162/88

363/87
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NTSIKELELO DONDASHE	First Appellant
MLUNGISI BLAAUW	Second Appellant
OUPA MFOBO	Third Appellant
NKUNDLA KLAAS	Fourth Appellant
and	
THE STATE	Respondent

CORAM: RABIE ACJ, SMALBERGER, et MILNE, JJA

HEARD: 18 November 1988

DELIVERED: 30 November 1988

J U D G M E N T

SMALBERGER, JA :-

The four appellants, together with two other accused, Hotnot Blaauw and Daniel Jonas, were arraigned before LUDORF, J, and two assessors in the South

...../2

Eastern Cape Local Division on a charge of murdering one Sandile Alfred Am (the deceased) on 14 September 1985 at Tshaka Street, Kwa Nobuhle, Uitenhage. They initially all pleaded not guilty. Hotnot Blaauw and Daniel Jonas were discharged at the end of the State case for lack of evidence against them. The four appellants were convicted at the conclusion of the trial of murder with extenuating circumstances (in the case of the fourth appellant, on the strength of his having changed his plea during the State case to one of guilty). The first, third and fourth appellants were each sentenced to 18 years imprisonment; the second appellant was sentenced to 15 years imprisonment. With leave of the trial judge the first, second and third appellants now appeal against both their convictions and sentences; the fourth appellant appeals against his sentence only.

In order properly to appreciate the issues which arise in the present appeal it is necessary to outline briefly the events which occurred at the trial. The first witness for the State was the district surgeon who conducted the post-mortem examination on the body of the deceased. He testified that the body was almost totally charred, and that the cause of death was burning. He was unable to establish any other cause of death, but because of the condition of the body could not entirely rule out other possible, unascertainable causes of death. He was, however, adamant that no bones in the deceased's body had been fractured. The next witness for the State was a 14 year old youth who claimed to have witnessed the killing of a person on 14 September 1985 by the so-called "necklace" method - which involves placing a tyre around the neck of the unfortunate victim, dousing it with petrol or a similar inflammable substance, and setting it alight. He

...../4

purported to implicate certain of the appellants in the killing. In giving evidence he deviated in material respects from his previous police statement and was completely discredited under cross-examination, so much so that the trial court eventually found his evidence to be "worthless" and ignored it in toto for the purposes of its judgment. Evidence was then adduced, in a trial within a trial, relating to the contested admissibility of a statement made by the fourth appellant to Lt Rautenbach of the South African police. Before the evidence in respect thereof was concluded, and a ruling given on the statement's admissibility, the fourth appellant changed his plea to one of guilty of murder with extenuating circumstances. A written, signed statement was handed in on his behalf setting out the basis on which his plea of guilty was tendered. In view of this development the State abandoned its attempts to prove the admissibility of

the fourth appellant's earlier statement.

Counsel for the appellants thereafter proceeded to admit the following on their behalf (in terms of s 220 of the Criminal Procedure Act 51 of 1977):-

(a) The identity of the deceased as well as the fact that the body collected by the police received no further injuries until the time the post-mortem examination was performed (the admission referred to "the body", not to "the deceased").

(b) The correctness of the plan and photographs (and the keys thereto), depicting the scene of the alleged crime (and which establish that a charred body was found in Tshaka Street in close proximity to where a tyre, stones and half a brick with bloodstains on it were lying).

(c) The admissibility of statements made by the first, second and third appellants on 20 September 1985 to three different magistrates.

The State then closed its case. After a successful application for the discharge of Hotnot Blaauw and Daniel Jonas the defence case was closed without any evidence being led. The trial court then returned a

verdict of guilty of murder with extenuating circumstances in respect of the fourth appellant before hearing argument in relation to the other three appellants. It was apparently contended in argument on their behalf that no nexus had been proved between the events referred to in their statements and the death of the deceased. Counsel for the State thereupon informed the court that he had been under the impression that the concession as to the admissibility of their statements had incorporated (albeit impliedly) an admission that the statements referred to the killing of the deceased, and reflected each appellant's version of the events culminating in the deceased's death. He thereupon applied for the re-opening of the State case, which was duly granted.

