CASE NO 78/91
H v N

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DAVID MOKOENA APPELLANT

and

THE STATE RESPONDENT

CORAM: BOTHA, KUMLEBEN JJA, et
HOWIE AJA

DATE HEARD: 6 MAY 1993

DATE DELIVERED: 25 MAY 1993

J U D G M E N T

KUMLEBEN, JA:

The appellant stood trial in the East and South Eastern Circuit Local Division of the Supreme Court on seven counts. Three were murder charges, the details of

which are as follows:

> Count 1: The murder of Anna Mashiane ("Anna") on or about 26 September 1987 at or near the farm Keeromplaas, district Middelburg.

Count 2: The murder of Linah Khaliphayo ("Linah") during the period May - July 1988 at or near the farm Uitkyk, district Middelburg. Count 4: The murder of Sophia Simelane ("Sophia") on or about 4 April 1989 also at or near the farm uitkyk. The appellant pleaded not guilty on all counts. The court (Curlewis J sitting with two assessors) found the appellant guilty on all of them as charged. The death penalty was imposed in respect of each of the convictions of murder. They, and the consequent sentences, are before us on appeal in terms of s 316A(1) of the Criminal Procedure Act, no 51 of 1977 (the

"Act"). I ought to mention that the other counts in the indictment were two of robbery in conjunction with the alleged murders of Linah and Sophia respectively (counts 3 and 5) and two other counts, one of robbery and one of housebreaking with intent to steal and theft (counts 6 and 7 respectively) committed on 11 December 1989 on the farm Wonderhoek, district Middelburg.

The key witness for the State was Liesbet Majona ("Liesbet"). At all relevant times she and the appellant were living together as husband and wife. Her testimony, which to an extent incriminated the appellant on each charge of murder, included evidence of certain items of clothing and other things brought to their home by the appellant from time to time; statements made to her by the appellant; and conduct on his part that she observed. The other lay State witnesses were called primarily to relate the movements of the three victims

before each was killed and to identify certain of their possessions.

The court approached the evidence of Liesbet with caution and found her to be a satisfactory witness. It was mindful of the fact that she perhaps knew more about the appellant's possible involvement in the offences than she was prepared to admit. She was, for instance, probably aware of the fact that certain of the articles brought to their home had been illicitly acquired by the appellant. But it is as probable that she was not in a position to challenge him in this regard or to dissociate herself from conduct on his part which aroused suspicion. Notwithstanding this apparent defect in her evidence, I do not consider that the trial court erred in accepting it. The court likewise found the evidence of the State to be acceptable with one qualification as regards the lay witnesses, though not a

material one: In many instances a specific date of an occurrence was put to a witness by the prosecutor. It was then affirmed when in the nature of things such detailed recollection, and perhaps the identification of days with reference to the calendar, could hardly have been expected of the witnesses concerned. In the circumstances when dealing with their evidence I shall omit any reference to a particular date which was, as it were, put in the mouth of the witness.

The appellant gave evidence during the course of a trial-within-a-trial to decide on the admissibility of a statement made by him (to which I shall in due course refer) and on the merits in rebuttal of the State case. On both occasions he proved to be thoroughly untruthful. Since this was not disputed on appeal there is no need to refer to any of the many examples of his mendacity.

The evidence admitted or tendered by the State on each count can be thus summarized.

