IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THEBOGO HAROLD MAPHIKE ..... Appellant

AND

THE STATE..... Respondent

Coram: SMALBERGER, MILNE et EKSTEEN, JJ A

Heard: 19 August 1993

Delivered: 31 August 1993

J U D G M E N T

EKSTEEN, JA :

The appellant was convicted in the Wit-watersrand Local Division of robbery with aggravating circumstances and of murder. He was 16 years old at the time of the commission of the offences, and this was largely the reason for the comparatively lenient sentence passed on him. He was sentenced in respect of the robbery charge to six years' imprisonment of which three years was conditionally suspended, and in respect of the murder charge to nine years' imprisonment of which three years was suspended. The two

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sentences were ordered to run concurrently. On an application for leave to appeal against both convictions, and sentences the trial judge granted the appellant leave to appeal to this Court against the convictions only.

The appeal turns entirely on fact, and quite apart from the consideration that it had no reasonable prospect of success, it seems to me that even if the learned trial judge was of a mind to grant leave to appeal, it could hardly be said that this appeal was of such a nature that it required the attention of this Court. Any leave granted ought, therefore, in terms of section 315(2)(a) of the Criminal Procedure Act no 51 of 1977 ("the

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Act") to have been granted to the full court of the division from which it came..

It was not disputed at the trial that at about 9 o'clock on the morning of 16 November 1990 the 51 year old Mr Ivan Leo Utian ("the deceased") was in his jeweller shop known as Geneva Watch Co situated in Eloff Street, Johannesburg when three men entered the shop with the apparent intention of robbing the deceased. The deceased succeeded in setting off the alarm system with which his shop was equipped. He was thereupon shot in his neck and chest, and expired shortly afterwards. The three men ran out of the shop in a bid to make good their escape.

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At more or less the same time Mr Nell, the retail manager of a clothing company, was walking down Eloff Street and stopped to look at the display window of the Geneva Watch Co. As he walked past the main door of the shop he saw a black man dressed in a pair of dark navy blue pants, a navy blue jersey and a white shirt standing in the door. As Nell walked past this man closed the door. Nell then stood looking at the goods displayed in the next window of the same shop. Suddenly he heard the sound of a gunshot and at the same time became aware of the fact that the shop's alarm was going off. He walked back to the door of the shop and saw the

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man, whom he had noticed at the door, running into the street, followed by another man who had also come out of the shop. As Nell got right up to the door a third man emerged and ran off. Nell says that as this man came out he looked straight at him and noticed that he had pimples on his face. As the man ran away he noticed that he was wearing a green jacket, knee-length pants or shorts with turnups rolled up, redbrick coloured socks and green and brown shoes. He also had his hand inside his jacket pocket. Nell tried to phone the police from the deceased's shop, but before he could get through to them, two business watch policemen

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who had been patrolling the area came into the shop. Shortly afterwards more policemen and the ambulance arrived. Nell, who says he is very observant and has a "photographic" memory, gave the policemen a detailed description of the man in navy blue and of the third man in the green jacket. Sgt Mphago and Const Thamangane thereupon set out to see if they could find anyone in the streets answering this description. They did not have to wait long before they came up to the appellant. His general appearance as well as the clothes he was wearing seemed to correspond to the description of the man in the green jacket whom Nell had seen running out of

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the shop - except for the fact that the appellant was not wearing any socks. The two policemen apprehended appellant and on searching him, found a white alarm transmitter - or "panic button" -in his jacket pocket. On being asked what it was, appellant replied that it was his, whereupon the policeman gave it back to him. They summoned assistance to fetch the appellant and Const Leishman turned up in his motor car. Thamangane and the appellant got in and Leishman drove back to the Geneva Watch Co. Nell was still there and as soon as he saw the appellant he recognized him as one of the men who had run out of the shop. After some investigation at the shop

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Leishman and Thamangane took the appellant to the Brixton Police Station where he was held in custody. Sgt Mphago seems to have made his own way to the same police station at more or less the same time. Mphago and Thamangane both made written statements of the events at the police station, and while Leishman was making his statement the two of them went to wait for Leishman in his car. There, on the floor behind the left front seat, Mphago picked up the white alarm transmitter that he had earlier found in the appellant's jacket pocket. When Leishman joined them Mphago gave it to him and Leishman immediately recognized it as the deceased's transmitter.

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Leishman testified that he was a member of the business watch in that area and that he had often gone into the deceased's shop. The deceased, he said, always wore this transmitter on his belt. It was about the size of a packet of 20 cigarettes and thus very conspicuous. Leishman also said that he was the first policeman to arrive on the scene after the deceased had been shot and. that he immediately noticed that the deceased was not wearing the transmitter at the time.

