191/91

CASE NO. 90/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

BOSTELLA SITHEBE APPELLANT

and

THE STATE RESPONDENT

CORAM: VAN HEERDEN, NIENABER JJA
et NICHOLAS AJA

DATE HEARD: 11 NOVEMBER 1991

DATE DELIVERED: 29 NOVEMBER 1991

J U D G M E N T

NIENABER JA:

The appellant confessed to a spate of crimes, including murder. A magistrate recorded his admission that he had collaborated in four separate excursions of armed robbery, all committed in and around Johannesburg within the space of two days, during one of which someone was gunned down. The admissibility of that confession was strenuously challenged by the appellant when he appeared before Stegmann J and two assessors in the Witwatersrand Local Division on nine counts: one of murder, five of robbery with aggravating circumstances, one of attempted robbery with aggravating circumstances and two of unlawful possession of respectively a firearm and ammunition.

That challenge resulted in a trial within the trial. The appellant testified. He alleged that he had been assaulted and tortured until he eventually agreed to confess in terms he was instructed to memorise. A host of witnesses, in excess of twenty, contradicted him. Because of his explanation that the police, and not he, was the source of the contents of

the confession, the merits of the charges against him were to some extent also traversed. (**S v Lebone** 1965 (2) SA 837 (A) at 841H-842B; **S v Khuzwayo** 1990 (1) SACR 365 (A) at 371g-374d). The court below disbelieved the appellant. His confession was admitted in evidence. The trial then proceeded. Some of the witnesses who testified at the trial within the trial were recalled by the State and repeated their evidence on the merits. The prosecution followed that course because of what was declared by this court in **S v de Vries** 1989(1) SA 228 (A) at 233H-234B:

> "It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the enquiry into voluntariness in a compartment separate from the main trial. In England the enquiry into voluntariness is made at 'a trial on the **voir dire**', or, simply, the **voir dire**, which is held in the absence of the jury. In South Africa it is made at a so-called 'trial within the trial'. Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt. (See **R v Dunga** 1934 AD

> 223 at 226.) The prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the defendant at the trial within the trial. See **Wong Kam-ming's** case **supra** at 257-8. Similarly, in a case where the trier of admissibility is also the trier of guilt (eg a magistrate or a Judge sitting without assessors), evidence given by an accused person in the trial within the trial must be disregarded when the issue of guilt comes to be considered."

If everything said during the trial within the trial was sacrosanct the prosecution evidence on the issue of the appellant's guilt - so the State believed - had to be presented afresh.

The appellant, on the other hand, elected not to testify again. He called only one witness on a peripheral issue. Mainly on the strength of his confession, thus admitted, as well as his pointing out of the scenes of the robberies and certain admissions he made under cross-examination during his evidence in support of an earlier application for bail, juxtaposed, of course, with his own silence in the trial on the main issue, the trial court convicted him on all the counts but two (one of the complainants could not be

located to testify (count 7) and the State was unable to prove that the firearm which the appellant admittedly carried was loaded (count 9)). The trial court, applying the law as it then stood, also found that there were no extenuating circumstances in relation to the count of murder. He was accordingly sentenced to death. On the remaining counts, relating to the robberies and the unlawful possession of a firearm, the sentences were so structured that he was sentenced to an effective period of imprisonment of 24 years. Leave was granted to him by the court **a quo** to appeal to this court against his convictions, against his sentence of death and against the sentences imposed on the remaining counts.

The correctness of the convictions was questioned by counsel for the appellant on a number of grounds.

The first and principal one was that the court **a quo** erred in equating the appellant's election not to repeat his testimony in the trial within the trial with silence when the trial proper proceeded on the merits. The merits, or at any rate some of them,

were canvassed during the trial within the trial; the appellant did testify and was cross-questioned about them; consequently, so it was contended, it was wrong of the court **a quo** to have disregarded his evidence and to have treated the matter as if he remained silent in the face of a **prima facie** case against him.