The State then called Warrant Officer Oelofse as a witness. He testified that on the afternoon of 14 September 1985 he went, in response to certain information

...../7

received, to Tshaka Street where he found the charred body of the deceased. There was general unrest in the particular township at the time, but this was the only incident involving the burning of a person reported on that day, more particularly in Tshaka Street. Had there been other reported incidents he would, because of the nature of his duties, have been aware therof. He conceded that there was a possibility that someone had been burnt and the body buried without the police having been informed (as had happened in isolated previous instances) but considered this to be very unlikely. It was apparently the practice at the time to leave a body that had been burnt lying in the street for members of the public to gaze upon, presumably with a view to intimidating them.

Finally the State called the investigating officer Lt Rautenbach. He testified to having personally arrested the first, second and third appellants. He

interviewed them separately after their arrest. He informed them that they were suspected of having participated in the murder of the deceased on 14 September 1985 at Tshaka Street, Kwa Nobuhle. Each of the three appellants indicated that he understood the charge, and elected to make a statement before a magistrate. According to Rautenbach the deceased's identity book was in the police docket. In the course of his interview with each appellant he showed them the deceased's identity book. Each one identified the deceased as being the person killed in Tshaka Street on the day in question. Under cross-examination it came to light that the interviews with the appellants had been conducted through an interpreter, the three appellants having spoken Xhosa. The interpreter was a policeman. He was not called as a witness. No reason for the failure to do so is apparent from the record. Rautenbach is not conversant with Xhosa - his

...../9

knowledge of the language extends to no more than a few words.

The trial court accepted the evidence of both Oelofse and Rautenbach. On the strength of the latter's evidence it held that the admitted statements of the first, second and third appellants related to the events surrounding the death of the deceased. It held, further, that the failure to call the interpreter was no bar to the acceptance of Rautenbach's evidence. It concluded from the statements that the first, second and third appellants had each actively participated in the events giving rise to the deceased's death, and that each was in law responsible for his death. Extenuating circumstances were found to be present mainly because of the youth of each appellant.

Mr Melunsky, who argued the appeal on behalf of the appellants, submitted that on the assumption that the statements made by the first, second and third appellants

...../10

amounted to confessions (whether to murder or some lesser offence on which it would be competent to convict on a charge of murder), the requirements of s 209 of the Criminal Procedure Act had not been satisfied as such confessions had not been confirmed in a material respect, nor was there aliunde evidence of the commission of the offence charged. He submitted, further, that it had not been established that the events related in each of the confessions pertained to those surrounding the death of the deceased, and that the required nexus between such confessions and the death of the deceased had accordingly not been proved. He also contended that the trial judge erred in allowing the State to re-open its case after argument had revealed what the shortcomings in the State case were, as there was potential prejudice to the appellants arising from the possibility that perjured evidence might be led to cure the defects in the State

...../11

case.

I shall deal with the latter contention first. A trial court has a wide discretion, which must be judicially exercised, to allow the calling of evidence after the close of a party's case (R v Gani 1958(1) SA 102 (A) at 107-8). When the identity of the deceased was admitted by counsel for the appellants at the trial in the terms set out above (counsel concerned not being Mr Melunsky) this constituted an admission that the person on whose body the post-mortem examination was conducted was the deceased. An admission as to identity would normally also include an admission that the deceased was the person named in the indictment as the person killed. The admission concerning the admissibility of the statements by the first, second and third appellants was made generally. It was not confined to the question of whether the statements were freely and voluntarily made, or qualified in any other way. Relevance is the basic

criterion of admissibility. By not contesting in any way the admissibility of the three statements, or seeking to define or limit the basis on which their admissibility was conceded, it is arguable that counsel for the appellants, at least by implication, accepted that the statements were relevant. They could only have been so if they related to the circumstances surrounding the death of the deceased, which formed the basis of the charge against the appellants. They would not have been relevant had they referred to a totally unconnected incident. The admission conceivably went further than the appellants' counsel intended, and this presumably is the reason why the trial judge did not hold the first, second and third appellants bound by its full implications. At best for those appellants, however, counsel for the State was misled into reasonably believing that they were conceding that the statements related to the killing of the deceased. Thus, when the question of an