As regards count 1, it was formally admitted that Anna died from an unknown cause on 26 September 1987. For a period before that date she had been living on the same farm as Liesbet and the appellant, where the latter was employed. Anna was confronted by the farmer's wife about some peaches which were said to have been stolen. Her explanation was that the appellant had given them to her. When the appellant learnt of this, he told Liesbet that "at the place where he meets up with Anna no grass will grow." (Liesbet declined to explain this figure of speech but it clearly had a threatening and sinister meaning.) One afternoon Anna left her home telling her younger sister, the witness Rose Mashiane, that she was going on a visit to some plots in the area. she had two blankets in her possession when she left. She was not

seen alive again. Liesbet said that the appellant came home one night bringing with him two blankets, a fowl and a crate containing eggs. His clothes were covered with blood. At his request she boiled some water with which he cleaned his blood-stained knife. The blood, according to him, came from a beast that had been slaughtered and the blankets he said he had bought at a shop. One of them (exhibit 1) was convincingly identified by Rose Mashiane as one that Anna had with her when she left home. This blanket remained at the appellant's home and was handed to the investigating officer, Detective Sergeant Mahole. Rose Mashiane confirmed that Anna's body was later found lying under some trees near a footpath on the adjoining farm and she was able to identify it.

Turning to count 2, Linah's daughter, Susan Nkosi, remembers an occasion when Linah left home with some aprons she had made. She planned to sell them on the

farm Uitkyk. She failed to return. Susan subsequently identified the aprons, a purple purse, a black bag and a carry bag as belonging to her mother. These aprons and the other things were brought home by the appellant. He told Liesbet that he had bought the aprons for her. At some later stage she was walking in the veld with a friend on Uitkyk when they came upon the body of an unknown woman lying in a river. She reported this to the appellant and offered to take him there. He refused to accompany her but the next morning suggested that she should report the matter. She told her employer who summoned the police. The defence admitted that Linah died during the period May 1988 to July 1988; that asphyxiation, due to a ligature being applied to her neck, caused her death. The post-mortem examination conducted on 4 August 1988 confirmed that the body had lain in water before it was found.

It was formally admitted that Sophia, a seventeen year old girl, died on 7 April 1989 also as a result of strangulation. Her naked body was found in a muddy area on the farm Uitkyk. There were signs of a struggle at the scene and indications that the person or body had been dragged to where it was discovered. At the pre-trial proceedings in the magistrate's court in terms of s 119 of the Act the appellant pleaded guilty to this charge. In answer to questions pursuant to this plea he said:

> "Wat ek kan onthou is dat ek en Sophia wel in 'n bakleiery betrokke geraak het. Sy het my eers met 'n vuis geslaan. Ek het haar toe gepooitjie. Ek het ook neergeval en sy het toe bo-op my kom sit. Ons het toe gerol. Ek het toe bo-op haar gesit en haar verwurg. Sy het toe op die toneel beswyk."

In reply to the question whether he had intended to kill her he said:

> "Nee dit was nie my opset nie. Ek wou haar net so bietjie te lyf gegaan het sodat sy my more kon respekteer."

(In the light of these answers a plea of not guilty was entered.)

On what must have been the same morning Liesbet happened to see the appellant in the area where Sophia's body was subsequently found. The appellant returned home at about noon on that day although he ought to have remained at work. He had fresh scratch marks in the region of his throat. His explanation was that they arose during the course of a fight at a gambling school. She also noticed that there was mud on his knees and elbows and and some signs of blood. He produced R 20 and a watch. During the afternoon he left home and returned at night with a pair of canvas shoes. These, the watch and the shoes, were found at the appellant's home and identified as belonging to Sophia.

As I have said, the disputed issue resulting in a trial-within-a-trial was whether a statement written out

by the appellant after his arrest ought to have been received in evidence. This statement, a lengthy one, is disjointed and rambling. As regards count 1, the death of Anna, it is exculpatory. In it the appellant states that Liesbet suspected Anna of having a relationship with him, that she provoked Anna into fighting with her and that Liesbet fatally stabbed Anna in his presence. As regards count 2, though his statement does not refer to Linah by name, he says sufficient to make it clear that she is the person to whom he is referring. Liesbet, according to him, encouraged him to rob Linah of the clothing she had for sale. He killed her by felling her with an axe and at night threw her body into a river. He prefaced this explanation of how she met her death by stating:

> "Ek het dit gedoen, maar nie geweet wat ek doen. Ek vra nog my daaroor maar kan nie sien wat ek gedoen het nie."

