Case No 166/89
/wlb

SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal between:

MZIWOXOLO HLEHLI — **Appellant**

and

THE STATE — **Respondent**

CORAM: E M GROSSKOPF, MILNE et STEYN JJA

Date of Hearing: 11 September 1990

Date of Judgment: 25 September 1990

J U D G M E N T

MILNE JA/.....

MILNE JA:

The appellant and his co-accused, whom I shall call accused No 2, were convicted of rape and sentenced to 6 years' imprisonment by a Regional Magistrate. The appellant unsuccessfully appealed to the Cape Provincial Division against his conviction and sentence. He appeals to this court with leave of the court a quo.

The complainant's version may be summarized as follows: On the evening of 30 May 1987 she was on the way from Zone 13 in Langa to Zone 5 where she intended to visit a friend. It was about 8 p.m. and already dark when she encountered three persons in a passage. In the witness box she purported to identify the appellant and accused No 2 as two of the three: the third person was unknown to her. I should mention that she said that this occasion on 30 May

was the first time she had ever seen the appellant and he also was, therefore, at that time unknown to her. She knew accused No 2 by sight only and "not for a long time." The person whom she purported to identify as the appellant then spoke to her and pulled her into the passage. He was armed with an open pen-knife, she struggled, and he cut her jersey. The third person then struck her with a clenched fist on the eye. Her three assailants then dragged her for about half a kilometre "oorkant die spoorweg" and accused No 2 blindfolded her, "sodat ek nie aan hulle kan kyk nie." While they were dragging her and before she was blindfolded, they were talking and they addressed each other by their nicknames, the appellant being addressed as "Kaya", accused No 2 as "Piesang" and the third person as "Lungile". She was ordered to lie down under a tree and each of them then raped her twice in the following order: the appellant, then accused No 2 and then the third person. She said that while

accused No 2 was having intercourse with her for the first time "Hulle [referring to her three assailants] het vir my hulle name gesê en vir my gesê waar hulle bly." She also mentioned that after she had been raped for the first time the appellant slapped her with an open hand on her cheek when she tried to get up. When each of them had raped her twice the third person directed her to Zone 13 and she then went to the house of her friend Daphne Mbalo in Zone 13. She told her what had happened. She told Daphne that accused No 2 had told her that his name was "Piesang" and that he lived in Zone 12. Daphne knew that accused No 2's nickname was "Piesang" and the following day she pointed out the house where he lived to the complainant. On 17 July accused No 2 was arrested and, in the presence of the complainant, he pointed out the appellant, who was then also arrested.

Daphne Mbalo also testified for the State. She said that she knew the appellant by sight and that his nickname was "Kaya". She had known accused No 2 for a long time and he lived close by. His nickname was "Piesang". She described how the complainant came to her house at about midnight on 30 May 1987. Her clothes were dirty and her cheek was swollen. She was crying. She said she had been raped. Then occurs the following passage in her evidence:

"Het sy gesê wie haar verkrag het? --- Sy het net vir my gesê een van hulle was Piesang, ek het gehoor toe hulle met mekaar praat.
Het sy vir jou enige adres verskaf van Piesang, 'n moontlike adres? --- Ek het vir haar gesê as dit Piesang is, dit is Piesang wat ek ken want hy bly net hier oorkant.
Het u toe vir haar die adres gegee? --- Ja, toe gee ek vir haar die adres, toe wys ek vir haar die volgende oggend toe ons uitstap, daar bly hy."

The prosecutor then simply handed in a statement which purports to have been made by the appellant to a magistrate. It reads as follows:

"Hierdie voorval het begin te Zone 5 Langa. Op hierdie dag was ons dronk. Dit was die langnaweek aan die einde van Mei op 'n Saterdag vermoedelik 30 Mei 1987. Ek het my vriend Banana Jcuwa ontmoet wat saam met 'n meisie was. Ek het toe saamgeloop met hulle. Na agter die stasie Langa waar ek en hy en die meisie geloop het. Dit was buite nie vêr van die stasie nie maar in die bos. Ek het daar met die meisie geslaap. Ek het ook gemeenskap gehou met haar. Sy het niks gedoen nie. Dit is al."

