

Case Number 511/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MFUNGELWA MCHUNU

Appellant

and

THE STATE

Respondent

CORAM: E M GROSSKOPF, EKSTEEN, JJA et MAHOMED, AJA HEARD: 9

MAY 1994 DELIVERED: 27 MAY 1994

J U D G M E N T

E M GROSSKOPF, JA

The appellant was convicted on two counts of murder in the Natal Provincial Division. On the first count he was sentenced to 25 years' imprisonment and on the second he was sentenced to death. He now appeals against both convictions and sentences.

The first count related to the murder of one Mabida. Mabida was a taxi owner who also drove some of his taxis. During the morning of 19 January 1991 he drove a taxi from Mooi River en route to Estcourt. There were about 15 passengers on board. While they were travelling one of the passengers handed Mabida some money, saying that he and his companion wished to get off at the Hidcote turn-off. Mabida stopped at the turn-off. One passenger alighted from the vehicle, and walked towards the driver's window. Shortly thereafter another passenger, who had remained in the taxi, started firing shots at the driver from behind. The passenger who had alighted then shot at the driver from outside. The assailant inside the taxi also alighted. The two assailants

ran away. When the police arrived on the scene Mabida had died from his wounds. He had sustained, inter alia, three gunshot wounds in his head and neck. About 300 meters from the scene of the attack on the other side of a hill the police found track marks which indicated that a vehicle had either stopped suddenly or had pulled away suddenly.

The second deceased was one Sithole. He worked for Mooi River Textiles in Bruntville. On 6 March 1991 he was coming from work at about 5.30 p m when he was shot down in Main Road, Bruntville. He died almost immediately from multiple gunshot wounds.

Both deceased were members of the African National Congress.

The appellant was charged, together with three other persons, with the above two murders and with a third of which he was ultimately acquitted. The main evidence linking the four accused with the offences was that of an accomplice, Hadebe. His evidence implicated all four accused. However,

the trial court was not satisfied that Hadebe's uncorroborated evidence should be accepted beyond reasonable doubt. His was the only evidence linking the first three accused to these offences, and they were consequently acquitted. In the case of the appellant, who was the fourth accused at the trial, there was evidence corroborating Hadebe. This was evidence that the appellant had made an incriminating statement to a police officer, Capt Myburgh. After a trial within a trial the trial court held that this evidence was admissible and that it sufficiently corroborated Hadebe's evidence to justify a conviction.

On appeal the main attack against the appellant's conviction was directed at the admissibility of the statement. It is accordingly necessary to summarize the evidence in this regard.

The State led the evidence of W 0 Du Preez, Lieut-Col Nel, Det Sgt Twala, Det Sgt Shezi and Capt Myburgh. The first four witnesses described the events between the arrest

of the appellant and the making of the statement to Capt Myburgh. According to their evidence they went by helicopter early in the morning of 12 November 1991 to a kraal in the Opathe area which Hadebe had identified to W O Du Preez as being that of the appellant. The appellant was arrested at the kraal and taken to Estcourt prison. At the prison he was in the company of Twala and Shezi. They parked in the parking lot outside the prison and stood outside the vehicles with the appellant. The purpose, according to Col Nel, was to enable Hadebe to look through the window from the inside to confirm that the appellant was the correct person. After Hadebe had provided this confirmation the appellant was taken to the police station at Mooi River where he was interviewed by Col Nel and W O Du Preez, Du Preez being fluent in Zulu. The appellant then indicated that he was prepared to make a statement to a magistrate. Thereupon Col Nel, through another officer, tried to obtain the services of the magistrate at Mooi River, but he was unavailable. Col Nel thereupon

telephoned Capt Myburgh of the Murder and Robbery Unit in Pietermaritzburg who agreed to take the statement. Twala drove the appellant to Capt Myburgh. After giving the appellant the usual warnings and explanations, Capt Myburgh took the statement. He testified that the statement was read back and interpreted to the appellant who signed each page.