...../13

absence of nexus between the statements and the killing of the deceased arose, because counsel for the State had laboured under a reasonable misapprehension induced by the conduct of the appellants' counsel, the trial judge understandably granted the State's application to re-open its case. There was never any real danger of the possibility of perjured evidence being given, and no suggestion of this kind was made to either Oelofse or Rautenbach. All the State did was to lead evidence which had been available to it, and which it presumably would have led had counsel for the State not been under a misapprehension as to the ambit of the admissions made. The appellants were offered the opportunity to lead further evidence after Oelofse and Rautenbach had testified, but did not avail themselves of it. No prejudice, in the accepted legal sense of that term, was caused to the first, second and third appellants by the granting of the

...../14

application to re-open the State case. I am satisfied, in all the circumstances, that in granting the application the trial judge exercised his discretion judicially, and that no grounds exist for interference with the exercise of such discretion. Regard may therefore properly be had to the evidence of Oelofse. That of Rautenbach is, however, on a different footing. We know from his evidence what he said to the first, second and third appellants. In the absence of the interpreter's evidence, however, we do not know whether what Rautenbach said was correctly conveyed to those appellants, nor whether their replies were correctly interpreted. It follows that Rautenbach's evidence concerning what the three appellants said is hearsay and inadmissible (**R v Mutche** 1946 AD 874). Because Rautenbach only had, at best, a smattering of Xhosa it would be dangerous to rely on any impression he formed from questions put to, and answers given by, the three

appellants. To the extent therefore that it relied upon anything said by them to Rautenbach the trial court erred.

The statements made by the first, second and third appellants constitute the only evidence implicating them in the killing of the deceased. Their guilt or innocence has to be determined primarily in relation to what is contained in their individual statements. I shall deal in turn with the statement of each appellant, and the consequences flowing therefrom.

The statement of the first appellant is to the following effect:-

> "Ek wil sê dat ons 'n persoon met 'n motorband verbrand het. Dit was ek en Nkandla en Ouman en Teletele en Mabalama en Aianda en Hotnot. Daar was nog ander persone, maar ek kan nie hulle name onthou nie. Dit was verlede Saterdag wat dit gebeur het. Dit is al."

In order to decide whether the first appellant's statement amounts to a confession one may have regard not only to what appears in the statement but also what may necessarily

...../16

be implied therefrom (S v Yende 1987(3) SA 367 (A) at 375 C). The necessary implication which flows from the first appellant's statement that "ons 'n persoon met 'n motorband verbrand het" is that his conduct was unlawful and intentional. Death was a subjectively forseeable consequence of such conduct, and it may properly be inferred from the evidence and the probabilities that the first appellant was aware of his victim's death when he made his statement. The statement therefore amounts to a confession of murder.

The next question which arises is whether the person to whose killing the first appellant has confessed was the deceased? It is known from the first appellant's confession that a tyre was used to burn his victim, and that the incident occurred "verlede Saterdag". The first appellant's confession was taken on 20 September 1985, and "verlede Saterdag" would have been 14 September 1985. The

...../17

deceased's body was found on that date. The deceased had been burnt, and there was a tyre approximately a metre from where his body was lying. While there is no specific evidence to that effect, it may reasonably be inferred that the tyre was a burnt out or partly burnt out one. The cause of the deceased's death was burning. In addition there is the evidence of Oelofse that this was the only incident involving the burning of a person reported on 14 September 1985. The possibility of there having been an unreported incident of that nature is remote. Viewed cumulatively the evidence established, in my view, the required nexus between the killing confessed to by the first appellant and the death of the deceased. The first appellant's confession was therefore a confession to the killing of the deceased.

