CG CASE NUMBERS : 171/93; 185/93 and 204/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LIZZIE ZODWA MBATHA First Appellant

SIMON SIPHAMANDLA ZWANE Second Appellant

THEMBINKOSI KUNENE Third Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, VAN DEN HEEVER JJA et
NICHOLAS AJA

HEARD ON: 11 MAY 1994

DELIVERED ON: 27 MAY 1994

J U D G M E N T

VAN DEN HEEVER JA

First, second and third appellants were accused nos 2, 3 and 4 in the Circuit Court at Ladysmith when they faced i.a. two charges of murder and one of robbery arising out of a single incident which occurred on 12 September 1991. On that day a group of KwaZulu government employees were robbed of their vehicle, of the firearms of the policemen detailed to escort and guard the administrative staff, and of the R134 000 the latter intended distributing among waiting pensioners. Two of the police guards were shot and died then and there. Accused no 1 was Perseverance Mkwanazi. In what follows I refer to these four as they were referred to at the trial. All four pleaded not guilty and raised alibis, but were convicted on all three counts. Accused nos 2, 3 and 4 were sentenced to death in respect of each of the murder charges and given a term of imprisonment in respect of the robbery.

Accused no 1 did not apply for leave to appeal against the sentences of imprisonment imposed on him.

He was refused leave to appeal against his convictions and did not pursue the matter. The other three noted appeals in terms of section 316A(1) of Act 51 of 1977 against their convictions and the death sentences imposed in respect of the murder charges. The appeals against the convictions have now been abandoned. The only issues remaining therefore are (1) whether this Court in the exercise of its independent discretion is of the view that the death sentence is the only proper sentence for either or both of the murders in respect of which each accused was convicted; and (2) if so, what approach should be adopted having regard to the argument advanced on behalf of appellants that s 277 of the Criminal Procedure Act is in conflict with the provisions of s 9 and 11(2) of the Constitution as contained in Act 200 of 1993.

One of the main prosecution witnesses was Mrs Kessia Sikhakhane. She is an assistant nurse at Madadeni Hospital and the wife of Constable Sikhakhane.

The couple own a blue Opel Kadett car which is garaged on the adjoining premises belonging to Constable Mkwanazi. Mrs Sikhakhane knows all four of the accused. Accused no 3 is a relative of hers. He repairs the Opel from time to time, and often borrows it. He also on occasion acts as a chauffeur for the witness or her husband when they require it. He appears to be very-much at home in the Sikhakhane household. Accused no 4 is a friend of accused no 3. Although the latter is married to another woman, accused no 2 is his girlfriend. And accused no 1 is the younger brother of accused no 4.

The facts, in chronological order, on which the convictions in question were based, may be summarised as follows. I omit detail not relevant for present purposes.

Mrs Sikhakhane told the court that on 10 September 1991 accused no 1 arrived at her house and reported to her that a robbery was being planned in

which her Opel was to be used. She woke number 3 who was asleep in her house at the time and reported in turn to him. She also reported the conversation to her husband when he returned from work that afternoon. He immediately went to fetch accused nos 1, 3 and 4, and a quarrel ensued between accused nos 1 and 3. Nothing came of it.

On 12 September accused no 3 collected Mrs Sikhakhane from her work at the hospital at 06h30 and dropped her and her car off at her home. He returned shortly afterwards (she was then in the bath), wanting to borrow the Opel ostensibly to take his wife to work. The keys were in the bedroom. When he went to get them there, she heard him rummage in a drawer, which she found half open after she emerged from the bathroom. Her husband's service revolver which she had seen in the drawer earlier was no longer there.