The appellant gave a different version. He confirmed that he was arrested at the kraal in the Opathe region early in the morning of 12 November 1991. During his arrest he was, he said, assaulted by the police. One of them hit him in his back with a rifle butt. He was then conveyed to Estcourt, where he was taken into the prison to meet Hadebe. Hadebe greeted him with the words "Ja Mzanzi". The appellant denied that his name was Mzanzi. Hadebe paid no regard, and proceeded to tell the appellant in detail how Mabida and Sithole had been killed. After this the police asked him whether he still denied his complicity in the murders. He persisted in his denial that he was in any way

involved. He was removed from the prison. Outside in the parking area he was punched, slapped and kicked by the police. He was placed in handcuffs and leg-irons and taken to Mooi River. There he was interviewed in an office by Col Nel, W O Du Preez and a number of Black policemen. He again denied knowledge of the offences and was again assaulted. His head was hit against the wall while he was handcuffed to the window. Because of these assaults he agreed to make a statement, but said that he wanted to make one before a magistrate. However, he was taken to Capt Myburgh, where he made the statement accepted in evidence. He did not dispute that he had given the answers deposed to by Capt Myburgh and he accepted that the statement had been correctly recorded. He said however that the statement had been made under duress, and that he had merely repeated what Hadebe had told him, as he had been instructed to do by the police.

The police witnesses denied the allegations of assaults and the averment that the appellant had been told

what to say to Capt Myburgh.

The main attack against the admissibility of the statement before us, as before the trial court, was based on the fact that the appellant had requested to be taken before a magistrate and had been taken to a police officer instead. This Court has often emphasized the undesirability of having a confession taken down by a police officer, who is *ex officio* a justice of the peace, rather than by a magistrate. This line of cases had its origin in the judgment of Colman J in S v Mofokeng and Another 1968 (4) SA 852 (W) which was approved in S v Dhlamini and Another 1971 (1) SA 807 (A) at 815A-B. I need not repeat what was said in these cases and those following on them. There are many good reasons of practice and policy why the police should, if at all possible, obtain the services of a magistrate for the taking down of confessions rather than make use of a police officer.

The failure to make use of a magistrate does not, however, have a direct effect on the admissibility of a

confession. The requirements for admissibility are laid down in sec 217(1) of the Criminal Procedure Act - the confession must be "proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto...". The failure to obtain the services of a magistrate may, in the particular circumstances of a case, cast light on whether these requirements were satisfied, but is not in itself an additional ground for ruling a confession inadmissible. See S v Mbatha en Andere 1987 (2) SA 272 (A) at 279A-280B; S v Mavela 1990 (1) SACR 582 (A) at 589f-i; and S v Mahlabane 1990 (2) SA CR 558 (A) at 562a-563a.

I turn now to consider the circumstances in which the appellant was taken to Capt Myburgh in the light of the principles stated above. It is common cause that the appellant expressed a wish to be taken before a magistrate. Indeed, the police officers made no attempt to conceal this fact. Thus the following passage appears in the evidence of

W O Du Preez:

"Adjutant, hoe het dit nou gekom dat die Beskuldigde 'n bereidwilligheid begin openbaar het om hierdie verklaring wat hy aan u gemaak het, te herhaal op 'n ander plek? --- Die Beskuldigde het nie 'n verklaring aan my gemaak by Mooirivier polisiestatie nie. Hy het slegs erken dat hy kennis dra van die moorde en dat hy bereid is om 'n verklaring af te lê.

Was daar enige rede waarom u nie - of het u aan hom verduidelik hoekom dit nodig is om dit elders te herhaal, dit wat hy vir u sê? --- Ek het aan hom gevra of hy 'n verklaring wou aflê. Hy het my toe meegedeel dat hy 'n verklaring sou afle voor 'n landdros.

Voor 'n landdros? --- Dit is korrek.

Het hy uit sy eie gesê hy wil 'n verklaring voor 'n landdros aflê of is dit aan hom voorgestel? --- Hy het gevra, of hy het aan my gesê hy verkies om aan 'n landdros 'n verklaring te maak."

This was confirmed by Col Nel.