The trial within the trial was concerned only with the admissibility of the appellant's confession. But because of the appellant's explanation that the contents of his confession were drummed into him by members of the investigating team, he was cross-examined on, and evidence was led of, his pointing out of the scenes where the various robberies took place to police officers who were not involved in the investigation thereof. This showed that the appellant had personal knowledge of the circumstances of the robberies which, in the absence of any countervailing evidence from him, would justify the inference that he must have been involved in them personally. Such knowledge was consistent with his confession. It also tended to show that the confession, made on the same day as the pointing out,

was voluntary since the appellant, although invited to do so, declined to report and complain of any assaults committed on him. The appellant, on the other hand, dismissed the evidence of the pointing out and the photographs taken thereof on the ground that it was all stage-managed by the police.

For the same reason he was cross-examined and evidence was led about some significant admissions he made regarding his involvement in the robberies and the killing, during evidence which he gave in support of an earlier application for bail. These admissions also accorded with his confession. According to the appellant he was so intimidated by the presence in court of some of the police officers who had assaulted him that he simply agreed to anything put to him; the admissions he made were accordingly tainted.

The court **a quo**, in a detailed and well-reasoned judgment, rejected the appellant's explanations and admitted the confession. Thereafter the evidence of the pointing out and the admissions made during the bail application were again tendered. The appellant, through his counsel, did not object to

this procedure. Nor did he repeat his cross-examination or his own testimony. In the result, as the court **a quo** pointed out in its subsequent judgment on conviction:

> "...the evidence of the state witnesses as to the pointing out of the four sites by the accused to Captain Roux, although tested by Mr Shapiro's cross-examination, in the end remained unchallenged by any evidence from the accused since his evidence in the trial within a trial must be disregarded."

So, too, in relation to the appellant's admissions made during the bail application, the court **a quo** said:

> "In the present matter the accused himself, while testifying in the trial within a trial, gave evidence to the effect that he had been under the pressure of police threats when he made the relevant admissions in the course of his bail application on 21 April 1989. Having regard to the decision in **S v De Vries, supra**, I consider that such evidence must be disregarded."

According to counsel for the appellant the court **a quo** erred in applying the reasoning of the **De Vries** case **supra** to the present one: **De Vries's** case was either distinguishable on the facts, and hence of no application, or it was wrongly decided. It was wrongly decided because it failed to recognise that a

trial court in the substantive trial has a discretion to consider evidence given during the trial within the trial when it would be fair to an accused to do so - which is what English legislation, according to counsel, subsequently provided; and since our rule descends from the English law this court ought to follow suit.

I disagree. In my view the **dictum** from **De Vries's** case **supra** quoted earlier is both correct and in point. Its authority, reinforced by the English decisions on which it relied, derived from its own internal dynamics and remained unaffected by subsequent statutory changes, if any, to the law in England. It has been consistently followed by this court (cf. **S v Khuzwayo supra** at 372h). The principle which it exemplifies is that an accused must be at liberty to challenge the admissibility of an incriminating document at a trial within the trial without fear of inhibiting his election at the end of the day - irrespective of whether the document is admitted or not - of not testifying on the issue of his alleged guilt. Unless the trial within the trial is treated as a

watertight compartment, with no spill-over into the main trial, that danger will always exist: for if an accused person's evidence in the trial within the trial can legitimately be held against him in the main trial, he might be obliged to testify again in order to regain lost ground; and if the evidence of a State witness, where the merits are at stake, can simply be transplanted into the main trial, the accused might be obliged not only to cross-examine fully on all such issues (lest he lose the opportunity of doing so later) but to testify himself in order to neutralise its effect. In principle, unless the parties stipulate to that effect, neither the evidence of the accused nor of State witnesses given during the trial within the trial, ought therefore to be injected into the main trial. Of course if an accused decides not to avail himself of his right to silence, different considerations will apply. But it is not necessary, in this case, to delve into matters such as whether the accused can then be cross-examined on what he had said earlier about the merits. This question can be left open, as it was left open in the **De Vries** case **supra** at

234D. The only live issue, in this case, is whether the court **a quo** was right in disregarding the accused's evidence given during the trial within the trial. In my opinion it was. The first ground of criticism raised against the judgment by counsel for the appellant is therefore rejected.

