CASE NOS: 250/91 AND 16/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIMON NDLOVU 1ST APPELLANT

JACKIE MASHEGO 2ND APPELLANT

AND

THE STATE RESPONDENT

CORAM BOTHA, VIVIER et GOLDSTONE JJ.A.

DATE HEARD : 14 MAY 1993

DELIVERED : 24 MAY 1993

J U D G M E N T

GOLDSTONE JA:

G.L.R. ("the deceased") and T.C.C. ("T.") were both 18 years of age and close friends. They lived with their respective parents in Witbank. On 29 June 1990 they decided to purchase dagga. They walked to the Spar Supermarket where they met Simon Ndlovu who is the first appellant ("No 1"). It was the first time T. had met him. It would appear, however, that the deceased had had previous contact with him. After sharing a dagga cigarette with No 1, they arranged to meet him at the

same place on the following morning at 10:00. He would then sell to them R10 worth of dagga. That evening the deceased slept at T.'s home. On the Saturday morning they awoke later than planned and decided that the deceased alone would keep the appointment with No 1. They agreed to meet at the home of the deceased at 13:00, However, the deceased did not arrive at her home as arranged. At about 19:00 T. alerted the police and a search for the deceased was launched. Early the following morning the deceased's body was found. It had been concealed in tall grass in an open field between the Spar Supermarket and the R12 highway. She had been raped and severely assaulted. Whilst the medical evidence was not conclusive, the probable cause of death was strangulation.

No 1 and Jackie Mashego, who is the second appellant ("No 2"), were charged with the murder and rape of the deceased. They appeared before Esselen J

and two

assessors in the East and South-East Circuit Local Division. They were found guilty as charged. In respect of the murder both appellants were sentenced to death. For the rape they were each sentenced to imprisonment for 18 years. Both appellants now appeal to this Court against the convictions and sentences.

On the afternoon of 2 July 1990, No 1 was arrested by the police. Shortly after 15:00 on the following day he made a statement to a magistrate, Mrs M.J. Venter. He was recorded as having said the following:

> "Ek en ene 'Jackie' het 'n blanke meisie verkrag. Daarna het 'Jackie' haar verwurg. Beide van ons het die blanke meisie verkrag. Die meisie het my naam gevra en ek het haar my regte naam gesê. Ek het vir 'Jackie' gemaan om haar nie te verwurg nie, want die meisie is nie moeilik nie. Hy het gese die meisie ken my naam en sy sal 'n klagte maak. Dit is al. Ek wil niks verder se nie."

No 1 sought to attack the admissibility of the statement on the ground that it was not made freely and voluntarily. He stated, during a trial-within-a-trial, that after his arrest on 2 July 1990 he was repeatedly assaulted. His thumbs were tied together, he was punched and kicked and a tooth was knocked out. On the following day he was again assaulted, repeatedly and seriously. He was taken to a magistrate, He told her he had been assaulted and she declined to take a statement from him. Thereafter he was assaulted yet again. He was taken back to the magistrate and she recorded the statement. All the relevant police officers testified and denied that No 1 was assaulted. It was the evidence of the magistrate, Mrs Venter, however, that effectively destroyed the version of No 1. He was brought to her only once. He complained that he had been hurt by his handcuffs. She noticed scratch marks on his thumbs. She saw no other visible injuries. For good and

adequate reasons the

trial Court accepted the evidence of Mrs Venter and that of the police officers. In the result the version of No 1 was rejected as false and it was held that he had failed to discharge the burden of proving that the statement had not been made freely and voluntarily. No sound reason for interfering with that conclusion was suggested by counsel for No 1. I cannot find one.

On 4 July 1990, the two appellants separately pointed out spots in the field where the body of the deceased was found. During the course of the pointings out they each made confessions. Lieutenant D J Krugel recorded that No 1 pointed out a spot where "Ons haar opgeklim net". With regard to another spot he said "Ons het haar hier gebêre".