The appellant agreed that he expressed his desire to be taken before a magistrate, but said that his intention was not to make a confession, but to tell the magistrate how he had been treated, and that he had no knowledge of these crimes. On 18 December 1991 he appeared before a magistrate

for a bail application. He was represented by an attorney. When cross-examined about the statement made by him he said:

"The Police refused me the right to make a statement before a Magistrate. They took me to Pietermaritzburg where I made a statement before a white man wearing a safari suit and a black man carrying a firearm."

Asked whether he had wanted to make a statement to a magistrate, and, if so, about what, he said:

"I was going to tell the magistrate about an incident when the Police arrived at my home to arrest me."

The appellant was consequently consistent in saying that he wished to be taken to a magistrate. It is nevertheless a matter for comment that, when finally appearing before a magistrate in the bail application, he made no mention of the alleged assaults on him, nor did he contend that the statement made by him was merely a repetition of what others had told him to say.

The next question then is why the appellant was not taken before a magistrate. The attempt by Col Nel to find a

willing magistrate seems to have been rather perfunctory.

When the magistrate at Mooi River proved to be unavailable

the search was stopped, and a police officer from

Pietermaritzburg was approached. By the same token a

magistrate from one of the surrounding towns might have been

willing to take the confession. Col Nel said that magistrates

were often unable to assist and, it may be inferred, he found

it easier to approach a police officer.

The position then is that the appellant wished to

go before a magistrate and the efforts by the police to

obtain the services of a magistrate were rather faint. How do

these circumstances impact on the question whether the

confession was freely and voluntarily made? The trial court

dealt with this matter as follows:

"Certainly it is more desirable for statements to be taken by magistrates, but the Act allows statements to be made before police officers and if the Court is satisfied that the police officer has given the Accused the necessary warnings and satisfied himself that there had been no assaults or undue influence upon him, then such statements must be accepted as being admissible in evidence. We were impressed by Captain Myburgh as an honest.

careful and responsible officer. He went to some length to ensure that the accused had not been assaulted. He recorded that he asked the accused to undress down to his underpants and he recorded that there were no signs of bruises or any other fresh injuries. Indeed, he is supported by this in that the Accused was examined by a district surgeon on the very next day, Dr. Bayat, and the only injury which he found was some tenderness to the lumbar spine. He in fact recorded that there was no bruising or any other injuries which he found on the Accused. All the police officers, in our view, were good witnesses who gave their evidence in a straight forward manner and were unshaken in cross-examination. We reject the evidence of the Accused of the alleged assault upon him, for a number of reasons. The principal reason and this was also conceded fairly by Mr. De Wet, was the virtual impossibility for the Accused to have heard and retained in his memory the facts set out in the three typed pages of the statement as coming from Hadebe. The Accused was obviously lying in this regard. There were names and facts set out in this statement which he could not possibly have recalled and then given to Captain Myburgh some two hours after he had heard them. There is also his reply to question 11.1 which is: 'As you are still prepared to make a statement, I would like to know the source of information regarding the proposed statement you wish to make'. To which the answer was: 'Because I was there when this thing happened'. We also believe that he was not telling the truth when he said he saw Hadebe in the Estcourt prison. If it was so that he in fact saw Hadebe in prison then there seems no reason why the police would deny that and say that he was only standing in the parking lot. Colonel Nel gave a

very good reason why he wasn't taken in and was just allowed to stand outside so that he could be identified. It also seems to us to be highly improbable that if the police were intent upon forcing the Accused to make a statement by assaulting him they would take him out into the open parking lot and assaulted him, and not assault him in private where they would not be seen by anybody.

The evidence of the accused that he had lacerations on his ankles and his wrists from being roughly handled while he was handcuffed and in leg-irons was also not borne out by the report of Dr. Bayat. Furthermore, the proceedings at the bail application reveal that he, at that stage, although referring to the statement he made to Captian Myburgh, made no complaint about having been assaulted. For these reasons I ruled that the statement was admissible."

