464/92, 465/92

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

| | |
|---|---|
| HERBERT SIPHO MAHALA | 1st Appellant |
| XOLANI MAXWELL MAHALA | 2nd Appellant |
| versus | |
| THE STATE | Respondent |

CORAM: JOUBERT, E.M. GROSSKOPF, NESTADT, F.H. GROSSKOPF JJA et VAN COLLER AJA

Date of Hearing: 7 March 1994

Date of Judgment: 29 March 1994

J U D G M E N T

JOUBERT JA:

The two appellants were charged before ZIETSMAN JP and two assessors in the Eastern Cape Division, sitting in Grahamstown, with five counts of offences allegedly committed by them in the district of Stutterheim in South Africa, within the jurisdiction of the trial Court. Count 3 related to murder. I shall refer to appellants 1 and 2 as accused 1 and 2 respectively. Each of them was found guilty as charged. On the murder charge each of them was sentenced to death, the trial Court having found that the death sentences were in the circumstances the only proper sentences to be imposed. The accused exercised in terms of sec 316A of Act 51 of 1977 their automatic right of appeal to this Court against their convictions and death sentences in regard to the murder charge. They obtained leave from the Court a quo to appeal to this Court in respect of their convictions on

all other counts.

Special Plea

When the accused were called upon to plead to the charges in the Court a quo they raised a special plea of lack of jurisdiction in terms of sec 106(1)(f) of Act 51 of 1977, viz. that in breach of international law they had been unlawfully arrested in the Republic of the Ciskei and/or unlawfully removed from the Ciskei without their consent and brought to South Africa. The onus was on the State to prove that the trial Court had jurisdiction to try them. After hearing evidence and argument the Court a quo dismissed the special plea. Its decision on the jurisdiction issue has been reported as S v. Mahala and Another 1992(2) SACR 305(E)

I shall first deal with the relevant facts surrounding the arrests of the accused who lived at Mlungisi location near Stutterheim in South Africa. Geographically the Ciskei used to be an integral part of South Africa until it became a sovereign independent state on 4 December 1981 by

virtue of the provisions of the Status of Ciskei Act 110 of 1981. Unfortunately the border between the Ciskei and South Africa is not clearly demarcated in situ. Nor are there border posts between the two countries. While King William's Town is situated in South Africa it is surrounded by Ciskeian territory. The tarred road which links King William's Town with stutterheim passes intermittently at irregular intervals from one country's territory to that of the other. Thus the first 5 km of the road from King William's Town is on South African territory, the next 35,8km is on Ciskeian territory and the remaining 13,7km to Stutterheim is in South Africa. The Governments of the Ciskei and South Africa by agreement jointly maintain the road while their citizens, including members of their police forces, freely use it for travelling purposes.

It was common cause that both accused proceeded on 5 February 1991 from Stutterheim to the shop of a certain Melani in Tolofiyeni location in the Ciskei. They offered to

sell him a generator which they had at their home in Melungisi location near Stutterheim. It was agreed that Melani would go the next morning to inspect the generator. On 6 February 1991 the accused returned to Melani's shop. Melani took his nephew Balulu (also known as Monwabisi) and accused 2 in his bakkie to have a look at the generator. Accused 1 remained at Melani's shop pending their return. After having inspected the generator in Melungisi location Melani proceeded homewards with his two passengers.

In the meanwhile Warrant Officer D.J. Pieterse stationed at Stutterheim sent a radio message to the police in King William's Town requesting them to intercept Melani's bakkie with its three occupants en route from Stutterheim to King William's Town. The interception was to occur on the Stutterheim road or in King William's Town. The occupants, who were wanted for an interview in connection with a murder, were to be kept in King William's Town pending the arrival of the police from Stutterheim.

Acting on this radio message a group of five policemen in uniform under the command of Warrant Officer Gert Pieterse proceeded in two police vehicles from King William's Town towards Stutterheim. They had explicit instructions not to arrest or detain any person in the Ciskei.

