Case No 154/93, 381/93

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BERNARD MTWANA LATHA	First Appellant
MBUSO SADAM SIBISI	Second Appellant
and	
THE STATE	Respondent

Coram: NESTADT, F H GROSSKOPF et NIENADER JJA

Heard:	Delivered:
25 February 1994	24 March 1994.

J U D G M E N T

F H GROSSKOPF JA:

The two appellants were convicted of murder, robbery with aggravating circumstances and rape in the Durban and Coast Local Division by Combrinck J sitting with two assessors. The appellants were both sentenced to death on the murder count and to twelve and eighteen years imprisonment respectively on the robbery and rape counts. The appellants appeal against their convictions and sentences on all three counts. On the counts other than the murder count they appeal with leave of the Court a quo.

There was a further suspect, one Mzo Nxumalo, ("Mzo"), who is alleged to have played a major role in the commission of these crimes. Forensic tests showed that: he was present at the scene of the crime, but he died before the trial commenced.

The deceased was a 38 year old housewife who lived with her husband and three daughters in a house in Pinetown. During the morning of 12 February 1992 the deceased was alone at the house. The evidence clearly shows that she was attacked by somebody armed with a firearm. It is common cause that she died as a result of a gunshot wound of the abdomen. Apart from the fatal wound the deceased sustained another injury which was consistent with a bullet wound. It perforated the deceased's scalp in two places but did not penetrate the skull. There was also a superficial laceration of her right arm which could have been caused by a glancing bullet. The deceased's hat was found next to the laundry sink outside the kitchen door. In the hat were two holes which coincided with the two perforations found in the deceased's scalp. There were other clear indications as well that a shot or shots had been fired at the deceased while she was still outside the house. It appears that she then entered the house through the kitchen. Her

assailants thereafter raped her, ransacked the house and stole a radio, two wristwatches and a few other articles. The deceased's body was later found inside the house in the passage next to the kitchen.

The main issue in the case was the identity of the deceased's assailants. Each of the appellants made a confession in which he implicated himself in the commission of the crimes in question. The State also relied on certain pointings out by both appellants at the scene of the crime. The admissibility of these confessions and pointings out was contested by the appellants in the Court a quo on the basis that they were not made freely and voluntarily. A trial within the trial was held to determine this aspect of the case. At the conclusion thereof the learned trial judge ruled that the confessions by both appellants as well as the pointing out by the first: appellant were admissible. The pointing out by the second appellant on the other hand was held to be inadmissible because the Court a quo was

 not satisfied that the constable who acted as interpreter on that occasion had sufficient knowledge of the languages used to give a proper interpretation.

The appellants testified in the trial within the trial, but they both elected not to give evidence in the main trial. The only witness who testified on behalf of the defence was the investigating officer, and his evidence was of a purely formal nature.

The Court a quo considered the evidence, other than the confessions by the two appellants and the pointing out by the first appellant, in order to determine whether the requirements of s 209 of Act 51 of 1977 had been met. The Court found that there was conclusive evidence aliunde that the crimes in question had actually been committed, and that there was also cogent evidence confirming the confessions in material respects. In my view these findings cannot be controverted. The first appellant in fact accepted that the commission of these crimes had been properly proved

 by

evidence aliunde. Although the second appellant did not make any concession in this regard, he did not seriously contest these findings. In my view there is indeed no basis for challenging these findings. The crucial question that has to be decided, therefore, is whether the confessions and the first appellant's pointing out were properly admitted by the Court a quo.

The confessions of both appellants were made to police officers and the onus was accordingly on the State to prove beyond reasonable doubt that such confessions were freely and voluntarily made by the appellants in their sound and sober senses and without having been unduly influenced thereto (s 217(1) of Act 51 of 1977). The same principle applies to the incriminating statements made to the police officer by the first appellant in the course of his pointing out. The State also had to show that the pointing out as such was freely and voluntarily made. (S v Sheehama 1991(2) SA 860 (A) at 878C-879I, 880H-881G.)

