was not made freely and voluntarily and without having been unduly

influenced

influenced thereto - it was alleged that she had been assaulted by the Brixton police, including Constable Adam Makathe, on the day she made the statement.

The State accepted the onus of proof in regard to the admissibility of the confession, conceding that the presumption in s. 217(1)(b)(ii) of Act 51 of 1977 did not apply because it did not appear from the document in which the confession was recorded that it was made freely and voluntarily, and without having been unduly influenced thereto.

At the trial within the trial, Makathe gave evidence for the State. He said that he was a detective-constable

in

in the South African Police attached to the Brixton Murder and Robbery Squad. He had nothing to do with the investigation of this case, which was the concern of the Alexandra Police Station. On the morning of 22 April 1982 at about 07h00 he went to the house of the accused in Alexandra. He did this on his own initiative and in his own time. He told the accused that he was arresting her on a charge of murder. He took her direct to the Alexandra Police Station and handed her over to the investigating officer. At no stage did he take her to Brixton, nor did he assault her or exercise any form of pressure on her.

Det. Sgt.

Det. Sgt. Stephen Seokane said that on 5 April 1982 the accused came to report that her husband had been killed, and he took a statement from her in which she said that she did not know who had killed the deceased or why he had been killed.

At about 08h30 on 22 April 1982 he left his office at Alexandra to go to the Regional Court. He returned at between 10h00 and 10h30. The accused was in his office. As a result of information received from the station commander, he telephoned Makathe, who was at Brixton, and received a report from him. He then interviewed the accused. She made a statement to him.

In.....

In answer to a question by Seokane, she said that she wanted to make a confession before a magistrate. She did so freely and voluntarily. He did not apply any sort of pressure on her, or hold out any inducement. She did not complain that she had been assaulted by detectives at Brixton or anywhere else. She looked normal and did not seem distressed. He then took her to Randburg by car.

Mandelstam said that the accused was brought before him at 13h00 on 22 April 1982. She appeared to him to be in her sound and sober senses. She did not appear to be in the least upset, nor did she appear to be in pain.

He

He said, "She appeared to me to be under no fear, she appeared to me to be making the confession quite willingly." Before taking the statement he put a series of questions to her. He recorded the questions and answers as follows (I have numbered the questions for convenience of reference):

1. "Question: Do you realise that you are .
in the presence of a magistrate
YES.
2. Question: Do you understand the warning
that was given to you? YES.
3. Question: Do you nevertheless wish to
make a statement? YES.

Question:

4. Question: Was any pressure applied on you to make a statement? NO.
5. Question: Were you encouraged or influenced by any person to make a statement? NO.
6. Question: Were any promises made to you by any person to make a statement? NO.
7. Question: Do you expect any benefit if you make a statement? I EXPECT IT WILL HELP ME IF I MAKE A STATEMENT.
8. Question: Have you previously made a similar statement, and if so, to who and when? YES TO THE S.A.P. ALEXANDRA ON 1.4.82.
9. Question: Why do you wish to repeat the statement? BECAUSE I MADE A WRONG STATEMENT TO THEM, I NOW WANT TO MAKE AN ACCURATE STATEMENT.
10. Question: When were you taken into custody? I AM NOT IN CUSTODY.

Question

11. Question: What is the date of the crime in regard to which you wish to make the statement? LAST MONTH, I DON'T REMEMBER THE EXACT DATE.
12. Question: Have you been assaulted by anyone and, if so, when and and by whom? YES, BY THE BRIXTON POLICE TODAY.
13. Question: Have you any injuries of any nature? MY NECK IS PAINFUL BUT I HAVE NO VISIBLE INJURIES, MY NECK IS SORE.
14. Question: Who brought you to this office? DET. STEVEN FROM ALEXANDRA.
15. Question: How did it come about that you were brought to this office? THE POLICE BROUGHT ME HERE.
16. Question: Does the fact that you were assaulted today in any way influence you to make a statement now to me? IT IS BECAUSE OF THE ASSAULT THAT I AM MAKING THE STATEMENT.

17. Question: Why do you want to make a statement to me now? MY HEART WANTS ME TO MAKE THE STATEMENT.
18. Question: Do you not wish to make the statement because you are perhaps afraid of further assaults on you? NO, I AM NOT AFRAID, I WANT TO MAKE THE STATEMENT FREELY.
19. Question: What benefits do you expect from making a statement to me? I EXPECT THAT THE STATE WILL ASSIST ME IN OBTAINING LENIENCY FROM THE COURT.
20. Question: Do you understand that you now have nothing to fear from the police and you don't have to make any statement if you don't want to? YES.
21. Question: And do you still wish to make a statement? I WANT TO MAKE A STATEMENT, MY HEART WANTS ME TO MAKE A STATEMENT."

