IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VUYANI APRIL Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, EKSTEEN, JJA et VAN COLLER AJA

HEARD: 15 August 1991

DELIVERED: 13 September 1991

J U D G M E N T

E M GROSSKOPF, JA

The appellant was convicted of murder in the Eastern Cape Division by a court composed of SUTEJ J and two assessors. Six other accused who were charged with him were discharged at the end of the State case. At the time of the commission of the offence (29 January 1987) the appellant was fifteen years old, and no question of extenuating circumstances consequently arose under the law which prevailed when he was sentenced on 19 September 1989 (vide section 277 of the Criminal Procedure Act, no. 51 of 1977, prior to its substitution by section 4 of Act 107 of 1990). He was sentenced to nine years' imprisonment of which four years were conditionally suspended. With the leave of the Court a quo he now appeals only against his conviction.

At his trial the appellant was represented by attorney and counsel. The evidence was as follows. Mr. C. Kelsey testified that on 29 January 1987 he was a corporal in the S A Defence Force. He was in charge of three military vehicles patrolling the area of A, B, C and D streets in the black township of Grahamstown. He noticed a fire in D Street. After

deploying his men, he returned to D Street to investigate. This was at about 23h00. When he arrived on the scene, the flames had died down, and he found the burnt corpse of the deceased, one Nomazizi Basson, a woman of approximately thirty years. She was lying on her stomach. On her back was a tyre which was tied to her hands with wire. Her feet were tied together with a piece of cloth. Near the deceased was an empty jar which smelt of paraffin. There were no other persons in the vicinity. Mr. Kelsey summoned the police.

As a result of Kelsey's report, det. const. Goliath went to the scene. He arrived there at 23h16. He found the deceased as described by Kelsey. The deceased was removed by ambulance. An autopsy was later performed by Dr. K A Gough, the district surgeon of Grahamstown. Dr. Gough's report was handed in as exhibit C. The following formal admissions, inter alia, were made by the appellant:

> "2. Dat sy (ie, the deceased) op 29.1.87 gesterf het as gevolg van die beserings opgedoen in die voorval te 'D' straat Grahamstad.

3. Dat die beserings aldus opgedoen is blyk uit die P.M. verslag hierby aangeheg, Bew. C, en dat die korrektheid van die inhoud daarvan erken word."

In his report Dr. Gough stated his conclusion that the deceased's death had been caused by shock due to second degree burns. He expanded on this in his oral evidence by describing the extent and severity of the burns. He had found no other traces of injury, but conceded that there might have been superficial injuries of those parts of the skin which had been destroyed by the burning. It is not necessary to consider Dr. Gough's evidence in any greater detail. It was common cause in both courts that his conclusion about the cause of death was correct.

The evidence which I have summarized up to the present was not disputed. A further witness, Thosamile Tshete, who was tendered by the State, was more controversial. Tshete was a young man of 18. After some introductory questions and answers, the following passage occurs in the transcript of his evidence-in-chief:

"Now, Mr Tshete, you made a statement to the police regarding the incident that occurred on 29 January 1987. --- There is no such a thing.
Sorry? --- There is no such a thing.
Didn't you make a statement to the police, I just want you to tell the Court what happened that night, but I, first, did you make a statement to the police, to Constable Logodlo? -- No, I did not make a statement, I was only assaulted or beaten up and said to sign."

After a few more questions, which apparently did not elicit replies satisfactory to the prosecutor, the examination-in-chief terminated. Tshete was cross-examined at some length, mainly about the methods he said the police had applied in order to obtain incriminatory evidence from him against the accused persons. Questions were also asked by the Court. I shall later have to revert to some aspects of Tshete's evidence.

Although the evidence summarized above does show that the deceased was killed by burning, there is nothing in it to implicate the appellant in her killing. No doubt the state expected Tshete to identify the perpetrators (or some of them) but he did not do so. In the result the appellant was linked to the killing only by a confession made by him to a magistrate, Mr.

