46/92

saak No 540/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

T E KAMTE	1st Appellant
N GWEBANI	2nd Appellant
N B NOMEVA	3rd Appellant

and

THE STATE	Respondent

CORAM: E M GROSSKOPF, VIVIER, VAN DEN HEEVER, JJA

HEARD: 12 March 1992

DELIVERED: 27 March 1992

J U D G M E N T

E M GROSSKOPF, JA

The three appellants stood trial in the Eastern Cape Division before SUTEJ J and assessors on a count of murder arising from the death of one Andries Mentoor on 19 November 1985 in the Mlungisi Black Township in Queenstown. They were found guilty of the following offences:

First appellant: Public violence;

Second appellant: Murder;

Third appellant: Assault with intent to do grievous bodily harm.

Sentence was passed on 27 October and 3 November 1989. Since the second appellant was only 17 years old no question of extenuating circumstances arose under the law then prevailing. The appellants were sentenced as follows:

First appellant: 18 months' imprisonment;

Second appellant: 13 years' imprisonment;

Third appellant: 9 months' imprisonment.

On application to the trial judge, a special entry

was made on the record. In addition leave was granted to all three appellants to appeal against their convictions, and to the first appellant to appeal against his sentence.

I deal first with the special entry, but before setting out its terms it is necessary to have regard to the background. On the morning of 19 November 1985 the deceased, a coloured man, was killed. He received a number of wounds to his head, which caused inter alia a fracture of the skull, and was thereafter burnt. The police had no leads to the perpetrators of the murder. In March 1988, almost two and a half years after the event, the main State witness, Miss Nontuthuzelo Solani, approached the police and volunteered the information that she had been an eye witness to the killing. A statement was taken from her on 11 March 1988. The first and second appellants were arrested on 28 March 1988.

The evidence of Miss Solani was briefly as follows. She was 23 years old at the time of the trial, and had been

living in Queenstown prior to the murder of the deceased. On the morning in question, shortly before 7 a.m., she was on her way to the shop when she heard people screaming that there was a coloured person. She then saw a coloured man emerging from a shop, and people were saying that he should be beaten up and set alight. Some people started throwing stones at him. He tried to get away, but three persons came running to him from the direction where she was standing. The three persons were the first appellant, the second appellant and a certain Phumzile.

As these three persons approached the coloured man, the second appellant turned and went into a house. The first appellant turned around before he reached the coloured man, and she did not see him again. Phumzile went up to the coloured man and stabbed him. The coloured man fell down. Somebody brought a tyre onto the scene, and the second appellant emerged from the house with a bottle containing some type of liquid. He placed the tyre on top of the

coloured man, poured the liquid over him, and set it alight. The liquid caught fire. The coloured man was still "screaming, struggling and talking". The bystanders were singing. At this stage a police vehicle (which she called a hippo) appeared and everybody ran away.

In her evidence Miss Solani said she did not know Phumzile's surname. However, in a reply to a request for further particulars, delivered prior to the trial, the State had alleged that the responsibility of the three appellants arose by reason of their being parties to a common purpose, and that the parties to the common purpose were the accused and Phumzile Sijila together with the rest of the group unknown to the State.

A man named Phumzile Sijila was in fact arrested together with the first appellant. However, when questioned by the police, he told them that he had been in goal in Queenstown when the offence was committed. This was confirmed and he was released.

In cross-examination Miss Solani repeated that she did not know the surname of the Phumzile whom she had seen. She said that she had given a description of him to the police and told them that he was a friend of the appellants' but that she did not mention the surname "Sijila" to the police.

While Miss Solani was still in the witness box, the prosecutor informed the Court that, after discussing the matter with the Attorney-General and his deputies, he had been instructed to place it on record that the surname Sijila appeared in Miss Solani's statement, and, in fact, that it appeared more than once. He refused, however, to make the statement available to the defence.

The first and second appellants both testified that they had not been at the scene of the murder at all.