In any event it would not have availed the appellant if his earlier evidence had been reconsidered. Counsel's point, if I understood it correctly, was that such evidence could have mattered if taken into account at the main trial: at the trial within the trial the **onus** was on him (s 217 of the Criminal Procedure Act 51 of 1977), to be discharged on a balance of probabilities; at the main trial it was on the State, to be discharged beyond a reasonable doubt - and that, so it was said, would have made all the difference. I do not think so. In the first place, the issues are not the same. Secondly, the court **a quo**, in its judgment on the admissibility of the confession, comprehensively rejected the evidence which the appellant tendered at the trial within the trial. He was found, for good reasons, to be a liar.

It could therefore not have made any difference to the eventual outcome, irrespective of the **onus**, if the same evidence had been taken into account when his guilt was being considered. Once rejected the evidence was worthless. Nothing happened thereafter to improve its quality. To have reconsidered it would have been a futile exercise.

It was also argued that the appellant was prejudiced when the prosecution witnesses who had testified on the merits during the trial within the trial were recalled to do the same during the main trial. This, so it was said, was contrary to an understanding between the legal representatives that such evidence would not have to be duplicated. That may be so. But counsel for the appellant did not object to such evidence when it was tendered anew, nor was he deprived of his opportunity of again cross-examining these witnesses; in particular he could have called the appellant to counter their evidence. He did not do so. There was no prejudice to the appellant.

The appellant's second main ground of

complaint consisted of an attack against the ruling of the court below, provisional at first but confirmed in the main judgment, that the appellant's confession was not elicited by force and consequently was admissible in evidence. The confession was placed before the court **a quo** in the form of two exhibits - exhibit M consisting of the introductory questions and answers recorded by the magistrate which was all that the court **a quo** had before it during the trial within the trial; and exhibit T which contained the body of the confession.

The appellant testified, at the trial within the trial, that he was systematically tortured and terrorized until he was prepared to consent to anything suggested to him. He signed a document which had been prepared in advance and which he was then told to memorize. For signing this document, he said, he was rewarded with R5 and given a cool drink. (No such document was produced in evidence.) The next day he was taken before a white man. According to him this was on 7 April 1989. He was not told, he said, that the white man was a magistrate. He contradicted

himself on whether the statement he made and signed was read back to him. Exhibit T ranges widely over all the robberies in question, and contains detailed information which could only have emanated from the appellant himself. Nevertheless he stated that he was merely reciting a version dictated to him by the police.

The State led rebutting evidence from some 20 witnesses, including the magistrate, his interpreter, and the district surgeon, to whom the appellant was taken immediately after the confession was signed by him, and all of whom denied the appellant's version of events. The court **a quo** concluded:

1. that the evidence of the prosecution witnesses had not been shaken under cross-examination and that it was highly improbable that so many of them, including the magistrate and the district surgeon, would have conspired to falsify documents, to incriminate the appellant falsely and to conceal their own iniquity;

2. that the appellant, on the other hand, proved to be a poor witness whose evidence was often

vague, contradictory and improbable. So, for example, he never complained of the assaults and the injuries he suffered when he could have done so on several occasions.

The only point about the State case which troubled the court **a quo** related to the evidence of David Manyika. He was a policeman and part of the investigating team. The appellant was left in his care at 9:00 on 6 April 1989. It was then, so he stated initially, that he returned the appellant to the police cells at Benoni. The time recorded in the Occurrence Book was, however, 9:53. According to Manyika, when he was recalled as a witness, that was not correct: an entry in his official pocket book showed that he arrived at Kwa Thema at 10:00 which meant that he must have left Benoni at 9:30 at the latest. Of course, if the entries in the Occurrence Book were unreliable, as counsel for the appellant was at pains to suggest elsewhere in his argument, the criticism loses much of its force. But the real point is that the appellant did not state that he was tortured during this period. According to him it only happened between 10 and 12

o'clock that morning. Nor did he allege that Manyika ever assaulted him when the two of them were alone. This single instance of a gap of 50 minutes left unaccounted for in the prosecution evidence, which is not itself particularly sinister, cannot measure up to the wealth of material counting against the appellant.

