IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FREDDY ALFRED POTWANA ..... FIRST APPELLANT

EZEKIEL MANDLAZI ..... SECOND APPELLANT

GIDEON KGASOANE ..... THIRD APPELLANT

RONNIE FAKUDE ..... FOURTH APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : BOTHA, HEFER et KUMLEBEN JJA

HEARD : 15 NOVEMBER 1993

DELIVERED : 30 NOVEMBER 1993

J U D G M E N T

KUMLEBEN JA

During the evening of 26 July 1986 the deceased, Zeblon Kunene, was attacked and killed in his home at Kanyamazane in Kangwane. He had extensive business interests in that area and was also prominent in civic affairs. His assailants gained entry to his house on the pretext of wanting to buy liquor. He was overpowered and fatally shot, though armed with a pistol at the time. This led to the four appellants and a fifth person, Mr Moses Nxumalo, being charged with murder. Since the pistol could not be found, it was the subject of a second charge, one of robbery. The appellants were convicted on the first count and sentenced to death, but were found not guilty on the robbery charge. (Nxumalo was acquitted on both counts.) Their convictions and sentences are before us on appeal in terms of s 316A of the Criminal Procedure Act 51 of 1977 (the "Act").

The matter was heard in the South and South Eastern Circuit Local Division of the Supreme Court before Curlewis DJP and assessors. The trial took the following course. The widow of the deceased explained, in more detail than I have sketched, how the deceased came to be killed. The State then sought to rely on two written confessions made by the first appellant and one by each of the others. The admissibility of these statements was contested on the grounds that they had been induced by threats and assaults. This led to an interposed and separate enquiry to resolve this issue. The court ruled that the State had proved beyond reasonable doubt that the statements had been freely and voluntarily made and they were received in evidence. Before closing its case, the State adduced no other evidence of any significance incriminating the appellants. They thereafter elected to testify and subject themselves

4 to cross-examination: each merely stated in evidence-in-chief that he knew nothing about the commission of the crimes. It should be mentioned that, according to the summary of material facts annexed to the indictment, the State case was that the murder was planned by the the third appellant and Nxumalo and carried out by the other three appellants with perhaps others involved. It was suggested by State counsel during cross-examination that the deceased and Nxumalo, who was also a well-known and influential business man in those parts, were competing applicants for the grant of a liquor licence and that this gave rise to the commissioned killing of the deceased.

The evidence adduced by the State at the enquiry was to the following effect. Initially the local South African Police at Nelspruit were entrusted with the investigation of the case. When

no progress had been made for some three months, the Brixton Murder and Robbery Unit, stationed at the Brixton Police Station in Johannesburg, was called in during October 1986 to work on this case in conjunction with the Kangwane police. They too had no success in tracing suspects. In May 1988 the matter was again left in the hands of the Kangwane police. In July 1989, three years after the murder, the first appellant was arrested at Nelspruit by Captain Oberholzer, who was a member of the South African police seconded to the Kangwane police force. Warrant Officer Wessels of the Brixton police was informed of the arrest and interviewed the first appellant at Nelspruit. He denied all knowledge of the crime, but Wessels felt that he was not telling the truth. On 21 August 1989 Brigadier Engelbrecht instructed Wessels to take charge of the investigation. He was to operate from Brixton with a

squad consisting of Detective Warrant Officer Monene, Detective Sergeant Weyers and Detective Sergeant Makate. During the ensuing days this team was anything but idle. Their investigation can best be recounted in diary form. And it is necessary to do so in some detail since the judgment of the court a quo does not systematically or comprehensively set out the background facts which bear upon the issue and enable one to view it in proper perspective. I should also mention that precise references to time are taken from the evidence of Wessels. He explained that he had recorded events contemporaneously in his pocket book and later transcribed them when preparing a statement for the docket. He referred to this statement when giving evidence.

23 August 1989: Wessels interviewed the first appellant at the Nelspruit prison. He was told, or inferred, that the first appellant could not make any

disclosures at Nelspruit because he feared for his life. Wessels did not pursue the matter further at that stage, but discussed it with Oberholzer. The latter decided to withdraw the charge against the first appellant. (It is not clear whether this was done with the approval of Wessels.)