The trial Court accepted that Miss Solani was a single witness in so far as she implicated the first and second appellants, but considered her evidence sufficiently

trustworthy to justify their conviction, particularly since their alibi evidence was rejected. The position of the third appellant is somewhat different. He was not implicated by Miss Solani, and his conviction rests mainly on a statement made by him. I deal with him separately later.

It is against the background of the facts set out above that the special entry was made. It is in the following terms:

> "The State having disclosed during the course of the trial that notwithstanding Miss SOLANI'S denial that she provided the surname "SIJILA" to the Police, the said surname appeared more than once in her statement to the Police. It is contended on behalf of the Accused that the reference to the surname "SIJILA" is a material discrepancy between Miss SOLANI'S evidence in Court and her statement to the Police because it goes to the very root of Miss SOLANI'S credibility and reliability. It is contended further on behalf of the accused that the State was under a duty not only to make such disclosure, which they did, but also to make the relevant statement available for cross-examination and that its failure in making the said statement available for such purposes, constituted an irregularity or illegality which resulted in a failure of justice."

The law on this matter is not in dispute. In S v.

Xaba 1983(3) SA 717 (A) at pp. 728 D - 730 D BOTHA JA discusses the duty of a prosecutor when the evidence given by a State witness at a trial diverges from a prior statement made by him to the police. At pp. 728 H to 729 A he then states the following:

> "It is clear, therefore, that when a State witness gives evidence from which a serious discrepancy emerges between that evidence and a prior statement made by the witness to the police, the prosecutor has no choice: he is obliged to disclose that fact and, apart from special circumstances which are not relevant here, to make the statement available to the defence for the purposes of cross-examination of the witness. It is equally clear that a prosecutor's duty of disclosure in these circumstances is one of the rules or principles of procedure which must be adhered to in a criminal trial in order to ensure that the accused has a fair trial and that justice is done.
>
> It follows that the failure of a prosecutor to observe this duty is an irregularity in the proceedings for the purposes of s 317(1) of the Act."

And as to when a discrepancy is to be regarded as serious, BOTHA JA says (at p. 729 G-H):

> "Whether or not a discrepancy between the evidence of a State witness and his previous statement to the police is sufficiently serious to call for the

> performance of the duty of disclosure by the prosecutor must therefore be assessed in the context of the effect that such disclosure and the cross-examination following upon it might have on the credibility of the witness. In my opinion a discrepancy is serious whenever there is a real possibility that the probing of it by means of cross-examination could have an adverse effect on the assessment by the trial Court of the witness' credibility and reliability."

In the present case it can hardly be doubted that the discrepancy was serious. According to her statement, so it would seem, Miss Solani placed three persons on the scene of the murder, namely first appellant, second appellant and Phumzile Sijila. Phumzile Sijila had a cast-iron alibi, and was therefore released immediately. At the trial she gave a different version - now it was not Phumzile Sijila, but another Phumzile whose surname she does not know, who assaulted the deceased. If her evidence were shown to be false in respect of the identity of Phumzile Sijila, the Court would most likely not have accepted it against the first two appellants, both of whom denied having taken part in the attack on the deceased. And, I should add, although

the trial Court accepted Miss Solani's evidence, a perusal of the record discloses that it was not free of blemishes. Further cross-examination may well have seriously impaired her credibility.

On behalf of the State Mr. Price argued that, by making it known that the name Sijila appeared in the statement, the prosecutor had in substance performed his duty according to the principles laid down in Xaba's case, supra. The defence would have been able to infer, he said, that Miss Solani had in her statement attributed the actions to Phumzile Sijila which in her evidence she said had been committed by a different Phumzile. The defence would accordingly have been able to cross-examine her as effectively as it would have been if it had had possession of the statement. He assured us that there were no other discrepancies between her statement and her evidence.

These submissions are in my view unfounded. Even accepting that the reference to Phumzile Sijila was the only

discrepancy, cross-examination would have been much more effective if the cross-examiner had the document in his hand. The witness could have been confronted with the actual words recorded in the statement, with the number of times the name Sijila was used and the context in which it appeared. She could have been asked whether she had signed the document and whether she had read it or had it read out to her. In short: if there is a serious discrepancy between a witness' statement and his evidence, there can be no satisfactory substitute for the production of the document to the defence.