I do not agree with the proposition stated in the first sentence of this extract. It is not the officer taking the statement who must, in the final analysis, be satisfied that the statement was made freely and voluntarily and without undue influence, but the trial court, and, on appeal, this court. This comment is, however, by the way. I agree with the trial court that the crucial issue in the present case is one of credibility. If the police evidence is

accepted beyond a reasonable doubt there could be no reason to reject the confession. The fact that the appellant initially expressed a preference to appear before a magistrate could then not be conclusive, since on the police version proper measures were taken to ensure that, despite the appellant's earlier preference, any statement to Capt Myburgh would be made freely and voluntarily. And on that version there was nothing sinister in the rather ineffectual attempts to obtain the services of a magistrate. On this point, it should further be borne in mind that Capt Myburgh was not involved in the investigation of the charges against the appellant and no reasons were adduced to cast doubt on his integrity.

In view of what I have said, this appeal can only succeed if the appellant could persuade us that the trial court's credibility findings were incorrect. The appellant's counsel made no attempt to do so, and in my view these findings are unassailable. The features relied upon by the

appellant, viz the appellant's expressed wish to be taken to a magistrate, the fact that he was taken to Capt Myburgh instead, and the friendly relations between Capt Myburgh and Col Nel, were known to the trial court when the credibility findings were made, and do not suffice to show that these findings should be rejected.

It follows that the appellant has not shown that the confession to Capt Myburgh was wrongly admitted. It reads as follows:

"I cannot remember the dates regarding this thing I was involved in. I will explain how it happened.

During January 1991, a black male by the name of Maytapele Khanyile came to my kraal at Opothe near Tugela Ferry. I was not present when he arrived.

After Maytapele visited my kraal, he left again. I did not speak to him. I was then called by a person Mbuyiselwa Sithole who asked me to come to his kraal. I was together with Mdudusi Mchunu when Sithole called me.

Mbuyiselwa told me and Mdudusi that Maytapele was looking for persons to go and fight the violence against the 'A.N.C.' at Mooi River, and that he Maytapele was send (sic) by the Inkatha people at Mooi River. I told Mbuyiselwa that I was scared because I does (sic) not want to die.

I was then told by Mbuyiselwa that these people will pay me well and I decided to go. Mdudusi also agreed to go and we fetched a third person from his kraal. We asked Zwelamandla Ndlovu to go with us, he agreed. He also needed money as we were not working.

We discussed what we were going to fight with, Maytapela told us not to worry as there was a lot of firearms at Mooi River. The same day we left to Mooi River, we went with Maytapela's car.

At Mooi River Maytapela introduced us to a person called Nyasi Mchunu. This man was in charge of Inkatha at Mooi River. We asked Nyasi how much he was going to pay us. Nyasi said that we must say how much we want.

Myself, Swelamandla and Ndudusi said to Nyasi that we want ten thousand (R10,000.00) rand each. Nyasi said that it was too much. At the end we decided to take one thousand rand (R1,000.00) each and Nyasi paid us.

Nyasi took us to his office next to the hostel and he gave each of us a firearm. Nyasi said that we must go and shoot a person who was an 'A.N.C.' member, he said that he will go and show us where this person was.

We left with the car of Maytapela and Nyasi took us to a Taxi rank at Mooi River. Nyasi pointed out this person who was to be shot. This man was a taxi driver.

Mdudusi and Zwelamandla got into this man's taxi.

I remained in Mayatapela's car as I had shot myself in my toe in Nyasi's office. (Deponent indicates towards his left foot). Mdudusi and Zwelamandla left with the taxi. Myself and Nyasi left to the spot where we had to meet them after they have killed the taxi driver. The car was driven by Mayatapela.

We waited at the spot. Mdudusi and Zwelamandla came running towards us. They got into the vehicle telling us that that they have killed the taxi driver. We left to Nyasi's house where we stayed for a couple of days.

Nyasi came to us again and said that there was another person who must be killed. He said that this person was working at a certain factory at Mooi River.

We were told by Nyasi that another person was going to point out the person to us that was going to be killed. He brought a person to us who was not known to us.

On a certain day unknown to me, Nyasi came to us with this unknown person.

