THE SUPREME COURT APPEAL

OF SOUTH AFRICA

Case no: 372/94

In the matter between:

SIBUSISO ZULU — First Appellant

and

QEDA JEREMIAH ZULU — Second Appellant

and

THE STATE — Respondent

Coram: F H Grosskopf, Nienaber, Marais JJA

Heard: 15 September 1997 Delivered: 29 September 1997

J U D G M E N T F

H GROSSKOPF JA:

The appellants were both convicted on 6 counts of murder and 15 counts of attempted murder by Combrink J sitting with two assessors in the Natal Provincial Division. The first appellant was 19 years of age when the crimes were committed. He was sentenced to 25 years' imprisonment in respect of the 6 murder counts and to 12 years' imprisonment on the 15 counts of attempted murder. The sentence of 12 years' imprisonment was ordered to run concurrently with the sentence of 25 years' imprisonment. The second appellant is the uncle of the first appellant. He was 33 years of age at the time of the commission of the crimes. The second appellant was sentenced to death in respect of each of the 6 murder counts. The 15 counts of attempted murder were taken together for purpose of sentence and he was sentenced to 15 years'

imprisonment in respect of those counts. The court a quo granted both appellants leave to appeal to this court against conviction and sentence.

Early on the morning of Tuesday 2 March 1993 a group of children were being conveyed in a light delivery motor vehicle from their homes in the Table Mountain area near Pietermaritzburg to their respective schools. As the vehicle went round a sharp steep bend in the road a man with a firearm appeared from the side of the road. He confronted the driver and began firing at the vehicle. The vehicle came to a stop and the gunman was joined by several others. They were armed with at least one AK 47 automatic rifle and other firearms which they used in their attack on the vehicle and the children. Six of the children died as a result of gunshot wounds while many of the other children sustained gunshot injuries. The court a quo found that the two appellants had been part of the group of armed men at the scene that morning and that they had taken

part in carrying out the attack on the children and the driver of the vehicle.

The first appellant was arrested on the morning of Thursday 4 March 1993. He was taken to the police station where he was interrogated by the police during three successive sessions. The first session lasted for about 40 minutes from 10:45 to 11:25. The questioning was conducted by Brig Du Preez while the investigating officer, Warrant Officer Van Huysteen, made notes. Sgt Khanyeza acted as interpreter. The second session started about an hour-and-a-half later and lasted for approximately two hours until 14:45. W O Van Huysteen was the interrogator at this session and according to his evidence the first appellant then gave him some of the names of the alleged perpetrators. Sgt Khanyeza was again the interpreter. After an adjournment of about two-and-a-half-hours the third session started at about 17:20. On this occasion Maj Van Aswegen asked the questions while W O Van Huysteen made notes. Brig

Du Preez later joined them. The interpreter was Sgt Nsindane. The evidence of the police was that the first appellant admitted his complicity soon after they had commenced with the third session that evening. He then proceeded to make a statement which was recorded by the police on tape. This tape was subsequently made available to counsel for the defence but it was not handed in as an exhibit.

The first appellant was examined by a district surgeon before he was taken to a magistrate at about 23:25 that Thursday night to make a statement. It is common cause that he made the statement which was later admitted as a consequence of a decision by a majority of the members of the court a quo after a trial-within-a-trial.

The first appellant objected to the admissibility of the statement, but accepted that he bore the onus in terms of the provisions of s 217(l)(b)(ii) of

the Criminal Procedure Act 51 of 1977 to prove on a balance of probability that the statement was not made freely and voluntarily and without having been unduly influenced thereto. This subsection has now been declared invalid (S v Zuma and Others 1995(1) SACR 568 (CC)), but since the court a quo gave its final verdict in this case on 23 December 1993, and before the commencement of the Constitution Act 200 of 1993 on 27 April 1994, this appeal still has to be determined on the basis that the onus was on the first appellant to show that the statement was not admissible (S v Mhlungu and Others 1995(2) SACR 277 (CC) at 300h-301e).

It was the first appellant's testimony at the trial-within-a-trial that he was assaulted by the police after his arrest and that the police schooled him and instructed him what to say to the magistrate. These allegations were denied by the police witnesses who testified at the trial-within-a-trial. The court a quo

unanimously rejected the first appellant's testimony that he was assaulted or threatened with assault or forced in any way to make the statement to the magistrate. The first appellant's evidence that he was schooled by the police was rejected as an outright lie by all three members of the court a quo. The learned trial judge, however, concluded that something must have happened during that Thursday which did not emerge from the evidence, but which probably caused the first appellant, who initially denied all knowledge of the attack, to change his mind. In the result the learned trial judge held at the conclusion of the trial-within-a-trial that the first appellant had indeed discharged the onus, while the other two members of the court a quo held that he had not. The first appellant's statement was accordingly admitted. The court a quo again dealt with the admissibility of the statement in its final judgment and then unanimously held that the confession had been properly admitted as part of the

evidential material before the court.

