

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STEPHEN MNYAMEZELI TEMBA DAYIMANI

Appellant

and

THE STATE

Respondent

CORAM: HOEXTER, E M GROSSKOPF, JJA et NICHOLAS AJA

HEARD: 2 March 1990

DELIVERED: 29 March 1990

J U D G M E N T

E M GROSSKOPF, JA

The appellant and one Heteni were charged before the South-Eastern Cape Local Division with murder. Both pleaded not guilty before VAN REENEN AJ and assessors, but were found guilty. The appellant's co-accused was not proved to have been at least 18 years of age when the offence was committed, and he was

sentenced to 20 years imprisonment. The appellant's age was given in the indictment as 49. No extenuating circumstances were found in his case, and he was sentenced to death. With the leave of the trial judge he now appeals against his conviction and sentence.

The relevant evidence for the State may be summarised as follows. On 2 July 1986 the police were summoned to a football stadium, called the Woolfson stadium, in Kwazakele near Port Elizabeth. Inside the stadium they found the corpse of a woman which had been badly burnt. There also were a burnt-out truck and kombi. The body had apparently been burnt by using motor vehicle tyres. On 3 July 1986 a post mortem examination was held by Dr. A.P. du Plessis. His report was handed in by agreement between the parties. Defence counsel expressly confirmed that "die inhoud van die verklaring word bevestig en erken in terme van artikel 220 van die Strafproseswet". In his report Dr. du Plessis stated "that, as a result of my observations, I conclude ... that the cause of death was

incineration". Literally this means that the cause of death was the burning of the deceased to ashes. While perhaps unduly emphatic, this language is in my view entirely unambiguous.

A number of police witnesses stated that, although burnings of this sort were not uncommon at that time, they had no knowledge of another person having been burnt inside the Woolfson stadium. The witnesses to this effect were detective warrant officer Faleni, who had been in the Port Elizabeth murder and robbery unit for three years at that time but left it in August 1986; detective warrant officer Noyo, who was a member of the Port Elizabeth murder and robbery unit between 1984 and August 1987; and detective constable Mpumbani, who was a member of the Port Elizabeth murder and robbery unit in July 1986 and was still a member at the time of trial. Captain Gouws of the same unit found on an investigation of police records that the deceased in the present matter was the only female who had been burnt in the Woolfson stadium up to December 1986 (December 1986 was presumably chosen because the alleged pointing out in the

present case took place in that month), but that there had been an incident in December 1986 in which a man was burnt. It is not clear whether this is the same incident as that testified to by Mpumbani who said that the man was burnt near the stadium, but not in it. Whatever might be the admissibility and cogency of all this evidence, it is at least clear that the deceased was burnt to death in the Woolfson stadium in July 1986, and that there is no suggestion in the evidence that the same ever happened to any other woman.

The deceased was never properly identified. A thirteen year old girl, Zukiswa Nenemba, gave evidence that she had not seen her sister Nololose since July 1986 and had heard that she had been burnt in the Woolfson stadium, but this evidence is, of course, of very little value.

The appellant was arrested on 22 November 1986, apparently under the emergency regulations. On 10 December 1986 he was taken to Captain Gouws. The State alleges that the appellant then made a confession to Captain Gouws, and pointed

out the scene of the offence to him. The appellant denied that he had pointed out any spot, or that he had made any confession. There were also allegations of torture. These issues were decided in a trial within a trial held by the full court, i.e., judge and assessors. The evidence on behalf of the State in the trial within a trial was as follows.

Detective Sergeant Faku testified that, on information received, he questioned the appellant, who was already in custody. The appellant expressed his willingness to make a statement. Faku then handed the appellant to Constable Mzana of the murder and robbery unit. Mzana brought the appellant to Captain Gouws. Gouws testified that the appellant was brought to him on 10 December 1986. In his office he cautioned and questioned the appellant and recorded the appellant's answers. Constable Mzana interpreted. After the answers were written down, they were read over and interpreted to the appellant, who signed the document. This document reads as follows:

"Om 12md op die 10 Desember 1986 en te Moord en

Roofkantoor, Port Elizabeth, voor my BENNETH GOUWS in die S.A. Polisie en ampshalwe n vrederegter in die distrik van Port Elizabeth verskyn swartman Myazeli Dayimani oënskynlik by sy gesonde en volkome verstand.