24 August 1989: Wessels and Weyers returned to Johannesburg.

25 August 1989: When the first appellant was discharged by the court, Monene and Makate, as instructed by Wessels before he left, promptly arrested the first appellant and escorted him to Johannesburg. At 15h50 Wessels interrogated the first appellant in the presence of Monene and Makate in a waiting room at the Brixton police station. The first appellant confirmed what he had said to Wessels at Nelspruit and added that he feared being detained at Nelspruit if the persons named by him were to be

arrested. When asked by Wessels, he said that he was prepared to repeat what he had told him before a magistrate or justice of the peace. At 16h30 Wessels arranged for Captain Olivier to interview him and record his statement. This he did at 17hl5.

26 August 1989: The first appellant agreed to lead them to where suspects might be found and identified by him. They left from Brixton shortly before midnight.

27 August 1989: During the course of the day the first appellant led the investigating team to places in Kanyamazane where the fourth appellant and later the second appellant were found, identified by the first appellant and arrested. The second appellant was interrogated by Wessels and others at the Kanyamazane police station. He denied any complicity alleging that he was at the time in custody at the Nelspruit prison. He was taken to that prison where

its records refuted his alibi. On their return to Kanyamazane, Wessels instructed Monene and Makate to convey the second and fourth appellants to Middelburg and detain them there. Also on this day Wessels arranged with Lieutenant van der Merwe to supervise a "pointing out" exercise which the first appellant was prepared to carry out. That evening he further assisted Wessels and other policemen in finding and identifying another suspect, Mr Solly Masheane.

28 August 1989: The third appellant was traced to an address in Witbank with the help of the first appellant and he too was arrested. Monene and Makate were instructed to take the second and fourth appellants to Brixton police station whilst Wessels and Weyers returned there with the third appellant and a further suspect, William Nkosi, who had also been arrested.

29 August 1989: The investigating foursome

interrogated the second appellant from 14h30 to 14h53; the fourth appellant from 15h05 to 15h20; the third appellant from 15h25 to 15h45; Nxumalo from 15h52 to 16h07; and Solly Masheane from 16hl2 to 16h25. The three appellants made certain disclosures to their interrogators and were prepared to repeat their statements and have them recorded. That same afternoon, after Weasels had made the necessary arrangements, Lieutenant Zeelie took the statements of the second and fourth appellants at 17h20 and 18h04 respectively; and Colonel Earle that of the third appellant at 18h36.

30 August 1989: After a further discussion with Solly Masheane, Wessels released him. The rest went to Nelspruit where the second and fourth appellants pointed out certain places with explanatory statements which were recorded. 7 September 1989: Wessels and Weyers took the first

appellant back to Nelspruit. On the way he expressed a desire to point out another suspect. He led them to a house near Witbank but this person was not there. According to Wessels, as the investigation with the first appellant progressed, he became more and more friendly and co-operative and on this journey made disclosures not contained in his initial statement. These comprise his second statement which was reduced to writing by Lieutenant Gouws.

9 September 1989: Wessels arrested Nxumalo and within half an hour started interrogating him. At his request he was allowed to summon his attorney. After consulting with his legal representative, Nxumalo denied any involvement in the crime and declined to say anything further. No confession was forthcoming from him.

As appears from the above chronicle of events, Wessels was the leading figure in the Brixton

investigating squad. He, Meyers and Monene gave evidence at the enquiry. Each denied that the appellants were threatened, assaulted or any in way influenced to make their statements. There is no need to refer to the other State witnesses who gave evidence at this enquiry. Their evidence was of a formal nature and not challenged. The appellants explained on oath that they had confessed involuntarily and in support of this defence the third appellant called a witness, Miss Rose Mahlanga.

On the State case relating to the admissibility of the statements the following conclusions and comments are warranted and indisputable. (i) The statements made by the appellants amounted to confessions conclusively implicating each in the murder of the deceased, (ii) These confessions were accurately recorded after the

customary preliminary questions had been answered by each appellant. (iii) The "pointing out" exercise, and the incriminatory statements made at the time, need not be separately considered: if the confessions are inadmissible, the pointing out and accompanying statements must likewise be disregarded: cf S v Sheehama 1991(2) SA 860 (A) 874 A - B. (iv) It was in fact common cause that the correctness of the convictions depends entirely on the admissibility of confessions made in terms of s 217(1) (a) of the Act. The appellants agree with the sequence of events as set out in the State case but allege, as I have said, that they were compelled or induced to confess.

