Case No 591/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIMON QINISANI KHUMALO APPELLANT

and

THE STATE RESPONDENT

CORAM: SMALBERGER, NIENABER et HOWIE JJA

HEARD: 15 NOVEMBER 1994

DELIVERED: 22 NOVEMBER 1994

JUDGMENT

/NIENABER JA

NIENABER JA:

The appellant was accused no. 4 in the court below. He and his three co-accused appeared before Howard JP and two assessors in the Circuit Local Division for the Northern District of the Natal Provincial Division. They were all convicted of murder (count 1) and of robbery with aggravating circumstances (count 2). The other accused were all sentenced to 20 years imprisonment on count 1 and to 10 years imprisonment on count 2, of which a period of 5 years was to run concurrently with the sentence on count 1 - an effective sentence of 25 years imprisonment. The appellant was regarded as the prime mover in their joint escapade. He was sentenced to death on count 1 and to 10 years imprisonment on count 2. This is an appeal, in terms of s 316 A (1) of the Criminal Procedure Act, 1977. It was noted as an appeal against both conviction and sentence but in this court the appeal against conviction was for good reason abandoned. The appropriateness of

the death sentence is therefore the only issue at stake.

The appellant, a 29 year old ex-policeman, lived in Johannesburg but hailed from Estcourt in Natal. Accused nos. 1 and 2 were acquaintances of his who also lived in Johannesburg. The three of them hatched a plan to travel to Estcourt to capture, strip and sell a vehicle. On all the evidence the plan was conceived and financed by the appellant. In Estcourt they met up with accused no. 3. During the evening of 10 May 1992 and at a filling station in Estcourt the four of them boarded a taxi operated by the deceased. The deceased was 21 years old. The taxi belonged to his father. He was accompanied by his 9 year old brother, Philani Ndumo. The appellant and the deceased knew one another. What the appellant clearly did not appreciate was that Philani also recognised him. Various other passengers boarded the taxi. One of them collected the fares on behalf of the deceased. The appellant paid the fares for himself and his three companions. All the other passengers eventually alighted which left the

four accused, the deceased and his younger brother. Somewhere along the journey, while his brother was still driving, Philani fell asleep. When he woke up the appellant was driving the taxi. Philani did not see the deceased and when he asked about him he was given the nonsensical answer by the appellant that his brother was in Durban with his girlfriend and that they would in due course fetch him. The four accused then conversed in low tones. Philani was roughly ordered to lie down on the floor of the vehicle. It stopped. All four accused got out. After a while they returned and the journey proceeded. They wanted to leave Philani near the location but he pleaded with them to drop him off at Mbombo's place which was more convenient. They did so. So much for the extraneous evidence.

All four accused testified. All of them were found to be mendacious witnesses and rightly so. Each tried to dissociate himself from the murder at the expense of his companions. Even so, it is possible to piece together from their

combined version a broad picture of what happened after the last passenger had disembarked. At some stage during the journey, while Philani was still asleep, the appellant drew a gun on the deceased and dispossessed him of the keys of the vehicle. He was manhandled to the back of the taxi where Philani, when he woke up, could not see him. Eventually, when they reached a place in the veld which was convenient for their purpose, appellant stopped the vehicle. The deceased was dragged some distance away and attacked with an axe and a home-made sword. He was left for dead. According to the medical evidence there were no gun-shot wounds; death was due to a series of major incised wounds of the deceased's skull and brain. The word used by the doctor was "hacking". Which of them struck the fatal blows, one cannot say. Each exonerated himself. Thereafter they returned to the vehicle and dropped Philani off. Afterwards they fixed false number plates to the taxi and unsuccessfully attempted to sell it.

The court a quo made the following findings regarding the aggravating factors which cannot, in my view, be faulted:

> "We find that the following aggravating factors are established beyond a reasonable doubt on the evidence:
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> 1. The deceased was killed in order to avoid detection.
>
> This is borne out by the sequence of events, it being clear from the evidence that he was robbed of his motor vehicle long before he was taken out and killed.

2. The intention to kill in respect of each of the accused took the form of dolus directus.

3. This was a brutal, savage and merciless killing. The deceased, a young man in his prime, going about his lawful occasions, was subjected to untold terror before he was finally dispatched.

