THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no 308/96

In the appeal of

YOUNIS KHAN..... Appellant

and

THE STATE..... Respondent

CORAM: HOWIE, SCOTT, JJA ET STREICHER AJA.

Date of Hearing: 26 August 1997

Date of Judgment: 18 September 1997

J U D G M E N T

HOWIE JA:.../

HOWIE JA:

Appellant was convicted in the Cape Provincial Division on two counts of murder and sentenced to 15 years' imprisonment on each. With the leave of the trial Judge (Lategan J) he appeals against the convictions and the cumulative effect of the sentences.

In 1992 a man by the name of Ismail Collison was shot dead at Belhar in the Western Cape. One Leon Davids was charged with his murder and due to stand trial in the Cape Town Supreme Court on 3 November 1993. Two people whom the State intended calling as alleged eyewitnesses at that trial were Collison's sister, Fatima, and another woman, Gadija Adams. On 29 October 1993 Davids's girlfriend, Karen Groenewald, accompanied by members of a well-known gang in the Belhar area, unsuccessfully made enquiries as to Fatima's whereabouts. Two evenings later a young couple arrived at the Collison home. The occupants did not recognise them.

They proffered the story to Fatima's mother Solega that Fatima's boyfriend was being held at Bellville police station and that if Fatima and Gadija went there they could secure his release. Fortunately for Fatima she was out but Solega offered to show the visitors where Gadija lived. Solega then accompanied the couple to Gadija's home. When Gadija came into the street she was shot four times. Solega Collison was shot twice. They died on the spot. The State's allegation was that the couple in question were Karen Groenewald and appellant and that appellant was responsible for the shootings. Why Solega was murdered is not clear. Unlike Gadija, she was not due to be a witness in the Davids case so the inference would seem to be that she was silenced because she could have testified to the killing of Gadija. Appellant was charged together with Groenewald with the double murder. Groenewald was acquitted for lack of evidence.

The sole incriminating evidence against appellant is a

confession he made before a magistrate on the day after his arrest on the charges in question. It reads as follows:

> "Die verklaring wat ek nou gaan aflê gaan oor iets wat op Sondag 31ste van die tiende maand gebeur het, toe ek in Belhar was. Ek en Marlon was in die extension in Belhar om 2 (twee) vroumense te gaan skiet. Daar was 'n vroumens saam met ons in die rooi kar om vir ons te gaan wys waar die twee vroumense woon, en toe sy vir ons klaar gewys het, het ons uit die kar uit geklim. Ons het die twee vroumense gaan soek by die huis ... en hulle twee toe geskiet. Ons het daar weggehardloop van die toneel af. Die rooi kar het ons opgetel en het ons huis toe gevat. Dit is al."

The confession was ruled admissible pursuant to an interlocutory trial in the course of which appellant testified. He admitted having made the confession but alleged that its making was the result of an assault on him by the investigating officer and various improper and undue influences which the latter exercised upon him. He also claimed that

its contents were the product of someone else's knowledge, not his own. In all those respects it is unnecessary for present purposes to say more than that his evidence was rejected as beyond reasonable doubt false and that the trial Court's credibility findings in this regard, although the relevant prosecution evidence was the subject of some criticism in counsel's heads of argument, were not attacked on appeal.

It also requires mention that a submission in appellant's heads that, if the confession was indeed admissible, the additional evidence required for a conviction by s 209 of the Criminal Procedure Act, 51 of 1977 ("the Act") was lacking, was not persisted in at the hearing. The evidence on record dehors the confession shows clearly enough that the confessed crimes were proved and, furthermore, the confession was confirmed in material respects.

The essential contention in support of the appeal against

conviction was based on an aspect of appellant's evidence that was not rejected, namely, that at no stage before making the confession was he informed of the right to legal representation, that he was ignorant of such right and that had he been so informed he would have requested legal representation. Significantly, soon after making the confession, and on the same day, he was brought before a magistrate's court for formal remand. He was then told of the right in question and responded by saying that he wanted to apply for legal aid.

In the light of these facts counsel for appellant argued that the failure to inform appellant of his right to legal representation before he made the confession constituted, firstly, undue influence within the meaning of s 217 of the Act and, secondly, an infringement of the right to legal representation conferred by s 73(1) of the Act and the right afforded by s 25(l)(c) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim

Constitution"), to be informed of the right to such representation. The further result, so the argument proceeded, was that admission of the confession in evidence infringed the right to a fair trial granted by s 25(3) of the interim Constitution.