In my view the court **a quo** was right when it admitted the appellant's confession in evidence.

The next ground of criticism related to the evidence which the appellant gave during his application for bail. It was argued that such evidence should not have been admitted or, if admitted, should not have told against the appellant.

The appellant's evidence at his bail application was proved at his subsequent trial by means of section 235 of the Criminal Procedure Act, 1977. Should it have appeared from the evidence in the trial that his earlier evidence had been induced by threats or compulsion it would have affected the weight and cogency of such evidence. (Cf **S v Cele** 1985 (4) SA 767 (A); **S v Shabalala** 1986 (4) SA 734 (A) at 745E; 746F-H)). The appellant did suggest, during the trial

within the trial, that he was intimidated at the time by the mere presence in court of some police officers and that this was the reason why he simply agreed with propositions put to him by counsel for the State. That explanation was not, however, repeated during the trial proper and apart from being inherently unlikely, was rightly disregarded by the court **a quo** when the appellant's guilt was under consideration.

The final suggestion was that the questions put to him were so ambiguous that his consent meant nothing. The propositions to which the appellant agreed were as follows:

> "Jy erken dat jy op 20 Maart 1989 Eerste Nasionale Bank beroof het van R38 769,95. Is dit reg? --- Ja."

And again:

> "So jy betwis nie dat dit jy is daar op die foto regoor teller 2 met 'n vuurwapen in jou hand waar jy die mense in die bank beroof van die geld nie? --- Ja."

Thirdly:

> "Beskuldige, jy het ook offisiere vergesel waar jy die volgende bank aan hulle uitgewys het, 'n Trust Bank, ek gaan die foto's aan u toon, Trust Bank in Booysens, Johannesburg, Eerste Nasionale Bank in Elandsfontein en 'n

> moord waar julle 'n man doodgeskiet het te 9 Kiplingstraat in Alberton, is dit reg? --- Ja."
>
> Fourthly,
>
> "Jy erken ook dat jy die moord daar gepleeg het? --- Ja.
> Wie het die man geskiet? --- Boen."

In my view these admissions are so plain that the appellant could have been under no illusion about their meaning. If he wanted the court to place a different and more innocent construction on them or if he wanted to explain that he did not appreciate what was being put to him, he should have tendered such explanation in evidence. He elected not to do so. The admissions therefore stand uncontradicted. The court rightly took his replies into account as uncontested material which had a bearing on his guilt.

To sum up, the court **a quo** was right in allowing the confession into evidence. Someone who was innocent would not have confessed in those terms. In addition the appellant pointed out the scenes of the various robberies which, in the absence of an explanation to the contrary, demonstrated his knowledge

of and complicity in those crimes. The evidence relating to the pointing out was not challenged. Finally there are the admissions he made during his bail application. The appellant elected not to give evidence when the issue of his guilt was tried. The consequence is that the confession, the pointing out, and the admissions he made during the bail application remained uncontroverted by any evidence from the appellant. In the result the court **a quo** was bound to convict the appellant. The appeal against his conviction must accordingly fail.

I turn to the appeal against the sentence of death imposed on the appellant on count 3. That sentence preceded the Criminal Law Amendment Act 107 of 1990 which inaugurated an entirely new approach to the imposition of the death sentence, and which this court is now enjoined to apply to matters such as this one which had not yet been finalised at the date of commencement of the new Act. The State must now prove aggravating and disprove mitigating factors.