According to ballistic evidence that firearm was one of those used in the armed robbery which took

place later that morning. A team of five people from the magistrate's office at Glencoe travelled in a double cabined Toyota Land Cruiser belonging to the KwaZulu government to a point near Shongwe's Bottle Store in a sparsely populated area near Hattingspruit to pay out pensions. Four armed members of the KwaZulu police accompanied them. There were two tin trunks in the vehicle. One contained the money, the other the cards relating to the individual pensioners who had received advance notification and were to be paid that day. The police always took up the same positions in the vehicle when providing this armed escort for the administrative staff. On this day it was Constable Molefe armed with an HMC automatic (described as a machine gun), who sat in front next to the window on the left, with Mr Thabete in the middle next to the driver, Mr Sokhela. Four people occupied the seat behind these three. Constable Mzimela, similarly armed, sat immediately behind the driver. Next to him was Mrs Mazibuko, then Mr Dlamini,

with Mr Ntsele at the window on the left. The other two, Constables Mthethwa and Masango, were in the back cabin of the Toyota, one on each side of the tin trunks.

A queue of pensioners awaited them when they arrived at the pay-out point some time before noon. As the driver of the Toyota stopped and switched off the engine, four people positioned themselves around the vehicle. At least three (and probably all four) were armed. Evidence of what followed was given by some of the occupants of the Toyota. A gun barrel was placed against the right cheek of the driver. He was told to raise his hands. He did so. Shots were fired. The driver saw Constable Molefe collapsing onto Mr Thabete. (The post mortem examination revealed that a bullet entered the left side of his neck. Its track was downwards, through vital blood vessels into the heart. He must have died almost instantaneously. This bullet was proved to have been fired from Constable

Sikhakhane's Webley.) Further shots were fired.. Messrs Sokhela and Thabete were pulled out of the vehicle and made to lie on the ground. The keys of the Toyota were taken from the former. Mr Ntsele, who had ducked behind the front backrest when the firing started, was pulled out on the left by a foul-mouthed woman. Dlamini received similar treatment. Neither of the constables in the rear was holding his weapon. Each had put it on the seat next to him. They were ordered at gunpoint by two robbers, one on each side, to open the back door of the Toyota. They did so since they were keen to flee. A shot was fired through this open door. It struck Constable Mzimela, who had turned his head, in the jaw on the right, emerging from his neck on the left and injuring i.a. the left carotid artery. (According to the medical evidence he lived long enough to breathe in and swallow a good deal of blood. ) He or his body was removed from the vehicle by a woman. The Toyota containing the money and the police weapons was driven

off to where an Opel Kadett was parked about a kilometer from and out of sight of Shongwe's Store. A youngster on his way to the store saw a person sitting in this Opel, and gave evidence that when the Toyota arrived, a trunk was removed from it and put into the Opel. A man and a woman climbed into the Kadett, which followed the vehicle with the government registration number as it drove off. The police later found the government vehicle abandoned seven or eight kilometres away.

Constable Jiyane, warned as an accomplice, identified this get-away car. He told the court that on 12 September 1991 accused no 3 arrived at his home in the Sikhakhanes' blue Opel, accompanied by the other three accused. Accused no 3 asked Jiyane to accompany them to where he, accused no 3, was going to collect debts. After putting in petrol they went out and past Shongwe's Store, then turned and came back some distance, and the Opel was then parked. The others left the car on foot. He remained behind. His story was

that the four accused stayed away for so long that he walked to another shop where he bought himself a cool drink. On his way back to the car he saw the Land Cruiser used for pension pay-outs being driven by accused no 3. Accused nos 1 and 2 were passengers in this. It was followed by the Opel in which he had been waiting. He had to summon a taxi to get home. The only portion of this tale as regards his own complicity which is acceptable and was accepted as being truthful, is that he accompanied the four in the Sikhakhanes' car that day and waited for the Toyota and his erstwhile companions to return. He was a poor witness, and it was surprising to learn that he was still a member of the police at the time of the trial.

