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Case No 342/87

SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

JOHNNY SAMPSON — First Appellant
and
RAYMOND FARRED — Second Appellant

versus

THE STATE — Respondent

CORAM: HOEXTER, BOTHA et MILNE JJA

DATE OF HEARING: 21 March 1989

DATE OF JUDGMENT: 31/3/89

J U D G M E N T

MILNE JA/.....

MILNE JA:

At about 1.30 p.m. on Friday, 17 June 1983, near the Edenmore Shopping Centre in Edenvale, a Mr Achamer was robbed of some R28 000 which he had drawn on behalf of his employers and which was in a black briefcase. The robbers initially used a Ford Cortina motor car, registration number BRL 081 T ("the Cortina") to get away from the scene. They then drove the Cortina to a car park on Tenth Avenue in Edenvale. There they hurriedly transferred themselves and their loot to a blue and white Mercedes motor car ("the blue Mercedes"). Unbeknown to them, an alert and intelligent member of the public, Mrs Denise Brown, had observed this transfer and, concluding that a robbery had taken place, she made a note of the registration number of the blue Mercedes and gave it to the police. The police found that it was registered in the name of one Geyser Mostert and found it in

his possession later that night. This led to Mostert and a number of others being charged in the Regional Court with the robbery, the theft of the Cortina and another charge which is not relevant to this appeal. A number of the accused were found guilty of the robbery and the theft. Amongst them were accused nos 4 and 9. They appealed against their convictions and sentences to the Transvaal Provincial Division but the appeals were dismissed. With leave of that court they appealed to this court against their convictions.

During the trial the Regional Magistrate admitted the confessions which the appellants had made to a magistrate. For the sake of convenience the two appellants were referred to as accused nos 4 and 9 during the appeal in the Transvaal Provincial Division and in this court and I shall continue to refer to them in that fashion when it is necessary to deal with them separately. After the

confessions had been admitted a "warning statement" made by accused no 9 was also admitted. It was common cause, both in the Transvaal Provincial Division and before us, that:

(a) the correctness or otherwise of the convictions depended on whether the confessions were rightly admitted by the trial court; and

(b) in terms of s217(1)(b)(ii) of Act 51 of 1977 the onus of proving that the confessions were not made freely and voluntarily and without the maker having been unduly influenced thereto, lay upon the appellants.

The relevant factual background is set out in great detail in the judgment of the Regional Magistrate and accurately summarised in the judgment of SCHABORT J (with whom VAN ZYL J concurred). I accordingly do not propose to repeat the facts save to the extent necessary to provide the

setting for a proper consideration of the points argued in the appeal.

At the outset I should mention that it is common cause that, at about the time when the robbery was being committed, accused nos 4, 5 and 9 were together in a green Mercedes Benz motor car in Voortrekker Avenue, Edenvale, a few blocks away from where the robbery was being committed. They were twice stopped and questioned by the police but nothing untoward having been discovered, they were allowed to go free. The significance of these events will appear later.

As already mentioned, Geyser Mostert who later became accused no 10 was found in possession of the blue Mercedes late on the night of 17 June. Accused no 10 gave information to the police and took them to accused no 2. Accused no 2, in turn, pointed out accused no 9 to the

police. This was at about 5 a.m. on Saturday, 18 June. Accused no 9 denied all knowledge of the robbery. About 30 minutes later he pointed out accused no 4 to the police. According to the evidence of accused no 4, when he was pointed out by accused no 9 he, accused no 4, told the police that accused no 9 had given money to his lover Elizabeth Julius and accused no 9 did not deny this. Accused no 2 thereafter pointed out accused nos 1,3,8 and 7 and one Cyril Brown. At about 11 a.m. on the day of his arrest accused no 4 made the so-called "warning statement". On the evening of Sunday, 19 June, the appellants and other persons who had been arrested in connection with the robbery were questioned by the police and it appears that a substantial part of the Sunday night was taken up with the police travelling to various places with the two appellants and other suspects. At 9.35 a.m. on Monday, 20 June, accused no 9 made his confession to a magistrate and some three hours later accused

no 4 made his confession to a magistrate. On the afternoon of the following day, that is to say, Tuesday, 21 June, all the accused were taken to the district surgeon, Dr Chaplin, for medical examination.