Die verklaring is deur S/Kst. Mzana na my kantoor gebring en in die kantoor is daar slegs ek, die verklaarder en die tolk, S/Kst. Mzana wie van Afrikaans na Xhosa en andersom getolk het.

Die verklaarder word meegedeel dat hy in die teenwoordigheid van n vrederegter is. Die verklaarder word gewaarsku dat hy nie verplig is om enigiets te sê of enige plek uit te wys nie, en as hy enige iets sou sê of enige plek uitwys dit neergeskryf sal word en by sy verhoor as getuienis gebruik sal word. Daarna verstrek hy die volgende antwoorde op die onderstaande vrae.

1. Begryp u die waarskuwing wat nou deur my aan u gegee is?
Antw.: Ja.
2. Is u deur enigiemand aangerand of gedreig om hierdie verklaring te maak of enige plek uit te wys?
Antw.: Nee.
3. Het u enige beserings aan u?
Antw.: Nee.
Opmerkings deur vrederegter of daar enige sigbare beserings aan verklaarder is. Geen.
4. Het enige persoon enige beloftes aan u gedoen of enige wyse aangemoedig om n verklaring of plekke uit te wys?
Antw.: Nee.
5. Verwag u enige voordele indien u n verklaring

- aflê of plekke uitwys?
 Antw.: Nee.
6. Is jy in hegtenis geneem?
 Antw.: Ja.
7. Wanneer is jy gearresteer?
 Antw.: Saterdag 22 November 1986.
8. Het u vantevore h verklaring afgelê of plekke uitgewys?
 Antw.: Nee.
9. Indien wel, aan wie en waar?
 Antw.: N.V.T.
10. Indien u nog begerig is om h verklaring af te lê of plekke uit te wys kan (u) nou voortgaan.

(get.) M.M. DAYIMANI"

Thereafter, at 13h05, Captain Gouws, Constable Mzana and one Detective Constable Strydom left the police station to enable the appellant to point out certain spots. Strydom went along as driver and for security reasons. They drove to the Woolfson stadium and entered it. What then happened was recorded contemporaneously (according to Gouws) as follows:

"... verklaarder wys uit h uitgebrande trok wat langs die muur van die stadium staan. Toon h plek op die grond tussen die muur van die stadium en die uitgebrande trok waar h onbekende s/vrou deur Comrades en myself met 'tyres' doodgebrand was. Die swart brandplek op die grond is nog duidelik sigbaar."

The appellant afterwards pointed out various other spots which are not of relevance to the present case. Captain Gouws recorded these also, and ultimately his notes were read back and interpreted to the appellant, who indicated that he understood and again attached his signature. Captain Gouws had had no previous knowledge of this case.

Mzana, who at the time of the trial was no longer in the police force, testified that when Faku handed the appellant to him, he took the appellant to Captain Gouws because Captain Gouws was dealing with cases in which people had been burnt. Thereafter he interpreted what Captain Gouws and the appellant said to each other. At the outset Captain Gouws asked the appellant what the purpose of the visit was, and the appellant started talking. Captain Gouws made notes. Afterwards they left in a motor vehicle. Constable Strydom was driving, and the appellant gave directions. Captain Gouws made notes. Eventually they arrived at the Woolfson stadium. Mzana's evidence in chief then reads as follows:

"En wat het daar gebeur? -- Dit is waar hy uitgewys het.

Kan u onthou wat hy uitgewys het? -- Wat ek nog kan onthou is die plekke waar hy uitgewys het. Hy het ook verder gesê dit is nou die plek waar 'n vrouenspersoon uitgebrand was."

Constable Strydom also testified. He confirmed that he was the driver on the particular day and that the appellant directed him to the Woolfson stadium. There the appellant, Gouws and his interpreter (Mzana) left the car and the appellant pointed something out to the others. Strydom remained in the car.