The first appellant explained that, after the charge against him had been withdrawn at Kanyamazane, as he walked from the court he was confronted by Monene and Makate, He was grabbed from

behind and told to keep walking as he was pushed forward. One of the policemen pointed a firearm at him. He was taken to a Combi, handcuffed and placed in it. They drove off with him. On the journey they questioned him about the crime. He denied any knowledge but this was not accepted. He was told that if he did not admit his complicity he would be shot in the veld on the pretext that he had tried to escape. On their arrival at Brixton police station he was told that he was at the end of the line - at "the last station" - and that unless he confessed he would be eliminated. At this stage a letter written by him was found in his pocket. It was intended for his family to tell them, should he disappear, what had happened. It was only under cross-examination that this letter was referred to and it was not produced or handed into court. He explained how it had come to be written: the day after his arrest

Oberholzer had interrogated him and said that he had better confess otherwise he would be in trouble when the Brixton police arrived. These threats, he said, caused him to confess before Olivier. At a later stage he was told that his statement needed amplification and hence his second confession.

The evidence of the second appellant was to the following effect. On the journey in the Combi from Nelspruit to Middelburg Monene asked him how the deceased had met his death. When he said he did not know, Monene said "jongmanne, julle is bale jonk, ons gaan nou na Brixton toe en as julle nie doodgaan nie, gaan julle kruppel wees." Monene said that he should reflect on this. The next morning he was taken from his cell to a room on the top floor of the Brixton police station building where he found Wessels, Weyers and two other policemen. He was stripped down to his underpants and tied to a chair. Makate

threatened him with his life if he failed to tell the truth and placed a wet sack over his head. Water was thrown on him and he had difficulty in breathing. He said "Ek net toe op my gemors as gevolg van die feit dat ek nie asem kon haal nie." Electric shocks were applied to his left leg and genitals. Each time this did not elicit information from him, the procedure was repeated. Ultimately he succumbed and asked them what he was expected to say. The details of the offence and his involvement, as ultimately recorded in his statement, were then furnished by them. He was told that when he confessed he was not to tell that he had been assaulted: he was to give the impression that he was speaking voluntarily. His interrogators by clear implication said that if he did not do so he would be killed.

The fourth appellant confirmed in substance the threats made on the journey from Nelspruit. That

same morning he too was taken from his cell to a room in the Brixton police station building. He was shown the second appellant, who was asked by a policeman to explain to him, the fourth appellant, the coercive treatment he had received. He said "hier is ek dood" and without more the second appellant was removed from his presence. A "tokkelossie", as the electrical apparatus was described to him by the police, was produced and he was subjected to the same treatment as his brother. He could not withstand the pain and undertook to make a statement. What he told Zeelie that same afternoon, he said, was not the truth but what had been related to him by his interrogators. The electric shocks caused him to limp, but in the presence of Zeelie he attempted to walk normally as he had been warned not to give any indication of having been assaulted.

The evidence of the third appellant was

that upon his arrest, Wessels asked whether he knew the first appellant and Nxumalo. He admitted that he knew them but denied all knowledge of the crime. The next day he was taken from his cell to a room on the first floor of the Brixton police station. Wessels, Monene and Weyers were present. Wessels produced some papers, which he, the third appellant, had seen the previous day when Wessels questioned him. He was told to admit that Nxumalo had instructed him to kill the deceased. This he denied. He was thereupon tortured in the manner previously described. When he could no longer bear it, he responded to their instruction to incriminate Nxumalo by fabricating evidence against him. They desisted from torturing him and said that he would be fetched to make a statement. He was warned not to deviate from what had been told to him by his interrogators. He in due course "confessed" to Earle. His statement was read

by Weasels and he was satisfied with it. When asked under cross-examination why he had not told Earle about the coercion he gave these answers: "How could I have done that, because I was told that if I do not say the same thing that they told me, I would have to come back to them and been assaulted, shocked again" and "Now, how could I have done that, reported that to him, because he was also a policeman, how can I report another policeman to another policeman?"