At the trial within a trial, which was held in order to determine the admissibility of the confessions of the appellants, the Regional Magistrate heard the evidence of the two appellants and of those other of the accused who had made confessions. He also heard the evidence of a large number of other witnesses including the evidence of various police officers and the district surgeon, Dr Chaplin, as well as that of the magistrate who took the confessions of the appellants. Both the appellants testified that they had been told by the police what to say in their statements. Furthermore, as it was put by the court a quo, "Die appellante het albei 'n lang relaas van mishandeling,

marteling, onbehoorlike beïnvloeding, intimidering en voorsêery gegee wat na bewering sou uitgeloop het op die aflegging van die bekentenisse." These allegations were denied by the police. Furthermore apart from a "blou merk net onder linkeroog" in the case of accused no 9 the magistrate who took the appellants' confessions, did not see any injuries on the appellants. It appears from the evidence of Dr Chaplin and from the observations of the Regional Magistrate during the trial which commenced some months after the arrest of the appellants, that the "blou merk" may in fact be a permanent discolouration and not the result of any injury or assault. Nor did Dr Chaplin see any injuries on either of the appellants, although he refers, in his reports, to various minor injuries in the case of other accused. I shall return to the evidence of Dr Chaplin in due course.

The Regional Magistrate carefully considered the evidence of all the witnesses and after having referred to the merits and demerits of the witnesses and weighing up the probabilities, came to the conclusion that the appellants had not discharged the onus of establishing that the confessions were improperly obtained. The Regional Magistrate's judgment is, on the face of it, a fair-minded evaluation of all the relevant factors. For example he (rightly) criticised Dr Chaplin's conduct in not conducting a proper examination of the accused and the Magistrate was fully alive to contradictions in the evidence of W/O Sacks and W/O Holmes. What is more he took into account these factors in evaluating the evidence of these witnesses. In the case of accused no 4 the Regional Magistrate found that he was a poor witness who evaded questions in the witness box. Accused no 9 on the other hand gave his evidence reasonably well. He found, however, that there were material conflicts between the

versions of the various accused as to the assaults allegedly perpetrated on them by the police and that in the case of the appellants there were material conflicts between their versions of such assaults and conflicts between their versions of the assaults perpetrated on them and assaults perpetrated on Elizabeth Julius (the lover of accused no 9) and the latter's version of such assaults. The magistrate also disbelieved the evidence of Elizabeth Julius with regard to these assaults and found Cyril Brown, who was called as a witness by one of the accused, to be an untruthful witness.

The Transvaal Provincial Division, after a full and detailed analysis of all the evidence and the probabilities, also came to the conclusion that taking into account contradictions, inconsistencies and improbabilities in the evidence of the appellants and Elizabeth Julius there were serious doubts about the credibility of the appellants and

that they had not discharged the onus.

Counsel for the appellants did not seek to persuade us that the Regional Magistrate or the court a quo had erred in their appraisal of the evidence of the appellants and their witnesses. I am satisfied that he was correct in adopting this attitude. He submitted, however, that, in effect, the Regional Magistrate (and the Transvaal Provincial Division) had given insufficient weight to the combined effect of the following factors:

(a) The improbability of accused no 9 making a confession in his "warning statement" within a few hours of being arrested notwithstanding that he had denied all knowledge of the robbery when arrested unless, so he submitted, accused no 9 had been assaulted in the interim;

(b) That the police had admitted using improper methods

of interrogation; and

(c) That the manner in which the medical examination by Dr Chaplin was carried out indicated that the police had "something to hide".