Ristow, on 5 February 1987. The admissibility of this confession was contested, but after a trial within a trial, the Court ruled it admissible. This ruling was attacked on appeal, and I turn now to consider its correctness.

The ground of attack on the admissibility of the confession was that the appellant had, so it was alleged, been unduly influenced to make the confession within the meaning of section 217(1) of the Criminal Procedure Act. It was common cause that the onus was on the appellant in terms of section 217(1)(b) of the Act to establish the undue influence relied upon by him.

The evidence of the appellant was as follows. He said that he went to the local police station on a Thursday in February 1987 to see the investigating officer, const. Logodlo (whose name is also sometimes spelt "Lugodlo" in the record) because he had received a message that he was to do so. He was accompanied by his mother. Logodlo ordered the appellant's mother out of his office, and asked the appellant to sit down.

He asked the appellant where he had been on 29 January 1987. The appellant replied that he had been at home. In reply to a further question by Logodlo the appellant said that he did not know what had happened that night. Logodlo then told the appellant that Zolile Maqanda (who was accused no. 6 in the Court a quo) had been arrested, and had given a statement implicating the appellant. Logodlo read from a piece of paper which he said was Zolile's statement. This statement provided details of the appellant's alleged participation in the attack on the deceased. After reading it out, Logodlo asked whether the appellant admitted the contents of the statement. The appellant said no. What then happened is described by the appellant as follows:

> "He (ie Logodlo) threatened me by saying, look here boy, you must tell the truth, otherwise you will land in the cells. ... He then said that if I were to admit what was said there as being the truth ... he will let me have free bail."

While Logodlo was saying this, the appellant continued, Sergeant Kadi of the Rini Municipal Police entered the office. He asked what the appellant's name was. The appellant told him.

The evidence of the apellant then continued: "He (ie Kadi) said I must tell the truth, otherwise I was going to shit and land in the cells". Thereupon Kadi left the office.

Logodlo then told the appellant that he (the appellant) was going to a magistrate. The appellant had given no indication that he was prepared to confirm the alleged statement of accused no. 6.

A policeman took the appellant to Mr. Ristow, who had an interpreter with him. The appellant then made the statement exhibit B. One of the introductory questions asked by Mr. Ristow was "Verwag u enige voordele as u 'n verklaring aflê", to which the appellant replied "No". When asked during his examination in chief why he had not told the magistrate of the promise of free bail made by Logodlo, the appellant said that Logodlo "had practically said to me that I must not mention that to the magistrate". The information contained in the body of his confession had been derived, the appellant said, from what Logodlo had read from the statement alleged to be that of accused

no. 6.

Under cross-examination the appellant said that, when he was with the magistrate, he no longer thought about what Kadi had told him. He was no longer concerned about that. On appeal Mr. Majiedt, who appeared for the appellant, accepted that the statement allegedly made by Kadi did not amount to undue influence in the making of the disputed confession.

This then leaves the undue influence allegedly emanating from Logodlo. According to the appellant's evidence under cross-examination, Logodlo had told him that he would be taken to a magistrate and that he should there "vertel oor die ding wat hy vir my oor gelees het. ... Hy het gesê dat as ek by die landdros kom moet ek nie melding maak van die beloftes van ... 'free bail' nie". The appellant was extensively cross-examined about the answers given by him to the introductory questions put by the magistrate. The most relevant questions were the following:

"1. Ek deel die verklaarder mee dat ek 'n landdros

is, dat ek hoegenaamd niks te doen het met die ondersoek teen hom nie, dat ek nie saam met die polisie of enige ander persoon in die saak werk nie en dat hy onbevrees en vrylik in my teenwoordigheid kan praat; dat ek nou sekere vrae aan hom gaan stel en dat hy by die beantwoording van die vrae my in sy volle vertroue moet neem en as daar na sy oordeel enigiets onbehoorlik gebeur het wat hom beïnvloed het om na my toe te kom om 'n verklaring te maak hy dit by die beantwoording van vrae aan my moet openbaar. Ek onderneem om dit dan summier onder die polisieoffisier se aandag te bring en sal hom versoek om ondersoek na sulke bewerings te doen. Ek deel hom verder mee dat hierdie geen hofsitting is nie en dat ek geen klagte teen hom verhoor nie. Daarop vra ek hom of hy dit verstaan en so aanvaar. Sy antwoord was: EK VERSTAAN EN AANVAAR DIT.