Sergeant Erasmus, a member of the group of five policemen, testified for the State. He stopped Melani's approaching vehicle on a portion of the road that was in the Ciskei. No firearms were pointed at the occupants of the bakkie. Nor were they formally arrested. He asked Balulu and accused 2 to alight from the bakkie and informed them that the police at Stutterheim wanted to question them. He asked them to accompany the police in the yellow police van to Stutterheim. They voluntarily agreed to do so. Melani was likewise approached by Warrant Officer Gert Pieterse who removed his firearm and promised to return it to him at Stutterheim. Melani also voluntarily agreed to return with

his bakkie to the police station in Stutterheim for interrogation. Erasmus testified as follows regarding the voluntariness of Balulu, accused 2 and Melani to return with the police to Stutterheim for questioning and his inability to do anything had they refused to co-operate with the police, viz:

> "Nou het enige van die drie insittendes u enige teken of aanduiding gegee dat hulle nie saam met julle wou gaan nie? ...
> Nee U Edele, hulle was heeltemal yrywillig om saam te gaan.
> Wat sou u gedoen het as hulle enige teken gegee het dat hulle wou nie gaan nie? ...
> U Edele, soos ek reeds gesê het, ons het nie, geen arrestasiemagte in die Ciskei nie, ek sou hulle noodgedwonge moet laat gaan.
> HOF: U sou hulle laat wat? ... Ek sou hulle noodgedwonge moes laat gaan, ek kon hulle nie dwing om saam te gaan nie, U Edele."

Melani and Balulu also testified on behalf of the State. Their evidence corroborated in all material aspects the evidence of Erasmus regarding the circumstances of the interception by the police of Melani's bakkie and the return of Melani, Balulu and accused 2 with the police to

Stutterheim. Melani and Balulu affirmed that they were not ordered but requested by the police to return to Stutterheim for something to be investigated. Balulu under cross-examination tersely stated: "I agreed because I was being requested. If I was forced I would have resisted."

At the Stutterheim Police Station Melani's firearm was returned to him. He and Balulu noticed that the police had arrested accused 2. This was confirmed by Warrant Officer D.J. Pieterse.

Accused 2's evidence regarding the interception by the South African police of Melani's bakkie was that the police had drawn their firearms which they held in their hands. He was instructed to go to the back of the bakkie where he was searched. Balulu and he were instructed to get into the police van. He obeyed because the police were people of the law. That was also his attitude during cross-examination:

"Miss Von Hasseln to Witness: So Mr Mahala you

> went with them for no reason but the fact that they were policemen, is that what you say? ... Yes."

He was not arrested at the roadside in the Ciskei. Nor was he arrested in Stutterheim. He heard for the first time in East London that he had been arrested.

As regards accused 1 the scene then shifted to the Ciskei since Warrant Officer D.J. Pieterse ascertained from Melani in Stutterheim that accused 1 was waiting at his shop in the Ciskei. Arrangements were then made with Melani to return to his shop where he could point out accused 1 to the Ciskeian Police. Warrant Officer D.J. Pieterse enlisted the support and co-operation of the Ciskeian Police in order to arrest accused 1 so that the latter could be tried in a South African Court for offences allegedly committed in South Africa. Sergeant Yiba of the Ciskeian Police was made available for the task.

According to Yiba's evidence on behalf of the State he travelled on 6 February 1991 with Melani in his bakkie to

the latter's shop in Tolofiyeni. A South African constable, Nondala, accompanied them. At the shop Melani pointed out accused 1 to Yiba who proceeded to grab hold of accused 1 inside the shop. Accused 1 struggled to free himself. Nondala came to Yiba's assistance to subdue accused 1. Yiba informed the latter that he was a member of the Ciskeian Police Force and arrested him because he was wanted by the South African Police for murder and robbery committed in Stutterheim. The arrest was made at the request of Warrant Officer D.J. Pieterse. He took accused 1 to Zwelitsha Police Station in the Ciskei where accused 1 was detained at llh05 according to the occurrence book.