Similar submissions were made to the Regional Magistrate and to the Transvaal Provincial Division but, in argument before this court, appellants' counsel laid far greater emphasis upon the submission that the confessions had been obtained by improper methods of interrogation. Passages in the evidence of Lt van Zyl and Det Sgt Kage were referred to in support of this argument. In cross-examination of the former, the following passage occurs:

> "Luitenant u het gesê dat julle toetse doen, met ander woorde met die ondervraging is julle besig om te ondervra dan is daar 'n sekere toets om te sien of hulle die waarheid praat of nie. U vat byvoorbeeld die een se verklaring na die ander een toe en sê wat sê jy hiervan?, daardie tipe ding? -- - Ja, dit word miskien in gevalle gedoen, maar dit

> is die enigste toets. Die verklaring sal nie aan die beskuldigde gegee word om te lees nie.
> Maar uit die verklaring uit kan die beskuldigde gekonfronteer word? --- Dit is reg, ja.
> Partykeer sê julle goed wat die ander persoon glad nie gesê het nie, net om hulle te probeer uitlok om te praat? --- Dit is korrek.
> In hierdie geval sou dit seker gebeur het want daar is tien beskuldigdes? --- Moontlik.
> Dit is die rede hoekom die beskuldigdes 'n hele aand ondervra is, met ander woorde op 'n Sondagaand. Hulle word moeg en praat makliker. Hulle het nie die weerstand as normaalweg nie. Nie waar nie? --- Dit kan wees."

The following passage occurs in the evidence of Kage:

> "Nou is die idee nie dat julle die beskuldigdes die hele aand en dag laat wakker bly het nie en die aand laat wakker bly het sodat julle hulle kan afbreek nie. Verklarings kry wat julle wil hê? --- Edelagbare dit is nie ons wat die werk beheer nie, dit is die witmense.
> Ek vra nie of dit julle was nie, is dit die witmense se idee dan? --- Ja, dit is hoe hulle dink."

Before dealing with these passages, it is relevant to refer also to the evidence of W/O du Preez, where he said

the following:

> "Die, dan u het gesê u konfronteer die beskuldigdes met getuies. Wat u doen is u neem 'n verklaring van die een beskuldigde en gaan na die ander beskuldigde toe en sê kyk dit is wat die ander een van jou gesê het? --- Nee.
> Wat bedoel u? --- Ek bedoel as jy nou 'n klomp ondervragingstaktiek. As die mense nou daar is soos die Engelsman sê jy 'bluff' hom maar om 'n man te ondervra.
> U 'bluff' hom? --- Ja, jy lei hom om die bos.
> Totdat jy 'n verklaring uit hom uitgekry het, want ek verstaan nie jou getuienis onder kruisverhoor deur no 3 wat jy sê ek het gewag tot al die mense daar was dat ek hulle oor en weer konfronteer met mekaar se verklarings? --- As almal nou daar is en jy kry 'n storie van 'n man. Veronderstel hy ontken dit nou. Dan gaan hy (jy?) na die volgende man toe. Jy kry sy storie. Jy hou so aan en jy roteer, heeltemal 'n roteer basis die hele tyd. Een of ander tyd sê hy erken hy dinge. Dit is hoe jy jou inligting inwin brokkie vir brokkie.
> HOF: Hierdie inligting wat jy dan so inwin, is vir u eie inligting? --- Dit is korrek.
> Dit is inligting om op te volg? --- Dit is korrek."

The magistrate in dealing with the argument that there was no apparent reason why various of the accused

should have made confessions said "Wat betref beskuldigde 3 en 4 is dit redelik om te aanvaar dat hulle met inligting bekom van beskuldigdes 1, 2, 9 en 10 gekonfronteer was."

Now it is one thing for the police to obtain, as it were, pieces of the jigsaw puzzle from various persons suspected of having committed an offence and to use those pieces to build up a complete picture of the matter being investigated. It is quite another to confront suspects with one another's statements in order to induce them to make a confession or to trick them into making a confession. Rule 10 of the Judges' Rules provides that:

> "When two or more persons are charged with the same offence, and a voluntary statement is made by any one of them, the police, if they consider it desirable, may furnish each of the persons with a copy of such statement, but nothing should be said or done by the police to invite a reply. The police should not read such a statement furnished to a person unless such person is unable to read it and desires that it be read over to him. If a

> person so furnished desires to make a voluntary statement in reply, the usual caution should be administered."

