168/92

Case No 315/91

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PHILLIP SHOBA Appellant

and

THE STATE Respondent

CORAM: CORBETT CJ, E M GROSSKOPF JA, et NICHOLAS AJA.

DATE OF HEARING: 28 August 1992.

DATE OF JUDGMENT: 23 September 1992

J U D G M E N T

CORBETT CJ:...../

CORBETT CJ:

On 24 May 1991 the appellant was convicted in the Natal Provincial Division of the crime of murder and sentenced to death. This is an appeal against both conviction and sentence.

The undisputed facts, as established at the trial, show that on Wednesday, 21 March 1990 the deceased, a 10-year-old girl named Nonhlanhla Wendie Zondo, visited the home of one Meshack Mafutha Shoba (the brother of the appellant) on a farm in the district of New Hanover. She was evidently on her way home from school. She was the daughter of a great friend of Shoba's and it was her custom to thus visit the Shoba home. Having been given some food and having for a while played with Shoba's youngest child, the deceased left to go home. To do so she had to walk for about 40 - 45 minutes. She left Shoba's house at approximately 15h00. She did not reach her home. Her father,

Mafruit Obed Zondo, noticing that she had not returned home at the usual hour, sent his son to look for her. He later returned without the deceased and then Zondo himself went to look for her. He arrived at Shoba's house at about 18h00. He had seen no sign of the deceased on his way there. He spoke to Shoba who told him that his daughter had been at his (Shoba's) house. The appellant, who was present at the time, said nothing.

The disappearance of the deceased was reported to the police and on the evening of Sunday, 25 March 1990 Warrant-officer Taljaard and Constable Mngadi, of the South African police arrived at Shoba's house, where they found, among others, Shoba and the appellant. Having searched the house for the deceased without success, Mngadi, acting on information which he had previously received, arrested the appellant in connection with the disappearance of the deceased. This occurred after 18h00 that evening.

The policemen then took appellant in a police van to the Crammond police station (about half-an-hour's drive away) and he was locked up in one of the cells there. On the following afternoon (i e the afternoon of Monday 26 March 1990) Mngadi interviewed the appellant in his cell and questioned him about the disappearance of the child. Then, according to Mngadi, the appellant announced that there was something he wanted to show them. Mngadi and the appellant, together with Taljaard, went off in a police van and, under the appellant's direction, drove towards Shoba's house. On appellant's instructions they stopped short of Shoba's house and then appellant guided them on foot off the road and through tall grass in the open veld to a spot where the body of a young girl (later identified as that of the deceased) was lying. The body was in a fairly advanced stage of decomposition. Owing to the high grass (approximately 2 metres tall) in the area the body became visible from a

distance of about only 2 metres. There were no foot paths in the vicinity. The spot where the body lay was more than 20 metres from the roadside and about 250 metres from Shoba's house. Photographs were put in showing the body as it was found at this place.

I continue with the police version of what happened. According to them, they all returned to the police station and the appellant was put back into his cell. On the next day (Wednesday, 27 March 1990) at about 07h00 it was reported to Mngadi that the appellant wanted to see him. He went to appellant's cell and there the appellant told him that he wanted to make a statement. Mngadi explained to him the options of making a statement to him (Mngadi) or to a magistrate. The appellant chose the latter course and later that day he was brought before Mr F W Strydom, a magistrate in Pietermaritzburg. After putting to the appellant the usual preliminary questions and recording his answers to

them, Mr Strydom took the following statement from the appellant:

> "A man, Tshindile, came to me. He was with Ngiliza. They told me that they were sent by a person who owns a car. According to them the owner of the car wanted some fat of a child. I was at my brother's home when these 2 males arrived. A child also arrived at my brother's home. This child was to be killed. This was on a Wednesday and it was raining. Whilst the child was inside the house, Tshindili went out so that he could wait and catch the child. I followed Tshindili. The child later came out. We caught the child. When she was a distance from my brother's house, Tshindile throttled the child until she died. Ngiliza then came from the shop with a razor blade. Tshindile then used the blade to cut out the private parts of the child. He also cut out her liver and heart. We then handed it to Ngiliza so that he could hand it to the person who had asked for it.
>
> On Saturday, the owner of the car arrived. It is a van. Ngiliza then gave him the organs which we had cut out. It was placed into the cubbyhole of the vehicle. A bottle of wine was taken out of the vehicle and they started to drink. Ngiliza's wife and two other women, who had arrived with the owner of the vehicle also drank some of the wine. Ngiliza

> later left with these people and he said that he would come back on Monday. He has not returned.
>
> We are four people involved in this matter. I ask not to be detained with these people.
>
> That is all."