The first appellant made his confession to Colonel Roux of the murder and robbery branch of the Durban police station. The investigating officer in this case, Warrant Officer Prinsloo, was a member of that branch. The second appellant's confession was taken by Captain van der Mescht of the same murder and robbery branch. The sergeant who interpreted for van der Mescht was also a member of that branch. Counsel for appellants complained that members of the murder and robbery branch were used to record the confessions. They submitted that where a magistrate was readily available it was undesirable to take the appellants to police officers to make their confession, particularly where those police officers were members of the same unit which was investigating the case. This Court has held in a number of cases that although it would not be irregular for a police officer attached to the particular unit which investigated the matter to take a confession, it would be preferable in such a case to take the suspect to a

magistrate or a police officer who was a member of

another unit. (S v Mdluli and Others 1972(2) SA 839(A) at 840H-841D; S v Mbatha en Andere 1987(2) SA 272(A) at 279a-280b; S v Mahlabane 1990(2) SACR 558(A) at 561h-563a.)

In dealing with this problem the Court has often stressed that it is not a question of impugning in any way the integrity of responsible police officers in carrying out their duties as justices of the peace. It has been pointed out, however, that the undesirable practice of taking an accused for a confession to a police officer who is, or who is perceived to be, part of the investigating team, "constitutes fertile earth for an accused in which to plant the seed of suspicion", or "may plant suspicion in the mind of the accused". (S v Dhlamini and Another 1971(1) SA 807(A) at 815A-C; Mdluli's case, supra, at 841 A-B.) This in turn often leads to a protracted inner trial to determine the issue of admissibility.

The evidence of the investigating officer in this case shows that he unfortunately failed to heed the repeated judicial remarks in this regard. In the result he burdened the State with the onus of proving that the confessions were freely and voluntarily made, whereas the State could otherwise have relied on the presumption provided for in s 217(1)(b) of Act 51 of 1977.

A redeeming feature is that it was apparently not envisaged by the police at the outset that the appellants were going to make full confessions. As soon as it became evident in the case of each appellant that he was incriminating himself, the police officer taking the statement immediately warned the appellant and gave him the opportunity to proceed before a magistrate.

I shall deal firstly with the circumstances surrounding the first appellant's confession. Although Colonel Roux was the commanding officer of the murder and robbery branch he was not part of the investigating team. The sergeant who acted as interpreter was similarly not

part of the investigating team. He was on special duty

at the time and only subsequently joined that particular unit. Roux testified that he was asked by Prinsloo to take an ordinary statement and not a confession. According to Roux only those suspects who wished to make a confession were taken to a magistrate.

The veracity of Roux's evidence is borne out by the wording of the printed form which he used, and by his subsequent conduct when the first appellant proceeded to incriminate himself. The particular form which Roux utilized was certainly not the usual form for taking down a confession. The form was headed "statement by suspect". At the end thereof it made provision for the signature of the investigating officer as the person who took the statement. The crimes which the first appellant was alleged to have committed were set forth in an annexure to this so-called "warning statement". The printed form required the interrogator to inform the suspect that he may prove his innocence by answering the

questions put to him. One would hardly have expected such an instruction in a form making provision for a confession. When reading the actual statement of the first appellant it will be observed that Roux immediately stopped him when he started to implicate himself in the commission of the crimes. It appears that Roux then warned the first appellant that his statement could amount to a confession and that Roux further informed him that he was not obliged to continue, but if he wished to do so he could proceed before a magistrate. The first appellant replied that he wanted to tell Roux what had happened.

The pointing out by the first appellant was done in the presence of Captain Prinsloo of the child protection unit who had nothing to do with the investigation of the case.