.....

3. Vervolgens waarsku ek die verklaarder dat hy hoegenaamd nie onder enige verpligtinge is om enige verklaring af te lê nie, maar indien hy 'n verklaring sou aflê, terwyl hy praat, neergeskryf sal word en later as getuienis teen hom in 'n hofsaak gebruik kan word. Hierop vra ek aan die verklaarder of hy hierdie waarskuwing deeglik begryp. Sy antwoord daarop was: EK BEGRYP.

.....

5. Ek vra vervolgens die verklaarder om in sy eie woorde aan my te vertel hoe dit gebeur het dat hy na my kantoor gekom het om sy

verhaal aan my te vertel. Die volgende was sy verduideliking (neergeskryf in sy eie woorde). SERSANT LOGODLO HET GESê DAT EK HIERNATOE GAAN KOM. HY HET NIE GESê WAT EK HIER SAL DOEN NIE.

5.A Wil jy 'n verklaring voor my aflê of nie? EK WIL.

6. Die volgende vrae word voorts aan die verklaarder gestel:

(a) Het enigeen aan u voorgesê wat om in u verklaring te sê of sal die verklaring wat u gaan maak bestaan uit dinge wat u self ervaar en waargeneem het en wat binne u eie kennis lê?
Antwoord: DIT GAAN OOR IETS WAT EK SELF WEET.

.....

(h) Is u deur enigeen beïnvloed om die verklaring te maak?
Antwoord: NEE.

(i) Is u deur enigeen aangemoedig om die verklaring af te lê?
Antwoord: NEE.

(j) Is enige beloftes aan u voorgehou om u te oorreed om die verklaring af te lê?
Antwoord: NEE.

(k) Verwag u enige voordele as u 'n verklaing aflê?
Antwoord: NEE.

(l) Hierop deel ek die verklaarder mee dat hy geen voordele van enige aard hoegenaamd kan verwag nie al sou hy die verklaring maak. Ek bring die belangrikheid hiervan tot die verklaarder se aandag en verneem by hom of

hy dit alles verstaan. Hy antwoord daarop.
Antwoord: EK VERSTAAN.
(m) Aangesien u op geen voordele hoegenaamd kan staatmaak nie, is u in die omstandighede nogtans bereid om 'n verklaring af te lê?
Antwoord: JA
(n) Het u al vantevore 'n verklaring van dieselfde aard gemaak en indien wel, wanneer en aan wie?
Antwoord: JA, VANDAG AAN SPEURDER KONSTABEL LUGODLO.
(o) Waarom verlang u dan om die verklaring te herhaal?
Antwoord: WANT EK WIL DIE LANDDROS Sê WAT EK GESIEN GEBEUR HET."

The only explanation which the appellant gave for the discrepancy between some of these answers and his evidence was that Logodlo had told him not to mention the promise of free bail.

On behalf of the State, evidence was given in the trial within a trial by Const. Logodlo, sgt. Kadi, sgt. Kiti (the policeman who took the appellant to the magistrate) and Mr. Ristow. Kadi denied that he had had anything to do with the appellant, and, in particular, that they had had the conversation alleged by the appellant. Logodlo's evidence was as follows.