The appellant was one of a group of three or four men who surrounded the complainant mentioned in

count 1 when he parked his car at the entrance to his garage next to his house in Linden at about 8:00 on Saturday 18 March 1989. They dispossessed him of his wallet, his wrist watch and the keys of his car and then, at great speed, drove away in the car. They arrived at Alberton about an hour later. The appellant described the incident which followed in these terms in his confession:

> "-- Ons het Alberton toe gery. Bull het bestuur. Ons het daar rondgery in blanke gebied. Ons sien 'n blanke vrou wie haar voertuig bestuur. Sy ry 'n sekere erf in. Ons ry verby. Ons hou stil en ry terug deur agteruit te ry. Ons hou stil. Bull sit voertuig in neutraal. Die voertuig het geluier. Bull en Temba het uitgeklim. Hulle is na die voertuig van dame. Ek het hulle te voet gevolg. Bull stap na die bestuurder se kant. Die blanke vrou het begin skree. Ek het gesien toe blanke vrou haar handsak na die huisdeur gooi. Terwyl ek na handsak kyk hoor ek 'n skoot klap. Toe ek omkyk het ek gesien 'n blanke persoon het neergeval. Die persoon wie ek nie kan sê of dit 'n man of 'n vrou was nie het 'n kort wit broek aangehad. Ons hardloop uit die erf uit. Ons klim in voertuig en ry met Skyline na Bull se huis in Emdeni, Soweto."

This version corresponds in broad terms to the evidence of the State witnesses. Mrs van Graan was

waiting for Mrs van der Merwe who was due to pick her up at her home. She heard Mrs van der Merwe's car arrive. As she opened a side door Mrs van der Merwe alighted from her car. It was then that both of them became aware of the presence of three black men in the driveway, each holding a firearm. One of them approached Mrs van der Merwe and demanded that she hand over the keys of her car. Another approached Mrs van Graan. The court **a quo** described the incident as follows:

> Mrs van der Merwe did not hand over anything; instead, she screamed and threw both her handbag and her car keys towards Mrs van Graan. Mrs van Graan did not manage to catch them and they struck the door by which she had just left the house. She bent down to pick them up and as she did so she saw the man who had caused Mrs van der Merwe to scream. As she straightened up she found herself facing a pistol held by a black man standing about three paces from her. He motioned to her to hand over the handbag and keys she had picked up. Just at that moment both witnesses heard a shot which both believed was fired by the third black man who had remained in the driveway behind the other two. Thereupon all three black men ran away. As they did so, Mrs van der Merwe and Mrs van Graan saw a White man collapse on the driveway between Kipling Road and the entrance to number 9. He fell and lay at the

> point marked C on the photographs F1, 2, 3, 4 and 6. Mrs van Graan recognised him as the 27-year old Mr Rian Lotz who lived with his parents in the house across Kipling Road from number 9."

Another witness whose attention was drawn by the sound of the shot described how she saw Lotz, the deceased, fall. The three black men then ran down the driveway towards the waiting car which they had earlier stolen in Linden and escaped.

The appellant was convicted of murder on the basis that he and his companions formed and executed the common purpose to rob while realising that someone might be killed in the attempt. (See **S v Madlala** 1969 (2) SA 637 (A) at 640F-H; **S v Petersen** 1989 (3) SA 420 (A) at 425E-F; **S v Nzo and Another** 1990 (3) SA 1 (A) at 7C-D.) The trial court was unable to make a finding as to the identity of the person who actually shot the deceased; it was not proved to have been the appellant. The appellant was an active participant in the robbery which led to the death of the deceased. The robbers came prepared with firearms. They did not hesitate to use violence when they sensed resistance. The deceased

rushed to the aid of two elderly helpless ladies. There is nothing to indicate that there was any necessity to kill him since he himself was unarmed. He was shot down in cold blood. The court nevertheless found, rightly as far as the appellant was concerned, that the State had at most proved **dolus eventualis** on his part. Two days after the deceased was killed he and his associates committed two bank robberies in each of which violence was used, although no one was fired at. The appellant was involved in both those robberies. It shows the measure of the man.

The appellant did not testify on sentence. The matter was postponed to enable the defence to procure the evidence of a probation officer. This was done. Her evidence was not particularly helpful. It revealed that the appellant was 24 years old at the time of the murder. He left school in 1978 after repeating standard 2. Since then he has been unemployed.