In weighing these submissions one must have regard to the following evidence, which was either undisputed or the finally accepted evidence. Acting on information, the investigating officer, Detective Sergeant Jordaan, arrested appellant, then 19 years old, at his parents' home at Elsies River at 00h30 on 11 November 1993. He told appellant he was arresting him on a charge of murder and that anything he wished to say might be used in evidence against him in court. He also told him that he could remain silent and had no need to speak at all. There was no response from appellant. I should add that they communicated at all times in Afrikaans. Appellant was then placed in a police vehicle. Jordaan said he had been shown

appellant's home by one Stevens who had already been arrested in connection with the same case. Stevens had been brought to the scene in another vehicle but was kept out of sight and, according to Jordaan, appellant could not have seen Stevens that night. Jordaan then drove to other areas to make arrests unconnected with the present matter. He eventually had appellant admitted to the police cells at Kraaifontein at 1:55 the same night, nothing relevant having passed between them since the arrest. Other suspects in the case were detained at other police stations.

The next contact that Jordaan had with appellant was on 12 November at 8:55 when he went to take him from the cells to interview him. Before they had left the cells on the way to the patrol van appellant made a spontaneous comment to Jordaan. The latter put it thus:

". . . toe ek horn uithaal by Kraaifontein-selle het hy

> spontaan gesê dat niemand ken horn in Belhar nie en dat hy weet sy vriende het sy 'game' weggegee en dat by gaan die waarheid praat".

Jordaan proceeded to take appellant to his office at Belville South police station. There he warned appellant that he was not obliged to make any statement; if he did, it might be used against him in court. Appellant nonetheless made a statement which Jordaan wrote down. He read it back to appellant who confirmed it as correct. It was by now 9:45. Jordaan, who at this stage had no admissible evidence against appellant, then asked if he wanted to repeat the statement to a magistrate. He warned appellant that before he took such a step he should think it over thoroughly. Jordaan went on with other work and about twenty minutes later asked appellant what he intended to do. The reply was that he would make the statement to a magistrate. Arrangements were made for this to be done. Before recording the confession - this was at 11:15 the same morning - the magistrate,

following the contents of a printed form, observed certain preliminaries. One was to warn appellant that he was under no obligation to make any statement but if he chose to make one it had to be voluntarily done, of his own choice, and that it would be recorded and might later be used in evidence against him. After appellant indicated that he understood this warning the magistrate asked how it came about that appellant was brought to him. The answer was -

"Ek het maar net gevoel ek moet met 'n landdros praat."

The ambiguity inherent in the word "moet" - whether it was something he wanted very badly to do or whether it was something he felt obliged to do - was not canvassed by the magistrate or when appellant testified in the admissibility trial. However, once appellant's rejected allegations as to assault and undue influence on the part of Jordaan are

left out of the reckoning, the second interpretation has no formal basis. By contrast, the first interpretation is in accord with Jordaan's evidence that appellant expressed a spontaneous wish to speak his mind.

The trial started in August 1995 and sentence was passed in October of that year. Those passages in the evidence that concern legal representation - apart from the unrejected aspects of appellant's testimony already mentioned - are not helpful. Under cross-examination Jordaan, conceding that he had not told appellant that he was entitled to legal representation, said that in 1993 he was not aware of s 73 of the Act. In the magistrate's testimony he said he did not understand it to be his duty to inform appellant about legal representation. As regards appellant's evidence, he was not asked any questions which might have shown what effect, if any, his ignorance of his right to legal representation had upon his making the

confession. Moreover, nobody concerned in the trial thought to investigate whether, if appellant had told Jordaan or the magistrate who took the confession that he wanted legal representation, his family could have afforded their own attorney or whether legal aid was, in 1993, available at all to an arrestee not yet charged in court.