One Frost, an installation supervisor of Security Centre, with which deceased's shop had been registered, was summoned to the shop and asked whether he could identify the trans-

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mitter. He recognized it as an old type of trans

mitter which had been issued by his firm, but of which

very few were still in existence. From his eviden

ce it appears that all the transmitters which they

issue to their clients are individually and differently

coded to the premises concerned, so that when the sec

urity centre receives an alarm call they know ex

actly from which premises it eminates. He tested

the transmitter the police handed to him - i e the

one found by Sgt Mphago - on two separate occa- .-

sions by activating the alarm button, and on each occasion the security

centre confirmed that the signal came from the Geneva Watch Co. The

transmitter found in the appellant's possession

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was therefore shown to have been coded to the Geneva Watch Co and must have come from that shop.

At about 4 o'clock on the afternoon of the same day the appellant was interviewed by Warrant Officer Gous who was the investigating officer at the time. As a result of what the appellant told him, Gous decided to arrange for a formal confession to be taken from appellant. He tried to arrange for a magistrate to take the confession, but as it was a Friday afternoon after 4 o'clock he was unable to find a magis-trate. So he decided to use the services of a police officer from another police station. He phoned Captain Steyn (who at that time was

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still a lieutenant) at the Krugersdo-rp Police Station and arranged for him to take the confession. The appellant was taken over to Krugers-dorp where he made a confession to Captain Steyn in which he admitted having taken part in the robbery together with two of his friends, and having been present in the shop when one of his friends shot the deceased. He told Captain Steyn that one of his friends had taken the alarm transmitter from the deceased and subsequently dropped it as they were running away. Appellant then picked it up and put it in his pocket. When he was arrested and searched the transmitter was found in his pocket.

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At the trial the appellant-contested the admissibility of the confession alleging that it had been extorted from him after a series of assaults by various policemen, and that he had been instructed to say what he had, by Gous. In a separate hearing to determine the admissibility of the confession the trial judge disbelieved the appellant and accepted the evidence of the policemen the appellant had sought to incriminate. Several of them denied having had anything to do with the appellant, or said not to have been present at the police station at the relevant time. Others denied having assaulted appel-lantin any way. The trial judge scrutinized the

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evidence carefully, and, in his questioning took Warrant Officer Gous to task for not having been more assiduous in looking for a magistrate to take the confession rather than using a police officer. Warrant Officer Gous, however, explained the difficulties attendant upon finding a magistrate and an interpreter over a weekend - difficulties which he himself had experienced in the past. From the recorded confession, together with the questions and answers which preceded it, and the evidence of Captain Steyn, it appears that Steyn was very meticulous in seeking to ensure that the confession was being made by the appellant freely and voluntarily, while in his sound and sober

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senses, and without having been unduly influenced thereto by anyone, as is required by sec 217(1) of the Act. This explanation satisfied the trial judge. He found Gous to have been a good witness and accepted his evidence. He also accepted the denials of the other police witnesses that they had assaulted or threatened the appellant in any way. The appellant on the other hand was found to have been a dishonest witness and his evidence was rejected as false beyond a reasonable doubt. The reasons for these findings were well set out by the trial judge and they are supported by the record. There is no reasons for us to interfere with them.

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There is however one aspect which was touched upon very cursorily in cross-examination, and not adverted to at all by the trial judge, which warrants some consideration. The appellant, on his evidence, was 16 years old at the time. This was not contested and must therefore be accepted. Warrant Officer Gous however says that the appellant appeared to him to be 20 years of age, or even in his early twenties. He did . not ask appellant how old he was before he sent him off to Captain Steyn. In the course of the meticulous and extended questioning by Steyn directed to ensuring the free and voluntarily nature of the statement he was about to record,

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as well as to satisfy himself that the appellant had considered the advisability of making such a statement, Steyn asked the appellant how old he was. When appellant told him that he was 16 years old, Steyn was surprised as appellant had seemed to him to be older than that. So he asked appellant whether he could produce proof of his age. When appellant replied that he could produce a birth certificate Steyn accepted that he was only 16 and recorded the following question and answer:

> "Vraag. Noudat u beweer dat u 16 jaar oud is stel ek dit aan u dat u geregtig is om bygestaan te word deur u ouer of voog. Wat is u kommentaar daar-op?"

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"Antwoord: Ek wil my verklaring gee en klaar kry. Wk wil nie enig-iemand he wat bystaan nie."

Appellant was thereupon invited to proceed with any statement he wished to make. In his evidence at the trial Steyn indicated that he had considered it to be in the interests of the appellant to be assisted by his parents and had in fact invited the appellant to obtain such assistance. Appellant however declined, and insisted on making his statement forthwith.