The appellant testified that he was arrested on 22 November 1986. During the first couple of days, he said, he was beaten and tortured to provide information about certain people, and also to produce a gun. This carried on until 24 November 1986, when the appellant was apparently taken to the St. Albans prison, where, according to his evidence, he remained until he was taken to see Captain Gouws on 10 December 1986. The appellant did not say that he was ill-treated in any way after

24 November. On 10 December he was fetched at St. Albans by two policemen who took him to Captain Gouws. He denied that Faku or Mzana took part in taking him. When he arrived at the office, he found Gouws and Mzana there. Gouws questioned him about firearms, but he could not provide any information. (Later, under cross-examination, he said that this did not happen in Gouws' office, but on a previous occasion in another white policeman's office). They then put leg-irons on him, and Mzana said they were going to show him places where they had picked up people who were burnt and in respect of whom they could not trace the culprits. The three of them then left in a motor car. Strydom was not present. They drove to the Woolfson stadium, but the appellant did not point out anything.

Under cross-examination he denied that Gouws asked him anything or said anything to him in the office. All Gouws did was to bring him four papers and tell him to sign at the bottom of each of the pages. He did not know what these pages contained (presumably they were the notes referred to by Captain Gouws).

He was not threatened or assaulted in the office. When the three of them were in the car, Gouws was the driver. He denied that Gouws made any notes while they were in the car, denied that he (the appellant) gave any directions, and denied that he pointed out any spot.

The appellant's allegations of torture were denied by all the police officers concerned, and he was strenuously cross-examined in regard thereto. It is, however, not clear to what extent he relied on these allegations in respect of the voluntariness of any statement he may be found to have made to Captain Gouws.

At the end of the trial within a trial the Court held that the pointing out and statement were admissible. The State then closed its case, and so did the defence, without calling the appellant to give any further evidence.

In its judgment the trial court rejected the evidence of the appellant. This finding was not attacked on appeal, and in my view rightly so. The appellant clearly was an unimpressive

witness. It appears that the Court accepted the State evidence, and particularly that of Captain Gouws. The Court convicted the appellant on the evidence of his confession to Captain Gouws, coupled with the evidence that the offence was actually committed. As the Court pointed out, this course is permissible in terms of section 209 of the Criminal Procedure Act, no. 51 of 1977.

The only argument raised before us on appeal against the conviction was that there was a conflict between the evidence of Captain Gouws and that of Mzana. Captain Gouws, it will be recalled, noted down that the appellant pointed out a spot "waar h onbekende s/vrou deur Comrades en myself met tyres doodgebrand was." Constable Mzana, in the passage quoted above, stated "Hy het ook verder gesê dit is nou h plek waar h vrouenspersoon uitgebrand was." Mzana consequently did not say that the appellant implicated himself in any way. The statement by Mzana was spontaneously given in reply to the question whether he could remember what was pointed out. The matter was not taken further,

and in particular Mzana was not asked whether his answer represented accurately everything which the appellant had said. Moreover, Mzana gave evidence in April 1989 concerning a pointing out which had occurred in December 1986. He did not have the benefit of contemporaneous notes. Captain Gouws, on the other hand, noted down this statement at the time it was made, and it was read back and interpreted to the appellant, and signed by him. In these circumstances I do not think that Mzana's evidence detracts from that of Captain Gouws in any way.

If the evidence of Captain Gouws is accepted there can, in my view, be no doubt about the appellant's guilt. The statement by the appellant is very brief but unambiguous. He himself has not suggested that he was misunderstood, and there does not appear to be any room for misunderstanding. Nor has he given any explanation which might indicate that his statement should not be taken at face value.

One must always, of course, bear in mind the possibility that a confession may be false, but there is nothing in the

present case to suggest it, otherwise than in the case of S v.

Kumalo 1983(2) SA 379 (A) to which my brother NICHOLAS refers.

I do not, with respect, agree with my brother NICHOLAS that any significance attaches to the inaccuracy of the spot pointed out by the appellant. From the photographs this spot would appear to be no more than a few yards from that where the deceased was found. An error of this sort would be normal after the lapse of six months since the event, and the more so where there was a burnt area at the spot pointed out, which would have suggested that it was there that the deceased was murdered. And there does not seem to be any reason why the appellant should falsely incriminate himself. There can, for instance, be no suggestion that he is shielding anybody else, nor is any other motive suggested.

For the reasons aforesaid I consider that the appellant was rightly convicted.