Mrs Twala, a pensioner, took up the story. Two men and a woman arrived at her home one morning in September of 1991, in a blue car. She knew accused no 3 since he used to visit her sons at her home. Two trunks were brought into her house. They were opened. In one,

the lock of which had been sawn off, she saw more money than she had ever seen in her life before. Accused no 3 told her this was the proceeds of a robbery they had committed. She was given Rl 000 and told to "close her mouth". The rest of the money was transferred to a bag. The woman left on foot carrying this bag. The men wanted to borrow a wheelbarrow from Mrs Twala to enable them to take the trunks and four firearms which they also had in their possession to the river, to dump them. She suggested they take all this by car. They departed by car, but she discovered three days later that they had in fact left a trunk under a bed and firearms under a mattress in her house. She was distressed at the discovery. She and her grandson went and dumped the articles in the river. Some months later accused no 3, accompanied by the woman, came and asked for the firearms and for a jersey which the woman had left behind there. Mrs Twala handed over the garment and told him what she had done with the guns. He came again

later in the company of the police and pointed out her home as the place to which he had brought the firearms taken from the police in the robbery.

Mrs Sikhakhane takes up the tale once more. She said that accused no 3 arrived at her house again in the company of accused no 4 at between noon and one o'clock on 12 September when they returned her car. She had been sleeping, but woke when she heard them come in and talk to one another. Shortly afterwards accused no 2 arrived on foot, carrying the tool bag that belonged to the Opel. It had a hole in one side. Judging by what she saw through that, the bag appeared to be full of R50 notes. Accused no 1 also arrived and asked her for food. Accused no 3 told her that he had shot policemen who had died. At that stage the other three were quarrelling about what was to be done with the bag, since the police were approaching. All except accused no 1 then left her house. When she spoke to no 1, he told her that he had witnessed a robbery in which her

car had been used, had seen police being shot and money taken, and that the money had been hidden in her ceiling. She thereupon also left her home and went to that of accused no 3. When she returned the police had arrived at her home. (Called to the scene of the robbery, they had been told that a blue car had been seen standing in the vicinity of Shongwe's Store at the time of the robbery, and that the sikhakhanes owned a car of this colour.) There they found accused no 1 wrapped in a bedspread hiding under a bed, and the bag containing money in the ceiling. Her Opel was locked in the garage on the adjoining property, with the numberplates removed and in the boot, where the tools were lying loose. Constable sikhakhane's Webley and a knife were found tucked into the upholstery of the car. Mrs Sikhakhane was taken to the police station where she spent the night, being released the following afternoon after she had made a statement to the police. An amount of R282 950 was returned to the Madadeni magistrate's

office. The other accused had fled and were arrested later at various places on various dates, no 4 only in May of the following year.

After evidence was led by the prosecution, a disputed statement made to a magistrate by accused no 4 was admitted, accused declining to give evidence at the trial within a trial. That document, exhibit Q, was dated 1 June 1992. In that accused no 4 details the part others played in the robbery which had been planned in advance, minimizing his own share in the murders: the firearm he had, he says, did not work. According to exhibit Q the Opel had been fitted with false number plates for the expedition.

A disputed statement made to a magistrate by accused no 2 was also admitted after a trial within a trial, exhibit U. She describes the events of 12th September 1991, but gives no details of the robbery itself, save to say that her boyfriend and others had been compelled at gunpoint by constable Jiyane to commit

a robbery. The detail of what happened afterwards is in accordance with the summary of events above. Although she averred that she had been collected and taken along in the Opel simply for the ride, she climbed into the Toyota after the robbery when instructed to do so, saw the trunks being broken open and money transferred to a bag, which she took on foot to the home of Mrs Sikhakhane when asked to do so. The others were already there. She handed the money over to them, and then went home.

In their evidence at the trial these three denied any complicity in the events of 12 September near Shongwe's Store. It is unnecessary to detail their evidence on the merits. What was not exceedingly imaginative, was obstructionist. They even produced, as a surprise witness, a sentenced prisoner who they hoped would take upon himself the burden of their guilt. When, after obtaining legal advice, he claimed privilege against self-incrimination, accused no 3 claimed the

same privilege and refused to be subjected to cross-examination. Accused no 4 less persistently tried to follow suit.

After having been convicted on the two charges of murder and one of robbery, it appeared that the four accused had been convicted, while awaiting trial on these, in respect of an armed robbery committed just a week before the one presently in issue. On 6 September the four of them along with Constable Sikhakhane had robbed those in charge of a store at Amersfoort. Their booty had consisted of R12 000 in cash, firearms, and watches. This is not a previous conviction because they had not yet been convicted in respect of the Amersfoort escapade. It is nevertheless relevant on sentence. Cf S v Mvuleni 1992 (2) SACR 89 (A).