The trial magistrate then informed the appellant that he bore the onus of satisfying the court on a balance of probabilities that this statement had not been made voluntarily. I am not entirely satisfied that he was correct in this regard. The statement by the appellant contains certain admissions. In terms of section 219A(1) of Act No 51 of 1977, it was only admissible if it was proved to have been made voluntarily. The proviso to that section rendered it admissible on its mere production, only if the requisites of sub-paragraphs (a) and (b) of the proviso were

satisfied. Sub-paragraph (b) required that

> "It appears from the document in which the admission is contained that the admission was made voluntarily ..."

In the preamble to the statement by the appellant, the following questions and answers appear at the commencement thereof:

"Begryp jy die waarskuwing wat aan jou gegee is? --- JA, EK BEGRYP DIT.
Verlang jy om 'n verklaring te maak? --- JA.
Is jy deur enige persoon aangerand of gedreig met die doel om jou te beïnvloed om 'n verklaring af te lê? --- EK HET GEEN BESERINGS, WONDE OF KNEUSPLEKKE NIE WAT EK AAN U WIL WYS NIE.
Is jy deur enige persoon aangemoedig of op enige wyse beïnvloed om 'n verklaring af te lê of is enige beloftes deur enige persoon aan jou gemaak om 'n verklaring af te lê? --- NEE, GLAD NIE."

It will be observed that the appellant did not answer the question as to whether he had been assaulted or threatened by any one with the object of influencing him to make a statement. He merely said that he had no "beserings,

wonde of kneusplekke wat ek aan u wil wys nie." On the other hand, the answer to the next question may, on the face of it, be wide enough to establish prima facie that the statement was made voluntarily. I shall assume, without deciding, that it did and that the magistrate correctly approached the admissibility of the document on the basis that it was for the appellant to show that he did not make the statement voluntarily. The appellant, in response to the magistrate informing him that he bore the onus, gave evidence to the effect that he had been threatened with assault and told that "As ek nie saamstem nie dan sal hy [Sgt Gubane, who arrested him] my nie borg gee nie." He was also told that he would be locked up and he would lose his employment if he did not "saamstem". He furthermore mentioned in his evidence that when accused No 2 pointed him out he, accused No 2, and the complainant were together in the same vehicle. The appellant was then arrested and put

into the vehicle and on the way to Bellville where he made the statement he was, so he says, told "Daar is wel stoele en poppe wat vir my sal knyp." He said that the policemen had told him that the three of them had taken the girl to a station and near the station the three of them had raped her.

The appellant then closed his case on this issue and the magistrate said to the prosecutor "Beskuldigde 1 het sy saak gesluit by hierdie verhoor binne 'n verhoor. Wil die Staat getuienis aanbied. Wil die Staat getuienis aanbied?", which elicited the following reply from the prosecutor "Edelagbare, die Staat is nie in 'n posisie om op hierdie stadium getuienis aan te bied nie. Dit is die Staatsaak ten opsigte van die verhoor binne 'n verhoor." The evidence of the appellant on this aspect of the matter was therefore uncontradicted. Furthermore, nothing was put by the

prosecutor to the appellant as being the version of the State on this issue. I shall return to this aspect of the matter later.

The magistrate held that the appellant had not discharged the onus and admitted the statement. The State closed its case and the appellant then went into the witness box. He then, in effect, applied for the complainant to be re-called so that he could put a further question to her. Without enquiring into whether the application was well-founded the magistrate summarily dismissed the application in one terse sentence: "U het reeds 'n geleentheid gehad". This was true, of course, as it is true of every application to re-call a witness, but that is by no means an end of the matter. Be that as it may, the appellant then testified that on the evening in question he was at home with his girlfriend Veliswa Matuwani and his mother Alexandrina

Hleli. Both of them testified in support of his alibi. The magistrate, however, rejected the alibi and found both the appellant and accused No 2 guilty as charged.