The second appellant's confession was made to a police officer in similar circumstances. Captain van der Mescht testified that he was a member of the murder and

robbery branch, but that he had his own unit while the investigating officer was a member of a different unit. Van der Mescht made it quite clear that he was not involved in any way in the investigation of the case. The same applies to the sergeant who acted as interpreter for van der Mescht. Van der Mescht testified that he was asked by Prinsloo to take down a so-called "onderhoudsverklaring" of the second appellant. He then used the same printed form as Roux, and the observations which I have made with regard to that form apply equally to the second appellant's confession. When the second appellant started to incriminate himself van der Mescht, like Roux, informed him that his statement might amount to a confession. Van der Mescht warned him that he was not obliged to go any further, but if he preferred to do so, he could proceed before a magistrate. The second appellant intimated that he understood what had been explained to him, but that he wished to continue with his statement before Captain van der Mescht.

I find it unlikely that both police officers would have used the wrong form if the appellants had been brought to them for confessions. It is even more improbable in my view that both police officers would have added the piece about warning the particular appellant midway through his statement if such warning had not in fact taken place. In all the circumstances I can find nothing sinister in the way in which these confessions were taken by police officers of the murder and robbery branch. There is no justification in my view for suggesting that it was done in this manner to cover up alleged police assaults on the appellants. But seeing that these confessions were taken by police officers of the murder and robbery branch, though not of the same unit which investigated the matter, the trial Court looked more closely at the evidence to establish whether the confessions were indeed freely and voluntarily made. The judgment of the Court a quo confirms that the

question of admissibility was approached with added caution for that very reason.

At the conclusion of the evidence in the trial within the trial, counsel then appearing for the first appellant informed the Court a quo that he did not wish to address the Court on the admissibility issue - not surprisingly if one considers the extremely poor quality of the first appellant's testimony. According to his evidence he was assaulted and tortured by the police under Sergeant Fitchat after Fitchat had arrested him during the night of 24 February 1992. He was taken to the office of Colonel Roux the next day to make a statement, but nobody informed him of the alleged charges against him. He told Roux that he was not willing to make a statement, whereupon Sergeant Fitchat was called in. Fitchat removed him from Roux's office and assaulted him, causing an injury to his finger. On his return to Roux's office the first appellant still refused to make a statement. Roux then took out some paper and started

writing something down without asking the first appellant any questions. When Roux had finished writing he asked the first appellant to place his thumbprint on the paper, which he did. This version was entirely different from the one which his counsel had put to the various State witnesses during cross-examination, namely that the interpreter read to him what was allegedly contained in the second appellant's statement, and that he was obliged to repeat the same story to Colonel Roux. On both these versions the conduct of the police was completely irrational as well as grossly improper. It is hard to believe that the police would have used such methods to obtain the first appellant's confession. The first appellant's evidence relating to the pointing out was equally unconvincing, all the more so because he kept on changing his version.

The first appellant's statement was dated 25 February 1992 while the pointing out was done during the morning of 26 February 1992. That same afternoon the

first appellant was examined by a medical practitioner in

the office of the district surgeon at Durban. The doctor found no sign of any recent injuries. The first appellant did not draw the doctor's attention to the injury to his finger allegedly sustained during Fitchat's assault the previous day. He conceded that he should have complained to the doctor, but that he had failed to do so. This failure on the part of the first appellant seriously reflects on his credibility, more particularly with regard to the alleged assault.

The second appellant's evidence is that he was assaulted and tortured over a period of many hours after he had been arrested by Fitchat during the afternoon of 24 February 1992. One of the policemen allegedly hit him on the mouth causing a bleeding cut to the left side of his upper lip. The next morning Fitchat told him that he must make a statement, and he was then taken to Captain van der Mescht. The second appellant however refused to make a statement, whereupon van der Mescht allegedly

threw his pen down and told Fitchat to hit him.

According to the second appellant Fitchat took him down the passage, bumped him against the wall and took him back to van der Mescht. By then the second appellant had decided to make up a story. On his evidence van der Mescht did not ask him any of the preliminary questions set forth in the printed form, but merely told him that he was going to make a statement. The police had previously told him what the charges against him were and in what circumstances the crimes had been committed, but nobody had told him what to say. His evidence is that the actual contents of the statement were all lies made up by him as he went along.