According to the principles in Xaba's case, supra, the statement should therefore have been made available to the defence unless there were special circumstances justifying its non-production. In the present case Mr. Price said that, on the instructions of the Attorney-General, the document had not been given to the defence because the witness was frightened of retaliation and was very nervous in

the witness box. She had already been cross-examined at length, and it was feared that, armed with the statement, the defence might indulge in a further protracted and hair-splitting cross-examination. These reasons do not bear scrutiny. Miss Solani was the only witness implicating the first two appellants. Their counsel was entitled,and, indeed, under a duty, to cross-examine her, and the statement should have been made available to him for that purpose. If he exceeded permissible limits, the Court was there to protect her. It was not for the Attorney-General to presume that the Court would fail in this duty, and therefore to refuse to allow the defence the statement to which it was entitled.

In view of the aforegoing I consider that an irregularity was committed in the case. Since the irregularity related to the credibility of Miss Solani, and since she is the only witness implicating the first two appellants, it is clear that a failure of justice has

resulted and that their convictions cannot stand (vide section 322 of the Criminal Procedure Act, no. 51 of 1977).

As far as the third appellant is concerned, the evidence of Miss Solani was also important. Although she did not identify him as one of the people who attacked the deceased, she is the only eye-witness to describe the incident. Without her evidence there would only be the medical evidence about the nature and extent of the deceased's injuries, and police evidence of what was found on the scene.

It is against this background that the statement by the third appellant must be considered. The statement was recorded by a magistrate on 9 June 1988. It was handed in by the prosecutor without objection (but also without consent). No other evidence implicated the third appellant. He did not give evidence himself. The statement reads as follows:

> "Omstreeks 5.00 die oggend het ek skreeuery gehoor van mense wat gesê het daar hardloop 'n kleurling op. Ek het iets opgetel wat van yster gemaak is, die voorwerp het soos 'n byl gelyk. Ek het die kleurlingman eenkeer op skouer daarmee geslaan - hy

> het geval nadat hy op grond geval het het ek gehardloop. Vandaar is ek na my oom se huis toe wat by S gedeelte van die Woonbuurt bly. Toe ek daar aankom het ek gehoor toe mense vra wat dit was wat gebrand het. Ek het myself nie daaraan gesteur nie. Ek het in huis ingegaan en weer uit huis gekom. Ek het van die huis af weggeloop en toe ek met straat op stap was die vuur amper klaar en toe ek by die plek verbyloop het die mense al versprei. Ek het verneem dat 'n kleurlingman daar verbrand is. Dit is al."

Now it will immediately be noted that the statement does not indicate the date or place of the incident. The time ("omstreeks 5.00 die oggend") is substantially earlier than that given by Miss Solani and by the deceased's sister, who saw him shortly before his death. Miss Solani does not describe any blow on the deceased's shoulder with an axe, and the medical evidence by Dr. Koopowitz, who conducted the autopsy, discloses no injury which might have been caused by such a blow. Much of the statement is hearsay - the third appellant did not even know from his own knowledge whether the coloured man whom he had assaulted, was subsequently burnt.

The statement is therefore not only vague as to the date and place of the incident, but in material respects the incident described in the statement differs from that to which Miss Solani testified. In these circumstances there may well be doubt on the record as it stands whether the third appellant's statement has any relationship with the offence of which he was charged, and this might by itself justify the setting aside of his conviction. However, we now have the further feature that an irregularity has been committed by the failure to make Miss Solani's statement available to the defence. If there had not been this irregularity, Miss Solani would have been cross-examined further on her statement, and further facts may have been elicited to render it unlikely that the third appellant took part in the assault described by her. In these circumstances it seems to me that a failure of justice has resulted from the irregularity also in respect of the third appellant's conviction and that this conviction cannot stand.

In the result the appeals of all three appellants are allowed, and their convictions and sentences set aside.

E M GROSSKOPF, JA

VIVIER,JA
VAN DEN HEEVER, JA Concur