CASE NUMBER 460/92
H V N

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EX PARTE: THE MINISTER OF JUSTICE
on behalf of

MABUTI MAMKELI

IN RE: MABUTI MAMKELI Appellant

and

THE STATE Respondent

CORAM : HEFER, GROSSKOPF F H, JJA et HOWIE, AJA

HEARD : 9 NOVEMBER 1992

DELIVERED: 27 NOVEMBER 1992

JUDGMENT

Howie, AJA:

Mabuti Mamkeli (to whom, for convenience, I shall refer as "appellant") was convicted of murder in the King William's Town Circuit Local Division (Van

Rensburg J and assessors). No extenuating circumstances having been found, he was sentenced to death on 2 February 1989. An unsuccessful application to the trial Judge for leave to appeal against the conviction was followed by an unsuccessful petition to the Chief Justice.

The matter thereafter came before this Court on sentence only in terms of the provisions of s 19 (12) of Act 107 of 1990. At the hearing of that appeal appellant's counsel (who also appeared before us in the present matter) directed his main argument at the conviction, not the sentence. In the course of its judgment setting aside the death sentence and replacing it with a long term of imprisonment, this Court held that it had no jurisdiction to consider a conviction in an appeal under the Act referred to. However, reasons were expressed for doubting appellant's guilt and it was indicated that the judgment would be submitted to the

State president so that he could consider extending mercy to appellant in terms of the Criminal Procedure Act, 51 Of 1977.

In due course the General Law Amendment Act, (139 of 1992) came into force, in terms of s 19 of which the Minister of Justice may refer to this Court the case of any person sentenced to death prior to 27 July 1990. For the section to apply, the person concerned must have exhausted all recognised legal procedures pertaining to appeal or review; an appeal against his conviction must not yet have been considered by this Court; and the Minister must entertain doubt as to the correctness of the conviction. Acting in terms of section 19, the Minister has, on appellant's behalf, referred the matter of his conviction to this Court for its consideration. It is not in dispute that the section applies, and that it has been appropriately invoked. S s (4) of the section provides that this

Court has the same powers in a matter such as the present as it has in respect of an appeal against a conviction.

This Court's judgment in the previous appeal is reported as S v Mamkeli 1992 (2) SACK 5 (A) . Most of the facts relative to the conviction are set out there but as the conviction was not in issue in that appeal, and as counsel's arguments in the present matter ranged more widely than on that occasion, it is necessary, briefly, again to refer to the relevant evidence.

The deceased, M.M., was a 16 year old, physically immature schoolgirl. She lived in the Stutterheim district and attended school at a place near Berlin. She left home on Sunday 10 May 1987 at about 3 pm intending in Stutterheim to board a taxi for Berlin. She was wearing a dress, a white jersey and sandals. She had in her possession a plastic bottle of

sour milk and a bag containing two skirts, a school tunic, a blouse, a navy jersey and some school books. She was seen at about 4 pm that afternoon near a tree close to Stutterheim station. She was in the presence of appellant. The woman who saw them knew them well. She heard appellant complain that the deceased, to whom he referred as M., had stolen money from him and that he intended taking her to the police.

The deceased was not seen alive again. Her body was found the following Sunday morning, 17 May, in a pool in the Kumakala river just upstream from a culvert under the Stutterheim - Queenstown national road. This pool was approximately 500 metres from the tree where she was last seen. Her hands had been tied behind her back and there was a length of flexible copper piping wound tightly round her neck. There were copious bloodstains on the side of the culvert. Her dress and tunic were found some 200 metres downstream.

Later that day Const. Schoeman of the Stutterheim police, acting on information, approached appellant and requested him to come to the police station. There he asked appellant if he knew the deceased and referred to her by name. Appellant denied knowing her and said he had never heard of her. Appellant was therafter arrested on suspicion that he was responsible for the deceased's death.

On 18 May and 20 May the investigating officer, Det. Sgt. Mgwadla, in the presence of appellant, found various articles alongside the Kumakala river, including some of the deceased's clothing, the milk bottle and her books.

On 22 May a post-mortem examination was conducted by a Stutterheim district surgeon, Dr Brink. He determined the cause of death as strangulation by means of the copper piping. He also found genital injuries consisting in a rupture of the hymen, a tear of

the fourchette and a 5 cm tear of the posterior vaginal vault, which tear extended into the peritoneal cavity. Dr Brink considered that these injuries were indicative of forceful intercourse and concluded that the deceased had been raped prior to her death. On information he received, he estimated the date of death as having been some 12 days before his examination.