This statement was written out by the appellant and handed to the investigating officer, Detective Sergeant Mahole, and was therefore made to a "peace officer" as defined in s 1 of the Act. Thus, if the statement amounts to a confession within the meaning of proviso (a) to s 217 (1), it is inadmissible since it was not confirmed before a magistrate or justice of the peace.

Whatever the meaning the word "confession" in general usage may bear, a statement to be a confession in terms of this section must amount to "an unequivocal acknowledgment of ... guilt, the equivalent of a plea of guilty before a court of law." (R v Becker 1929 A.D 167 at 171.) In S v Yende 1987(3) S.A 367 this court, after reviewing certain aspects of the application of this test, at 375 B-E said:

"Ten einde te besluit of dit op 'n bekentenis neerkom, moet daar na die appellant se verklaring in die geheel gekyk word. (S v Msweli (supra op 1163F); S v Motlouncr 1970 (3)

> SA 547(T) op 549B; S v Mhlangu 1972 (3) 8A 679(N) op 682 A-B: S v Potgieter 1983 (4) SA 270 (N) op 274A.) In die verband, moet daar nie net gelet word op wat in die verklaring staan nie, maar ook wat noodwendig daardeur geimpliseer word. (Vgl S v Msweli (supra op 1164B); S v Mbatha 1985 (2) SA 26 (D) op 29F.) Indien die inhoud van 'n verklaring nie uitdruklik al die elemente van die misdaad erken of alle verweersgronde uitsluit nie, maar dit by noodwendige implikasie wel doen, kom die verklaring op 'n bekentenis neer. Of 'n verklaring, hetsy alleenstaande of tesame met sodanige omringende omstandighede wat regtens in aanmerking geneem kan word, vatbaar is vir 'n noodwendige implikasie sal bepaal moet word volgens die meriete van elke afsonderlike geval. Bestaan daar twyfel in die verband is die verklaring nie 'n bekentenis nie want uit die aard van die saak bevat dit dan nie 'n onomwonde erkenning van skuld nie. (Kyk Schmidt (op cit 526).)"

In applying this test to the statement in the present case, the qualification or explanation to which I have referred is significant. The most reasonable and acceptable meaning to attach to it is that the appellant acted unconsciously or involuntarily and is therefore not criminally accountable for his conduct resulting in

the death of Linah. At the very least one must entertain a doubt whether his statement is a "confession" as envisaged by s 217(1) (a) and it then follows on the authority cited that the proviso is inapplicable. In the course of his judgment in Yende's case Smalberger JA held at 374 E - F that in deciding whether a statement amounts to a confession the test is an objective one. Nevertheless the intention of the person making the statement was said to be an element of the surrounding circumstances which can be taken into account:

> "Soos Schmidt ook verder daarop wys, beteken die toepassing van 'n objektiewe maatstaf egter nie dat alle subjektiewe faktore buite rekening gelaat moet word nie. 'n Verklaarder se gemoedstoestand of bedoeling sal soms in aanmerking geneem moet word as een van die omringende omstandighede waarvolgens die objektiewe betekenis van sy verklaring vasgestel kan word."

In this regard it is noteworthy that his statement in reference to count 1 is wholly exulpatory; that he does

not confess his guilt on count 4 although he subsequently pleaded guilty to this charge; and that in contrast he pleaded not guilty on count 2 which is not what one might have expected if his statement was intended to amount to an admission of guilt in respect of this count. These are further considerations which lend some support - I put it no higher than that - to the inference that the statement relating to the death of Linah was not an unequivocal admission of guilt. The court a quo was therefore correct in admitting the statement.