The crucial question for determination by the trial court was whether the evidence established beyond reasonable doubt that the appellant was one of the complainant's assailants. In my judgment it was not safe to rely upon the complainant's identification of the appellant. I say this for the following reasons. In view of the fact that she had never seen the appellant before, that it was already dark when she encountered him and that she was blindfolded when they crossed the railway line, her opportunity for observation was very limited. No identification parade was held. She saw the appellant when he was pointed out to the police by accused No 2. In these

circumstances her identification in the witness box of the appellant is of little value. The unacceptability of her claimed ability to recognize the appellant is further demonstrated by the fact that she said she knew accused No 2 by sight before the night of the rape but it is clear that she did not on the night of the rape recognize accused No 2 as the person whom she knew by sight. There are, furthermore, some aspects of her evidence which are open to criticism. In the first place having said in her evidence initially that it was the third person who punched her in the eye with a clenched fist, she said at a much later stage that it was the appellant who had caused her eye to swell by punching with a clenched fist. Secondly, she is recorded as having said that while accused No 2 was having intercourse with her "Hulle het vir my hulle name gesê en vir my gesê waar hulle bly." This strikes one as somewhat improbable, to put it mildly. In fact, further questioning revealed that it

was only accused No 2 who allegedly gave her his address. Yet when Daphne Mbalo testified, she said it was she who had given the complainant the address of accused No 2. The complainant had, furthermore, been blindfolded, so she said, before any of them raped her and the question then arises as to how she would have known who was talking. No doubt it is reasonably possible that she may have heard them addressing each other by their nicknames after she was blindfolded but then, how would she know in what order the three assailants raped her? In the court a quo Friedman J dealt with this difficulty in the following manner:

> "Daarbenewens wil dit voorkom uit haar getuienis ten opsigte van haar beskrywing van hoe elkeen van hulle met haar te werk gegaan het, dat die blinddoek haar nie verhoed het om waar te neem wat elkeen gedoen het nie. Die blinddoek kon derhalwe nie baie effektief gewees het nie."

This is, however, not what the complainant said. She said she was blindfolded "sodat ek nie aan hulle kan kyk nie".

The appellant and accused No 2 were undefended and the point was simply never canvassed or tested. The result is that it is, with respect, really speculation to suggest that because she purported to say how each of them "met haar te werk gegaan het" therefore it followed that the blindfold could not have been very effective. The complainant alleges that she told her friend Daphne that accused No 2 had told her that he lived in Zone 12. This is not borne out by Daphne who, as already mentioned, says that she gave the complainant accused No 2's address. Furthermore, if it is true that before she was blindfolded she had heard the three of them addressing each other by their nicknames, the question then arises as to why she would only have mentioned "Piesang" to Daphne. Daphne says she only mentioned "Piesang" and this, incidentally, accords with the appellant's evidence at the trial within a trial that the police told him that the complainant knew the name of only

one of the person that had raped her. The magistrate attempts to get over difficulties of this nature by reasoning as follows:

> "Die drie persone het met mekaar gepraat en mekaar op hulle byname genoem. Sy het die name Piesang, Kaia en/of Koko en Nlungi gehoor. Beskuldigde 1 is na verwys as Kaia en Koko en beskuldigde 2 as Piesang en die derde persoon as Nlungele."

This is simply not correct. She did not say that she heard the names "Piesang, Kaia en/of Koko en Lungi". She did not mention the name "Koko" at all and that is what the appellant said throughout that his nickname was.

Leaving aside for the moment the document containing the alleged admissions by the appellant, one has, as against the evidence of the complainant, the evidence of the appellant, his girlfriend and his mother, that he was at home on the night in question. True, there are some discrepancies of detail between the version of the appellant

and his girlfriend as to exactly what happened and in what order that evening, but the magistrate misdirected himself in saying that "onder kruisondervraging het sy egter 'n heel teenstrydige getuienis van beskuldigde 1 gelewer." Most, if not all, the discrepancies are explicable on the basis that they are the kind of detail that the witnesses would have had no particular reason to fix in their minds at the time when the events in question occurred e.g. what they had to eat.