The appellant's counsel presented no argument in respect of the finding that there were no extenuating

circumstances. On the face of it the murder of the deceased was a cruel, calculated act. The onus of establishing extenuating circumstances rested on the accused, and he placed nothing before the Court which might tend towards proving such circumstances, nor was there anything in the evidence for the State which could assist the appellant in this regard. The appeal against the finding that there were no extenuating circumstances must accordingly also fail.

In the result the appeal is dismissed.

E M GROSSKOPF, JA

HOEXTER, JA concur

Case No. 462/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STEPHEN MNYAMEZELI TEMBA DAYIMANI

Appellant

and

THE STATE

Respondent

Coram: HOEXTER, E M GROSSKOPF, JJA et NICHOLAS AJA.

Heard:

2 March 1990.

Delivered:

29 March 1990.

J U D G M E N TNICHOLAS AJA:

On the morning of 2 July 1986 a charred human body was found lying in the Woolfson Stadium in Kwazakele Township, Port Elizabeth. Upon it were the burnt-out remains of four or five motor vehicle tyres, and lengths of wire which had been an integral part thereof. The body was unrecognisable. It may have been that of a Black woman named Nlolose Nenemba, who was last-seen on 1 July 1986, but it was never identified.

In the report on the post mortem examination, the body was described as "the charred remains of a female", and the cause of death was said to be "incineration".

Arising out of the discovery of the body, Stephen Dayimani was arraigned in April 1989 as accused No. 2 before VAN REENEN AJ and two assessors at a sitting at Port Elizabeth of the South East Cape Local Division of the Supreme Court. Accused No. 1 was Vuyane Mgotho Heteni. The

two were charged with murdering Nlolose Nenemba, or an unknown Black woman, on 1 July 1986 at or near Woolfson Stadium, Kwazakele, Port Elizabeth. They pleaded not guilty, but were found guilty as charged. The trial court having found that it had not been proved that Heteni had reached the age of 18 at the date of the crime, he was sentenced to 20 years' imprisonment. No extenuating circumstances were found in the case of Dayimani and he was sentenced to death. With the leave of the trial judge he now appeals against the conviction. In what follows he will be referred to either as "the appellant" or as "the accused".

At the trial there was no evidence from an eye-witness. The evidence against each of the accused (which consisted mainly of their own incriminating statements and pointing-out) was largely in separate compartments and no connection was shown to exist between them. It will consequently be unnecessary to refer again to accused No. 1.

The appellant was detained under the Emergency

Regulations in November 1986. On 7 December 1986 he was arrested by Det. Sgt. Faku of the South African Police. Without objection from defence counsel or demur from the trial judge, prosecuting counsel led Faku to say that he was given the name of the person who committed the offence in relation to a person who was burnt in the stadium and he arrested that person, who was accused No. 2. Faku said that he questioned the accused, who gave him an explanation, and said that he wanted to make a statement to Faku. Faku declined to listen to it and handed him over to Constable Mzana of the murder and robbery unit on 7 December 1986, telling him "dat beskuldigde praat oor mense wat nou uitgebrand was en hy het hom gebring."

Det. Const. Mzana confirmed that he had received the accused from Faku. At about 12 noon on 10 December 1986 he took him to Captain Gouws at New Brighton Police Station. At the interview which followed, Mzana acted as interpreter from Xhosa to Afrikaans and the other way round. In Gouws's

office the accused was asked the object of his visit, and "(hy) het vir ons vertel wat hy weet." This was written down by Gouws. The accused was willing to go and point out the places mentioned in the statement. Mzana said that he could remember the places which were pointed out and that the accused ".... het ook verder gesê dit is nou 'n plek waar 'n persoon uitgebrand was."

Captain Gouws's evidence differed from that of Mzana in certain respects. He said that Mazana brought the accused to his office for the purpose of pointing out. Hy put to the accused the precautionary questions which normally preface the taking of an accused's statement, and recorded the answers on Ex. "F". The questions and answers were then read back and interpreted to the accused. Capt. Gouws said nothing about the accused making a statement in his office, and it is implicit in his evidence that he did not do so. He read out notes which he made at the time (Ex. "F"):

".. Om 13h05 op 1986-12-10 vertrek vanaf New Brighton polisiestasie in motorkar vergesel van bestuurder, speurderkonstabel J Strydom en tolk, speurderkonstabel Mzana. Ry in die rigting van Kwazakelewoonbuurt, ry tot by Issac Woolfson stadium, Kwazakele. Ry stadium binne, verklaarder wys uit h uitgebrande trok wat langs die muur van die stadium staan. Toon h plek op die grond tussen die muur van die stadium en die uitgebrande trok waar h onbekende swartvrou deur Comrades en myself met 'tyres' doodgebrand was. Die swart brandplek op die grond is nog duidelik sigbaar."