In due course appellant was charged in the Court below with rape and murder on the strength of the facts and opinions mentioned, all of which were established in evidence at the ensuing trial.

In the course of the proceedings the following further facts emerged:

(a) When found, the deceased was no longer wearing the dress and jersey in which she left home, but the navy jersey and a skirt which she had carried in her bag. In addition, the article with which her hands had been tied was

the white blouse. This had also been in the bag when she set off for Berlin.

(b) The time of death could not be fixed with any certainty. The most that Dr Brink could say was that the deceased had been dead "for quite a number of days" before his examination.

(c) Det. Sgt. Mgwadla, who testified that he found the various relevant articles because appellant pointed them out to him on 18 and 20 May, made and omitted significant entries from his official pocket book, exhibit M, in so far as the course of the investigations on 18 May was concerned. Moreover, his evidence conflicted with some of the entries in his

pocketbook.

(d) At about 9 am on 18 May appellant was taken to a magistrate in his office at

Stutterheim. This was for the purpose of making a statement to the magistrate. Asked by the magistrate whether he had made a statement before in relation to the same incident, appellant said he had made a statement to the police the previous day but alleged that he did so because he was assaulted by the police and threatened that he would be shot if he did not do so. The magistrate asked appellant whether he had any injuries and noted that appellant's left eye was swollen. In that regard appellant said that he had been kicked in the police cells. The magistrate then asked appellant specifically about assault by the police. In reply, appellant stated that he had been kicked on the left eye and that his head had been knocked against a wall. He accused the

police who had been on night duty in the cells as having been responsible and said that they had done this in order to force him to make a statement. Asked how he had come to be brought to the magistrate, appellant said that a detective had told him to come. He said the detective had asked him if he would tell the truth to the magistrate. Appellant continued: "Ek dink ons sal hof toe gaan en dat ek waarheid daar moet praat". The magistrate declined to take a statement from appellant and he was returned to police custody. (e) At 11 am on 18 May Dr Miller, another district surgeon at Stutterheim, examined appellant and recorded -

"Small closed 1 cm horizontal laceration over left lateral eye brow - superficial -no surrounding bruise".

No evidence was led by the State from the magistrate or Dr Miller. Nor was any policeman called to controvert the allegations of assault which appellant made to the magistrate.

In regard to Mgwadla's evidence that appellant made self-incriminating pointings-out, the prosecution sought to corroborate him by calling evidence from Det. Sgt. Qata in relation to the events of Monday 18 May and Cst. Makuzweni in connection with a visit to the relevant scene on Wednesday 20 May.

In his defence, appellant raised an alibi. It is not in dispute that the trial Court's comprehensive reasons for finding this defence false beyond reasonable doubt were fully justified. Appellant went on to deny that he had pionted out anything to the police. He admitted being taken to the river on two occasions but said that the first was on Tuesday 19 May, not Monday 18. He alleged that it was the police who showed him

various spots, not the converse. In addition, he denied that they found anything in his presence.

The trial Court acquitted appellant on the rape charge. Its reasons were that the genital injuries were not proved to have been caused by a male organ or, in any event, prior to death. The Court's judgment then proceeded:

> "A further unexplained fact, namely that the deceased was wearing different clothing when her body was found to that which she was wearing when she had left home, on the afternoon of Sunday, 10 May 1987, casts doubt on whether in fact it was the accused who sexually assaulted her, if she was sexually assaulted prior to her death." With respect, it would appear to have been sufficiently proved, by way of the bloodstains, the

genital injuries and the entire matrix of background facts, that the deceased was raped, and then murdered to conceal the rape. If indeed, therefore, the change of clothing shed doubt on appellant's identity as the rapist, it seems necessarily to follow, as a matter of inescapable logic, that equally pervasive uncertainty surrounds his identity as the killer. However, the trial Court based the conviction primarily on the police evidence as to the alleged pointing out and held that that evidence, coupled with appellant's presence in the company of the deceased at 4 pm on Sunday 10 May, established guilt on the murder charge beyond reasonable doubt.

In the hearing of the present matter counsel for the State initially accepted that the police evidence of pointing out was essential to the success of the prosecution case and indicated that he did not seek to support the conviction solely on appellant's presence

with the deceased, on the post-mortem findings being consistent with death on 10 May and on appellant's mendacity, even taking all those features cumulatively. Eventually, however, counsel did seek to place some reliance on them in the event that the evidence of pointing out had to be discarded.