The appellant has several previous convictions, commencing with one in 1982 for robbery and three previous convictions for housebreaking with

intent to steal and theft, for which he received strokes and sentences of imprisonment respectively. Clearly he is of a criminal bent to which his participation in the robberies under discussion bears testimony. He hardly exemplifies promising material for rehabilitation.

It was urged upon this court that the appellant's complicity in the murder should be viewed in the light of his comparative youthfulness, his poor social background and his limited intelligence. Youthfulness can be discounted: the appellant was pursuing a career as an adult criminal. That he was brought up in adverse circumstances and nurtured in an atmosphere of violence, I am prepared to accept - but that does not in itself mitigate his conduct. As to his supposed "dullness of intellect", it lacks a proper foundation in the evidence.

That leaves one with essentially two factors in his favour. Firstly, that it has not been shown that the appellant was the one who fired the shot that killed the deceased and secondly, that his own state of mind was one of **dolus eventualis.** Neither factor, by

itself, necessarily precludes the imposition of the death sentence. As always in matters of this sort it remains a question of degree. In this case it cannot be said that the appellant must have realised, when he and his confederates confronted the two elderly ladies in a residential area, that there was a significant degree of risk that someone might be killed. When a bank or a supermarket is robbed, the robbers can anticipate countermeasures and resistance which could readily lead to bloodshed. This was not such a case. In **S v Mthembu** 1991 (2) SACR 144 (A) at 147d-f Smalberger JA stated:

> "Where a person by his own act, and with direct intent to kill (**dolus directus**), causes the death of another, then the greater the premeditation that preceded his conduct, the more base his motive, the more brutal, heinous or callous the crime, the greater will society's resultant indignation and revulsion be, and the more readily can the conclusion be reached that such person's deed 'is so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing' (**S v Matthee** 1971 (3) 769 (A) at 771D). However, when dealing with an accused convicted of murder who was not a perpetrator or co-perpetrator, and whose **mens**

> **rea** was not in the form of **dolus directus**, a sentence of death will rarely be imperatively called for. This is the situation which pertains in the present matter."

It also pertains in this one. In my opinion a sentence of death is not the only proper sentence. But the crime he committed remains deserving of an exemplary severe sentence. Such a sentence, in my view, would be 20 years imprisonment.

I turn to the appeal against the sentences imposed in respect of the other counts. It was contended that these sentences, 44 years imprisonment scaled down to an effective 24 years imprisonment, was so severe as to justify interference on appeal. I cannot agree. The trial judge committed no misdirection or irregularity in its judgment on sentence. It gave meticulous consideration to every point raised in the appellant's favour by his counsel. Neither the approach nor the conclusion of the trial judge can be faulted. The sentences imposed are fully justified in the circumstances. They must stand.

It would not, however, do to superimpose the 20 years imprisonment for the murder on the effective

sentence of 24 years for the remaining crimes. For the same reason that the trial judge felt obliged to direct that a portion of those sentences should run concurrently, so too the sentence for murder must coincide, at least for a portion thereof, with the other sentences. That must be done in such a way that the appellant is to serve an additional six years imprisonment for the murder, which would result in an effective sentence of 30 years imprisonment.

The following order is made:

1. The appeal against the conviction fails.

2. The appeal against the death sentence in respect of count 3 succeeds. The sentence of death is set aside and there is substituted in its stead a sentence of 20 years imprisonment.

3. The appeal against the sentences imposed in respect of the remaining counts fail.

4. It is directed that 10 years of the sentence of 20 years imprisonment imposed in respect of count 3 is to run concurrently with the sentence of 10 years imprisonment imposed in respect of count 1 and that the next 4 years of the sentence in respect of

count 3 is to run concurrently with the sentence of 12 years imprisonment imposed in respect of counts 4 and 5 together, resulting in an effective total sentence in respect of all the counts of 30 years imprisonment.

P.M. NIENABER JA

VAN HEERDEN JA)
) CONCUR
NICHOLAS AJA)