In this court the admissibility of the statement was attacked mainly on the basis that the alleged protracted interrogation unduly influenced the first appellant to make the statement against his will. Lengthy interrogation in an appropriate case can no doubt be a decisive factor leading to the conclusion that a statement was not made freely and voluntary and without being unduly influenced thereto. See in this regard the observations made by Williamson JA in S v Mkwanazi 1966(1) SA 736(A) at 746G-747A:

> "Lengthy interrogation by the police, even if there is no suggestion of what is termed 'a third degree method' attached to it, may of itself undoubtedly have an effect or influence upon the mind or attitude of some persons so interrogated. The mentality and make up of the person being examined, the manner and personality of the interrogator and the methods adopted by him can each have a bearing on any possible influence flowing from the interrogation. Obviously a Court called upon to decide whether or not a statement made consequent upon such an interrogation was unduly influenced thereby would consider all such aspects if it appears possible that some undue influence or persuasion might have been

present. But where, as here, the person interrogated himself at no time raises the suggestion that he was overawed or browbeaten by his interrogator into making a statement or confession, there is really no basis for saying that the interrogation, however protracted, might have unduly influenced him. Such a submission would be really based on a pure hypothesis unsupported by any evidence in fact;..."

My first difficulty with the first appellant's objection in this connection is that it was never part of his case that the length of the interrogation placed undue pressure on him to make the statement against his will. Counsel sought to overcome this difficulty by relying on the evidence of W O Van Huysteen that the first appellant at a certain stage during the third session said to his interrogators "hy het nou genoeg gehad". The first appellant never confirmed that he actually made such a remark, and if so, what he actually meant to convey thereby. The remark should in any event be considered in its proper context. According to W O Van Huysteen the first appellant remarked "...hy het nou genoeg gehad ... hy gaan die waarheid praat." If the first appellant had

in fact made such a remark because he could no longer resist the undue pressure of a lengthy interrogation he would surely have said so in the course of his evidence.

The second difficulty that I have with this objection to the admissibility of the statement is that the objective facts do not support the conclusion that the interrogation sessions were unduly long or harassing. The third session did indeed last three hours but the evidence was that the first appellant began to confess soon after the interrogation had commenced. There were indeed lengthy intervals between the three sessions, allowing the first appellant an opportunity to rest and time to reflect.

It is common cause that the first appellant was shown a photograph of his uncle, the second appellant, while he was being questioned on that Thursday. Counsel for the appellants pointed out that it was quite clear that the first

appellant was afraid of his uncle, and submitted that the showing of the photograph placed additional pressure on the first appellant to make a statement. I find it highly unlikely that fear of his uncle would have persuaded the first appellant to make a statement in which he implicated that very same uncle. The first appellant himself testified that the photograph of the second appellant was shown to him so that he could identify the second appellant and tell the police where to find him.

It is correct that the first appellant at the outset denied that he had anything to do with the attack on the children, but in my opinion there is no evidence to suggest that he was persuaded to change his story as a result of any undue pressure or persistent and lengthy interrogation. In my judgment the statement is not inadmissible on this ground.

Counsel for the appellants conceded, and in my view quite rightly, that

the first appellant did not discharge the onus of proving that he had been assaulted by the police. I agree with the court a quo that the first appellant was an extremely poor and unsatisfactory witness. Even if the onus had been on the state throughout it was in my view proved beyond reasonable doubt that the first appellant had not been assaulted, either as alleged or at all. I have reached this conclusion despite the fact that W O Van Huysteen was an unimpressive and evasive witness who contradicted himself and the other state witness in many respects. His evidence should in my view carry weight only insofar as it is corroborated by other reliable evidence.

The first appellant's evidence that he was schooled by the police was rejected as false by the court a quo. The first appellant alleged that the police supplied him with information regarding the attack and also gave him the names of the other suspects and told him to mention those names in his statement to

the magistrate. It would of course have been impossible for the police to have supplied those names to the first appellant if they themselves did not know who the other perpetrators were. W O Van Huysteen testified that the police heard for the first time who they were when the first appellant revealed their names during the second interrogation on Thursday 4 March 1993. The only suspect whose name had previously been mentioned to the police was that of the second appellant.

When Sgt Doubell first gave evidence he testified that he and Sgt Walters took W O Van Huysteen to their informer on the evening of Wednesday 3 March 1993 and that the informer then gave them the names of the other participants. That evidence contradicted the testimony of W O Van Huysteen, and when he was recalled he denied that he accompanied Sgt Doubell on the Wednesday evening. His evidence was that he saw the informer only once and

that that was after the first appellant had made his statement to the magistrate on Thursday 4 March 1993. W O Van Huysteen agreed that the informer mentioned certain names on that occasion but said that he could not remember those names. According to W O Van Huysteen their discussion related mainly to the firearms which had been used in the attack.