In my view the triad of features just mentioned cannot, even cumulatively, serve to establish guilt beyond reasonable doubt in the absence of the evidence as to pointing out. Appellant's being with the deceased, even if apparently annoyed with her for allegedly stealing his money, loses any real incriminatory impact if there was reasonably possibly an interval of even a day between his presence with her and the time of death. And the time of death cannot be determined with anything approaching reliability. Appellant's false evidence might have added impetus to a prima facie State case calling for an answer from him

but the first two items of evidence in the triad do not constitute such a case. Moreover, it is not at all improbable that appellant would falsely have denied knowing appellant or being with her even if innocent of her murder. Assuming his innocence, he could well have thought his alibi more acceptable than the truth; he could have thought that to admit being with her would lead to the inference being drawn by the police that he was her murderer: cf. S v Mtsweni 1985 (1) SA 590 (A) at 594 C - D.

Consequently, in this Court, as in the trial Court, the State case stands or falls by the alleged pointing out by appellant. It need hardly be said that if that evidence failed beyond reasonable doubt to establish either a pointing out by him or, if he did point anything out, that any articles retrieved or facts unearthed were "discovered" by the police as a result of such pointing out (cf R v Samhando 1943 AD 608), the

appellant's guilt was not proved. The same is true if there is doubt that he knew beforehand where they were to be found, even if it be accepted that he did point them out.

The police testimony in this regard consisted of the evidence of Mgwadla, Qata and Makuzweni. The trial Court bore in mind the inconsistencies between Mgwadla's evidence and the entries in his pocketbook but concluded that such differences were not of "sufficient materiality" to warrant rejection of his evidence even if his explanations in this connection were "not entirely convincing". The Court reasoned that as appellant did not dispute going with the police to the scene of the crime on two occasions, the only important matter in issue was whether he pointed out the articles recovered to the police or whether they showed them to him. Accordingly, so the Court held, the inconsistencies in Mgwadla's recorded entries did not

appear to be "of any great relevance". In addition, the Court found his evidence to have been corroborated by Qata and Makuzweni in respect of whose evidence there could - so it was held - be no criticism and who were thus accepted as truthful and reliable.

Analysis of the police evidence reveals the following. Const. Mkululi, who was called by the trial Court, said that on Sunday morning, 17 May, he found the deceased's dress and tunic 200 metres downstream from the culvert. They were among some bushes but "just lying open", as he put it. What was also found on the Sunday was the deceased's right sandal. No witness referred to this finding but one of the photographs taken by the police of the scene on that day, exhibit A, clearly shows it. Mgwadla, when first called by the State, testified that om Monday 18 he, Qata and appellant walked from the tree referred to earlier, up the river towards the culvert. They did not find

anything of relevance. They came to the culvert, climbed the bank to the road and descended the other side. There, appellant pointed out the pool and the wreck of an old motor car which was lying about 10 paces from the pool. Mgwadla said he went to the wreck and broke off a length of copper piping identical to that with which the deceased had been strangled. Asked by the trial Judge why he did so, he said it was because of a statement made to him by appellant. The learned Judge then pertinently asked -

"Yes but did the accused point the wire out to you? .... Yes M'Lord." The witness went on to say that the engine compartment was open and a variety of different wires was visible.

Qata's evidence as to the visit to the scene on 18 May amounted to this. Mgwadla requested him to accompany him and appellant -

"because he alleged that the accused person

was going to point . . . some places at the scene." It was then, Qata thought, between 8 am and 10 am but he could not recall. At the culvert appellant pointed out the car and the pool. The witness then saw Mgwadla break off a piece of copper piping but could not say why he did so.

As to the events of Wednesday 20 May, Mgwadla's evidence was that he interviewed appellant and asked him about the items which the deceased had had in her possession. Appellant then "took" him and Makuzweni. They proceeded to the pool and went down -stream through the culvert. Appellant then pointed out the deceased's books and her left sandal at a distance of some 200 metres from the culvert. At about 250 metres he pointed out her other skirt. Approximately 300 metres from the culvert he pointed out the milk bottle. All these articles were in a bushy area near

the river but easily visible. Mgwadla said that they were "just in the open". They were visible to anyone on the riverbank and not obscured in the bushes.

Makuzweni's evidence as to the Wednesday was that appellant told them to follow him. He then pointed out the milk bottle about 50 metres from the culvert. Thereafter, said the witness, "we found books ... we found a sandal .... we found a skirt." He later explained these findings thus -

"We walked there, walked about there and then the accused would say, 'there is one', then

walk around again and say 'there is the other one'".

According to this witness the items found "were not easily visible because it was in a forest there". Asked specifically if they were hidden away, he said he could not say.