He arrested the appellant at his home on 5 February 1987. He asked him whether he knew anything about the deceased's death. The appellant replied "let's go, I will tell you later." They drove to Logodlo's office, where the appellant told him what had happened. Logodlo asked the appellant whether he wanted to repeat this to the magistrate, and the appellant indicated that he did. Logodlo summoned Kiti to his office, and told him to take the appellant to the magistrate's court. Through his branch commander Logodlo arranged that a magistrate would be available to take the appellant's statement. He did not read out anything to the appellant nor did he offer him any inducement to make a statement to the magistrate.

Kiti testified that he took the appellant and some of the other accused to the magistrate. His evidence as to when the other accused were taken contradicted that of the appellant.

Finally Mr. Ristow testified about the taking of the statement. In this regard he was cross-examined only on his observation that the appellant appeared "ontspanne" when he made

the statement. For the rest Mr. Ristow was questioned about statements made by other accused persons who claimed that they had been assaulted.

Mr. Ristow's evidence concluded the State case in the trial within a trial. The defence formally admitted that the statement had been correctly interpreted. The Court held that the statement was admissible. The substantive part reads as follows:

> "In die aand van 29/1/87 (Donderdag) het ek en die jeugdiges van "B" Straat van 'n biddiens afgekom. Terwyl ons in "B" Straat geloop het het twee swartvrouens verskyn. Hulle het gesê 'daar gaan daardie meisie op.' Dit is die meisie wat ons gebrand het. 'n Klomp seuns het van "A" Straat verskyn. Ek weet nie hoeveel van hulle daar was nie. Zolile Maganda en ek het na die meisie gehardloop. Blykbaar het ons verby haar gegaan.
> Sekere seuns het gefluit en gesê 'Hier is sy agter.' Ek en Zolile het haar toe gekry. Ons het vir die ander seuns toe geskree. Hulle het bygekom en haar vasgehou. Zolile en ek het 'n motor gestop en vir petrol gevra. Die bestuurder daarvan het gesê dat hy nie petrol het nie, maar hy ons sal oplaai en dit by die Mobil garage sal kry. Ons het na die garage gegaan en daar het die bestuurder van die voertuig petrol uit 'n motorfiets getap. Ons het na die lokasie teruggegaan. Die bestuurder van die voertuig het

> weggery. Toe ons terugkeer het die meisie op die grond gelê. Sy was alleen. Sy was bewusteloos. Ek kon sien dat sy geslaan was want sy het gebloei. Ek het petrol oor haar gegooi en daarna weggehardloop. Ek weet nie wat verder aangegaan het nie. Dit is al."

After the appellant's statement had been allowed as evidence, the State closed its case on the merits. The appellant then also closed his case without leading any evidence on the merits.

In its reasons for admitting the confession, the Court firstly stated that "the magistrate has impressed the members of this court very greatly and he had gone a long way toward establishing that not only the statement was made to him freely and voluntarily but that there was no question of any influence exercised whatsoever". The Court then referred specifically to the questions and answers set out as 6. j, k, l, m and o above.

The evidence of Kadi, the Court held, did not take the matter much further. Kiti and Logodlo were more important. As regards Kiti, the Court said "there is no reason why the Court should not accept the evidence of Sergeant Kiti, who is a middle-

aged person, obviously been in police service for a long time and was totally unconnected with the investigation of this case".

And as far as the conflict between Logodlo and the appellant was concerned, the Court held as follows:

> "I must say immediately that if the evidence of Detective Constable Lugodlo has to be put on a scale or carefully balanced against the one given by the accused, the members of the court prefer and find more credible the evidence of Lugodlo than the evidence of the accused. Detective Constable Lugodlo has left a favourable impression on the members of the court. And the accused himself in giving his version and his evidence, has on a few occasions contradicted himself."

The Court then proceeded to set out the contradictions in the appellant's evidence.

