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CG CASE NUMBER: 590/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LUYANDA MKIZE Appellant

and

THE STATE Respondent

CORAM: **NESTADT, MILNE et VAN DEN HEEVER JJA**

HEARD ON: **22 MAY 1992**

DELIVERED ON: **27 MAY 1992**

J U D G M E N T

VAN DEN HEEVER JA

Four accused were charged with murder in the South Eastern Cape Local Division: in numerical order, Vuyisile Koos Ndima, Luyanda Mkize, Jonguxolo Witbooi and William Tshebe Phukwana. I refer to them in what follows by the numbers given them at the trial.

The incident which formed the subject of the charge, was a "necklacing" murder which took place on the evening of Sunday, 16 November 1986, at Veeplaas near Kwazakele in the Port Elizabeth district.

The deceased, a forty-four-year-old German employed as a marketing projects manager by Volkswagen, Gens Paul Bassel Lorck, on occasion gave black fellow employees a lift home, and visited in the township. A colleague last saw him at the Folk Music Club in Port Elizabeth on Sunday evening, 16 November. He left at about 9 pm and was not seen again.

The police received information at about ten o'clock that night that the company car allocated to him for his use had been involved in an armed robbery at

Algoa Park Motors and, again, an hour later, at Despatch Motors. At about midnight the burned-out shell of this was found at the Phakamise school, adjoining Veeplaas and less than a kilometre from the Veeplaas graveyard. A search was launched for the deceased. His incinerated remains were found after some days, and later identified only by means of dental comparisons.

We know that, on foot in the black area, deceased was noticed by so-called "comrades", chased, caught, assaulted in various ways, taken to the Veeplaas graveyard and set alight.

All four accused (ranging in age at the time from 18 to 52 years) were alleged to be comrades and part of the crowd that participated in the assault upon and killing of the deceased.

The trial commenced on 30 October 1989, virtually three years after Lorck's murder. All four pleaded not guilty and chose to make no admissions. The only eye-witness called by the prosecution was

Nontshembiso Heshu. In November 1986 she was 13 years old, and had received minimal schooling. At the trial her evidence was found by the court a quo to be totally unreliable. She sketched the outline of what happened to deceased after he had been (as an inescapable conclusion) robbed of his car, as summarized above. She named comrades she saw participating in the attack on the deceased, included all four accused in her list and identified them in court. Her evidence conflicted in material respects with a statement she had made to the police much earlier, especially in regard to whether, and how, accused no's 3 and 4 had participated in the events of that night. However, in both that statement and in court she said that accused no's 1 and 2 actively participated in necklacing the deceased, who was alive at the time.

After she had testified the prosecution tendered statements made by accused no's 1 and 2, and the record of what each pointed out and what he said

while doing so. These were ruled admissible after a series of trials within the trial.

Accused no 1 in his statement (exhibit M) made during a pointing out to then lieutenant Jonker (not the same person as major Jonker who was in charge of the pointing out done by accused no 2) admitted having initially taken part in the assault on the deceased to the extent that he and a certain Koni held the German down. A third person stabbed him while the two of them were so holding him. After this he, accused no 1, was merely a spectator. His statement to magistrate Morgenthal (exhibit Q) is in similar vein, with more detail and some use of the plural:

"ons het gewag ... ons is daarna beveel ..."

which may suggest greater participation than exhibit M does, but remains ambiguous i.a. because admission that orders given were obeyed, is lacking.

Warrant officer Els told the court that he arrested accused no 2 in the early hours of the morning

of 14 October 1987. As the result of what accused no 2 told him, Els asked him whether he would be willing to point out places of which he had spoken. On receiving an affirmative answer, Els took him to Major Jonker, who was not involved in the investigation of this matter, for this purpose. Major Jonker recorded the procedure preceding, and what happened and was said during, the pointing out, in the document he handed in as exhibit N.

I omit the preliminary and subsequent formalities which satisfied the major that accused no 2 had not been coerced or unduly influenced, was calm and relaxed, and reflect that he was properly warned. Accused no 2 directed the major to the graveyard, and asked him to stop at a car wreck diagonally opposite a headstone bearing the name Nabambi.

There accused no 2 made a confession which major Jonker recorded, although he had not anticipated this, had the incorrect form with him, and would have

taken down the confession in his office had that been the purpose for which Els brought accused no 2 to him.