He explained that Strydom accompanied them because he (Gouws) had to make notes, and also for security reasons. Mzana went as interpreter. After completion, Ex 'F' was read over, interpreted into Xhosa to the accused, who indicated that he understood it and then signed it.

Det. Sgt. Strydom also gave evidence for the State. He said that on 10 December 1986, and at the request of Gouws, he assisted at a pointing-out. He went along "omrede dit onlustesituasie was en ek het vir begeleiding en ook beveiliging saamgegaan." He drove the vehicle, and the accused indicated to him the route he should follow.

Gouws wrote down everything which the accused said as interpreted by Mzana. At the stadium Gouws, the interpreter and the accused got out and the last-mentioned pointed out places to Gouws.

When he came to give evidence, the accused said that he was taken to Gouws's office. Mzana was present. After he had been questioned about fire-arms, he was put in leg-irons and taken out in a car. Strydom was not there. He asked where they were going to. The Black detective (i.e. Mzana) said,

"... we are going to show you places where we picked up people which were burnt and we could not trace the culprits."

When it was put to him that the reason why he was taken out was that he said that he wanted to point out certain places, he replied, "They are telling lies, there is no such thing." He said he never pointed out any place at the stadium. He did not point to a spot where he said he and the Comrades burnt a Black female with tyres: he did see a black spot

there but it was not pointed out by him. He was never at the killing of the woman. He had never been to the Woolfson Stadium before that particular day. He admitted signing the notes made by Gouws.

In giving the judgment of the trial court, VAN REENEN AJ said that there was no doubt that the accused was a consummate liar, and that his counsel had not contended to the contrary. The court was satisfied that Ex. "F" was freely and voluntarily made and was admissible in its entirety.

He said:

"Die lykskouing wat later gedoen is, toon dat die liggaam erg verbrand was en dat uitkenning nie moontlik was nie. Die ondersoek het ook getoon dat daar rook in die longe was, wat 'n aanduiding was dat die brand begin is toe die vrou nog geleef het."

In the core passage in the judgment he said:

"Ingevolge die bepalings van artikel 209 [van die Strafproses Wet] kan 'n beskuldigde aan 'n misdryf skuldig bevind word op die enkele bewys van

h bekentenis deur daardie beskuldigde dat hy die betrokke misdryf gepleeg het en indien die bekentenis in h wesenlike opsig bevestig word òf dat daar ander getuienis is wat bewys dat h misdaad inderdaad gepleeg is. In hierdie geval het ons bekentenisse van altwee beskuldigdes dat hulle aandadig was aan die dood van die oorledene. En daar is dan verder afdoende bewys dat op dié betrokke dag h swartvrou op daardie plek verbrand is. Die verkoolde lyk van h swartvrou is daar gevind met die reste van uitgebrande bande op haar.

Daar was ook getuienis dat daar gedurende die betrokke tydperk geen ander swartvrou verbrand is nie. Daar word dus aan die tweede vereiste wat daar in artikel 209 is, voldoen. Dat beide beskuldigde skuldig is aan die moord op die oorledene ly geen twyfel nie. Hulle word dus skuldig bevind aan die moord van die oorledene, ongeag wie sy mag wees."

In my respectful opinion the judgment, is open to criticism in three important respects.

(1) I do not agree with the finding of the trial court that there was proof that the cause of the deead's death was burning.

It was necessary for the State to prove beyond a reasonable doubt, and dehors the evidence of the accused,

that the deceased was alive when the burning began. This proof the trial court found in the report of the post mortem examination.

That post mortem examination was carried out on 3 July 1986 by Dr Andrew Philip du Plessis, a qualified medical practitioner in the service of the State as a district surgeon at Port Elizabeth.

The report was handed in as Ex. "D" by consent, and the defence counsel admitted and confirmed its contents in terms of s. 220 of the Criminal Code. Dr du Plessis was not called to give evidence.