Pausing to reflect on the effect of Qata and

Makuzweni's evidence, the former said nothing more than that appellant pointed to the car and the pool. There can be nothing significant in that. They were not hidden. Nothing in the photographs suggests that they were not simply features of the landscape reasonably possibly known to anyone who passed along the national road above the culvert or anyone who was, quite innocently, familiar with the riverbanks.

Makuzweni confirms Mgwadla's evidence only in one respect, namely, that appellant pointed out the milk bottle. The other articles, he says, they "found". Admittedly, according to him, appellant variously said "there is one" and "there is the other one" but this does not convey whether it was appellant's so saying that led to the finding or whether his remarks coincided with the police themselves having already spotted some of the articles. Moreover, this witness contradicted Mgwadla as to the ease with which all these items could

be seen.

As regards Mgwadla's testimony, and commencing with the alleged pointing out of the copper piping, his evidence stands alone on this aspect and is inconsistent. Initially, Mgwadla merely said that having been shown the car, he proceeded to remove the copper piping. He had to be asked why. He replied that it was prompted by a statement appellant made. Only in response to a specific question by the trial Judge as to whether appellant pointed it out did he make an affirmative allegation. Later in the trial, having been recalled by the State, Mgwadla said that he removed the copper piping as a result of a report made by appellant. Finally, in his pocket book, Mgwadla made no reference to a pointing out of the copper piping. He merely recorded "Suspect pointed out scene of crime." In all these circumstances, it was not adequately proved that the copper piping was in fact pointed out by

appellant. The law draws a clear distinction between a statement and a pointing out and no statement made by appellant to Mgwadla was proved by the State to be admissible. If it nonetheless remains open to the prosecution to rely on s 218 (1) of the Criminal Procedure Act, whereby evidence is admissible of a fact discovered as a result of an accused's inadmissible statement, Mgwadla's evidence as to the copper piping can only assist the State if that evidence was beyond reasonable doubt honest and reliable and if it established a discovery, in the true sense, of something the police did not know before. His credibility is also vital, of course, regarding the significance of the recovery of the deceased's possessions on the Wednesday.

Turning, to the matter of Mgwadla's credibility, two omissions from his evidence-in-chief immediately strike one. He failed in his account of his

investigation on the Monday to disclose that appellant had been taken to the magistrate to make a statement. He also omitted to reveal that appellant had alleged that he had been assaulted by the police in order to force him to divulge information. In cross-examination he proffered the patently lame excuse that he had forgotten those facts. He also said that appellant had volunteered to go to the magistrate. In the light of the magistrate's record of appellant's allegations to him (exhibit C), and the State's failure to contradict them, Mgwadla's evidence on this score is not acceptable.

The next consideration of importance concerns the pocketbook entries in respect of 18 May. Once again there is no reference to appellant's abortive visit to the magistrate. Mgwadla simply said he forgot to enter that. There is also, as I have said, no reference to appellant's having pointed out the copper piping. This

is in contrast to the later entry that appellant pointed out the articles found on the Wednesday. It is clear, futhermore, that a number of important entries relative to 18 May are inconsistent with Mgwadla's evidence. The first 6 entries read as follows:

> "07h30: Reported on duty .... 08h00: At office doing administration duties.
>
> 09h50: At surgery with suspect .... 11h00: Suspect was examined by Dr Miller ....
>
> 11h55: Suspect ... took Detective Qata and me to the scene of crime.
>
> 12h10: Suspect pointed out scene of crime."

According to Mgwadla's evidence the pointing out episode occurred before appellant was taken to the magistrate and lasted about an hour. The magistrate

recorded that appellant came to his office at 9.06 am. The visit to the scene must therefore have taken place between 8 am and 9 am as Mgwadla sought to say in evidence. That cannot be so, however, if the pocket book entries are correct. Mgwadla clearly transposed the time of the visit to the scene, either in his evidence or in the pocket book. The switch is radical enough not to be attributable realistically to error. There appears to be no reason why, if the true time was before 9 am, Mgwadla would not have recorded it so. On the other hand, if it subsequently suited him deviously to misrepresent the time he would have done so in his evidence. Not only that. Under cross-examination on this subject he was conspicuously at a loss for a coherent and acceptable answer. He said he had forgotten to record either the pointing out or the journey associated with it at the times they took place and so wrote them in later that morning at Dr Miller's

surgery. He went on to say that the times he entered in the pocket book in this regard were the times at which he remembered those events and entered them in his book, not the times when they occurred. He was then asked why, if that were so, there were separate entries in respect of the journey and the pointing out and why the respective times were 15 minutes apart. The witness answered that the entry for 11h55 was made while he was still at the doctor's surgery. Appellant was then handed over to him and they left for his office. The entry for 12h10 was effected after reaching his office. Mgwadla agreed that Dr Miller saw appellant at 11 am as reflected in his report, exhibit 0. Considering the scope and extent of the doctor's examination and report it is not believable that they were still at the surgery at about midday.