4. The accused displayed callousness and depravity by leaving the deceased's body to rot in the veld.

5. None of them has displayed the slightest remorse.

6. There are additional aggravating features which distinguish the case of accused no. 4 from the other accused. Unlike the others, he is a relatively educated person, a former policeman who must have fully realised the grievous consequences of his crimes. It was he, an ex-policeman from the Estcourt area who organised transport for accused nos. 1 and 2 from the Reef for the express purpose of committing a robbery. It was he who arranged for them to board the deceased's taxi. It was he who paid Moffat Dlamini the fares for the other accused as well as himself. It was he who threatened to shoot the child Philani and later

lied to him about the fate of the deceased. It was he who drove the stolen vehicle to the deserted place where the killing took place. It was he who drove the stolen vehicle at all material times thereafter and tried to sell it in Qwa-Qwa. It was he who enlisted the services of Mavuka Hadebe to change the number plates on the stolen vehicle. It was he who negotiated with Ndaba in the Tatane area of Loskop for the stripping of the vehicle. And it was he who was to be the main benefactor of the murder of the deceased because he was the one who stood to be identified by the deceased as one of the robbers. The cumulative effect of all these factors is such that upon a conspectus of all the evidence we find the inference irresistible, established beyond all reasonable doubt, that it was accused no. 4 who was the prime mover and instigator, not only of the robbery but also of the murder of the deceased."

As for the mitigating circumstances, counsel for the appellant relied on three factors in particular why the death sentence, so it was submitted, should not be taken to be the only appropriate sentence:

(a) the appellant reached the age of 29 years without any previous convictions being recorded against him;

(b) the deceased's younger brother Philani was not killed when the appellant and his companions could easily have done so;

(c) S v Ngcobo 1992 (2) SACR 515 (A) in which this court, by a majority, interfered with the death sentence imposed on a passenger who murdered a taxi driver, was a more serious case on the facts than this one; if this court reduced the sentence in that case, all the more reason to do so in this case.

None of these reasons, singly or cumulatively, persuades me that the court a quo erred in imposing the death sentence in respect of count 1.

His unblemished record is undoubtedly a factor in his favour, and a strong one, but, as the court a quo pointed out in its judgment on sentence,

> "The heinousness and brutality of the murder are such that the retributive and deterrent purposes of punishment must necessarily override ail other considerations."

It is also true that Philani was not killed but there was no evidence to suggest that the appellant knew that Philani had recognised and would be able to link him to the murder. As it was put by the court a quo in its judgment on

conviction:

> "The child Philani is extremely fortunate to have been spared the same fate. The explanation for that is that the accused naively thought that being a child he would pose no particular threat, particularly in view of the fact that he did not actually witness the killing or the robbery."

Philani's life was not in the true sense spared; it was never really in danger. He was not regarded as a threat. There is no basis in the evidence or the probabilities for the suggestion that he was not killed because the appellant and his companions recoiled from the prospect of killing a young child. It was not because of compassion that he was not killed but simply because they did not think that there was any need to do so. That they let him go is therefore not a factor significantly reducing their moral blameworthiness.

As for Ngcobo's case supra, it differed in its circumstances, even though there was the superficial similarity that a taxi driver was killed by one of his passengers. In this case there was much stronger evidence of prior consultation

and planning, and of a sustained resolve to kill the deceased when the appellant and his allies had ample opportunity to reflect on and reconsider their decision to dispose of him. The deceased was not killed in order to execute a robbery, as in Ngcobo's case, he was executed in order to eliminate him as a potential witness against the appellant. The inference is inescapable that his fate was sealed the moment he recognised and greeted the appellant at the commencement of the journey. I therefore do not agree that Ngcobo's case was the more serious one. The reasoning of the majority in that case accordingly does not apply.

In the result the appeal on sentence must fail. The death sentence was indeed the only appropriate sentence. But because the constitutionality of the death penalty is due for consideration by the constitutional court I propose to follow the established practice of adjourning this matter until that issue has been clarified by that court (cf S v Makwanyane en 'lot Ander 1994 (2) SACR

158A) 162c-f).

The following order is made:

1. The appeal against the appellant's conviction on count 1 is dismissed.

2. The finalisation of the appellant's appeal against the death sentence imposed in respect of count 1 is adjourned to a date to be determined by the registrar of this court.

P M Nienaber
Judge of Appeal

Smalberger JA] (Concur
Howie JA ]