Counsel for the State contended on appeal that appellant knew of his right to legal representation because of a certain answer he gave in evidence-in-chief. This was in recounting the events preceding his being taken to confess before the magistrate. It reads:

> "En hy het toe weer teruggekom na my toe en hy het vir my weer gevra of hy my moet neem na die landdroskantoor toe vir 'n bekentenis, toe het ek gevoel dis reg vir my, want daar was vir my geen geregtige lease' vir my nie, want ek het 'n prokureur of 'n Staatsprokureur nodig om teenwoordig te wees by die landdros nie/'

Unfortunately no one attempted to clarify what this unintelligible and

perhaps faultily transcribed answer was intended to mean. It certainly cannot be construed as an answer favourable to the State on the present issue. Conceivably it reflected an attempt to say that he would have wanted an attorney but it leaves one no better informed as to any possible causal link at the relevant time between ignorance of the right in question and the making of the confession. .

Although the evidence does not establish, even as a reasonable possibility, that had appellant asked for legal representation he would have got it, counsel for the State argued the matter before us on an acceptance that he would. It seems to me to be right, therefore, to make the assumption that had appellant been told of his right either by Jordaan or the magistrate he would not have made the confession when he did and and that he would first have obtained the services of an attorney. As to the likely outcome of a consultation with such attorney, I shall assume, in appellant's favour, that he would have been

advised to keep silent and would therefore never have confessed.

Finally as regards the factual matrix, there is nothing in the evidence which shows, as a reasonable possibility, that the confession might be unreliable as regards appellant's own involvement. And even in so far as the confession refers to a second assailant, it should be mentioned that a State witness who saw the young man who came to the Collison home on the night of the murders, and who could see appellant in the dock, indicated that they might be different people. Moreover, there were no witnesses to the actual shootings. In these circumstances the presence of a second assailant is not inconsistent with the accepted evidence.

Given the facts and circumstances outlined above, can it be said that the omission to inform appellant of the right in question unduly influenced him to make the confession? I think not. When s 217 speaks of undue influence it manifestly means, as regards

influence, that which induces a confession. In this matter what prompted the statement to Jordaan and its repetition to the magistrate was appellant's self-induced perception that his associates had given him away, coupled with the resultant desire to unburden himself. This was not the case of someone undecided about making a statement who might have been susceptible not only to external influences but even to misconceptions based on his own ignorance. In that sort of situation ignorance might well play a role in influencing one's conduct. There is no evidential basis for finding it did so here.

That being so, it cannot be found that the confession was unduly influenced in the sense discussed and therefore on that ground inadmissible.

The next question which appellant's contention raises is whether, despite its technical admissibility, the confession should have been excluded in the exercise of the trial Court's discretion.

By the time the trial took place the interim Constitution had come into operation. In terms of s 25 (3) appellant had the right to a fair trial. In ensuring the fairness of the trial within the context of this right it was for the trial Court to decide on all the facts whether fairness required the confession to be excluded: Key v Attorney-General. Cape Provincial Division and Another. 1996 (4) SA 187 (CC) par [13] at 196 A - D. Such a decision is discretionary: Ferreira v Levin NO and Others 1996 (1) SA 984 (CC) par [153] at 1077 G -1078 B and par [186] at 1091 I - 1092 A (followed in Key's case at the cited passage). Notwithstanding the constraints placed on this Court's jurisdiction by the interim Constitution, we are at large, and indeed required, to determine, in exercising the appellate function, whether admission of appellant's confession was fair in all the circumstances: S v Zumaand Others. 1995 (2) SA 642 (CC) par [16] at 652 D. One need hardly add that the Constitution of the Republic

of South Africa, Act 108 of 1996 ("the new Constitution") can have no application to the present matter. In the first place, the appeal was pending when the new Constitution took effect (4 February 1997) and must be disposed of as if it had not been enacted (see par 17, Schedule 6). Secondly, this being an appeal, and the appellant's contention being that the trial Court misapplied the law, the law with which we are concerned is the law as it was at the time of the trial: S v Mhlungu and Others 1995 (3) SA 867 (CC) at 888 B - G.

In the Court below the only submission advanced which bears upon the present contention was that the confession should be excluded because appellant's right under s 25 (1) (c) of the interim Constitution had been infringed. That was the right i a to be informed promptly after detention of the right to consult with a legal practitioner. Because the trial Judge held that the right to be so informed was not in existence in 1993 he rejected the submission and

did not proceed to consider discretionary exclusion. We must now consider, in his stead, whether such exclusion should have occurred. In support of the present contention appellant's counsel (who did not appear at the trial) persisted in the argument that at the time of his arrest and confession appellant had the s 25 (1) (c) right just referred to. This was because, so it was said, the constitutional provision in question had retroactive effect. Reliance was placed on numerous passages in the judgments of Mahomed J and Kriegler J in Mhlungu. There is no support in those passages for the suggested retroactivity. What they deal with is the availability of the fair trial right and its related s 25 (3) rights in a trial pending or incomplete as on the date of coming into operation of the interim Constitution. They do not state, or even suggest, that s 25 (1) rights applied to an arrest and confession-taking which occurred before that date. The interim Constitution does not enact that prior to its commencement the

law must be taken to be what it was not: Key par [4] at 191 E.