Captain McLaren testified for the State. He was the investigating officer in the case and was stationed at East London. On 6 February 1991 he proceeded with Lance Sergeants Sabbagh and Petzer to the Stutterheim Police Station where he received accused 2 who was put in leg irons. They then travelled to Zwelitsha Police Station which he and

Sabbagh entered while accused 2 and Petzer waited in the police vehicle. Yiba was present in the charge office. Accused 1 was fetched at McLaren's request. Sabbagh interpreted for him while he informed accused 1 that he was a suspect in a murder case at Stutterheim and that accused 2 had already been arrested. He told accused 1 that if he was willing to accompany him to South Africa he could do so but if he was unwilling then his extradition from the Ciskei to South Africa would be applied for by McLaren. Accused 1 expressed his willingness to accompany him to South Africa. McLaren thereupon made the following entry in his pocket-book:

> "14.35 Interviewed Herbert Mahala he was informed that Xolani Mahala had been arrested. He is willing to accompany me to East London."

After the entry had been translated to him by Sabbagh accused 1 signed it in their presence, including Yiba. According to the cell register accused 1 was released by Sergeant Nkombisa at 14.40p.m. McLaren then left the charge

office with accused 1 and Sabbagh. Outside at the police vehicle accused 1 was placed in leg irons as a safety precaution because both appellants were to travel in the same police vehicle. They then proceeded to East London where accused 1 was formally arrested.

Accused 1 testified that the only occasion he signed something in the charge office at Zwelitsha was when his personal belongings were returned to him. He denied having signed McLaren's pocket-book. The signature, however, looks similar to his. He was never asked whether he wanted to go to South Africa or not. He was instructed to go with McLaren. He was never told by anybody at any place, including East London, that he had been arrested.

On the factual issue concerning the arrests of the accused the Court a quo, correctly in my judgment, rejected the version of the accused where it was in conflict with that of the State witnesses. It found that the accused were not unlawfully arrested by the South African Police in the

Ciskei. Accused 1 and accused 2 were lawfully arrested by them in East London and Stutterheim respectively. The crucial question which then arose for decision was whether or not the South African Police unlawfully abducted the accused from the Ciskei or Ciskeian territory in violation of public international law and/or South African law.

In Nduli and Another v Minister of Justice 1978(1) SA 893(A) the appellants were unlawfully and forcibly seized in Swaziland and abducted to South Africa by South African Police who had strict orders not to apprehend them there. This Court held on the narrow basis that since the seizure and abduction of the appellants were not authorized by the South African State, public international law did not preclude them from being tried in South Africa on criminal charges which were otherwise cognizable by a South African Court. No international delinquency was committed because the South African State had not itself performed any act of sovereignty in Swaziland as a foreign state. It may be that

the soundness of this Court's ratio decidendi in the Nduli case may have to be reconsidered in future on a wider basis of recent developments in international public law and South African law should the occasion present itself. Compare a short discussion in 1991(54) THRHR p667: "Van die beginsel dat internasionale aanspreeklikheid vir 'n staat selfs uit ultra vires optrede van 'n staatsamptenaar kan ontstaan wat in amptelike hoedanigheid optree, het niks tereg gekom nie."