Against this background it is clear in my judgment that, if the document containing the admissions by the appellant, was inadmissible, then it ought to have been held that there was a reasonable doubt as to whether the appellant was indeed one of the complainant's assailants. The magistrate's reasons for admitting this document are as follows:

> "Tydens die verhoor binne 'n verhoor was dit duidelik dat beskuldigde 1 [appellant] nie gedreig was om hierdie verklaring aan die landdros te maak nie. Hy het heel teenstrydige getuienis gelewer. Hy het onder andere beweer dat die polisie hom gesê het dat beskuldigde 2 hierdie meisie sou verkrag het en dat hy moes saamstem daarmee. Dit is dan eienaardig dat die polisie hom sou dreig om 'n verklaring tot daardie effek te gaan maak. Dit is dan des te meer eienaardig dat hy in hierdie verklaring aan die landdros homself verbind met geslagsgemeenskap met hierdie meisie. Dit is heeltemal teenstrydig met die beweerde dreigemente dat hy moes gaan saamstem dat beskuldigde no 2 die persoon is wat die meisie verkrag het. Die een oomblik sê hy dat hy wel gedreig is om verklaring te maak en kort daarna dan ontken hy dat hy gedreig is."

I do not think that this is a fair reading of the appellant's evidence. In this regard one must bear in mind that one is dealing with an unlettered person who, in making his statement to the magistrate and in giving evidence at the trial, did so through the medium of an interpreter. In these circumstances there is always a potential for

misunderstanding. Added to this is the fact that, judging by the transcriber's note, the interpreter consistently failed to speak into the microphone to such an extent that the transcriber commented as follows:

"Deurgaans is tolk onhoorbaar".

This is, I think, something of an exaggeration as there were clearly passages of the evidence that were "hoorbaar" but there were five or six instances during the cross-examination of the appellant on this very issue when the evidence of the appellant was said to be "onhoorbaar". Furthermore, judging by the transcriber's comments there must have been a number of other instances when it was difficult to hear what the interpreter was saying, so that there is yet further room for misunderstanding. There are certainly some indications in the record that either what the interpreter was saying was not properly recorded or that he was not doing his job with particular skill. A few

examples will suffice:

"Ken u enige van die persone wat u daar ontmoet het? --- Ja, ek ken vir hulle.
Wie is hulle? --- Dit is hierdie twee.
Hierdie twee beskuldigdes? --- Hulle was eintlik, hulle was drie altesame, maar hulle twee nou, hulle dra geen kennis van die derde persoon nie."

It seems probable that the complainant said not "hulle dra geen kennis van die derde persoon nie" but "ek dra geen kennis van die derde persoon nie". Again:

"Hoe trek hy jou? --- Die beskuldigde het 'n manier as 'n persoon vir haar aan die bors gegryp het en getrek.
Die getuie? --- Die getuie."

Either the complainant is confused or the interpreter is.

And again:

"Toe hy klaar is met gemeenskap met u hou, het u daar gebly lê of het u opgestaan? --- Hulle het gesê ek moet bly slaap. As ek kan opstaan gaan hulle my slaan.
Wie het so gesê? --- Altwee van hulle.
Met ander woorde u moet bly lê, nè, nie slaap nie, maar lê, u bedoel lê? --- Ja."

This looks suspiciously like poor interpretation.

And finally:

"AANKLAER: Beskuldigde, wat het die polisie vir jou gesê moet jy vir die landdros sê? --- Die polisie het nie gesê wat moet jy vir die landdros kom sê nie."

It seems fairly clear that what the appellant said was "Die polisie het nie gesê wat moet ek vir die landdros kom sê nie." (I should add that the comprehensibility of the record is not greatly improved by the failure of the transcriber to use inverted commas where somebody else's words are being quoted.)

The effect of all this is that one must, in the circumstances of this case, approach apparent contradictions in the evidence of the appellant and between the statement and his evidence with a certain measure of caution.