This has become a common procedure. No doubt, it may result in a saving of court time, and of inconvenience to the medical witness concerned. But it is not a procedure to be encouraged. It is subject to the inherent risk that matters which ought to have been investigated, questions which ought to have been answered and difficulties which ought to have been resolved, are left untouched, with a

resulting possibility of injustice to one party or the other.

The present is a case in point.

In Ex. "D" Dr du Plessis certified that on 3 July 1986 he examined the body of a black female; that the chief post mortem findings made by him on this body were as set out in paragraphs 4, 5, 6, and 12; and that, as a result of his observations, a schedule of which followed, he concluded that the cause of death was "INCINERATION". In the "Schedule of Observations" was listed a series of "Nil abnormal noted", which was interrupted only by the said paragraphs 4, 5, 6 and 12. These read:

"4. External appearance of body and condition of limbs

The charred remains of a female.

5. Skull: No fracture is present.

6. Intracranial contents: Congested.

12. Trachea and bronchi: There is soot present"

Incineration is not a term of art. DORLAND'S

Illustrated Medical Dictionary, 25th ed., gives the word its ordinary meaning:

"incineration [L. in into + cineres ashes] the act of burning to ashes; cremation."

The Shorter Oxford English Dictionary gives -

"Incinerate 1. trans. To reduce to ashes, consume by fire. 2. intrans. To become reduced to ashes."

"Incineration, reduction to ashes; spec. (esp. in US) the cremation of the dead."

In its ordinary meaning, "incineration" is not a cause of death, but a method of reducing a corpse (or other object) to ashes. It is possible that Dr du Plessis meant no more than "burning". If that is so the word "incineration" as used by him was at least ambiguous, and this should have been cleared up by his giving evidence on the cause of death.

The basis for the doctor's conclusion could only have been paragraphs 4, 5, 6 and 12. Paragraph 4 ("The charred remains of a female") indicates that the body was "incinerated". Paragraph 5 ("No fracture (of the skull) is present") may exclude death from a head injury. But the significance of paragraphs 6 ("Intercranial contents:

Congested") and 12 ("Trachea and bronchi: There is soot present.") is not apparent to the layman.

When Ex. "C" was put in , the learned trial judge said that the fact there was soot in the lungs meant that the deceased was still breathing when the fire was started. Counsel for the State agreed; defence counsel was silent. Whatever the learned judge's private knowledge on the point, this was not a matter of which he was entitled to take judicial notice, or on which he could properly give instruction to his assessors. It was a matter of medical knowledge, on which evidence from an expert was required.

In my opinion therefore the post mortem report did not by itself provide proof that the deceased was alive when the burning started.

(2) It was not quite correct that there was a confession from No. 2 accused that he was implicated in the death of the deceased. All that happened was that he pointed out a place in the stadium "waar 'n onbekende swartvrou deur

Comrades en myself doodgebrand was". It was not established that the place pointed out to Gouws by the accused was the place where the deceased was burnt.

Photographs of the scene with the charred body in situ were taken on 2 July 1986, and handed in as Ex "A".

On photo No. 2 forming part of that exhibit, the body can be seen lying in the foreground in front of the relic of a scarred and stunted little tree. Some distance behind it in the middle-ground is a burnt-out truck, standing parallel to a wall. In a close-up, (Photo No. 1.) the body is seen with fragments of burnt-out tyres, and the wires on top of it.

(Faleri had said in his evidence that -

"According to my opinion this person was burnt by tyres, because I could clearly see that there were wires on the body of the deceased.")

The following is an extract from Gouws's evidence. (The questions are those of prosecuting counsel).

"Ek wil hê u moet vlugtig kyk na BEWYSSTUK A, dit is die tweede foto asseblief -- Dit is reg, ja. Kan u miskien op die foto vir ons wys indien daar

so 'n plek is waar die beskuldigde uitgewys het, die brandmerke uitgewys het? -- Dit is foto nr 2, tussen die muur, die oop deur en die regter voorwiel, het beskuldigde nr 2 'n plek op die grond uitgewys. Daar was swart merke.

Het u enige verdere ondersoek ingestel na enige ander merke wat in die omgewing kon gewees het? -
- Nee.

So u het net gegaan op wat hy uitgewys het? -- Dit is korrek."