The material content of exhibit N is as follows:

> "Ek was self by toe ons die witman gebrand het en gejaag het. ... Daar is die plek waar ek en die ander klomp die witman gebrand het. Ek wil graag net aan u sê wat daardie dag hier gebeur het. ... Novembermaand verlede jaar ek en Koos, Ngquyingani en Sigododo asook Sincelo het besluit om by Mampinga se huis bymekaar te kom. Omtrent 7 uur daardie aand hoor ek mense buite skree. Een sê hier is 'n boer. Ons hardloop toe na buite. Ek sien toe die wit boer op die grond pad naby die begrafplaas hardloop. Ek en die ander het hom toe gejaag. 'n Hele ent verder het ek hom 'getrip'. Hy val toe op die grond. Ek het hom teen die grond vasgedruk. Die boer skree toe in die Engelse taal 'Help me, help me, please my friend.' Ons sleep hom tot by die plek waar ek hom daar weer vasgedruk het teen die grond. Dis nou die plek wat ek aan Kaptein gewys het. Daar het ons Comrades besluit dat die boer gebrand moet word. Daar het toe baie mense gekom. Een van die groep gaan haal toe 'n 'tyre' daar naby. Daar het ook 'n kan met petrol gekom. Koos sny toe van die boer se hare af met sy mes. Hy sê dat die toordokter sulke hare soek. Die boer het steeds hard gehuil en gesoebat dat ons hom moet los. Ons sit die 'tyre' om die boer se skouers. Ons gooi die kan petrol oor die wit boer. Ons steek hom toe aan die brand. Die

> boer het baie hard geskree toe die vlamme op sy lyf brand. Ek het gesê, Hou jou bek - ek gooi hom toe met twee klippe teen die kop. Ons hardloop toe weg nadat Koos die boer met 'n mes verskeie kere gesteek het. Ek gaan slaap toe by my huis. Dis al."

Els asked accused no 2 the following day whether he was prepared to repeat his story to a magistrate. On again receiving an affirmative answer, he took him to magistrate Smith and exhibit P was the result.

Questioned by the court as to why he had not rolled two procedures into one and asked major Jonker to note down the facts accused no 2 had conveyed to Els as well as what would occur during a pointing out procedure, Els explained:

> "Omdat ons altyd die probleem kry sodra 'n gevangene aan 'n polisie offisier gestuur word dan is daar altyd kritiek omdat die - (tussenbeide)
> Die verklaring, meen jy? --- Die verklaring aan 'n polisie offisier maak, dan word daar gevra hoekom vat jy hom nie landdros toe nie.
> So was u altyd van plan om hom na 'n landdros te neem? --- Dis korrek.
> As hy ingewillig het om daardie verklaring te herhaal? --- Dis korrek.

Ek sien. Die landdros sou hom nie na 'n uitwysing geneem het nie? --- Nee.
Vir daardie doeleindes neem jy hom na 'n offisier? --- Dis korrek.
Maar verklaring doeleindes is u altyd van plan om hom voor 'n landdros te bring? --- Dis korrek."

The material content of exhibit P is as follows:

"Op 'n sekere dag te Veeplaas in die omgewing van Mampinga se huis het daar 'n blanke man opgedaag. Ander jong seuntjie het toe vir Khosi-hulle gaan roep. Ons het toe die blanke man begin jaag. Ek het toe 2 klippe opgetel en hom daarmee gegooi. Toe ons by die plein by die bushalte kom het ek die blanke man ingehaal en hom gepootjie. Hy het toe geval. Khosi en ander het toe bygekom. Khosi het toe die hare van die blanke man met 'n mes afgesny. Hy het toe die blanke man verskeie houe met sy mes gesteek. Die blanke man het toe gesterf. 'n Klomp jeugdiges het toe saamgedrom by die lyk van die blanke man. Die jeugdiges het toe die lyk gevat tot by die begraafplaas. Ek het toe daar by 'n ou kar gaan staan en sien toe hulle steek die lyk aan die brand. Terwyl ek nog daar staan het die klomp jeugdiges geskreeu dat die 'Hippo' kom. Ek kon sien dat die lyk van die blanke man brand - ek weet nie wie het die buitebande en die brandstof gebring het nie want ek was ver van die klomp jeugdiges gewees. By die plein waar hy doodgemaak was het hy geskreeu. Ek het baie jammer gevoel vir die blanke man toe ek sien hy sterf en hy skreeu. Ek het begin

> senuweeagtig word en dit is daarom dat ek nie nader gegaan het toe hy aan die brand gesteek word. Daarna is ons uitmekaar uit na verskillende gedeeltes, sommige na Guguleto en sommige na B.F. Dit is al."

At the close of the State case, accused no's 3 and 4 were discharged.

For the defence only one witness was called (who was found to be totally unreliable), to attempt to establish an alibi for accused no 1. Neither accused testified on the merits.

Accused no 1 was convicted of assault with intent to do grievous bodily harm in a judgment in which the trial court referred to the agreement between the prosecution and the defence which obviated the necessity of calling the district surgeon who had examined the incinerated remains of the deceased. The facts agreed upon were (apart from agreement that accused no 2 had been 19 years of age at the time), that the cause of death was probably incineration following burning with the use of tyres, commonly known as the "necklace"; and

that it had been impossible to determine (scil. beyond doubt) whether or not the deceased had been injured before being set alight, or had still been alive at that time. The admissions proved against accused no 1 were insufficient to justify the inference as an inevitable one that accused no 1 had participated in or associated himself with conduct which caused the death of the deceased.

The court then turned its attention to accused no 2, and having

> "carefully considered whether, as in the case of no 1 accused, we should rely on what the accused told Mr Smith or whether we can have regard to what he told Major Jonker. ... have come to the conclusion that we are entitled and in fact should take cognizance of everything he said to Major Jonker."