The appellant's version as to how he came to make a statement to the magistrate was set out with reasonable

clarity in what I may call his "evidence in chief". It was as follows:

> "Die polisie het vir my gesê ek moet eintlik hierdie ding, ek moet eintlik skuldig pleit, want as ek dit nie doen nie, dan maak ek dit moeilik vir hom en vir myself. Toe sê die polisie vir my die klaer, hierdie ding het wel plaasgevind, maar die klaer ken nie die persoon [persone?] wat hierdie ding gedoen het nie, sy ken net vir Brian in hierdie saak. Toe sê ek nee, as sy vir Piesang, vir hom ken, dan ek het niks te doen aan hierdie saak nie. Toe sê hy vir my as ek nie saamstem nie, dan sal hy vir my nie borg gee nie. Toe sê ek maar hoekom moet ek saamstem oor dit wat ek nie kennis dra nie. Toe sê hy vir my wel, as ek wil hê ek moet geslaan word dan moet ek maar net so bly. Toe sê hy nog 'n ander ding, hy sal vir my toesluit, dan verloor ek my werk ...(onhoorbaar) Toe sê hy stem saam dan kan ek vir jou vry borg gee. Die is dié dat ek nou bang gewees het en bang dat ek my werk sal verloor, toe dink ek wag dat ek maar saamstem, maar ek sal die waarheid praat hierso. Dit is daar waar ek nou die verklaring gemaak het ...(onhoorbaar)"

True, there is a passage in the cross-examination when the appellant seems to be saying that the policemen

told him that the complainant was raped by accused No 2 and that that was all that he said about the crime. The very next question, however, was "Hy het nie gesê waar sy verkrag was nie?" which elicited the answer "Hy het gesê." He then went on to say that the policemen said that the complainant was raped "daar naby die stasie" and then occurs the following passage:

"Is dit al wat hy vir jou gesê het? --- Dit is al wat hy vir my gesê het.
Wat het hy gesê van die voorval? --- Watter voorval?
Van die verkragting? --- Nou verstaan ek nie u vraag nie."

It is quite apparent here that there is either a lack of comprehension on the part of the appellant or lack of communication between the appellant and the cross-examiner <u>via</u> the interpreter. Matters were not improved when the prosecutor put it to the appellant that he was raising a matter for the first time when he quite plainly was not. When the appellant said that the policeman said he would

lose his work and not get bail he was asked by the prosecutor why he had not mentioned this previously. He had mentioned it at the outset and the magistrate should not have allowed this question to be put. There are, furthermore, other passages in which the appellant quite clearly says that the police told him more than simply the fact that the complainant had been raped by accused No 2. For example, he said

"Hy [referring to the policeman] het gesê as ek nie saamstem met hierdie verklaring nie dan sal ek geen borg kry nie, ek sal maar net gearresteer word.
En as jy saamstem? --- Toe sê hy as ek saamstem dan sal ek 'n borg kry." [my underlining]

I think it is reasonably clear that the appellant was saying here that the policeman was requiring him to agree with the version which the policeman was putting to him. He said also in answer to the question

"Hoe het polisieman gesê waar het dit begin?"
"Hy het gesê jy het so 'n ding gedoen. Julle was drie, julle het die meisie na die stasie gevat en naby die stasie

verkrag julle haar."

Some point was sought to be made of the fact that the appellant in his statement said that the rape occurred "in die bos" whereas, so it was submitted, the appellant said that the policeman had simply said that the incident took place near the station. In fact, near the end of the evidence of the appellant under cross-examination at the trial within a trial he said that the police had referred to "die bos naby die stasie". What is more, it is clear that the appellant says he was taken to the station in question and it may well be that either as a result of that visit or because he knew the locality anyway, he knew there was a "bos" in the vicinity of the station.

In my judgment the magistrate misunderstood the appellant's explanation as to how he came to make the

statement. His evidence was sufficient to make a prima facie case that he had been threatened and unduly influenced and in the absence of any countervailing evidence from the police, that became proof on a balance of probabilities. The magistrate should therefore have declined to admit the statement.

In the result there was insufficient evidence to warrant the finding that the identity of the appellant had been proved beyond reasonable doubt.

The appeal accordingly succeeds and the appellant's conviction and sentence are set aside.

A J MILNE
Judge of Appeal

E M Grosskopf JA]
Steyn JA] CONCUR