During the course of the pointing out by No 2, Lieutenant A Bezuidenhout recorded that he said:

"Ons het haar hier gegryp en toe verkrag. Simon het haar eerste verkrag. Toe ek haar

klaar verkrag het, het ons haar mond toegedruk

> en haar verwurg. Ons net haar opgetel en gaan weggooi."

The statements of both appellants were made in Zulu and they were interpreted to the respective police officers. There is no suggestion that either of the police officers understood Zulu. They recorded the Afrikaans translations of the interpreters, Detective Warrant Officer Kgotsoko and Detective Constable Mashile, respectively. Neither of the interpreters testified. The question which arises is whether it was proved by the State that either of the appellants told the interpreters what the respective police officers recorded. Put another way, was it proved that the interpreters had accurately interpreted the words of each of the appellants?

In R v Mutche 1946 A.D. 874 at 875, it was said by Davis AJA to be -

> "... axiomatic that what has been said through an interpreter to someone who does not understand the language interpreted is ordinarily merely 'hearsay', if deposed to only by that person."

Later, at 878, the learned Judge continued:

> "It seems to me clear that it is sufficient if B, the interpreter, deposes to the fact that he interpreted correctly all that was said to him by A, and if C, the person to whom he interpreted, then deposes to what B, the interpreter, said at the time. For here we have no hearsay. ... The interpreter deposes to a fact within his own knowledge, namely that he interpreted correctly; the person to whom he interpreted also deposes to a fact within his own knowledge, namely what the interpreter told him. The sum of the evidence of B and C, each speaking from his own knowledge, proves what was said by A. And this is the usual practice in South Africa."

That practice has continued to this day. In R v Mutche, the absence of the relevant evidence from the interpreter was held by this Court to be fatal to the admissibility of the words recorded by the person to whom the statement was being interpreted. Unless the statements in the present case can be admitted on some other basis, the failure to have called the interpreters renders them inadmissible.

Mr Malan, who appeared on behalf of the State both in the trial Court and before this Court, submitted that it was not open to the appellants to raise this objection because during the trial the correctness of the interpretation of the statements was not placed in issue. However, there was no obligation upon them to have done so. Their pleas of not guilty placed in issue every fact necessary for the State to prove in order to establish their guilt. In R v Kaplan 1942 OPD 232 at 237, Van den Heever J said:

> "If, to prove a relevant fact, evidence is tendered and received which is not receivable for that purpose, I cannot see how the omission on the part of the defence directly to impugn it can alter its nature."

See, too: R v K 1951(3) SA 180 (SWA) at 183B; R v C, 1955(1) SA 380(C) at 383 A - C. In any event, in a case such as the present, the appellants' counsel were entitled to assume that the State would call the two interpreters. Only when the State case was closed could they have known that they would not be called. At what stage prior thereto could counsel have been expected to have challenged the accuracy of the interpretation of the statements made by the appellants? This submission must be rejected.

Then it was submitted by Mr Malan that during the course of the trial it had been informally agreed between himself and counsel for the appellants that it

would not be necessary for the State to call either of the interpreters to testify. Counsel for No 1, who also appeared at the trial, informed us that he had no recollection of such an agreement. Counsel who appeared for No 2 at the trial did not appear for him in this Court. We were informed that he no longer practises as an advocate. Without in any way questioning the accuracy or correctness of Mr Malan's recollection, it would not be open to this Court to hold that the agreement contended for by Mr Malan had been concluded. The record is silent and there is no agreement between counsel who appear in this Court. In any event it is a wholesome rule of practice that admissions must be formally made and recorded in terms of s220 of the Criminal Procedure Act 51 of 1977: S v Maweke and Others 1971(2) SA 327 (A) at 329 E -F. In that judgment at 329 F - G, Miller AJA said:

> "Where such an admission has not been recorded,, it is questionable whether, in the absence of proper amendment or reconstruction of the record in the approved manner, the Court, on appeal, is entitled to take cognisance of the fact that an admission was made, even where the State and the appellants have agreed on that score, unless they have also agreed on the precise terms of the admission."