In State v Ebrahim 1991(2) SA 553 (A) this Court held that a South African Court has no jurisdiction to try an accused who had been abducted forcibly and unlawfully from Swaziland by instruments (werktuie) or agents of the South African State and brought back to South Africa where he was handed over to the police and arrested by them. This decision was based squarely on fundamental principles of Roman-Dutch law which did not confer a discretion on a court whether or not to exercise jurisdiction over such person in those circumstances (pp.569A, 579F-G, 582B, 584I). The

applicable fundamental principles of Roman-Dutch law as enunciated by this Court (p 582B-E) are in accordance with principles of public international law for the maintenance of the territorial sovereignty of States and the good international relations between States; the protection and upholding of human rights; the promotion of the proper administration of law according to the rule of law; and the prevention of abuse of the process of criminal proceedings. See a discussion of Ebrahim's case by Prof Cowling in (1991) 4 SA Journal of Criminal Justice p384-388 as well as Prof Dugard's article in (1991) 7 South African Journal of Human Rights p199-208. In Ebrahim's case this Court accordingly set aside the conviction and sentence imposed on Ebrahim by the trial Court in the Transvaal Provincial Division.

Until recently the English Courts have more or less consistently applied the principle of male captus bene detentus, viz that where an accused was in lawful custody before an English Court which had jurisdiction to try him the

English Court had no authority to go into the circumstances in which he had been brought to England. Such circumstances were no concern of an English trial Court. The accused was not entitled not to be tried. Nor could he insist on his discharge. See R v 0/C Depot Battalion, RASC, Colchester; Ex Parte Elliott [1949] 1 All E R 373 (KB). That was the approach of the courts in Scotland and Canada and still is that of the American Courts. The House of Lords in Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E R 138 (HL) was called on to decide the following certified question of law (p143c):

> "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."

In his speech Lord Griffiths stated the ratio decidendi as follows (p151 b-d):

> "The courts, of course, have no power to apply direct discipline to the police or the prosecuting

> authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.
>
> In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.
>
> If extradition is not available very different considerations will arise on which I express no opinion." (My underlining).

This answer to the certified question of law adopted by the majority of the members of the Court was stated by him in the following terms (p152j):

> "The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused." (My underlining).

The conclusion arrived at in this decision of the House of

Lords is a departure from the principle of male captus bene detentus in a limited manner, viz where an accused has been brought forcibly by an abuse of process within the jurisdiction of an English Court in disregard of available extradition procedures to bring him to England.

In the present matter the proven and accepted facts establish that the South African Police did not unlawfully abduct the accused from the Ciskei or Ciskeian territory in

!

violation of public international law and/or South African . law. Accused 1 was arrested by and released from custody by the Ciskei Police in the Ciskei. He voluntarily agreed to return to South Africa after he had been informed of the charge against him. He had been given a choice either to return or to be extradited. There was no duty on Captain McLaren to explain to him the exact nature and details of the extradition proceedings in terms of clause 5 of the Extradition Treaty (published pursuant to Proclamation No 10 of 1987 in Gazette No 10586 on

23 January 1987) between the

Ciskei and South Africa. Leg irons were put on him as a mere precautionary measure when he was taken to the vehicle in which he was to return to South Africa. He acquiesced in it. He was arrested in East London. These facts are clearly distinguishable from those in Ebrahim's case. There was no violation of the sovereignty of the ciskei. Nor was there an infringement of his fundamental human rights. His return to South Africa was not a breach of South African law. The position of accused 2 relating to his voluntary acquiescence to travel with the South African Police from the roadside in the Ciskei to Stutterheim where he was arrested likewise was not in conflict with the sovereignty of the Ciskei, his fundamental human rights or South African law. In his case there was likewise no breach of South African law and accordingly the facts applicable to him are clearly distinguishable from those in Ebrahim's case.

In the result the Court a quo correctly dismissed the special plea raised by accused 1 and accused 2 to its

jurisdiction.

Death Sentences

After the Court a quo disposed of the special plea the accused pleaded guilty to all the counts (including the murder count 3). They tendered a written plea of guilty in terms of sec 112(2) of the Criminal Procedure Act 51 of 1977. According to count 3 the accused on 23 January 1991 unlawfully and intentionally killed Elma Cawthorn (the "deceased"). In their written plea they admitted having "caused the death of Elma Cawthorn by pushing her into the Kubusie River whilst her hands were tied. We foresaw at the time that she may drown and thereby die, but we nevertheless continued with our act." They also admitted knowing at the time that they were acting unlawfully.