This evidence agrees with what was recorded in Ex. "F" as having been pointed out by the accused on 10 December 1986.

(See above).

Although not far away from it, this was not the spot where the body was found lying. And there is no possibility of confusion.

When pointing out to Gouws, the accused did not give a date to the burning of which he was speaking. In an attempt to meet this difficulty, the State led evidence from Gouws, Det. W/O Faleni, and Det. W/O Noyo. This evidence was directed towards showing that there was only one woman burnt at the Woolfson Stadium during the relevant period,

If established, this would ground an inference that the incident referred to by the accused was the occasion on which the deceased met her death.

The following is the relevant extract from Gouws's evidence:

Nou kaptein, ek het u gister gevra om sekere ondersoek in te stel, vir my navraagwerk te doen, is dit korrek so? -- Dit is korrek.

Kan u vir die hof verduidelik wat ek u gevra het? -- Of daar enige swartvrou in die Woolfsonstadion vanaf Mei 1986 tot die twaalfde maand 1986 binne in Woolfsonstadion uitgebrand was.

Het u toe die misdaderegister deurgegaan? -- Ek het ons register nagegaan, edele.

En wat het u uitgevind? -- Dat daar wel 'n man, swart manspersoon gedurende Desember in die Woolfsonstadion uitgebrand is.

Desember 1986? -- 1986. Maar geen swartvrou was uitgebrand binne die Isaac Woolfsonstadion nie. Behalwe dié -- Behalwe dié voorval."

It is not clear why the investigation was limited to the period May 1986 to December 1986. Whatever the reason for that, it is clear that this evidence was hearsay. It was inadmissible at common law and no attempt was made to get it in under s.3 of the Law of Evidence Act, 1988. It

should therefore have been disregarded.

The evidence of Faleni which was relevant to this point was the following:

"Now whilst you were with murder and robbery did you deal with many of these types of burnings? -- During that period I can say every day.

Do you yourself know of any other such burning that took place at the Woolfson stadium? -- No, I never attended any other scene in the same spot. That was the only one. I do not even know whether there was anybody else which had also been burnt there.

Perhaps I can sum it up and you can tell me if I am correct. Are you saying that as far as you, Detective Warrant Officer Faleni is concerned, in other words, your own knowledge, this is the only such case at that particular place? -- That is correct.

(The question put when prosecuting counsel summed it up was leading in form, and misleading in content. The witness was not in a position to say "of his own knowledge" that "this was the only such case at that particular place." He had just said that this was the only scene he had ever attended in the same spot, and that he did not "even know whether there was anybody else which had also been burnt there.")

In his cross-examination by defence counsel the following was

recorded:

My question is did you attend to a similar incident subsequent to this in the township? -- Yes, prior to this case I did see similar cases, but after this incident I left murder and robbery.

I see. And you never attended to incidents of this nature in the township? -- When?

After you left the murder and robbery unit. -- I did.

In the township? -- That is correct.

In the Woolfson stadium? -- There was no other similar offence in the Woolfson stadium.

Which you attended, that is what you added? -- That is correct.

Your other colleagues, did they attend? -- I do not know."

Noyo said that he had been with the murder and robbery unit since 1984, and had investigated many instances of this type of case. Asked, "Did you yourself know, do you know of any other person that was burnt in the Woolfson stadium by this method?" he replied "No." In cross-examination, the following was recorded

MR MTHIYANE: Mr Noyo, you have said in your evidence that at the Woolfson stadium during that particular period, this was the only body that was burnt? -That is correct.

Right, what I would like to find out from you

is what do you mean when you say during that period. We know that it is being alleged that this body was burnt on 1 July 1986. -- I meant that I was dealing with these cases during then and this was the only body that was found burnt in Woolfson stadium.

COURT: But now what period? -- Since 1984.

The time that you were in murder and robbery, is that what it is? -- That is correct.

I do not think that on the evidence of Gouws,

Faleni and Noyo, the trial court was justified in finding

"dat daar gedurende die betrokke tydperk geen ander vrou daar

verbrand is nie." I have already mentioned criticisms of

Gouws and Faleni. In regard to Noyo, the prosecution did not

attempt to qualify him to give the evidence which he gave.