At the trial appellant contested the admissibility of this confession on the ground that he had been coerced into making it by the police, who had interrogated and assaulted him prior to his appearance before Mr Strydom. The Court **a quo** conducted the usual trial-within-a-trial and at the conclusion thereof ruled that the confession had been made freely and voluntarily and ordered that it be admitted in evidence. One of the grounds of appeal against the conviction is the contention that the trial Court erred in holding that evidence of the confession was admissible. I shall deal with this later.

The State case against the appellant thus rested on (a) the pointing out, (b) the confession and

(c) the appellant's presence near the scene of the crime on the afternoon in question. With regard to (c), I should add that it is common cause that the appellant was at Shoba's house on the afternoon of 21 March when the deceased arrived there. During the afternoon the appellant went out and returned at about 17h40.

The appellant's case, as presented in evidence at the trial, was briefly to the effect that at the time of these events he was staying with his brother and that on 21 March he and his brother, for certain reasons, returned to his brother's house at about 09h00. There they remained until between 14h30 and 15h00, when appellant went to the store at Crammond to buy some tobacco. In Crammond he met a lady friend of his and spent some time in her company before returning to his brother's house at about 18h00. He saw the deceased at his brother's house. He denied having had anything to do with her death.

Fundamental to the State case is the confession made by the appellant; and consequently its admissibility is a critical issue. In the trial-within-a-trial the appellant gave evidence; as also did a number of the policemen stationed at the Crammond police station, including Mngadi and Taljaard. Appellant deposed to protracted and serious assaults on him committed by certain of the policemen, starting on the day of his arrest and continuing until he agreed to make a statement. The avowed purpose of these assaults was to induce him to confess to having killed the deceased. He even went so far as to allege that he was assaulted by Zondo (the deceased's father) and the latter's brother in the back of the police van on the way to the magistrate. All these assaults were denied by the police witnesses.

In this connection it is pertinent to note that when the appellant was being questioned by the magistrate prior to making his confession the following questions

and answers were recorded:

"8. Question: Has anyone held out any promises or inducements to you that may have influenced you in your decision to make a statement?

Reply: No.

9. Question: a) Do you have any wounds or injuries on your person?

Reply: Yes. (Shows an open injury on his right leg).

b) (If applicable) Do you wish to tell me how you sustained these wounds or injuries?

Reply: I was assaulted at Crammond police station. I was made to hang from a pole. During this I sustained the injury to my leg.

10. Question: Have you been assaulted or threatened with assault to induce you to make a statement?

Reply: I was assaulted in the manner I just described.

.....

Q. Had it not (been) for the assault would you still want to make a statement? -- Yes, I still want to make a statement.

Q. Are you then saying that the assault did not induce you to come and make a statement?-- No, I voluntarily want to make a statement."

Appellant's counsel relied heavily upon the evidence of these questions and answers as constituting confirmation of appellant's allegations of assault.

In his judgment on conviction the trial Judge gave full and careful reasons for the Court having ruled that the confession was admissible. He dealt fully with the evidence as to assault given by the appellant. He found that the appellant's evidence as to the nature and duration of these alleged assaults was contradictory in many respects; that parts of the evidence were improbable in the extreme; and that some events described by him could not possibly have occurred in the manner alleged.

Later in his judgment and on the strength of the evidence given by him, the learned Judge described the appellant as "a manifest and blatant" liar. He rejected the appellant's evidence of an alibi and concluded that the appellant had participated in the

killing of the deceased and that he was guilty of murder.

I shall deal first with the ruling as to the admissibility of the confession. In argument on appeal appellant's counsel could not point to any misdirection on the part of the Court a quo; and indeed he conceded that the evidence of the appellant on this issue was "exaggerated" and unsatisfactory in a number of respects. This concession was rightly made. The appellant testified to having been punched, trampled on and kicked on a number of occasions between the time of his arrest on Sunday evening to the time that he came before the magistrate on the following Wednesday. If this were true it is very surprising that the only injury that the appellant was able to show to the magistrate was a smallish wound on his right shin alleged to have been caused by chafing.