The State elected to lead evidence on the merits with the object of establishing beyond a reasonable doubt that the accused had the direct Intention (dolus directus) to drown the deceased. The accused, however, claimed that the

evidence merely established dolus eventualis their part. In my judgment the trial Court correctly found on the proven facts that the accused had dolus directus to kill the deceased by drowning.

In this Court the accused did not attack their convictions as such save for the finding of dolus directus. Their attack was directed to the question whether or not the death sentences were the only proper sentences in this case.

An important factor to consider is the circumstances in which the murder was committed during the

night of 23 January 1991. The widow Olga Cawthorn ("Olga") then 70 years of age lived on the farm "Little Go" situated on the Cathcart side of Stutterheim. From time to time the deceased, her sister, then aged 69 years, used to come and stay with Olga. On the night in question after they had retired to their separate bedrooms accused 1 came under a pretext to pay Olga some money owed her by certain people. Accused 1 grabbed hold of her extended hands through an open

window while accused 2 forced his entry into the house. Both accused then with a common purpose launched a long, cruel, barbarous attack on the two women. They held them by their throats, hit them with their fists in their faces, slapped them hard in their faces and brutally kicked them. Their motive was greed. Accused 1 demanded the keys and papers of Olga's bakkie which was locked in her outside garage. Accused 2 wanted money. Olga gave him R80. The accused took them clad in their flimsy nightdresses to the parked bakkie where they tied their hands behind their backs with wire. They were pushed onto the open back of the bakkie and driven through Stutterheim towards the Kubusi river near a very deep pool approximately 2 to 3 km outside Stutterheim in the direction of King William's Town. This spot was approximately 14 km from Little Go. Olga managed to get her hands free unnoticed but kept them as if they were still tied. Olga was flung by the accused into the deep pool. She could not swim. The accused then fetched the deceased and

also threw her into the river. Soon afterwards Olga saw the deceased floating on the surface of the water. Olga freed her hands and courageously made her way to the opposite side of the river. Despite efforts of the accused to submerge her she managed to escape to Stutterheim.

On 24 January 1991 Dr Wingreen conducted a post-mortem examination on the body of the deceased. He found that she was still alive when she entered the river. The cause of her death he ascribed to multiple injuries and drowning. In his opinion she could have died from her injuries even if she had not entered the water. There were also signs of strangulation.

The personal circumstances of the accused have much in common. Both have no previous convictions involving violence, both showed remorse afterwards and co-operated with the Police after their arrests. The important difference between them is that accused 1 was 31 years of age when the murder was committed whereas accused 2 was merely 21 years

old.

As against the mitigating factors there are some serious aggravating factors. The accused deliberately planned a callous premeditated attack on Olga and the deceased, an elderly defenceless couple living alone in their isolated farmhouse. Once the accused succeeded in their purpose to rob Olga of her bakkie, money, shotgun and other articles there was no need to endeavour to murder both of them in the ruthless and heartless manner, as testified to by Olga. The Court a quo correctly took cognizance of the fact that "the brutal attacking and murdering of elderly people living alone in their isolated farmhouses, is prevalent here in the Eastern Cape". It is in the interests of society that such elderly people should not be exposed to murderous attacks by criminals.

Taking all the circumtances of this case into account I am of the view that the brutal murder of the deceased is so clamant for extreme retribution "that society

demands the appellant's destruction as the only expiation for his wrongdoing" (per Holmes JA in S v Matthee 1971(3) SA 769(A) at p 771D). It follows that in my judgement the death sentences were the only proper sentences to be imposed on both accused. The appeals against their death sentences therefore cannot succeed.

In the result the appeals are dismissed.

C.P. JOUBERT JA

E.M. GROSSKOPF JA

NESTADT JA CONCUR

F.H. GROSSKOPF JA

VAN COLLER AJA