(I

In her evidence the accused said that Makathe arrested her at 06h00 on 22 April 1982. He took her to Brixton. She was put in a room on the first floor. Makathe took a bag, filled it with water and pressed it over her head, while two other men held her arms. He told her she must tell the truth, saying that if she did not do so she would die in that bag. Eventually she agreed to make a statement - she would not have done so if the police had not assaulted her. Makathe drove the car to John Vorster Square and back to Brixton - at both places she stayed in the car. She was then driven to Alexandra by Makathe. Later Seokane took her to

the

the magistrate at Randburg. She said that her heart was sore, her body was also sore, her neck was sore.

She was extensively cross-examined by counsel for the State

The trial court held that the confession was admissible in evidence as having been freely and voluntarily made. Makathe and Seokane impressed the court as witnesses, although there was "a conflict between them and the conflict has not been cleared up". (This was in regard to whether Makathe handed the accused over to Seokane. It is now common cause that he did not do so). On the question whether she confessed to the magistrate freely and voluntarily, the trial judge said that "the magistrate,

the

the interpreter and Seokane were emphatically against her.

All of them said that she showed no sign of distress or

compulsion." The accused, on the other hand, was "not

a good witness, evasive and constantly harping on her con-

fused state of mind, the soreness of her heart, her lack

of understanding and so forth."

Moreover she

said that all the statements and answers in her confession

were dictated to her by the Brixton police: that was

untrue.

Nevertheless, I do not think that the conclusion

that the accused made the confession freely and voluntarily,

and without undue influence, can be supported.

Counsel

Counsel for the State conceded, in answer to questions by the court, that, notwithstanding the well-founded criticisms of the accused's evidence, it was reasonably possibly true that she was assaulted by Makathe. In my opinion that concession was properly and correctly made.

As was said in the judgment a quo, there was a long period of time to be accounted for between 07h00, when the accused was arrested by Makathe, and 10h00 to 10h30 when Seokane found her in his office; and during that period of three or three and a half hours the accused may have been taken to Brixton and John Vorster Square as she said. That gave rise to a number of disturbing

questions

questions which, on the evidence of Makathe, were left

unanswered. Why should he have taken her to Brixton?

Why should he falsely have denied that he did so? If

forcible measures were not being applied during the period

which was not accounted for, how did it come about that

the accused decided to make a confession?

 If the accused's confession followed assaults

upon her, it would be a natural inference that the confes-

sion was or may have been induced by the assaults.

See R v. Nhleko 1960(4) SA 712(A) at 720 B-C.

 In that case SCHREINER J A said at 720 C-D:

 "The burden rests on the Crown to prove

 that

that any statement of the accused which it tenders was freely and voluntarily made and, if there has been violence before the statement, it must satisfy the trial judge that the violence did not induce the statement either because it did not have an inducing tendency in the first instance or because that tendency had in some way ceased to operate."

Plainly an assault of the kind described by the accused would have had an inducing tendency. The question then is whether any such tendency had dissipated by the time she appeared before Mandelstam.

I do not think that the impressions of Mandelstam and Seokane as to the appearance of the accused are helpful. Whether any assault was still operating on her mind

was

was not something which would ordinarily have been capable of being observed. The interpreter did not give any relevant evidence.

Regarded in their entirety, the accused's answers to the questions put to her by the magistrate were equivocal. In answer to questions 4 and 5, she said that there was no pressure, encouragement or influence to make a statement. In answers to question 12,13 and 16, however, she said she was making the statement because of a police assault. In answer to the next question (question 17), she said that her heart wanted her to make a statement; and in answer to question 21, she said, "I want to make a statement. My

heart

heart wants me to make a statement." It does not appear what (apart possibly from police violence) had brought about a change of heart since 1 April 1982 when she had made a statement to Seokane.

I do not think that the answer to questions 18 and 20 afford any assistance to the State: once she had resolved to make a statement she had no reason to fear the police. The question still is whether that resolve was the result of undue influence.

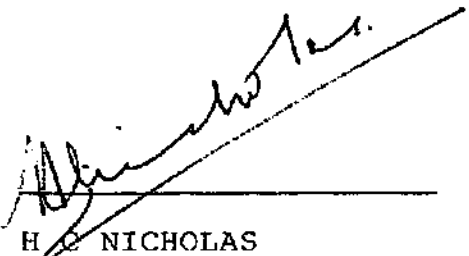
In my view the reasonable possibility was not excluded that the inducing tendency of an assault was still operating on her mind when she made the statement. The

trial

trial judge should have held that the confession was inadmissible in evidence and excluded it.

Neither of the accused gave evidence in their defence. In the circumstances of the present matter their failure to do so cannot assist the State: there was no evidence connecting either of them with the crimes charged in counts 1 and 2.

The appeal is upheld. The convictions and sentences in respect of both the accused are set aside.


H. C. NICHOLAS

RABIE, CJ
TRENGOVE, JA
SMUTS, AJA
GROSSKOPF, AJA

} concur