The circumstances in which a court may during the course of such an enquiry have regard to the substantive part of a confession are well established. As explained by Rumpff JA in S v Lebone 1965(2) SA 837 (A) 841H - 842C:

> "Die geskilpunt in die onderhawige saak was of voldoen is aan die bepalings van art. 244 (1) van die Strafkode en of die appellant die bekentenis vrywillig en sonder onbehoorlike beinvloeding afgele het. Vir doeleindes van daardie ondersoek is die waarheid van die inhoud van die verklaring in die algemeen

gesproke irrelevant en geen verhoorhof sal toelaat dat 'n aanklaer probeer om te bewys dat die inhoud waar is nie, 'n bewyslas wat hy juis probeer kwyt deur die bekentenis toegelaat te kry. Kruisverhoor van 'n beskuldigde deur die Staatsaanklaer oor die waarheid van die inhoud van die bekentenis is derhalwe, in die algemeen gesproke, nie tersaaklik nie en sal nie toegelaat word nie. Anders is die geval egter wanneer die beskuldigde self beweer dat die inhoud van sy bekentenis vals is en deur die Polisie ingegee is en hierdie feit gebruik word as deel van sy saak dat hy deur die Polisie gedwing is om 'n verklaring te maak. In so 'n geval moet die aanklaer die reg he om die beskuldigde onder kruisverhoor te neem oor die inhoud van die bekentenis om aan te toon dat die beskuldigde self die bron van die inhoud is en nie die Polisie nie, soos deur die beskuldigde beweer. Die kruisverhoor word dan gedoen met die doel om die geloofwaardigheid van die beskuldigde aan te tas, 'n relevante onderwerp, en nie om te bewys dat die inhoud waar is nie. Die inhoud van 'n bekentenis kan dus relevant word, in sekere omstandighede, in verband met die vraag of die verklaring vrywillig afgele is en dan sal kruisverhoor oor die inhoud toegelaat word vir sover dit deur die omstandighede geregverdig is."

See too S v Talane 1986(3) SA 196(A) 204H - 205E and S V Khuzwayo 1990(1) SACR 365(A) 371a - 374c. It is

therefore only if and when the defence raises the issue of falsity that cross-examination by the prosecutor, should he elect to do so, is permitted on the contents of the confession.

Mr Malan, who appeared for the respondent before us and at the trial, was mindful of the correct procedure to be followed. At the outset of the enquiry he handed up two confessions, relating to the second and fourth appellants (exhibits E and F), in order to place the preliminary questions and answers and the concluding notes before court, but with the substantive portion of the confession excluded. Curlewis DJP (the "court") reacted by saying:

> "Well, you do not need at the moment, to exclude them at all because I want to know what the cross-examination is. We will wait until, if it is of a certain nature, then of course my assessors and I will look at what he said."

This was at the stage when Zeelie had been called as a witness formally to state that he had recorded those confessions. As soon as counsel for the two appellants disclosed by questioning the witness that the defence was that they were not voluntarily made, the court intervened in the following manner:

> "COURT: But they say they were forced to say that?
>
> MR SAAIMAN: That is so.
>
> COURT: Is that correct. So, there is no need to call the 'tolk.' The other thing I want to know is this Mr Saaiman, please tell me, your clients, do they allege that that which is said there, was given them to say, or is it their own words, their own?
>
> MR SAAIMAN: No, it was given to them.
>
> COURT: It was given to them to say?
>
> MR SAAIMAN : Yes.
>
> COURT: Well you better, alright, he would not know about that presumably, but then let me have it. If that is so, then I want to see those statements please, and so do my assessors."

The same attitude was adopted when it was proposed to hand in the second confession of the first appellant (exhibit G) with the substantive portion excluded. During the cross-examination of Gouws the following occurred:

> "MNR MORE: Volledigheidshalwe en vir sover u daarop kan kommentaar lewer wil ek dit aan u stel dat hy se dat hy voorgese is om die inhoud so aan u mee te deel? — Dit is ook nie aan my meegedeel deur horn nie.
>
> CROSS-EXAMINATION BY MR SAAIMAN: No questions.
>
> RE-EXAMINATION BY MR MALAN: No questions.
>
> COURT: Is it admitted Mr More that that correctly reflects what was said?
>
> MR MORE: Indeed.
>
> COURT: So, it is not necessary then to call the interpreter.
>
> MR MORE: Yes
>
> NO FURTHER QUESTIONS
>
> COURT: Let me have that as well then because

> the 'inhoud' then becomes relevant. That will be G, provisionally."

This conduct on the part of the court was not restricted to the confessions. As I have said, the pointing out was accompanied by incriminating statements which were recorded. When Mr Malan sought to restrict the evidence to the pointing out without any reference to the statements, the court insisted that they be placed before it. This appears from the following passage when Mr Malan was leading the evidence of Lt van der Merwe:

> "MNR MALAN: Sal u begin met die uitwysing wat deur nr. 1 gedoen is?
>
> COURT: Have you got copies of that?
>
> MR MALAN: Yes, but these include the statements at the moment.
>
> COURT: Statements of what?
>
> MR MALAN: Of what was said at the pointings out.