It is quite evident, in my assessment, that Mgwadla's evidence on this material issue was of

extremely poor quality. The importance of the issue is this. In the light of the State's omission to contradict appellant's allegations to the magistrate, the reasonable possibility was not discounted that efforts were made by the police subsequent to his arrest to coerce him to admit guilt. The inference to be drawn from his being taken to the magistrate is that the police anticipated his making a statement that was at least in some degree incriminating and that coercion had to that extend succeeded. However, when no statement materialised, the police were left without any substantial evidence implicating appellant. The real danger to be borne in mind in evaluating the police evidence, therefore, is that having failed to secure a confession, Mgwadla sought to obtain the next best evidence, namely, a self-incriminating pointing out by the suspect. At that time (before S v Sheehama 1991 (2) SA 860 (A)) evidence of a pointing out was

admissible even if the pointing out was coerced. I can see no convincing reason, if there was a real prospect of obtaining a confession, or if a confession had already been obtained, why Mgwadla would have wanted to acquire evidence of a pointing out: the police could have looked for the missing articles by themselves. The fact that there was a second visit to the scene on the Wednesday strengthens these conclusions. If the first visit had, as I think, not yielded anything implicating appellant, it is more than a reasonable possibility that the second was a further attempt to obtain self-incriminating evidence.

In the circumstances it is probable that the true time of the visit to the scene on the Monday was after, not before, appellant was taken to the magistrate. The further probability is that to suppress that fact, and the inference to which it gives rise, Mgwadla testified falsely as to the time of the visit to

the scene and as to the pocket book entries in question. Qata did not really assist him on this score. The letter's evidence as to the time of that visit was noticeably uncertain.

In my view the trial Court overlooked the significance of all these shortcomings in Mgwadla's evidence. They were manifestly important. The Court's findings regarding the worth of his evidence were therefore misdirected. His credibility was substantially flawed.

From the aforegoing it cannot be accepted as proved beyond reasonable doubt that Mgwadla was ignorant, on Monday 18 May, of the fact that the deceased had been killed with a piece of copper piping from the abandoned car. It follows that it was not proved that there was anything in the nature of a discovery in Mgwadla's seeing similar piping on the wreck. The car must in any event have been seen by the

policemen who were at the scene the previous day. There is no evidence that the copper piping on the car was difficult to see or that it would have taken anything more than simple deductive reasoning to look for, or find it. Finally, it will be remembered that this alleged finding was not even recorded in Mgwadla's pocket book; certainly not as a result of something appellant pointed out .

As to the articles found on the Wednesday, the defects in Mgwadla's evidence apply yet again. His allegations that appellant pointed out anything therefore cannot be accepted as true.

In any event nothing which Mgwadla and Makuzweni said justifies the conclusion that the articles in question were hidden, or that it required foreknowledge of their respective positions to find them or, for that matter, that appellant led the policemen straight to them. Even the true culprit would not have

been likely to know where each article was. It is not as if they had been hidden so that only the person who hid them would know their location. It is also not as if the police also found other articles, from among which only someone in the know would have been able to identify the deceased's property. On the evidence, the items in question were the only articles found. It was therefore no more difficult for the police to find all these things than it would have been for the real perpetrator.

In addition, appellant's failure to point out the articles in question on the Monday militates against the conclusion that he knew their locality. If he did know, there is no understandable reason why he would have waited until the Wednesday to point them out; he and the police traversed the same area on the Monday.

In the circumstances there is not only inadequate evidence to show that the Wednesday's

findings were prompted by what appellant said or did, but, with the articles not having been hidden away, there is no reason to infer, if indeed appellant did point out any of them before the police saw them, that he was pointing to anything more than articles which were readily visible for all to see.

It follows that there are inadequate grounds for finding that any pointing out by appellant raises the inference of prior knowledge on his part which could only have stemmed from his commission of the murder.

For all the aforegoing reasons I consider that the State failed to establish beyond resonable doubt that appellant incriminated himself by way of any pointing out as alleged in the police evidence. The entire foundation on which the conviction was based therefore collapses.

The appeal succeeds. The conviction is set aside, as is the sentence imposed upon appellant in the previous appeal (case 461/91).

C T HOWIE,

AJA

HEFER, JA) CONCUR

GROSSKOPF F H, JA)