Sgt Doubell was then recalled and he told the court a quo that he had made a mistake when he had previously given evidence. In support of his new evidence he referred the court a quo to a contemporaneous entry which he had made in his pocket book relating to the occasion when he, W O Van Huysteen and Sgt Walters had been to see the informer on Wednesday 3 March 1993 at 21:00. According to this entry the informer told them that Qeda Zulu (the second appellant) and Mbongi Malembe (a defence witness in the case) were driving around in a blue and grey kombi at a place called Sweetwaters.

Sgt Doubell's new evidence was confirmed by Sgt Walters who testified that the names of Qeda Zulu and Malembe were the only ones mentioned by their informer on that Wednesday evening. Those two persons were referred to as the two main suspects in the case. This evidence of Sgt Walters was supported by a contemporaneous entry which he had made in his pocket book. The police version is that they did not have these names when they interrogated the first appellant on the Thursday. Maj Van Aswegen pointed out in his evidence that if the names of the other suspects had been known to the police on the Wednesday evening a massive manhunt for those suspects would immediately have been launched that same night. The fact that such a manhunt only took place on the Thursday night after the first appellant had disclosed the names lends strong support to the police version.

The exculpatory nature of the first appellant's statement is a further factor

which should be borne in mind when one considers the probabilities. It seems unlikely that the police would have instructed the first appellant to tell the magistrate, as he did, that his uncle the second appellant threatened him when he intimated his unwillingness to participate. Why would the police want to help the first appellant by suggesting to him that he was acting under duress when he took part in the attack on the children?

I am satisfied that the police did not school the first appellant and that the information contained in his statement came from the first appellant himself. I have reached this conclusion despite the unsatisfactory evidence of W O Van Huysteen in regard to his meeting with the informer, and notwithstanding the fact that when he was recalled Sgt Doubell departed from his initial testimony.

The first appellant's statement is the only evidence implicating him in the commission of these crimes. It was held in S v Mkwanazi supra at 745G-H

that a "confession in such a case is not necessarily 'suspect' but the circumstances may be such as to call for a particularly careful assessment by the presiding Judge of the question of the freedom and voluntariness of the confession". (See also S v Radebe and Another 1968(4) SA 410 (A) at 414D-E.) Having given the matter careful consideration I am satisfied that the statement was made freely and voluntarily by the first appellant without having been unduly influenced thereto. The statement was accordingly duly admitted in my view.

The admission of a statement does not however imply that the statement is necessarily reliable. The question may therefore be posed whether less weight should be attached to the first appellant's statement as a result of the poor quality of the evidence given by W O Van Huysteen and Sgt Doubell. In considering this question it should be borne in mind that the unsatisfactory

evidence of these two witnesses related to the issue of admissibility and not reliability.

W O Van Huysteen's evidence denying the alleged assaults and schooling was corroborated by other reliable evidence and I am satisfied that the first appellant's allegations in this connection were false. Counsel for the appellants did not contend that the unsatisfactory nature of W O Van Huysteen's evidence in this regard had any effect on the reliability of the statement. Insofar as Sgt Doubell's evidence is concerned I agree with the court a quo that his initial testimony was based on an incorrect recollection of when and where he received the information concerning the names of the participants. His later evidence was corroborated by that of Sgt Walters and the pocket book entries. In this instance too there was no suggestion by counsel for the appellants that Sgt Doubell's initial mistake had any bearing on the reliability of the statement or

the weight that should be attached thereto. The unsatisfactory nature of the evidence of these two witnesses cannot therefore in my opinion affect the reliability of the statement or the weight to be attached thereto.

I am of the view that the reliability of the first appellant's statement is proved by its contents. Once it was established that there had been no schooling it followed that the first respondent himself was the source of the information contained in the statement. There is no suggestion that the first appellant acquired any of the information contained in his statement from newspaper reports of the attack. It is significant that much of the information contained in the statement corresponds with the actual proven facts, eg that AK 47 and .303 rifles were used, that the ambush was planned and executed in a particular way, that the attackers were wearing a variety of clothing including blue and brown overalls and an army uniform. I am of the view therefore that the first

defendant's statement is not only admissible but also reliable.

Once his statement was admitted as evidence a strong prima facie case was established against the first appellant. His failure to testify in those circumstances strengthened the state case (S v Nkombani and Another 1963(4) SA 877(A) at 893F-G; S v Mthetwa 1972(3) SA 766(A) at 769B-H; S v Francis 1991(1) SACR 198(A) at 206b).