In considering what discretionary decision ought to have been made by the trial Court in ensuring the fairness of the trial, it is appropriate to begin with Key's case, In par [13] and [14] at 195 G - 196 C the following was said:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the acused be given a fair trial. Ultimately, as was held in Ferreira v Levin fairness is an issue which has to be

> decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence albeit obtained unconstitutionally, nevertheless be admitted.
>
> If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded."

Of course we are not dealing here, in view of what I have said already, with unconstitutionally obtained evidence but it is just, I think, to adopt the same approach if evidence is unfairly obtained or said to have been unfairly obtained. Equating the approach seems to me to operate fairly in favour of appellant. And there is certainly no warrant for saying that he is entitled to be placed in any better position than he would have been in had this debate concerned a confession

unconstitutionally obtained.

The next question is therefore whether the confession was unfairly obtained.

S 73 (1) of the Act has always provided that an arrested accused is entitled to "the assistance of his legal adviser" as from the time of his arrest. However the subsection has never been interpreted to imply that the arrestee has the right to be informed of the expressed right: Hiemstra Suid-Afrikaanse Strafproses, 5th (Kriegler) edition, 174. In the majority judgment (the case was decided three to two) in S v Mabaso and Another 1990 (3) SA 185 (A) at 209 A - D the following was said:

> "The latter [s 73 (1)] is not specific to criminal proceedings: it arises immeditely upon arrest. There is much to be said for the view that a person should be informed of this right immediately upon arrest, and perhaps this is a matter which might enjoy the attention

of the Legislature. But to the best of my knowledge it has never been suggested that a failure so to inform an accused may render inadmissible an admission made by an accused to the police; or a pointing out by him; or a confession made by him to a magistrate. I do not think that there is any relevant distinction to be drawn between those cases and s 119 proceedings. Also analogous, I think, are cases where there has been non-compliance '" with the Judges' Rules, in particular the Rules that the police should not question suspects without cautioning them that they are not obliged to answer; and that the police should not question suspects in custody at all. Such practices were conceived by the Judges to be unfair, and the Rules were devised, partly at any rate, to give suspects greater protection than that which they enjoyed under the common law. It is trite, however, that a failure to obey the Rules is not per se sufficient to cause a statement made by the accused to be inadmissible, although it is a circumstance to be taken into account by the court in considering whether the statement was made freely and voluntarily. See R v Holtzhausen 1947 (1) SA 567 (A)/'

If, as was conveyed there, non-compliance with the

Judges' Rules would constitute unfairness towards the arrestee, it must equally be unfair, in my view, not to inform him of the right which the subsection expressly affords him. The second sentence in the passage just quoted reinforces that view. Moreover, there is much to be said for the inherent justice in the approach, judicially aired before, that a right is meaningless if its existence is unknown. Whether s 73 (1) should be differently interpreted nowadays in the light of the prevailing constitutional provisions applicable to statutory interpretation it is unnecessary to decide. Apart from the fact that the problem raised in the present case is, as regards arrests after 27 April 1994, constitutionally provided for, interpretation of s 73 (1), as it applied in 1993, cannot be influenced by constitutional provisions which came into force only later.

I have no doubt, therefore, that it was unfair that appellant was not informed of his right under s 73 (1) before he made a

statement to Jordaan or the confession to the magistrate.

Does that conclusion justify the discretionary finding that, in the light of all the other relevant material, the confession ought to have been excluded?