Moreover, the evidence in regard to this wound

casts grave doubt on its authenticity (in the sense of having been sustained while the appellant was in custody) and also upon the appellant's credibility in general. I say this in the light of the evidence by appellant's brother, Mafutha Shoba, that some weeks before the murder the appellant showed him an injury on the middle of his shin which he (appellant) had sustained in falling over some stones in the course of what appears to have been a faction fight; and in the light of the demonstrably untrue account given by the appellant of how he came to sustain the injury. Mafutha Shoba's evidence may not be conclusive in that he was unable to recall on which leg he saw the injury, but is is nevertheless highly significant. Appellant's account of how he sustained the injury is fully dealt with in the judgment of the trial Judge and it is not necessary to go into detail. What is manifest is that the pole allegedly inserted between the back of appellant's knees and his arms and

body could not have chafed his right shin; and that this pole could not, as stated by appellant, have been suspended by ropes from the ceiling of the prison cell where this assault was alleged to have taken place. This is clear beyond any doubt whatever; and appellant's counsel rightly conceded this.

Admittedly, the fact that appellant made what have been shown to have been untruthful allegations regarding assaults to the magistrate at the time the confession was taken is a puzzling feature of the case. Any attempted explanation for this would amount to pure speculation. Moreover in the final analysis it is clear from the magistrate's recorded questions and appellant's answers (as confirmed in evidence) that these alleged assaults played no part in appellant's decision to make the confession. I might add that the magistrate recorded the following observation in regard to the appellant's mental and physical appearance at the time of the making of the confession:

"He appears to be calm".

In my view, no valid ground for interfering with the trial Court's ruling on the admissibility of the confession has been advanced on appeal and the matter must be considered on the basis that the confession forms part of the case against the appellant.

It was similarly argued that the pointing out was not done freely and voluntarily in that it was tainted by the same coercion which produced the confession. For the reasons already given I would reject the suggestion that there is any credible evidence of such coercion. Furthermore, it was not appellant's case that the pointing out was induced by coercion. On the contrary, he contended that there never was such a pointing out: that in fact the police took him to the body of the deceased. This evidence was considered by the trial Court. As observed by the trial Judge, the appellant's version involved the proposition that the

police took the appellant to a place other than that referred to in the State evidence and depicted in the official photographs. It was a place frequented by the public, a junction between two footpaths, and was littered with spent beer cartons. It also involved the proposition that at some time (presumably after the "pointing out") the body was moved to the place depicted in the photographs. The trial Judge characterized this evidence as "bizarre", "highly unlikely" and "false and an obvious late fabrication to explain the evidence of the pointing out". Here he stressed that appellant's version of the pointing out had never been put to the State witnesses. I am in complete agreement with the comments and findings of the trial Judge on this aspect of the case. I would merely add that the preposterous suggestion of the body having been moved was, in my view, a transparent attempt to explain how, on appellant's version, the police had previously managed to locate the

body, hidden as it was in the tall grass.

The confession, the pointing out (which led to the discovery of the body) and the evidence that the appellant saw the deceased arrive at Shoba's house and was in the vicinity all afternoon established, in my view, a strong case against the appellant. His alibi, namely that he went to buy tobacco and dallied with his lady friend, rests entirely upon his **ipse dixit**. The lady friend, whose first name he could not recall, was not called to testify. The purchase of the tobacco was not confirmed by appellant's brother who said that appellant returned that evening with sorghum beer. More importantly, this alibi is in complete conflict with what appellant stated in terms of sec 115 of the Criminal Procedure Act 77 of 1951 ("the Act") at the commencement of the trial. This statement was in writing and was signed by the appellant. It contained, in addition to a plea of not guilty, the following explanation:

> "On 21 March 1990 I was at the home of my brother, Mafutha Shoba, in Crammond. I had been there for about a week before the 21 March 1990. I only left his house at about 7 am on 21/3/90 to go to Bob's Butchery, where Mafuta worked. I returned to Mafuta's house at about 1 pm and remained there the entire day."

The inconsistency is obvious. When cross-examined about this the appellant became more enmeshed in the toils of his own mendacity. He sought to explain the inconsistency by alleging that at the time he made the sec 115 statement, owing to the lapse of time, he had forgotten the details of going to buy tobacco and meeting his girlfriend. Asked when he again remembered these details for the first time he replied:

> "I was asked today in court here as to where I had gone to. I then remembered and mentioned this."

This clearly is a reference to his examination-in-chief on the merits of the case. Yet it is on record that

prior to this, during the presentation of the State case, it was put in cross-examination by appellant's counsel to the witness Mafutha Shoba that "his instructions" were that the appellant left Shoba's home that afternoon at about 14h30 to buy tobacco and that he came back at about 18h00.