COURT: Well, you want that, do you not?

MR MALAN: I am not sure if my learned friends agreed ... (intervenes)

COURT: No, no, no, do not let us mess around, we are having a trial within a trial about that and so, let it all go there, I mean let him have the entire thing that he took down.

MR MALAN: Yes, he has that.

COURT: Has he?

MR MALAN: I thought your lordship wants it.

COURT: No, I want to know first if counsel, 1 and 2, have you got, Mr More have you got the pointing out?

MR MORE: Yes.

COURT: Yes. Well, now you can give me these to give a preliminary number. That will be what, G and H shall we call it? No, no, H and I."

and a little later

"MNR MALAN: Goed, ek dink die inhoud is op hierdie stadium nie ter sprake nie.

HOF: Nee, jy kan die inhoud uitlees, ons kan nie die ding so in die wiele ry nie. Ons sal weet as dit nie toelaatbaar is nie, dan is dit

> nie toelaatbaar nie. Ek meen, net soos by die ander, daardie inhoud moet ons sien weens die besondere weergawe wat hulle gee dat hulle voorgese is. Mnr. More, mnr. Saaiman, is dit nou u houding dat hulle gese is wat om te se en net daar te staan en so meer?
>
> MNR SAAIMAN: Ja.
>
> MNR MORE: Inderdaad, ja.
>
> HOF: Ja ek verneem dit was die, ja u kan maar uitlees, laat ons nie die ding ophou nie."

It is plain from the authorities quoted that it was quite irregular for the court to have insisted on these confessions and statements being placed before court as part of or during the State case. Only when each of the appellants elected to give evidence at the enquiry, could counsel for the State decide whether to cross-examine such appellant with reference to any part or to the whole of his confession. In the former event only those portions referred to in cross-examination would become part of

the record. The conduct of the court in this regard was therefore irregular and potentially prejudicial to the appellants (cf S v Gaba 1985(4) SA 734(A) 749 H - I). Furthermore, the apparent avidity with which it sought to have the confessions and statements before it, must have created an impression of partiality. I leave the matter there: for reasons which will later emerge, it is unnecessary to decide whether this feature of the case in itself amounted to a fatal irregularity or, if not, whether the appellants were in the result not prejudiced thereby.

The trial court, as I have said, ruled that the confessions were admissible. It is clear from the reasons for this conclusion stated in the judgment, that the principal - if not the decisive -ground for the rejection of the evidence of the appellants on the critical issue of whether they had

confessed voluntarily, was their denial of the truth of their confessions. The content, detail and length of each confession amply demonstrate that the appellants, despite their assertions to the contrary, spoke from first-hand knowledge and were not fabricating or recounting what was told to them. After some introductory remarks in the judgment, a consideration of the merits starts with the following comment:

> "Well, the whole issue as far as counsel were concerned, revolved round the statements that were made to the police. We had a trial within a trial and we admitted these statements, we were satisfied beyond doubt that they were freely and voluntarily made. I do not know whether the accused think that we are children to be imposed upon by the ridiculous stories they told. If they did think so, they are much mistaken. The version of no. 1 is much the same as the version of the others, that they were told by the police what to say in their statements. It is a ridiculous postulate, one only has to look at the statements, quite apart from the content, just look at the length of the statements to see what nonsense that is."

The judgment proceeds, if I may say so, to emphasize the obvious: that each appellant in making his confession was speaking from first-hand knowledge and truthfully. The court returns to this criticism on two further occasions by stating that :

> "[T]he accused, all of them start off under the handicap of having told lies concerning the method by which the statements were made. Mr Jordaan said no. 3' s statement is a short one, easy enough to fall in as it were, it could have been as he states, because no.3, it will be remembered said that he was merely given a sort of outline of what he should say and for the rest he should fill in as he thought fit.
>
> Mr Jordaan pressed upon us that he thought that no. 3 was a good witness. Well, he is wrong, he may have thought so sitting where he is, but as far as we are concerned he was a bad witness, as was 1, 2, and 4 were bad witnesses.
>
> I may say, having to tell such a ridiculous tale as they had to tell which they had made up, it is not surprising they appeared to have little confidence in what they were saying. But to get to Mr Jordaan's point that this might well have been so in respect of no. 3 because after all, he argued, if one looks at the statement, it

> could possibly be true that he filled out matters when he was simply given an outline. This cannot go up. I mean, how was whoever it was (whether it was Weyers or Wessels or whoever) able to teach him to say that he was helped by no. 5 and therefore he was not going to get any money. No one knew that except himself."

and at a later stage in the judgment:

> " [I] t is such an absurdity for the accused to say that these things were all taught to them like a parrot, in which case they would read that way, they would all be the same."