The first appellant's defence was based on an alibi, but the evidence of the defence witnesses in support of the alibi was so poor and unreliable that there is no reasonable possibility that the alibi advanced by the first appellant could be true. The court a quo found that the alibi was false and counsel for the appellants did not attack that finding.

In my judgment the court a quo correctly found that the state has proved its case against the first appellant beyond all reasonable doubt. His appeal

against his conviction must therefore fail.

I am of the view that his appeal against sentence should also be dismissed. The court a quo took into account that the first appellant was only 19 years old and that he was acting under the influence of his uncle the second appellant. The aggravating factors are however overwhelming. In my view there is no reason to interfere with the sentence imposed on the first appellant.

The conviction of the second appellant depended mainly upon the evidence of three eyewitnesses who identified him at the scene of the crime.

Mr Ngubane was the driver of the vehicle on that fateful Tuesday morning. He testified that he saw the second appellant when he came running towards the vehicle with a firearm while firing shots at the vehicle. He knew the second appellant as Qeda Zulu and said that he and the second appellant used to live in the same area, but that the second appellant had since left that

area. That area is commonly known as the Table Mountain area. He denied however that the second appellant had left as early as November 1991. According to Mr Ngubane he came to live in that area in 1992 and he and the second appellant had been living there together until about two months prior to the incident. He knew the second appellant as a person who used to drive a kombi. The witness was adamant that he saw the second appellant that morning. He still recalled that the second appellant was wearing a brown coloured overall.

Bongani David Gwala was a young boy of 12 years old who survived the attack. He knew the second appellant as Qeda Zulu the evangelist, and he identified the second appellant as the person who shot him three times. According to this witness the second appellant was wearing clothes with a green colour. He agreed that the second appellant was no longer living in the area in

March 1993, but denied that the second appellant had left there as far back as 1991. He and the other two eyewitnesses subsequently pointed the second appellant out at an identification parade.

Sebenzile Ngwenya was a 9 year old little girl who identified the second appellant as Qeda Zulu. She said that she grew up in front of him. She saw him running away that morning at the scene of the attack and said that he was wearing a blue overall.

The only difference between the evidence of the identifying witnesses related to the clothing worn by the second appellant. I agree with the state's submission that differences of this nature are to be expected, especially in the circumstances that prevailed at the time.

The court a quo was satisfied that all three these eyewitnesses had sufficient opportunity to make a reliable identification and found that these

witnesses were honest and reliable. I have no reason to disagree with that finding. Counsel for the appellants did not seriously attack this rinding but submitted that these witnesses were so frightened and their powers of observation so limited that they could have been genuinely mistaken as to the identity of the second appellant. This is not a reasonable possibility in my view, bearing in mind that they were not identifying a stranger. It is further highly unlikely that all three the eyewitnesses would have made the same mistake as to the identity of the second appellant.

The second appellant's sister, Mrs F Ngubane, was called as a witness by the state. Her evidence showed that the second appellant's evidence that he left the area in about November 1991 was false, and that he actually left in December 1992.

The alibi of the second appellant was found to be equally false, and

counsel for the appellants conceded that the evidence in support of the alibi was of a poor quality. I am satisfied that the state has proved beyond reasonable doubt that the second appellant was one of the perpetrators who attacked and killed the children on Tuesday 2 March 1993 and that he was therefore duly convicted. His appeal against his conviction should accordingly be dismissed.

There remains the question of the second appellant's sentences. The court a quo imposed the death sentence in respect of each of the 6 murder counts and 15 years' imprisonment in respect of the 15 counts of attempted murder. The death sentences were imposed on 24 December 1993 and therefore before the date of commencement of the Constitution of the Republic of South Africa Act 200 of 1993. The Constitutional Court has since decided in S v Makwanyane and Another 1995(3) SA 391 (CC) that legislation sanctioning capital punishment is inconsistent with the Constitution and accordingly invalid. It

further decided that with effect from the date of its order, ie 6 June 1995, the state is forbidden to execute any person already sentenced to death. The death sentences imposed in the present case must therefore be set aside and substituted by lawful punishment. In accordance with the current practice of this court the matter will have to be remitted to the trial court for the imposition of competent sentences in respect of the 6 murder counts. I am not persuaded that there are any lawful grounds for interfering with the sentence of 15 years' imprisonment in respect of the attempted murder counts and that sentence will accordingly stand.

The following order is made:

1. The appeal of the first appellant against both his conviction and sentence is dismissed.

2. The appeal of the second appellant against his conviction and against his

sentence of 15 years' imprisonment on the attempted murder counts is dismissed.

3. The appeal of the second appellant against the sentences of death imposed on him in respect of the 6 murder counts is upheld and such sentences are set aside.

4. The matter is remitted to the trial court for the imposition of competent sentences in respect of the 6 murder counts.

F H Grosskopf JA.

Nienaber JA
Marais JA Concur.