During the cross-examination of the second appellant the Court a quo ruled that in view of the second appellant's defence that the contents of the statement were false, it was permissible for the State to cross-examine him on what was contained therein. Counsel for the second appellant submitted that the court a quo

misdirected itself in allowing such cross-examination.

It has been held by this Court in S v Khuzwayo 1990 (1) SACR 365(A) at 371g-374d that where an accused alleged that the contents of a confession were false and that he had been told by the police what to say in the confession, the State prosecutor was entitled to cross-examine him on the contents of the confession. (See also S v Lebone 1965(2) SA 837(A) at 841H-842C; S v Talane 1986(3) SA 196(A) at 205E-206B; S v Potwana and Others 1994(1) SACR 159(A) at 165h-166d.) In my opinion the same principle applies in the present case where the second appellant alleged that the contents of his statement were false inasmuch as it was all lies made up by him. As was pointed out in Lebone's case, supra, at 842B-C, the cross-examination of an accused is allowed in such a case not to prove that the contents of the statement are true, but in order to test the credibility of the accused in respect of the issues raised by him in the trial within a trial. In my judgment there was

accordingly no misdirection on the part of the learned trial judge in allowing the State to cross-examine the second appellant on the contents of his statement.

The Court a quo found that it was impossible for the second appellant to have invented the detailed story contained in his statement. The Court a quo observed that the second appellant could give no reasonable explanation as to why it was necessary falsely to implicate the first appellant in this made-up story. The Court a quo further found that the second appellant's evidence that he was assaulted on the mouth on the evening of 24 February 1992 was manifestly false. He was examined by the same doctor as the first appellant, also on the afternoon of 26 February 1992. The doctor found no sign of any recent injury and he was adamant that the scar on the second appellant's upper lip was not a recent wound at the time. A number of photographs of the second appellant had been taken immediately prior to his

pointing out. on 25 February 1992. These photographs do not show any such injury.

The trial Court considered all the evidence which was given in the trial within a trial and came to the conclusion that the two appellants were not credible witnesses. The evidence of both the appellants was rejected as false on substantial grounds. The trial Court had no hesitation on the other hand in accepting the evidence of the State witnesses "who had made a good impression on us and who gave their evidence in a clear and forthright manner." In S v Francis 1991(1) SACR 198(A) at 204a-e this Court once again emphasized that the powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusions, including its acceptance or rejection of a witness' evidence are presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the

trial Court was wrong in either accepting or rejecting the witness' evidence. "Bearing in mind the advantages which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony." (204e.) Counsel for the appellants were unable to convince us that the Court a quo was wrong in its evaluation of the witnesses, its acceptance of the evidence of the State witnesses and its rejection of the appellants' evidence in the trial within the trial. In my judgment the Court a guo was therefore correct in holding that the confessions of the appellants as well as the pointing out by the first appellant and his accompanying statements were admissible.

Counsel for the appellants submitted however that their confessions did not go far enough to justify their convictions on the murder count. 1 do not agree. The first appellant said in his confession that he, the second appellant, Mzo and another unidentified man went

the deceased's house. They found her outside the house at the washing line. The first appellant knew at that stage that the second appellant was armed with a firearm. He admitted that he himself was armed with a screwdriver. The second appellant demanded money from the deceased. When she replied that she had no money the second appellant fired a shot at her. She ran into the house and they followed her. The first appellant admitted that he raped her and that he took a radio from the lounge. At one stage he saw Mzo holding the firearm. While still in the house he heard a shot. At the time of the pointing out he told the police officer that he actually heard two shots. He went to look for his three companions and found them standing next to the deceased. He then saw that she had been shot, but he could not say who had done it.

The second appellant gave a somewhat different version in his confession. According to him he and the first appellant had decided to break into the deceased

house. Mzo accompanied them. Before they ' reached the

house Mzo produced a firearm and said that "if anyone inside this house which we are about to break into becomes stubborn he, Mzo, will shoot them". He admitted that he raped the deceased and that he took a radio. He left Mzo inside the house with the deceased, who was then still alive. While he and the first appellant were already outside he heard two shots from inside the house.