The fact that these are administrative directions which do not have the force of law does not mean that they are to be ignored. In Rex v Mthlongo 1949(2) SA 552 (A) at 557 SCHREINER JA said:

> "By bringing the accused persons together in this way they are in effect invited by the police to reply to each other and the fact that they have been warned, as was the case here, does not prevent the procedure from being irregular. The chief objection to such procedure seems to me to be that it may lead to one or other of the accused persons being tricked into making a confession or furnishing admissions against himself. But, even if no such confession or admission results from the confrontation, evidence might be brought into existence of damaging statements made in the presence of one accused by another and such statements might then be admissible on the lines discussed in Rex v Christie (1914, A.D. 545) and Rex v Jackelson (1917, A.D. 556). Indeed in Rex v Mills and Lemon (1947, K.B. 297) the avoidance of the use in evidence of such statements by the other accused, who may not themselves testify in court, seems to have been regarded as the main reason for the introduction of the Rule."

As to the obtaining of a confession as the result of a trick or strategem compare S v Zulu 1965(3) SA 802 (N) and S v Pietersen & Others 1987(4) SA 98 (C). In my view where it is established that confrontation of the kind referred to in Mthlongo's case has taken place, that will, in many cases, materially assist the accused in discharging the onus that a confession has been improperly obtained. Here however I am by no means satisfied that such confrontation did in fact take place. In the first place there is no reason not to accept van Zyl's evidence that although he was present at the time when the appellants and the other accused were arrested he did not personally interrogate any of the accused in the ordinary sense of the word. It does not follow therefore that he is talking about the method of interrogation in fact used in this case. Secondly, Sgt Kage's admissions are in the vaguest of terms and it is certainly not established that he was responsible for applying pressure of the kind suggested

in the questions which were put to him in cross-examination in the passage set out above. The remarks of W/O du Preez amount, in my view, to no more than an admission that he was using information obtained from one accused to piece together a composite picture of the relevant events. Furthermore, it is relevant that neither of the appellants at any stage said he was tricked or confronted with the statements of the other accused and thereby induced to make a confession. It has not therefore been established that confrontation of the objectionable kind referred to in Judges' Rule 10 in fact occurred in this case. The suggestion that the confessions were made on the Monday because the appellants were exhausted through lack of sleep on the preceding night is not one that was advanced by either of the appellants in evidence. What is more, accused no 9 had made a (more incriminating) warning statement on the Saturday morning and had then indicated a willingness to confirm it before a magistrate.

Both the Regional Magistrate and SCHABORT J set out what are, in my view, plausible reasons why accused no 9 having initially denied any involvement should shortly thereafter have changed his tune without having been forced or unduly influenced to do so. In addition, there is the further factor (referred to earlier) that both the appellants knew that the police had seen them in the green Mercedes near the place where the robbery took place and at about the time when it took place in circumstances which had aroused the suspicions of the police.

While the manner in which Dr Chaplin carried out his examination is certainly open to criticism, there is no substance in the submission that the accused were taken for such examination because they had in fact been assaulted and the police were trying to cover up that fact. Counsel for the appellant expressly disavowed any suggestion that Dr

Chaplin had colluded with the police and accepted that there had been no question of bad faith on his part. In these circumstances, as the Regional Magistrate points out in his judgment, the police would have been taking an extraordinary risk in asking Dr Chaplin to examine the accused for any signs of assault. There is nothing in the evidence to suggest that they would have known in advance that the examination would be a perfunctory one and, accordingly, had any of the accused in fact been assaulted the examination might well have revealed such assaults. That the police, conscious of wrongdoing, would expose themselves to such a risk is improbable. I think it also bears mentioning that not only was the Regional Magistrate fully conscious of the perfunctory nature of Dr Chaplin's examination but the fact that it was of such a nature was established by the Regional Magistrate himself in questions which he put to Dr Chaplin in an entirely proper and disinterested pursuit of the truth.

In all these circumstances I am wholly unpersuaded that the Regional Magistrate erred in admitting the confessions. As already mentioned, it was common cause that if the confessions were rightly admitted they, together with the other evidence, established the guilt of the appellants.

The appeals of both appellants are accordingly dismissed.

A J MILNE
Judge of Appeal

HOEXTER JA]
] **CONCUR**
BOTHA JA]