On that basis he was convicted of murder. There is no formal judgment recording a finding of extenuating circumstances. Probably the prosecution conceded their existence.

The appeal before us, with leave of this court

after refusal by the court a quo, is against the conviction. The argument advanced may be summarized as follows. The trial court found Ms Heshu to be a totally unreliable witness. So exhibits N and P constitute the only evidence implicating accused no 2. It can not be said that the content of exhibit P is undoubtedly false. Exhibit P cannot be totally disregarded as the court a quo did. It rejected it on grounds that were mere speculation, namely that it had been made "no doubt as a result of some reflection on his part and possibly some 'advice' from other sources". There is no indication that so much of exhibit P as was exculpatory was considered with the necessary care before the decision to disregard it was arrived at (with reference to i.a. S v YELANI 1989 (2) SA 43 (A) at 50C). Had that been done, appellant would have been found guilty only of common assault by reason of his admission in exhibit P that he tripped deceased and threw stones at him.

Inherent in this argument, is the proposition

that although the trial court had before it two separate documents, they should have been dealt with as part of one and the same exposition by accused no 2 of his version of events.

The fact that there were two documents, made moreover at different times, is obviously not an inevitable bar to the need for such an approach. Schmidt, BEWYSREG, 2nd ed, p 528 states that:

> "Wanneer verskillende uitlatings as 'n enkele verklaring beskou moet word, is moeilik om te bepaal."

See in this regard cases such as R v MZIMSHA 1942 WLD 82, 85; S v RANTHLANKO 1965 (3) SA 814, and S v NIEUWOUDT 1990 (4) SA 217 (A).

Wigmore, EVIDENCE 3rd ed, Vol 1, p 424, sets out the logical rationale behind regarding statements as a composite whole. Where one part of what is said qualifies or alters another, both should be considered together. "There is no God" would constitute blasphemy but in the full context of the Biblical quotation, not:

> "The fool hath said in his heart: There is no God." (para 34.)

This is the approach adopted in cases such as R v VALACHIA AND ANOTHER 1945 AD 826, 837. However, as regards exculpatory portions contained in one and the same statement, the court is free, having considered them, to reject them, should valid grounds exist, as not worthy of belief. (S v KHOZA 1982 (3) SA 1019 (A) 1039 B-D.)

But where part of what is said does not so qualify, alter or explain another part but merely contradicts it, different considerations apply, the more so when the parts are separated in time, as here:

> "The past and future cannot thus be brought together in order to form an artificial identity. The law never intends that a party may make evidence for himself from his own declarations but merely that the meaning of a conversation shall not be perverted by proof of a part of it only." (STEWART v SHERMAN 5 Conn. 244, 245, quoted in Wigmore, para 2119, Vol VI, p 537.)

There can be no question in the present

instance of perverting the first statement made by accused no 2, exhibit N, were exhibit P to be excluded from the record. The two have a few common features. Accused no 2 was part of the group that chased the deceased. He caught up with him and tripped him. Koos alias Khozi cut off some of deceased's hair. And that is as far as it goes. There is no attempt in exhibit P to qualify or explain the import of the damning admissions in exhibit N, that accused no 2 joined not only in the comrades' decision to set fire to the deceased who was crying and pleading to be released, but also in the acts which followed and constituted the implementation of their common purpose to cause his death. (That Koos may have hastened the death of the deceased by stabbing a man who was in any event doomed, is irrelevant.) In exhibit P the statements containing those admissions are merely ignored and a different version of events set out. As mentioned, accused no 2 did not testify on the merits, nor did he give any

explanation for the conflict between N and P.

Mr Skweyiya, for appellant, urged that the trial judge did not expressly reject exhibit P as beyond doubt false. However, although he did not say so in so many words in the judgment on the merits, it follows from the court's acceptance of N that P had been weighed and found wanting: apart from the peripheral facts common to both, set out above, the two are totally inconsistent with one another.

The trial court cannot be faulted for having accepted exhibit N as reliable. The record shows why.

> "The confession of a crime is usually as much against a man's permanent interests as anything well can be; and ... no innocent man can be supposed ordinarily to be willing to risk life, liberty or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance." (Wigmore ibid, Vol III, par 866 at p 357.)

There is no suggestion in the evidence adduced by the prosecution which was accepted of impropriety,

coercion, or influence, having been the motive for the making of the confession contained in "N". Appellant made no attempt to give any explanation at all why, if innocent, he should have implicated himself up to the hilt in N. Moreover, it has the ring of truth about it. The detail, that deceased called out in English, echoes the evidence of deceased's colleague that he was "very much English speaking". And the callous brutality of the reprimand of accused no 2 to a man screaming as the flames bit: "Hou jou bek", followed by his flinging two stones at his head, constitute too graphic a scene for one to infer, without more, that this conduct was merely a figment of the imagination of accused no 2.

On the strength of exhibit N, accused no 2 was correctly convicted of murder.

The appeal is dismissed.

L VAN DEN HEEVER JA

NESTADT JA)
MILNE JA) CONCUR