There can be no doubt that the court attached undue importance to this feature of their evidence. The fact that they were lying in this regard must be seen in context and assessed accordingly. One may confidently conclude that these false assertions stem from the erroneous, though understandable, perception that a failure to dispute the authorship or authenticity of a confession would,

or might, prove prejudicial even though at the end of the enquiry the confession is ruled out. After all, it requires a rather sophisticated knowledge of the judicial process and the objectivity of the presiding official to appreciate, and be confident, that no such risk of prejudice exists. For this reason it is a matter of common experience for an accused person to give false evidence in this respect. This is not to say that this defect in their evidence is to be entirely disregarded. But it cannot, and ought not, to serve as a cogent reason for rejecting their evidence on the pertinent question, namely, whether their confessions were as a result of assaults and threats. In S v Mofokeng and Another 1968(4) SA 852(H) 854H - 855C, Colman J, after it was proved that the accused had falsely denied the authorship of their confessions, said:

"That, however, does not conclude the enquiry.

I may not receive in evidence a confession, even if I believe its contents to be true, unless I am satisfied beyond reasonable doubt that it was freely and voluntarily made and that the accused person who made it was not unduly influenced within the meaning of sec 244(1) of the Criminal Procedure Act to make it. The fact that the accused are unreliable witnesses does not of itself mean that the State's burden of proof has necessarily been discharged. In saying that I am not unmindful of the remarks of WILLIAMSON, J.A., in S. v. Mkwanazi, 1966 (1) S.A. 736 (A.D.) at p. 747. Those remarks embody an injunction against the rejection of a confession on the basis of mere conjecture unsupported by any evidence. But considered in their context they do not mean that a trial Court, which has found the accused to be an unsatisfactory witness, is thereby relieved of the duty to weigh up the evidence as a whole in order to decide whether the prerequisites to admissibility have been proved beyond reasonable doubt. It has to be remembered that, especially in a capital case, an accused person has a most powerful motive for seeking to have his confession rejected. Because of that he may lie; but for the same reason he may exaggerate or distort an event which has really taken place, and in so doing discredit himself. It is my duty therefore to examine the Police evidence about the circumstances leading up to the confessions."

Other reasons relied upon by the court -

ancillary ones it would seem - are also open to criticism. I refer to the following.

Rose Mahlanga said she was arrested at about 4h00 one morning in October 1987. She was taken to the Belfast police station where she was handed over to six policemen of the Brixton Murder and Robbery Unit. She had been arrested in connection with this murder. She was asked whether she knew Nxumalo and whether the murder had not been planned in her home. This she denied. She was thereupon driven to a certain place where she was blindfolded, stripped down to her underwear, and subjected to electrical shocks until she lost consciousness. When she recovered, she steadfastly maintained that she knew nothing about the offence. Monene then took her to Brixton where a "white policeman" interrogated her and she was again tortured in the same manner until midnight. The next

morning she was asked further questions about Nxumalo not directly relating to the crime and these she did answer. She was then released. She proceeded to see a doctor in connection with the assaults upon her and reported the matter to Nxumalo. He was well-connected with certain influential politicians. On his advice she reported the matter to the Member of Parliament for Nelspruit. This led to her seeing the Deputy Minister of Police in Cape Town, to whom she reported the matter and provided him with a medical certificate. Her evidence was foreshadowed during the cross-examination of Monene. He admitted that he was present when she was interrogated but denied that she was in any way maltreated. He said that Captain le Grange was one of the policemen involved. This question by counsel for the third appellant followed: "You see the difficulty I have is that she cannot remember the names of the people that asked all the

questions, but she says you were present, so you have got to help us. So, you were always present when she was asked questions?" Before an answer was given, counsel was diverted from this enquiry by the court interrupting and saying "How can she answer that?" and no more questions were asked to establish the identity of her interrogators. The required information could in all probability have been furnished by Monene or else the members of the Brixton unit involved in this case could have been brought into court to afford her the opportunity of identifying them. It is unfortunate, indeed surprising, that neither counsel nor the court thought of reverting to this question or of taking steps to find out whether Wessels, Meyers or Makate numbered amongst the policemen referred to by her. However, what does emerge from her evidence, which is to be accepted since it went unchallenged by any

cross-examination, is: that policemen of the Brixton unit were prepared to employ third degree tactics to obtain information about this murder; that Monene was one of those involved in such unlawful pursuit; and that she was so severely tortured that she took the matter further in the manner described by her.