As the first appellant's confession constitutes the sole evidence that he committed the crime of murder

...../18

with which he was charged, the provisions of s 209 of the Criminal Procedure Act have to be satisfied. In my view they have been despite the submissions made to the contrary by Mr Melunsky. The evidence of Oelofse establishes that the body of the deceased was found in circumstances indicating that he was burnt to death. It was argued that Oelofse's evidence did not amount to a positive identification of the body as that of the deceased, alternatively, that if he purported positively to identify the deceased his evidence was unacceptable. There is no merit in this argument. The deceased was known to Oelofse. According to Oelofse he found the body of the deceased in Tshaka Street at the point depicted on one of the photographs handed in as an exhibit. The clear implication in Oelofse's evidence is that he recognised it as such. His evidence was never challenged. While the district surgeon found that the deceased's body was

...../19

"feitlik heeltemal verkool", his evidence does not go so far as to suggest that it was totally beyond recognition. Furthermore, no cause of death other than burning could be found, although certain possibilities could not be excluded. As there is no factual substratum on which to base such possibilities they are purely speculative. The only reasonable inference to be drawn from the evidence of Oelofse and the district surgeon is that the deceased was burnt to death on 14 September 1985. Confirmation as envisaged by s 209 requires evidence outside of the confession which corroborates it in some material respect (**R v Blyth** 1940 AD 355 at 364). It is, however, not necessary that the confirmatory evidence should implicate the accused in the offence (**R v Blyth** (**supra**)). The evidence of Oelofse and the district surgeon provides the necessary confirmation in a material respect of the first appellant's confession (cf **S v Letsedi** 1963(2) SA 471 (A)).

...../20

It will be convenient to turn next to the statement of the third appellant. It was to the following effect:-

> "Gedurende laas Saterdag was ek by my tante. Toe ek daar was sien ek mense 'n persoon agternasit. Toe hulle hom agternasit haal hulle hom in en vang hom en slaan hom. Toe die mense die persoon agternasit het ek hulle geagtervolg. Nadat hulle hom geslaan het los hulle hom daar. Ek gaan toe weer na my tante se huis toe en toe sien ek weer dieselfde mense jaag weer dieselfde persoon. Hulle roep my toe en ek gaan saam met hulle. Toe hulle persoon inhaal, het ek die persoon ook met klippe gegooi, 2 klippe. Ek het hom raak gegooi terwyl hy op die grond lê. Met die kom die man met die naam van Molana met kan paraffien. Ek besef toe hulle gaan die persoon verbrand. Ek verkies toe om weg te loop, want ek het nie daarna gekom te verbrand nie. Toe hulle hom verbrand loop ek weg. Ek het nie help verbrand nie.
> Nadat hulle die paraffien op hom gooi het Phumlile 'n vuurhoutjie getrek en die paraffien aan die brand gesteek, ek het dit gesien toe ek wegloop."

For basically the same reasons that applied in the case of the first appellant, the third appellant's statement must be taken to relate to the events surrounding

...../21

the killing of the deceased. The third appellant admits in his statement to assaulting the deceased; the question is whether his statement justifies the finding that he participated in the killing of the deceased. When an extra-curial statement by an accused is tendered in evidence by the State regard must be had to everything in the statement which relates to the matter in issue, including the exculpatory portions thereof. (**R v Valachia and Another** 1945 AD 826 at 835). A court is entitled to reject exculpatory portions in such statement while accepting parts thereof which incriminate the accused (**S v Khoza** 1982(3) SA 1019 (A) at 1039 A). It should, however, only do so if, after a proper consideration of the evidence as a whole, it is satisfied that the exculpatory portions lack cogency - either because they are contradicted, directly or inferentially, by other acceptable evidence, or because of inherent

...../22

improbabilities. In the present instance there is no other evidence to gainsay what is contained in the third appellant's statement, nor are there any inherent improbabilities therein.