As a detective warrant officer, he was hardly in a position

to know of his own knowledge everything that was done by

others during the relevant period, whatever he may have heard

through reports and gossip. Moreover he gave evidence nearly

3 years after the relevant date, and he did not depose to any

record from which he could refresh his memory. In my opinion

Noyo's evidence did not provide a safe foundation for the

drawing of the inference.

(3) It appears from the judgment that the trial court, having decided that there had been compliance with s. 209, was of the view that this concluded the matter; that it then followed that there could be no doubt that the accused were guilty of murdering the deceased. There was no further enquiry.

This was an error. S. 209 provides that an accused may be convicted when the requirements there laid down have been satisfied, not that he must then be convicted. Even though there has been compliance, the court must still be satisfied beyond a reasonable doubt that the accused is guilty. And this requires consideration of the question whether the confession is a genuine one.

In the case of Walter Sykes, decided in 1913 and reported in 8 Cr. App. R 233, RIDLEY J (with whom PICKFORD AND AVORY JJ concurred) approved the following instruction to the jury on the way to approach to a confession:

"The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? is it corroborated? are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

This dictum has frequently been quoted with approval in cases in Rhodesia see (R v Funwane 1956(4) SA 761 (FC); R v O 1963(1) SA 43 (SR); and R v Madyedzo, 1964(4) SA 807 (S.R.A.D) at 810.)

It was pointed out in R v Sibanda 1965(1) 236 (S.R., A D) per BEADLE CJ at 239 D-G that the tests outlined in Sykes cannot be regarded as exhaustive; and that there is no suggestion that all the tests must all be applicable - "whether the application of any one particular test will be

sufficient in any particular case must depend entirely on the circumstances of that case."

In my respectful opinion, the Sykes dictum provides a useful guide for the assessment of the genuineness of a confession.

See S. v Kumalo 1983(2) SA 379(A) per BOTHA JA at 383 G to 384 A.

"In general, the danger of an innocent person freely and voluntarily confessing to a crime he did not commit is no doubt slight (R v Sikosana 1960 (4) SA 723 (A) at 729C), but it is nevertheless real; and, when once it appears that a purported confession contains a material untruth, as is the position here, the need for the Court to be on its guard against the danger of the confession being false in its essence, ie as to guilt of the "confessor", is immediately more compelling. Experience in the administration of justice has shown that people occasionally do make false confessions, for a variety of reasons. Our Courts have recognised this phenomenon of human nature (see, eg. R v Sikosana (*supra*); S v Mbambo 1975(2) SA 549(A) at 554 C-D; S v Mjoli and Another 1981 (3) SA 1233(A) at 1237G, 1239 B-F, 1245 E-H), and so has our Legislature, which from early times provided safeguards to be complied with before an accused person could be convicted on the strength of a confession (see Mjoli's case *supra* per JANSEN

JA at 1239 F-1240 H)."

The reality of the danger of false self-incrimination is exemplified by a case in this court: S v Njaba 1966(3) SA 140 (A). The appellant was tried on a charge of murder. At his trial a confession made by him was handed in as an admitted document. He did not give evidence. He was convicted and, no extenuating circumstances having been found, he was sentenced to death. It was subsequently established that at the time of the murder he was incarcerated in Leeuwkop Gaol.

In the present case the accused's "confession" was terse in the extreme. It was unaccompanied by any circumstantial detail which would have lent verisimilitude to the bald assertion that he and Comrades burnt a woman to death. In regard to the circumstances of the crime nothing was proved beyond the discovery of the body and the report on the post mortem examination. In the summary of material facts which accompanied the indictment, it was stated that

on or about Tuesday 1 July 1986 a group of persons of which the accused were members, took the deceased to the Woolfson Stadium. Members of the group hit the deceased with kieries. Later they put tyres upon her, poured petrol thereon, and set fire to it. There was no evidence direct to prove any of this. Apart from the fact that the charred body of a woman was found in the stadium, there was nothing to show that the accused's statement was true. There was little by which the statement could be tested, except that the spot pointed out by the accused differed from that where the body was found. There was no evidence to show that he had an opportunity of committing murder, or that the confession was credible.

In my opinion therefore the evidence in this case did not provide a safe basis for the conviction of the appellants. I would allow the appeal, and set aside the conviction and sentence.

H C NICHOLAS AJA+"