The court referred to her evidence in the judgment saying:

> "Now, Rose's evidence really had very little relevance to the whole matter, ... [that] depends in the first instance upon whether we accepted what Rose had said . . . that we are quite satisfied that Rose did not tell the truth in this court, neither did she tell the truth when she was taken to Mr Marais, I believe he is the National MP of this town and through him, was taken down to the Minister of Police, she did not tell the truth then. She was an informer. We accept unreservedly the evidence of the police on these aspects; she was an informer and of course, the last thing that the police would ever want and she would ever want, is to have that known and particularly the last thing that she would want, is to have it known that she had in fact informed about no 5 [Nxumalo]."

I have indicated the extent to which her evidence was relevant. The court's reasoning for rejecting it as untruthful was that, being a police informer, she had voluntarily furnished information to Wessels concerning Nxumalo but to cover her tracks, as it were, she falsely told Nxumalo that she had been tortured and, one presumes, in some way managed to fabricate the medical evidence supportive of this excuse. Apart from the fact that this ground for concluding that she was untruthful is speculative and was never put to her, it is based on a misunderstanding of the evidence. Wessels said that she was a regular informer in the pay of the local police at Witbank, as regards other offences committed from time to time. It was, however, another informer in this sense who first put the Brixton and Robbery Unit on to Rose Mahlanga as a

person who could furnish information about this offence. This informer said that Rose was a "houvrou" of Nxumalo, that when he visited Witbank he lived with her in her home and that a meeting of Nxumalo, William Nkosi and the third appellant took place in her house. When Wessels was asked why she had been brought to the Brixton police station, which is not the way an informer would ordinarily be treated, Wessels said that she was in fact a suspect whom he might have decided to arrest and charge with this murder. He described her as a "geleentheidsinformant" at one stage. In context this could only mean that she was a person from whom he expected to obtain or perhaps exact information. Having regard to her relationship with Nxumalo it is highly unlikely that she would have voluntarily informed on him. Thus the court manifestly misdirected itself in rejecting her evidence and, in

any event, in considering it to be of no relevance.

Defence counsel argued that the fact that none of the appellants were brought before a magistrate to make their confessions was a factor bearing out their contention that they were threatened and assaulted. The court dismissed this submission saying:

> "I am perfectly well aware of judgments which say that the police should take people in front of a magistrate, but until the legislature decides that the law has to be changed policemen are entitled to take statements if they are of a certain rank and the proper answer was given by one of the officers in this case."

It is so that an investigating officer has such a choice but it is obviously preferable to bring a would-be confessor before a magistrate when practicable to do so - provided the decision to confess has been voluntarily taken. For this reason it is legitimate and pertinent to ask why this course

was not followed. In this case no satisfactory reason for not arranging for a magistrate to take the confessions, especially those of second, third and fourth appellants, was forthcoming. In fact the excuse tendered by Wessels was a false one. When questioned on behalf of the first appellant in this regard at the outset of his cross-examination, he explained that the police at Brixton at that time encountered difficulties in finding a magistrate after office hours and for that reason a police officer would be used instead. However, during cross-examination on behalf of the second appellant, it was pointed out to him that according to his notes this appellant's interrogation was completed by 14h53 which was well within office hours. The following questions and answers followed:

> "So, u kon hom nog na ' n landdros toe gestuur het indien u belang gestel het om hom na 'n landdros toe te neem? — Daar was ander persone wat ek wou ondervra het.

> Maar adjudant, u is die ondersoekbeampte, 'n ondersoekbeampte neem nie 'n man wat 'n konfessie wil maak na 'n landdros toe nie, u stuur iemand anders, is dit nie die geval nie? -- Ek wou sy gedeelte ook bevestig met die ander beskuldigdes."