It appears from the third appellant's statement that he did not associate himself with the initial assault upon the deceased. He did, however, participate in the second assault by throwing stones at the deceased while he lay prostrate on the ground. It is not a necessary inference that he realised at that stage that the group was intent on killing the deceased. They had been in a position to kill him earlier, but had not done so. When their intention became clear, he dissociated himself from what was happening. As he put it: "Ek besef toe hulle gaan die persoon verbrand. Ek verkies toe om weg te loop, want ek het nie daarna gekom te verbrand nie". The trial court erred, in my view, in holding that the third

appellant's conduct was inconsistent with his avowed dissociation. Nor was it entitled to draw an adverse inference from the third appellant's failure to testify. In the absence of other evidence the third appellant was entitled to have his guilt or innocence determined on the basis of the statement he had made, which was proved and relied upon by the State as the sole evidence implicating him. That statement does not establish beyond all reaonable doubt that the third appellant was responsible for, or participated in, the killing of the deceased. There is nothing to show that the stones thrown by the third appellant contributed causally to the deceased's death. The statement is no more than a confession to an assault, albeit one of sufficiently serious proportions, involving as it did the use of stones, to justify the inference, as the only reasonable one, that the third appellant had the necessary intent to do grievous bodily

...../24

harm. In the case of the third appellant too there is confirmation in a material respect of the commission of the offence confessed to in his statement. In the circumstances the third appellant should only have been found guilty of assault with intent to do grievous bodily harm.

I come now to the second appellant. His statement reads as follows:-

> "Dit was op 'n Saterdag toe ons by 'n sokkerveld gewees het. Dis ek en my vriende wat daar gewees het. Toe die wedstryd klaar was is ons na ons huise. Ek en my vriend is toe na 'n shebeen om musiek te gaan luister. Terwyl ons daar was, het 'n seun Ntsiki en Nkundla daar aangekom. Ntsiki vra ons hoekom ons daar sit. Hy sê of ons nie kan sien daar is iemand wat gevang is. Ons vra hoekom is daar iemand gevang. Hy het gesê dis 'n witbroodjie wat gevang is, ons moet hom aan die brand gaan steek. Ons het gesê ons gaan dit nooit doen nie. Hulle het ons toe met klippe gegooi. Ons loop toe saam met hulle. Ons het gegaan na Tshakastraat toe. Ons het daar iemand gesien in die straat lê. Ntsiki het gesê ons moet die man ophelp. Ons het dit gedoen. Ntsiki het toe 'n motorbuiteband oor sy nek gehang. Die man het weer geval. Ander mense

...../25

> tel hom weer op. Ntsiki het toe die buiteband aan die brand gesteek en hy het gebrand. Ek het Ntsiki gesê daar is 'n verwantskap tussen my en die man, hy sê toe hy gaan my ook aan die brand steek, ek bly toe stil. Ons is toe weg - dis al."

There can be no doubt that this statement relates to the events surrounding the killing of the deceased - even the street where it occurred, Tshaka Street, is mentioned. The only question is whether the second appellant on his statement can be convicted of any offence. The principles which govern the approach to a statement of this nature have already been referred to. At the time of the events in question the second appellant was 15 years of age. It appears from his statement that he initially declined to join the group responsible for the deceased's death. Stones were then thrown at him, and he was coerced into joining the group. The trial court refused to accept that stones could have been thrown at him while he was at a shebeen, which it held connoted "under a roof". I see no

...../26

reason why such a connotation should necessarily be imported into the word. There is no evidence as to what the situation at the particular shebeen was, or where the second appellant was when the stones were thrown. There is nothing incongruous in the notion of a shebeen operating in the open air, particularly in the daytime. As appears from his statement the second appellant did no more than pick the deceased up when told to do so. It is not clear whether the second appellant continued to hold the deceased while a tyre was placed round his neck. When the deceased fell other people, not the second appellant, picked him up the second time. The question is not whether the second appellant appreciated what the likely fate of the deceased was going to be, but whether he willingly participated in the events and actively associated himself with the killing of the deceased. The failure of the second appellant to give evidence was not a

...../27

relevant consideration, and the trial court erred in taking it into account, for basically the same reasons mentioned in the case of the third appellant. It is apparent from the second appellant's statement that he did nothing to the deceased except help him up when told to do so. One cannot from his statement infer that he was a willing and active participant in the events surrounding the deceased's death. The indications are to the contrary - the more so if one has regard to the penultimate sentence of his statement where he speaks of his relationship to the deceased, and the threat of burning uttered against him (the second appellant). The reasonable possibility that he was coerced into being present, and was an unwilling participant in the events relating to the death of the deceased, cannot be excluded. Had the trial court approached the matter properly it would in my view have concluded that the guilt of the second appellant was not

...../28

established beyond all reasonable doubt. The second appellant's appeal against his conviction therefore succeeds.