In the first place it must be remembered that as at the time of the arrest and confession neither statutory provision nor judicial pronouncement required the intimation now under consideration. There was, therefore, a breach of fairness but no breach, conscious or unconscious, by Jordaan or the magistrate of any express right or duty. The position is, of course, distinguishable from the situation in S v Marx and Another 1996 (2) SACR 140 (W), upon which appellant's counsel relied, in which breach of the constitutional right in s 25 (1) (c) of the interim Constitution was involved. In that matter the statement in issue was not a confession but the assertion "Ek wil 'n verklaring maak. Ek het myself verdedig". The Court

(Cameron J) excluded the statement because of the unfair failure to inform the accused, before he made the statement, of his right to representation and because it was impossible to say that admission of the statement would not prejudice him in his entitlement to a fair trial. The reasons for exclusion, so it seems, focused upon the facts and circumstances relevant to the statement and its making and did not, expressly at any rate, encompass a weighing-up of the competing considerations mentioned in the passages quoted above from Key's case. The judgment in Key had, of course, not yet been given when Marx was decided.

Apart from the fact that the law as it was in 1993 did not require the intimation in question, it is important that the requirements of s 217 of the Act are themselves aimed at ensuring fairness. They serve to disqualify a confession in the event of violence, threats or promises (Zuma at 646 H -I), in other words police conduct involving

ill treatment or improper pressure (Wong Kam-ming v R [1980] AC 247 (PC) at 261 ([1979] 1 All ER 939 at 946g-h/i). The rationale for exclusion in such circumstances is threefold: the potential unreliability of the confession, the privilege against self-incrimination and the importance of proper behaviour by the police towards those in custody: Lam Chi-Ming v R [1991] 2 AC 212 (PC) at 220 ([1991] 3 All ER 172 at 178 c-d/e).

As already mentioned, the accepted evidence in this case reveals none of the mischief against which s 217 is aimed. Put another way, there was no behavioural impropriety on the part of the police and no hint that the confession was unreliable. And, as regards the privilege against self-incrimination, and indeed the right to silence, while the police and magisterial cautioning could not substitute for legal advice, the fact is that appellant was warned by both Jordaan and the magistrate that he was not obliged to speak, that he could keep

silent and that his words might be used against him.

Jordaan was, by inference, obviously intent on obtaining a statement in legally admissible form if he could but I do not consider that there is anything improper per se in asking an accused who has confessed to a police officer who is not a justice of the peace whether he is prepared to repeat the confession to a magistrate. Although such a question would initiate the making of an admissible confession and in that sense involve obtaining or procuring it, this is within the bounds of procedural propriety. Cf Zuma at 647 B - C.

Coming, now, to an evaluation of the facts and circumstances of this case, the paramount importance of an accused's rights to legal representation and fairness in the pre-trial and trial processes is manifest. What the unfairness in this case essentially did was to deprive appellant of the opportunity to be advised to remain silent. As against that, here was an accused who spontaneously,

voluntarily, without improper influence or ill treatment, knowing of his right to silence and his privilege against self-incrimination, confessed, apparently reliably, to two murders. And while the nature of the offence to which an accused person confesses may in some instances carry no weight at all, it seems to me that where the confessed offence is by nature patently a serious one, this can, from the point of view of the interests of the public, be a relevant factor to be weighed with all the others.

Having given the matter anxious consideration it seems to me that those factors which justify admission materially outweigh those which call for exclusion. The exercise of the relevant discretion leads to the conclusion, in my view, that appellant's confession to the magistrate was, although admitted by the trial Court for other reasons, properly admissible in all respects. It cannot be said, therefore, that the trial was unfair. It follows that the appeal against the convictions

fails.

As regards the sentences, the crimes in question were correctly described by appellant's counsel in his written argument as heinous. Planned, cold-blooded assassination of a prospective witness is murder of the most serious kind. The victim was a young woman who was in an advanced state of pregnancy at the time. The other victim was a middle-aged woman. Although her killing was probably decided on only shortly beforehand, the mission was nevertheless to effect a double execution. She had the misfortune to lead the murderers to their quarry and became their prey.

It is, of course, plainly mitigating that appellant was a 19 year old first offender when the murders were committed. Why he became involved, or was influenced, perhaps, to become involved, is not apparent from the evidence. There are indications of possible gang rivalry but in the nature of the defence put up appellant did not,

or chose not to, take the trial Court into his confidence.

Given the need in this case for stem retribution and powerful deterrence, the mitigating factors, even when plainly discerned and given their fullest possible measure, are substantially outweighed. I am not satisfied that any ground exists for interference with the trial Court's decision to decline to order any concurrence of the sentences.

The appeal is dismissed.

C T HOWIE

SCOTT JA) STREICHER AJA)
CONCUR