The prosecution tendered the evidence of the deputy Secretary for Justice in the KwaZulu Government on the problems caused by armed attacks on pension pay-out teams, of which there had been 20 since 1990.

Pensions are paid bi-monthly, in various centres in 26 different districts. Itineraries are drawn up and distributed in advance, sometimes covering an entire year, to enable scattered pensioners to make their own arrangements timeously to converge on a fixed pay-out point. The position had become so bad that armoured vehicles had had to be introduced in two districts, and after an attempted robbery at Ezakheni the clerks were reported to have refused to go out to pay. The witness handed in as exhibit W a list setting out details of these incidents from which it appeared that between 25 May 1990 and 10 September 1993, six policemen and four civilians had been killed, and 13 policemen and 10 civilians injured in successful robberies or attempts to take by force the money intended for distribution to pensioners. The total amount of cash involved is some three million rand. Apart from the loss to the government, the inconvenience and even suffering caused to the pensioners relying on payment on a particular

day, which was of necessity postponed on such occasions, could also be considerable.

As regards the first leg of the triad to be considered in determining sentence, none of the appellants saw fit to testify in mitigation after having been convicted. Their counsel merely advanced personal facts which were not disputed by the State.

Accused no 2 was 27 years of age at the time, having been born on 19 May 1965. She came from a very stable background despite having lost her father at an early age, was the youngest of seven children, passed standard 9, had worked for four years in an old age home in Newcastle as an ordinary worker and thereafter gone into informal business selling soft goods, from which she made about R700 per month. On this she maintained a seven year old child, and was said to have also maintained her mother aged 75. (One must accept that that means that she contributed towards the maintenance of her mother, who at that age was entitled to draw a

pension herself, if indigent.) And of course the recent armed robbery at Amersfoort produced enough for it to be accepted that need, even for comparative luxuries, could hardly have been pressing when the present matter was planned. That must have been almost immediately after the former one had been perpetrated. She at no stage suggested that she had been influenced by her lover, accused no 3, to embark on criminal activities. The description given by those on the scene of her conduct at the robbery, swearing at the victims and pulling i.a. the seriously wounded Constable Mzimela out of the Toyota, hardly suggests any reluctance to participate vigorously in such activities. There is no inkling to be found in the record that she felt the slightest concern about what she had done or ever gave a thought to either the two men who were struck down in the full flush of young manhood or to their families. That applies equally to accused nos 3 and 4.

Accused no 3 was born on 11 February 1966 and

had turned 26 at the time of the robberies. He passed standard 8 at school, which he left because of lack of funds to keep him studying longer. He earned R464 per month as a driver for a chemist in Newcastle for a year or two, and then started his own business as a hawker. On a monthly turnover of some R5 000 his profit was about Rl 000. His personal relationships appear to be irresponsible. He has five children from five different women, only one of whom he married, the marriage not being regarded by him as any impediment to his relationship with accused no 2. He has a fairly recent conviction for housebreaking with intent to steal and theft from which he learned nothing. Having broken into a shop and stolen tools and tyres valued at R4 880, he was sentenced to a year's imprisonment of which three months were suspended. That was in December of 1990. The prison sentence seems to have sharpened his criminal capabilities rather than his morality, and persuaded him to think on a more ambitious scale than before since

within months he was involved in the Amersfoort robbery. His counsel conceded at the trial, inevitably, that he played a leading role in the present one.

Accused no 4 was born on 24 January 1964. He passed standard 6 at school, is married and has three children and was in fixed employment earning R860 per month when he left the path of virtue. He has no previous convictions, but was also involved in the Amersfoort armed robbery. Although in his confession he minimised his own role, he too did not suggest either that he was influenced by any of the others or did not participate willingly and with full appreciation of the consequences, in the robbery which was the motive for the murders.