One knows that it is a matter of invariable practice for the investigating officer to instruct some other policeman to take a suspect or accused willing to confess to the official decided upon to act as scribe, and this was in fact the procedure adopted by Wessels in the case. His explanation for not attempting to bring this appellant before a magistrate is therefore a wholly unacceptable one. The interrogation of the second appellant was completed by 14h30. There was no reason why he could not have promptly arranged for a magistrate to record this confession and any further ones arising from the interrogations conducted immediately afterwards.

This issue was also canvassed with Weyers. He could not explain why Wessels had not even tried to obtain the services of a magistrate.

The court held that no adverse inference could be drawn from the failure to call Makate and Oberholzer as witnesses. It said in answer to a submission that these two ought to have given evidence:

> "Well, we have considered this: there is no merit in that at all. The state calls people who are relevant and if it calls one witness who it considers to be a good witness, it is quite unnecessary to call a line of witnesses."

It is the prerogative of the prosecution to decide on how many witnesses to call, and for the court to decide at the end of the case whether the onus of proof has been discharged. However, it cannot be said, as the court did, that Oberholzer's evidence would not have been relevant. It was his threat

alluding to the Brixton police which caused the first appellant to fear for his life and write that letter. There are no good grounds for concluding that this threat, which was unchallenged in cross-examination and not refuted by Oberholzer, was not at least a contributing factor influencing him to make his confession.

Apart from the misdirections and defective reasoning in the judgment, it failed to refer to a number of countervailing considerations and probabilities in favour of the appellants' version.

It is inherently improbable that the appellants would have freely confessed to a capital offence that had remained unresolved for three years or that, in the case of three of them, they would do so within a day or so of their arrest on arrival at the Brixton police station. Furthermore, the obvious reasons, if not the only ones, for a confession

freely made are contrition arising from remorse or the knowledge that the case for the prosecution is a strong or unanswerable one. In the present case there is no indication that, apart from the confessions, other evidence might have led to a conviction. And the coincidence of all four appellants being spontaneously prompted by self-reproach and repentance is to my mind an extremely remote one.

The detailed - and at times graphic account given by the appellants of threats and assaults, was to all intents untested. The cross-examination of each appellant has this in common with the reasoning in the judgment: it concentrated on the self-evident fact that their assertions as regards the content of confessions were untrue. For instance, of the 175 odd questions put to the first appellant during cross-examination, more than half

were directed to this topic. By contrast, questions relating to the key issue (whether he had been threatened by Oberholzer and later by Monene and Makate) were restricted to about a dozen. These numbers are no more than approximations and are referred to only to emphasize where the focus of the cross-examination lay. The cross-examination of the other appellants followed the same pattern. In the result, if their testimony on the threats and assaults is viewed on its own merits it cannot be said to be unsatisfactory or unconvincing in any material respect.

With reference to the evidence of the second appellant that he had been assaulted, Zeelie before recording his confession noticed and noted that he was limping. Second appellant said in evidence that this was as a result of the shocks he had received. This assertion was not challenged or

tested during cross-examination, apart from the general denial that any assault had taken place. This appellant told Zeelie, according to the latter's evidence, that he was suffering from cramp to explain the limp which had been noticed. No reason for the onset of cramp was suggested and this debility observed by Zeelie therefore in a measure confirms his evidence that electric shocks had been

administered to his one leg, that this caused him to limp and that he had been admonished not to disclose that he had been tortured.

To return to the judgment, the court concluded that:

> "The police were excellent witnesses, they gave their evidence well. I have not the slightest doubt, nor have my assessors, that they were telling the truth."

As far as the key witnesses - Wessels, Monene and

Weyers - are concerned, for the reasons stated, I am unable to commend them in these terms. But in any event, a favourable impression of the witnesses for the State is in itself not a reason for the rejection of the evidence of the appellants (See S v Singh 1975(1) SA 227 (N) 228 approved in S v Guess 1976(4) SA 715(A) 718H - 719A.) Taking their evidence into account, that of Rose Mahlanga and the probabilities and the defects in the State case, I have no doubt that the onus resting upon the respondent to prove that the confessions were freely made, was not discharged. The confessions ought not to have been admitted. It is therefore unnecessary to revert to the irregularity discussed at the start of this judgment, save to say again that the impression it must have created is most unfortunate.

The appeal is allowed: the conviction and sentence in the case of each appellant is set aside.

M E KUMLEBEN
JUDGE OF APPEAL

BOTHA JA
- CONCUR
HEFER JA