It seems to be that as a matter of general principle a young person in such circumstances ought to be afforded the assistance of a parent wherever this is reasonably possible.

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Our common law has always recognized the inherent intellectual immaturity and inexperience of youth, and made allowances for them (see e g Voet 4.4.42 and 45; 48.19.7 and S v Lehnberg en 'n Ander 1975 (4) SA 553 (A) at 560 C - 561 F). Sec 73(1) of the Act entitles any person who has been arrested to have the assistance of his legal adviser as from the time of his arrest, and sub-section (3) of the same section allows an accused who is under the age of 18 years to be assisted by his parent or guardian at criminal proceedings. In fact sec 74 goes on to make it imperative for the parent or guardian to be warned to attend such criminal proceedings whenever he or she

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"can be traced without undue delay", and makes it an offence for them to fail to attend and to "remain in attendance unless excused by the court. The conjunction of sub-sections (1) and (3) of section 73 in the same section would seem to indicate that a person under the age of 18 years would at least be entitled to the assistance of his parent or guardian as from the time of his arrest, in the same way as an adult would be entitled to the assistance of his legal adviser. In S v Gibson N O and Others 1979 (4) SA 115 (D & CLD) at 138 B-C, Milne J had occasion to remark on the "unwisdom of allowing a 17 year-old unrepresented accused, who is not assisted by his

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parents or guardian, to plead to serious criminal charges." (See also S v H and Another 1978 (4) SA 385 (E).

I have made these remarks as pertaining to a general principle. There may of course be exceptions where a youthful offender has, by virtue of the life he has led, acquired such a degree of wordly wisdom and maturity that he in fact requires no assistance or comfort from his parents, but is shrewd enough to fend very well for himself. These are features which a trial court would be entitled to take into account when faced with such a state of affairs. The

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degree of maturity of a young person together with other surrounding circumstances may well outweigh, to a greater or lesser extent, the general consideration of his youthfulness. (See in this regard S v Mohlobane 1969 (1) SA 561. (A) at 567 F - H and S v Petrus 1969 (4) SA 85 (A) at 95 H - 96 B.) Depending therefore on the circumstances, the failure to afford a young person the assistance of a parent or guardian where this is reasonably possible before taking a confession from such person, could conceivably lead to the conclusion that the confession was not made freely, voluntarily, or without undue influence.

.../22(a)

In the present case Captain Steyn recog-nized the desirability of the appellant having the assistance of his parent or guardian before making his statement. He duly informed appellant of the right to have such assistance and recommended to him that he get it. Appellant, however, refused. It seems to me though that Captain Steyn could ex abudante cautela, have enquired further into the matter and investigated the possibility of contacting his parents and procuring their attend-ance without undue delay. From the evidence it appears that appellant's parents were in or near Johannesburg, as it seems to be common cause that his mother was present at his first

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appearance in court on the Monday and subsequently visited him on several occasions at the Brixton Police Station where he was being held in custody. On the probabilities therefore one or other of appellant's parents my well have been able to come to his assistance at the Krugersdorp Police Station without unduly delaying the recording of the confession.

On the other hand, in the circumstances of the present case, it does not seem to me that any real harm has resulted from Captain Steyn's failure to take further steps in the matter. As I have indicated he seems, on the evidence, to have been meticulously careful and fair to the

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appellant in taking his statement. The appellant, who was in Standard VII at the time, and there fore reasonably intelligent, appeared both to Gous and to Steyn to be older than 16. In the circumstances, therefore, it would appear that, despite the fact that Captain Steyn could possibly have done more in attempting to obtain the at tendance of appellant's parent or guardian, the admissibility of the confession has not been affected on that account.

In any event I am of the view that the conviction would still have been well founded even without the confession. The appellant, on a mere reading of the record, was a bad witness and

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patently dishonest. The case put by counsel to the State witnesses was either not deposed to by the appellant when he came to give evidence, or flatly contradicted. The trial court was clearly entitled to reject his evidence, as it did, as being false beyond a reasonable doubt. The State witnesses, the court found, were honest and their evidence was accept- ed. On this evidence the appellant was found in possession of the alarm transmitter which undoubtedly came from the Geneva Watch Co, and in all probability from the body of the deceased, shortly after the deceased had been shot. He preferred no explanation for such possession

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but sought to dispose of the transmitter by dropping it on the floor of Const Irishman's car in which he was conveyed to the police station, and then falsely denied that it had ever been in his possession. Over and above this he was positively identified by Mr Nell as having been one of the robbers.

The convictions were therefore well founded.

The appeal is dismissed.

J P G EKSTEEN, JA

SMALBERGER, JA )
concur
MILNE, JA )