Appellant's counsel drew attention to sec 209 of the Act which provides that an accused may be convicted on the single evidence of a confession by him if the confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed. He submitted that because the district surgeon who performed the autopsy on the deceased was unable to determine the cause of death, owing to the degree of decomposition of the body, there was no evidence that the crime of murder had been committed. I shall assume in appellant's favour that

this is correct, but the question still is whether or not the confession is confirmed in any material respects. In my opinion it is. In the first place, the pointing out of the body (which led to its discovery) in itself provides confirmation (cf S v Mbambo 1975 (2) SA 549 (A), at 552 E - 554 A); and, in the second place, the disappearance of the deceased on the afternoon in question and the subsequent finding of the body near the home of Shoba in a remote spot, some distance from the road and not on any path, in my view provides further confirmation. The deceased was, after all, to all appearances a healthy child proceeding on her way home from school according to her usual habit. The circumstances of her disappearance and the finding of the body, in themselves, strongly suggest that she was murdered. The confession indicates that this happened in the vicinity of Shoba's house and the facts confirm this.

For these reasons I am satisfied that the Court

a quo correctly concluded that the appellant participated in a plan to murder the deceased in order to obtain parts of her body. There is consequently no doubt that the conviction of murder was well-founded.

I turn now to the question of sentence. The appellant's personal circumstances are that at the time of his trial he was 33 years old and the surviving parent of two small children. Although he had had little formal education he was gainfully employed as a bricklayer and earned R350 per month.

The aggravating circumstances in this case are firstly the particularly heinous nature of the crime. A young defenceless child, daughter of his brother's great friend, was, as the trial Judge aptly put it, waylaid, killed and slaughtered, as one would an animal, in order to provide human tissue. The murder was thus premeditated, coldbloodedly executed with dolus directus and totally unprovoked. The confession does not disclose

what inducement, if any, the "owner of the car" held out to the murderers. It does not appear to make much difference if there was an inducement. It was suggested in the heads of argument of appellant's counsel that it should be inferred that the appellant's belief in witchcraft was a motive for the killing. There is no basis whatever for this suggestion. If any inference is to be drawn, then, in my view, it seems probable that the child was killed in order to provide what is termed "muti", to be sold for someone's financial gain. Cases of this nature come quite frequently before the courts.

Another aggravating factor is the appellant's atrocious criminal record. In 1968, admittedly when he must have been a young boy, he was convicted of house-breaking and theft and sentenced to juvenile cuts.

In the same year there was a conviction of escaping from custody; and two years later one of cultivating dagga. In both cases corporal punishment

was again imposed. In 1974 the appellant was convicted of murder and the record indicates that he killed his victim, a 50-year old man, with a knife. At the same time he was convicted of raping a girl aged 16 and again used a knife, presumably in order to subdue her. Extenuating circumstances were found in respect of the murder and the sentence imposed was 10 years imprisonment. For the rape he received 3 years imprisonment. On 16 May 1983 he was released on parole. Appellant's counsel stressed the fact that after his release on parole appellant kept on the right side of the law until he committed the present crime. This is true and it is a factor to be weighed; but it cannot be allowed to obscure the enormity of a previous conviction for murder. Nor does it really rebut the impression, derived from his previous record, that the appellant is unlikely to be a fit subject for rehabilitation.

Appellant's counsel also argued that it ap-

peared from the confession that the appellant played a minor role in the murder and that this should count as a mitigating factor in his favour. It is true that the confession speaks of Tshindile throttling the child and of Ngiliza providing the razor blade with which Tshindile cut away parts of the deceased's body. But the whole tenor of the confession makes it clear that the appellant was a willing party to the common purpose, that he participated physically in its execution ("We caught the child"; "We then handed it - i e the parts of the deceased's body - to Ngiliza..."), and was present when the human parts were handed over to "the owner of the car". I cannot, therefore, agree that the appellant played a minor role or that his participation is substantially different from that of his two co-perpetrators.

Finally, appellant's counsel argued that appellant's pointing out of the body and confession bespoke a feeling of remorse which counted in his favour

as a mitigating factor. It is by no means clear to me that these actions on the part of the appellant were actuated by remorse. Certainly appellant never said so; and at the trial he persisted to the end in denying his participation in the crime, in denying the pointing out and in alleging that the confession was a false one extracted from him by means of police brutality. I do not think that this is a point of any substance.

Weighing the aggravating factors against such slight mitigation as there may be I have come to the conclusion that the death penalty is the only proper sentence.

The appeal against conviction and sentence is dismissed.

M M CORBETT

E M GROSSKOPF JA) CONCUR
NICHOLAS AJA)