In his attack on the Court's finding concerning the admissibility of the confession, Mr. Majiedt first contended that the trial Court had placed too much reliance on the enquiry made by the magistrate and the questions asked by him when the appellant was brought to him to make a statement. This issue must be seen in its proper perspective. The inducement held out to the appellant was, on his evidence, no more than that he would

be granted "free bail", i.e., that he would be released on his own recognizances. On the face of it, such an inducement seems a most inadequate reason for a deponent to give a false statement implicating himself in a gruesome murder. And it becomes the more inadequate if a magistrate has clearly explained to the deponent that the statement might be used in evidence against him, and that he should expect no advantages of any sort from making the statement. The magistrate's explanation therefore renders it extremely unlikely that the appellant was in fact induced by any promise of the sort alleged by him to make the statement, and the court a quo was in my view fully entitled to have regard to this factor. See S v Mkwanazi 1966(1) SA 736 (A) at p. 746 B-E.

Then it was argued that the appellant's version was corroborated by Tshete's evidence. Tshete testified that he had been arrested by members of the Rini municipal police force (including sgt. Kadi) for setting the home of Kadi's parents on fire. While he was under the control of the municipal police,

he was taxed by Kadi with the murder of the deceased in the present case and assaulted. Then he was taken to Logodlo's office. Logodlo asked him whether he knew anything about the death of the deceased. He said he knew nothing. Logodlo said no, Tshete's name and that of accused no. 3 were on a list which Logodlo had with him. Logodlo then produced a document which Tshete was told to sign. He did so. The contents of that document were not read out to him, and he did not read it. Logodlo did not assault him, but "spoke roughly" to him. He told him that if he did not sign he would be locked up. Later Tshete was taken to another policeman, Monaheng, where he was questioned about the burning of the home of the Kadi family. Monaheng also gave him a document to sign. It is not clear whether Tshete knew what was in the latter document, but it apparently did not relate to the present case. The suggestion in Tshete's evidence is that the document which Logodlo caused him to sign was the document which the prosecutor took to be a witness' statement.

I do not think that Tshete's evidence can be accorded

any weight. It is impossible to accept that the state would call as a witness a person whose "statement" was a document containing a tissue of lies which the witness signed without knowing its contents. How could the police or the prosecutor hope to benefit by doing this? And in any event, can it be said that Tshete corroborated the appellant? Tshete's evidence was that he had been coerced by assaults committed by municipal police including Kadi, and a threat by Logodlo that he would be locked up, to sign the document produced by Logodlo, without knowing what the document contained. The appellant said he was induced by a promise made by Logodlo of "free bail" to make a statement to a magistrate repeating what had been read out to him. He also said that Kadi had spoken to him in a threatening manner as set out above. These two versions both ascribe improper conduct to Kadi and Logodlo, but do not disclose any method or modus operandi which would, to any appreciable degree, render Tshete's evidence coroborative of the appellant's. Such correspondence as there is in the methods described in the respective versions relate to

matters of detail. Tshete's evidence, even if accepted, can accordingly have very little weight. I express no opinion on the question whether it was admissible at all. See S v Letsoko and Others 1964(4) SA 768 (A) at p. 774 H- 775 F.

Mr. Majiedt also relied on the cross-examination of Mr. Ristow during which Mr. Ristow said that two accused other than the appellant had told him that they had been assaulted by Kadi and, in one case, had been induced by promises to make a statement. The evidence, as I have stated, was given by Mr. Ristow, and the question of the admissibility of the evidence was raised at the trial. Defence counsel sought to justify its admissibility on the following basis:

> "All that I am submitting is that the point it shows is that certain allegations were made to the Magistrate. I am not saying that that was the truth or that was tested."

Later the following exchange took place between counsel and the Court.

> "COURT: It (ie Mr. Ristow's evidence) doesn't prove the truth of the allegations.

MR MAJIEDT: Yes, that is so and I take, I accept that.
COURT: Particularly without evidence of those deponents
MR MAJIEDT: That is not the purpose of this evidence M'Lord."