On the first appellant's version as set out in his confession he was a party to a common purpose to commit certain crimes. He knew from the outset that one of his companions was armed with a firearm. Thereafter he witnessed this person actually using the firearm to shoot at the deceased. Despite that knowledge he associated himself actively with the criminal conduct of the others. At the same time he personally committed rape and robbery. He clearly foresaw the possibility of the deceased being killed in the process. The necessary

intent to kill in the form of dolus eventualis was

therefore present in his case. I am therefore satisfied that he was a party to a common purpose to kill the deceased.

The same principle applies to the second appellant who was a party to a common purpose arising from prior agreement to commit housebreaking with intent to commit other crimes. Before he and his companions reached the house of the deceased Mzo made it quite clear to them that he was in possession of a firearm and that he intended using it in the event of any resistance by the occupants of the house. Notwithstanding that knowledge the second appellant associated himself actively with the criminal conduct of the others, while he personally committed rape and robbery. In those circumstances he too had the requisite mens rea in the form of dolus eventualis to kill the deceased. In my judgment he too was a party to a common purpose to kill the deceased. The fact that he was already outside the

house and busy running away when the shots were fired, does not show that he intended to dissociate himself from the existing common purpose. The only reason why he ran away was because one of his companions had sounded a warning to the effect that he should make his escape.

On the facts admitted in their respective confessions the appellants are in my judgment guilty of the murder. In this regard it should also be borne in mind that the appellants chose not to give evidence in the main trial. Their failure to testify tended to strengthen the State case.

There remains the question of sentence. As I have said, the appellants were both sentenced to death on the murder count. This Court must now consider, having due regard to the mitigating and aggravating factors as well as the main objects of punishment, whether the death sentence is the only proper sentence in respect of both appellants.

The first appellant was 27 years of age, while the second appellant was 25 years old. The first appellant had a number of previous convictions, including one for culpable homicide for which he received a suspended sentence of imprisonment in 1983, and one for assault with intent to do grievous bodily harm where a fine and a suspended sentence were imposed in 1984. He did, however, subsequently serve three terms of imprisonment for housebreaking with intent to steal and theft. Although the first appellant appears to be a recidivist one cannot rule out the possibility of rehabilitation in his case. The chances of rehabilitation may be better in the case of the second appellant whose previous convictions are less serious and less frequent than those of the first appellant.

One should not lose sight of the fact that there was no evidence to show that either of the two appellants had a hand in the actual killing of the deceased. They were both convicted of murder on the

basis of common purpose. But that does not necessarily mean that the death sentence should not be imposed. There are serious aggravating features which ought to be considered. The evidence shows that it was a premeditated attack on a defenceless woman in the privacy of her own home by armed intruders with greed as their initial motive. They started off by shooting her in the head without any warning. This was followed by a cruel and sustained attack on a women who had been seriously injured. In the end there was the senseless killing of the deceased, probably executed with the sole object of preventing identification.

This Court has expressed itself in a number of cases on such attacks on defenceless victims in their own homes, and has held that the interests of society demand that deterrence and retribution may well outweigh considerations of reformation in such cases. (s v Khiba 1993(2) SACR 1(A) at 4c-5b, and cases there cited.)

In view of these considerations I am of the opinion that the death sentence is the only proper sentence for the murder of the deceased in the instant case. This applies to both appellants.

The sentences of imprisonment imposed by the Court a quo in respect of the robbery and rape counts were not ordered to run concurrently. This would result in the appellants having been sentenced to a total period of thirty years imprisonment for those two crimes. It seems to me that such a sentence is so harsh that interference by this Court is justified. In my judgment these sentences should be ordered to run concurrently.

The appeals of both appellants against their convictions and sentences are accordingly dismissed, save that it is ordered that their sentences of twelve

years imprisonment (in respect of the robbery) and

eighteen years imprisonment (in respect of the rape) are to run concurrently.

F H GROSSKOPF JA

NESTADT JA)
NIENABER JA) Concur.