This brings me to the question of sentence. It is common cause that at the time of the deceased's death the first and fourth appellants were both 19 years of age. They were treated on an equal footing and each sentenced to 18 years imprisonment. The trial judge does not appear to have considered whether there were considerations which would have entitled him to distinguish between the two in regard to sentence. In my view there were. The first appellant never provided any explanation for his conduct. There is no reason to believe other than that he partici= pated willingly in the events that occurred. The fourth appellant, in the statement which forms the basis on which his plea of guilty was tendered and accepted, makes it clear that he was not party to any premeditated killing;

...../29

that he was drawn into the events that occurred because of his presence at the scene; and that while he was not threatened in any way to participate in them he felt scared not to involve himself in the killing of the deceased. In the circumstances the fourth appellant in my view should have received a somewhat lesser sentence than the first appellant.

There is no basis for interfering with the sentence imposed upon the first appellant. The circumstances surrounding the death of the deceased called for the imposition of a severe sentence. It has not been shown that in his case the trial judge misdirected himself in regard to sentence. The sentence, although undoubtedly severe, is not strikingly disparate from any sentence this Court would regard as appropriate. As far as the fourth appellant is concerned, I have already stated why in my view he should have been given a somewhat

lesser sentence than the first appellant. In all the circumstances an appropriate sentence in his case would be one of 15 years imprisonment.

Turning next to the third appellant, having regard to all relevant considerations pertaining to sentence, including the circumstances in which he assaulted the deceased, and the nature of such assault, an appropriate sentence for assault with intent to do grievous bodily harm in his case would be one of 3 years imprisonment. I do not, however, propose to impose such sentence. The third appellant has already served one and a half years imprisonment. I can do no better than echo the words of **BOTHA, JA,** in the hitherto unreported judgment in the case of **The State v Mgedezi and Others** (case No 415/1987 - judgment delivered on 30 September 1988), where faced with a similar situation to that which pertains in the case of the third appellant, he said :-

...../31

"A sentence of imprisonment imposed by this Court for an offence other than the one for which the accused was sentenced by the Court a quo cannot be antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977; the wording of the section does not permit of its application in the circumstances of this case. This appears to me to be a serious deficiency in the provisions of the Act, which requires the urgent attention of the Legislature. The Court has no power to antedate a sentence other than in accordance with the provisions of the section (see **S v Hawthorne en 'n Ander** 1980(1) SA 521 (A) at 524). The result is that if this Court were now to impose a sentence of imprisonment of 18 months, that sentence would commence to run from the date of this judgment, and no effect can be given to the time that the accused has already spent in prison. This is a result that I am not prepared to countenance. If the time already spent in prison by the accused is taken into account in the sentence to be imposed now, by making a deduction from the period of imprisonment to be fixed, the sentence will be artificial and will create a false impression on the accused's record of previous convictions in the future. In the interests of justice, however, I cannot see how that undesirable result can be avoided."

Having regard to the situation which exists because of the considerations mentioned by **BOTHA, JA**, the appropriate

...../32

sentence to impose on the third appellant is one of imprisonment for 18 months.

In the result the following order is made:-

1) The first appellant's appeal against his conviction and sentence is dismissed.
2) The second appellant's appeal is allowed, and his conviction and sentence are set aside.
3) The third appellant's appeal against his conviction and sentence is allowed to the extent that his conviction of murder and sentence of 18 years imprisonment are set aside, and there is substituted in their stead a conviction of assault with intent to do grievous bodily harm, and a sentence of imprisonment of 18 months.
4) The fourth appellant's appeal against his sentence is allowed to the extent that his sentence is reduced to one of 15 years imprisonment.

J W SMALBERGER
JUDGE OF APPEAL

RABIE, ACJ)

MILNE, JA) CONCUR