From these passages it is quite clear that this evidence was not tendered to prove the truth of the statements made to Mr. Ristow. In particular, this was not a case where hearsay evidence was introduced in terms of section 3 of the Law of Evidence Amendment Act, no. 45 of 1988. In these circumstances, Mr. Ristow's evidence cannot assist the appellant. If there is nothing on record to show the truth of the allegations made to Mr. Ristow by these other accused, then their allegations cannot serve to corroborate the appellant's evidence. Indeed, it is difficult to see what purpose this cross-examination served, and I express no view on whether it should have been allowed.

Mr. Majiedt also contended that the court a quo did not have proper regard to the probabilities in this case. I do not

have to repeat these arguments in detail. Suffice it to say that there was in my view no misdirection in the factual findings of the court a quo, and that there are no grounds upon which we would be entitled to interfere. The onus was on the accused, and there was ample evidence to support the finding that this onus had not been discharged.

It follows in my view that the confession, exhibit B, was correctly admitted.

On behalf of the appellant it was argued that, even if the confession exhibit B was admissible, there were features which cast doubt on its reliability. The confession purported to relate to events occurring during the evening of 29 January 1987 in the vicinity of D Street during which a woman was assaulted and burnt. This was the time, place and manner of the deceased's murder, and it was not seriously argued that the confession may have referred to some other incident. Nor was it contended (rightly in my view) that sec. 209 of the Criminal Procedure Act had not been satisfied, i.e., that the confession

had not been confirmed in a material respect, or the commission of the offence proved by evidence aliunde. What was contended was that some of the details in the confession conflicted with the objective facts, and that this raised a doubt whether the confession was genuine. Two features were mentioned. The first was that a jar smelling of paraffin was found near the body, whereas the confession stated that petrol had been poured over the deceased. This is not a conflict. The contents of the jar might never have been used in the assault on the deceased, or both substances may have been used.

Then it was argued that the statement mentioned B Street, whereas the deceased was found in D Street. This again is no conflict. These two streets are near one another. According to the statement, B Street was the street in which the appellant and Maqanda were when they started running after the deceased. This is not inconsistent with the objectively established fact that she was ultimately killed in D Street.

Finally the appellant's counsel questioned whether the

trial court had correctly applied the principle of common purpose in convicting the appellant. Basically the state had to prove that the appellant, with intent to kill, participated in the act which caused the deceased's death (the actus reus). Sometimes, in accordance with the principle of common purpose, the acts of others may be attributed to an accused (see S v Kumalo and Others unreported A.D., judgment delivered 29 May 1991). In the present case, the appellant's participation appears from the statement, exhibit B. According to this statement the appellant and Zolile saw the deceased, and called some other boys to help them. The other boys came and held the deceased. The appellant and Zolile then went to fetch petrol, which the appellant on his return poured over the deceased. According to him she was then unconscious. The appellant clearly poured the petrol over her so that it could be set alight by himself or by somebody else. That this demonstrated an intention to kill on his part cannot be doubted. And as far as the actus reus is concerned: the deceased was in fact, as intended by the appellant, later set

alight and killed by burning. The appellant thus played a vital part in the very act which caused the death of the deceased, and it hardly seems necessary to analyse the rules of common purpose to reach the conclusion that he was a party to the actus reus.

Finally it was contended that, on the strength of the recent decision in S v Motaung and Others 1990(4) SA 485 (A), the appellant should only have been convicted of attempted murder. In Motaung's case it was held that an accused, who joined in an attack upon a deceased after the deceased had been mortally injured, can in general not be convicted of murder of that deceased but could at most be guilty of attempted murder. In the present case the cause of the deceased's death was shock caused by burning. Motaung's case would, therefore, have been in point if the appellant had joined in the attack on the deceased after she had sustained her burns. This was not the case. The appellant was a party to the attack on her from the beginning, and in fact poured the petrol over her which was used (by itself or with other substances) to set her alight. The argument based

on Motaung's case can accordingly also not succeed.

In the result none of the grounds raised on appeal was in my view well founded.

The appeal is dismissed.

E M GROSSKOPF, JA

EKSTEEN, JA

VAN COLLER, AJA Concur