The factors personal to each of the accused as outlined above are neutral. There is nothing in the meagre facts presented on their behalf where they themselves did not see fit to take the court into their confidence, which induces some sympathetic understanding

of why each should have fallen into vice.

The nature of the offence appears from the above summary of events. The accused operated as an organized gang and put a good deal of thought into planning and making preparations for the robbery which was the motive for the murders, carefully and well in advance, down to carrying false number plates on the borrowed Opel. The evidence makes it clear that at the scene there was no confusion among the robbers. They did not get in one another's way, each knew exactly what to do, they operated as a cohesive unit rather than a number of individuals. The court a quo found, correctly, that the killing of the deceased was foreseen not as a possibility, but as the necessary elimination of picked targets. In the apt words of the trial judge, the robbers "had to strike first and strike fast". The police in the front cab were holding deadly weapons and had to be taken by surprise and rendered harmless instantly since the robbers' armoury was no match, in

equal contest, for the automatic weapons of the police. Those police were executed in cold blood. They were given no chance to defend themselves, nor even any election to surrender their arms and so save their lives. The motive for the killings was greed, not need. None of these three had a background of financial or physical deprivation. All had received a better education than hundreds of thousands of their law-abiding compatriots. All were capable of earning an adequate though perhaps not princely income by honest endeavour. And greed had not been satisfied by the booty taken a week earlier. All are mature, past the age where youthful irresponsibility might account for deviation from the path of virtue.

The murders are particularly shameless, and undermine the foundations of orderly society, because the victims were the very people whose function it is to protect society and uphold the law. They were killed to prevent their fulfilling that function and performing

the task to which they had been detailed. The killing was to the knowledge of the accused aided by the treachery of a colleague of the targeted victims. It was perpetrated in broad daylight and in full view of the pensioners who were to be disadvantaged as a result, in total contempt of them and their interests and those of the law-abiding community in general.

In a matter such as this, the interests of the community are paramount, and the deterrent and retributive elements of punishment are decisive. Only the death sentence appropriately reflects the revulsion of that law-abiding community against such a calculated and callous undermining of its defences. The two murders were part of the same incident and committed almost simultaneously. There is nothing to choose between them, each merits the death sentence.

That brings me to the constitutional issue.

Were it not for the provisions of the new Constitution of the Republic of South Africa contained

in Act 200 of 1983 as amended, this Court would have dismissed the appeal and confirmed the death sentences imposed. Counsel however argued that it is at least doubtful whether sections 276(1)(a) and 277 of the Criminal Procedure Act no 51 of 1977 will survive the test of constitutionality, in view of the provisions of sections 9 and 11(2) of the Constitution. Section 101(5) read with s 98(2) of the latter confers exclusive jurisdiction as regards this issue on the Constitutional Court. Although s 241(8) of the Constitution contains transitional provisions, it is not unambiguous, as witness arguments advanced as to the meaning of its provision that -

> "All proceedings which immediately before the commencement of this Constitution were pending before any court of law, ... exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted ... after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution."

This seems to indicate that the present matter, in which an appeal was noted before 27 February 1994, is to be dealt with in all respects as though the Constitution had not come into force on that date, so that the death sentences imposed may be confirmed by this Court. It was however argued that this section is capable of being interpreted to mean that it only refers to jurisdictional and procedural matters, not to substantive law. It may be that the interpretation of this section is also reserved solely for the Constitutional Court by reason of the provisions of ss 101(5) and 98(2), above. It is accordingly undesirable that the appeal be disposed of until the Constitutional Court has ruled on these issues.

Since the present appeal is riot one noted to this Court in terms of s 102(4) of the Constitution, we cannot ourselves refer the matter to the Constitutional Court.

Disposition of the appeal against the death

sentences is accordingly postponed to a date to be determined by the Registrar in consultation with the Chief Justice, pending a decision of the Constitutional Court on the issue whether confirmation by this Court of the death sentences imposed in a matter such as the present would be constitutionally competent, in view of the provisions of Act 200 of 1993.

L VAN DEN HEEVER JA

CONCUR:

E M GROSSKOPF JA)

NICHOLAS AJA)