We left Nyasi at the hostel. Myself, Mdudusi, Zwelamandla and Nyasi's friend walked on foot.

Myself and Mdudusi walked in front being followed by Zwelamandla and Nyasi's friend. Whilst walking we heard a shot from behind. I turned around and saw Nyasi's friend firing some more shots at an unknown person. This person was staggering around and he later on fell down on the ground.

I walked to Nyasi's friend who told me that this was the person who was to be killed. I took the firearm from Nyasi's friend and also fired two shots at the man lying on the ground. Mdudusi also fired some shots at this man on the ground.

We ran back to the hostel and told Nyasi that we have killed the man.

After a while a police vehicle arrived and Nyasi went to this vehicle. Nyasi spoke to the policemen and came back to us. He told us not to worry as the policemen were his friends, he further said the we must not worry as the Station Commander at Mooi River knows what Nyasi was doing.

We then quarrelled with Nyasi because we felt that he did not paid (sic) us enough and we went back to our kraals at Opothe."

It was not disputed that this confession relates to

the two murders charged in this case. Indeed, the evidence of Hadebe and the objective evidence as to the two killings make this abundantly clear. It was, however, contended that the statement does not show that the appellant had a common purpose with the murderers of Mabida (the deceased in the first count). I do not agree. According to the statement the appellant was one of the group of hired killers and had been

paid and armed for the murder. Because he had been hurt, his role was to assist with the escape of the others. In my view this constitutes sufficient participation in the murder to justify his conviction.

In the result none of the arguments raised in respect of the appellant's convictions can be sustained. In my view the appellant was correctly convicted on the evidence and the appeal against the two convictions must be dismissed.

I turn now to the appeal against sentence. On the first count the appellant was sentenced to 25 years' imprisonment. It is trite law that sentencing is normally a matter falling within the discretion of the trial court and that an appeal against a sentence can only succeed if the discretion was not properly exercised. This general rule applies to the sentence now under consideration. In argument the appellant's counsel could not point to any irregularity or misdirection in the court's reasoning. His only contention

was that the sentence was so severe that it justified the inference that the trial judge did not exercise a proper discretion. I do not agree. A killing for gain is always a very serious matter. In the present case the appellant's role was, fortuitously, a lesser one, but that does not detract substantially from the gravity of his offence. Even when regard is had to the mitigating factors, which I consider more fully when I deal with the appeal against the death sentence on the second count, the sentence of 25 years' imprisonment was not so severe, in my view, as to justify interference.

That brings me to the death sentence imposed on the second count. In an appeal against a death sentence this court has a discretion to decide afresh whether the sentence is, in its view, the proper sentence. This also is trite.

The aggravating factors in this case are obvious. I have already mentioned the seriousness of killings for gain. The murder was premeditated, planned and executed in cold

blood for money.

As against that there are some mitigating factors. The appellant is 30 years old and has no previous convictions. A clean record is usually an important mitigating factor, indicating that the person involved has no propensity to crime and can be expected to be rehabilitable. And there are suggestions on the record that there were special circumstances on the facts of this case which to some extent mitigate the seriousness of the appellant's conduct. Thus it appears from his confession that he was unemployed. He was a married man with a family to support. He was probably in dire need of money. He did not take the initiative but was persuaded to go along with this band of killers. And one must have regard to the social circumstances at the time. It is common knowledge that Natal was racked by violence. In such circumstances otherwise law-abiding people can be drawn into the general lawlessness which they would eschew in normal times. Having regard to these various

factors, I consider that there are enough mitigating factors in the present case to indicate that a long period of imprisonment would be sufficient for purposes of retribution and deterrence, while still providing for the possibility of the appellant's rehabilitation.

In the result the following order is made:

- (1) The appeal against the convictions on both counts and the sentence on count 1 is dismissed;
- (2) The appeal against the death sentence on count 2 is upheld. The sentence is set aside and replaced by a sentence of thirty (30) years' imprisonment.
- (3) The sentences on the two counts are to run concurrently.

E M GROSSKOPF, JA

EKSTEEN, JA) MAHOMED,
AJA) Concur