Mr Snyman, who appeared for the appellant, argued that it had not been proved that the bodies found were those of the persons named in the indictment or that the appellant was responsible for their deaths. This submission is without merit. Anna's body was identified

by her sister Rose at the place where it lay and it was formally admitted that she is the person to whom the indictment refers. The evidence of the appellant in his statement that he killed the person who was selling aprons and the post-mortem finding that the body had been lying in water establishes beyond any doubt that Linah was the person to whom he was referring and on whom the post-mortem examination was conducted. In fact it was formally admitted that Linah is the person named in the indictment and the subject of the post-mortem examination. There is ample evidence proving, albeit circumstantially, that it was the appellant who was responsible for the death of Anna and Linah. As regards count 4, the s 119 statement conclusively proved his involvement and the identity of this deceased. The appellant did not dispute the recording of the answers he gave in these proceedings, which have been quoted, save to deny that he said: "Sy het toe op die toneel

beswyk." According to him, what he said - and what ought to have been interpreted and recorded - was that she was still breathing when he left her. However, the interpreter concerned was called and said that he had accurately translated what was said at the s 119 proceedings.

In his evidence the appellant gave a more detailed -and in certain respects contradictory - account of his encounter with Sophia. He said that they were lovers and that they happened to meet on the day in question. She grabbed him and accused him of giving all his money to Liesbet. They grappled and fell to the ground. She started to throttle him. He gradually gained the upper hand and climbed on top of her. He in turn throttled her, but desisted and left her when she was still breathing. That morning he had drunk two litres of beer. When he fought with her, he said, he had no

intention of killing her. These allegations stand uncontradicted by any direct evidence. Thus, although his testimony in the witness box on two occasions, and certain aspects of his statement, demonstrated his manifest untruthfulness, one must nevertheless consider whether this account of what took place could reasonably possibly be true. In my view it cannot satisfy this test. Under cross-examination his evidence on being allegedly under the influence of liquor proved contradictory and generally lamentable. Nor can his evidence be accepted that he was provoked and that Sophia was the aggressor. It is obvious from a photograph of her body that she could never have been a match for him physically. This assertion that she had provoked him is inconsistent with the answer given in the s 119 proceedings in which he said that his reason for assaulting her was to make her more respectful towards him. In all probability he sustained the

scratch marks on his throat when he sat, or perhaps lay, upon her. He furnishes, one notes, no explanation for the fact that the body was found naked at the spot to which it had been dragged, or for his muddy condition when he returned home with the R 20 and the watch. In these circumstances one has no hesitation in rejecting his account of what took place. The inescapable inference is that he intended to kill her.

Similarly, as regards the other two counts an intention to kill was satisfactorily proved. In the case of Anna, it is unlikely that the motive was robbery bearing in mind that only one of the blankets brought home was identified as belonging to her. But his stated intention of killing her because she had implicated him in the theft of the peaches must be taken at face value and was no doubt the motive or main motive. As regards count 2, the inescapable inference is that Linah was

killed in the course of robbing her.

For these reasons I am satified that the appellant was correctly convicted on the murder charges.

On the question of sentence this court is enjoined to consider, taking the aggravating and any mitigatory factors into account, whether the death sentence is the only proper one. The appellant did not give evidence in extenuation and his counsel was hard pressed to put forward any mitigating considerations. He simply referred to the age of the appellant (48 years) and to the fact that he had received no formal schooling. The aggravating ones are self-evident and overwhelming. His previous convictions confirm that he is a hardened criminal. They include - during the period from 1975 to 1984 - three of theft, four of housebreaking with intent to steal and theft, two of rape and one of robbery (and

one deduces that the rape and robbery were committed conjunctively). The attacks were brutally carried out on defenceless women with a self-serving motive. With this criminal record the prospects of his rehabilitation during a lengthy period of imprisonment are meagre. This consideration is in any event outweighed by the retributive element of punishment which in this case calls for the confirmation of the death penalties imposed.

The appeal is dismissed and the sentences on counts 1, 2 and 4 are confirmed.

KUMLEBEN JA

BOTHA JA )

STEM SAAM

HOWIE AJA )