As I have already pointed out, in the present case there is no agreement as to whether any admission was made at all, let alone on the precise terms of the admission. This submission, therefore, must also fail.

Finally, on this issue, Mr Malan submitted that during his evidence during the trial-within-a-trial, No 2 made a direct or implied admission that he told the interpreter what appears in the statement as recorded by Lieutemant Bezuidenhout. (No such submission was or could successfully have been made with regard to the evidence of No 1). The passages in

the evidence of No 2

to which Mr Malan referred were those in which No 2 explained how he had been assaulted and told what spots to point out to Lieutenant Bezuidenhout and what to say concerning them. In particular he was told to say that he and No 1 raped and strangled the deceased. The following question and answer during cross-examination were relied on:

> "En het u toe vir die polisie verduidelik soos wat dit gebeur het? - Ek het gedoen soos hulle my voorgese het, want ekself het niks geweet nie, want ek het gesit en wag vir hulle."

In other words, the submission is that in effect No 2 stated that he informed the interpreter that he and No 1 had raped and strangled the deceased.

Even if this evidence raises a probability that No 2 told the interpreter that he and No 1 raped and strangled the deceased, in my opinion that cannot be found proven beyond a reasonable doubt. No 2 in no way

stated in terms what precisely he said to the interpreter. In this case it is of cardinal importance for the Court to know what presisely was said by the appellant. For all we know he may have attempted to place the blame on No 1 and to exculpate himself. Put briefly, the admission made many months later that he told the interpreter what he was told by the police to say is not a sufficient or cogent basis for holding, with the necessary degree of proof, what precisely he did say on that occasion to the interpreter.

As was pointed out during argument, the provisions of s3(l) of the Law of Evidence Amendment Act 45 of 1988 cannot assist the State in this case. The only relevant provision is s3(l)(c). Even if the circumstances and considerations referred to in sub-paragraphs (i) to (vii) thereof might have justified the admission of the hearsay evidence of Lieutenant Bezuidenhout (which is open to serious doubt), the

trial

judge would have been called upon to exercise a judicial discretion as to whether such evidence should have been admitted in the interests of justice. Because he was not asked to exercise such a discretion it is not open to this Court, on appeal, to exercise its own discretion.

It follows that the statements made by No 1 to Lieutenant Krugel and by No 2 to Lieutenant Bezuidenhout were not properly proved in evidence and must be disregarded.

Mr Malan properly conceded that there was no other admissible evidence against No 2. The statement of No 1 implicating No 2 is, of course, not admissible evidence against him. It follows that- the convictions and sentences in respect of No 2 must be set aside.

As far as No 1 is concerned there remains the statement he made to the magistrate. In it he admitted to having raped the deceased. Added to that

is the evidence of T. which established contact between No 1 and the

deceased on the day and in the vicinity of the place where she was raped and strangled. In my opinion, therefore, there was proof beyond a reasonable doubt that No 1 was guilty of rape and the appeal against that conviction must fail. There was no admissible evidence against No 1 justifying his conviction for the murder of the deceased. That conviction and the sentence therefor must be set aside.

It remains to deal with the sentence of 18 years' imprisonment imposed on No 1 for the rape. At the time of the offence he was about 26 years of age. He has no previous convictions. There was no proof as to the degree of force which was used by No 1 or of the injuries inflicted directly by him. On the other hand, an aggravating feature is that, on the admission of No 1, the rape was committed by two men. Their victim was a helpless young woman. In these circumstances I would have imposed a sentence of 12 years' imprisonment. The

disparity between that sentence and the one imposed by the trial Court is such as to justify interference by this Court.

The following order is made:

1. The convictions of the first appellant and the second appellant on the charge of murder and the sentences of death imposed therefor are set aside.

2. The appeal of the first appellant against the conviction for rape is dismissed. The sentence therefor is set aside and replaced by a sentence of 12 years' imprisonment.

3. The conviction of the second appellant on the

charge of rape and the sentence of 18 years' imprisonment imposed therefor are set aside.

JUDGE OF APPEAL

BOTHA JA)
VIVIER JA) CONCUR