CCC CASE NO 155/93

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

DAN KHUMALO APPELLANT

and

THE STATE RESPONDENT

CORAM: BOTHA, NESTADT JJA et NICHOLAS AJA

DATE HEARD: 22 FEBRUARY 1994

DATE DELIVERED: 15 MARCH 1994

J U D G M E N T

NESTADT, JA:

At about 7 pm on 10 December 1991 the owner of a store bordering on the main Nelspruit-White River Road in the eastern Transvaal emerged from his premises. He

was 43 year-old Jose da Silva. Having locked the front door, he walked to his car where it was parked at the side of the building. As he approached it, he was confronted by a person with a firearm. His assailant (together, it seems, with one or two others) had been lying in wait for him. Their motive was robbery. Da Silva attempted to flee. Three shots were fired at him, the third from close range. He was struck once in the head. His assailants escaped. Before doing so they apparently stole from Da Silva (though whether from his person or shop or car is not clear) an Astra 9 mm pistol. Da Silva was taken to hospital. He died there three days later from his head wound.

These events led to the appellant and two others being charged with murder and robbery as also on three counts of unlawfully possessing certain arms and

ammunition in contravention of Act 75 of 1969. Two of these counts related to the weapon and ammunition used to kill the deceased; the third concerned the possession of the pistol taken from the deceased. The trial came before CURLEWIS DJP and assessors sitting in the Eastern Circuit of the Transvaal Provincial Division. One of the co-accused (accused 3) failed to stand trial. The other (accused 2) was acquitted. The appellant (accused 1), however, was found guilty on all charges. The conviction for murder attracted the death sentence. In respect of the other four counts he was sentenced to twelve years imprisonment. This appeal is against the murder conviction and death sentence and (with the leave of this Court) against the appellant's other convictions.

The State called two eye-witnesses to the

crime. However, neither advanced its case. The one was unable to identify any of the deceased's assailants. And the other, who purported to identify the appellant as one of them, was discredited. The evidence on which the State ultimately relied was, in broad terms, certain extra-curial admissions allegedly made by the appellant. These took two forms. It is necessary to analyse them in some detail. According to the State evidence, the first occurred on the appellant's arrest. This took place on 11 December 1991, ie the day after the robbery. Having received certain information, three members of the South African Police, detective-sergeants Vuma, Nxumalo and Magakoa, went to the compound of a farm in the area. In a room there they came across accused 2. In a jacket (which the accused admitted was his) hanging on the wall of the room a firearm together with certain

ammunition was found. It can be accepted that it was the weapon which fired the shots at the deceased. Thereafter and in a second room the appellant was encountered. He was hiding in a large box. In response to a query by the police "waar...die ander vuurwapen (was)" (ie the Astra), he stated that "hy dit weggesteek het". He showed the police where it was to be found, namely in a nearby rubbish bin close to the house of the owner of the farm. They all proceeded to the spot. Sgt Vuma's description of what then happened is the following:

> "Nadat ons daar stilgehou het, het ons uitgeklim en langs 'n vullisblik het hy toe dit vir ons uitgewys. Hy het aan ons genoem dat hy die vuurwapen binne-in die vullisblik weggesteek het en dat ons net die vullis kan uithaal en dit is binne-in 'n geel plastiesesak. Nadat ons alles uitgehaal het, het ons toe die vuurwapen daar binne gevind."

The firearm in question was that of the deceased. This

was proved by a computer print-out which, without objection, was (presumably in terms of sec 221 of the Criminal Procedure Act, 51 of 1977) admitted in evidence.

Secondly, the State adduced evidence of certain pointings out, accompanied by inculpatory statements, which it was said the appellant made on 13 December 1991. Following on his arrest on 11 December, the appellant was taken to and kept in custody in the cells at the Nelspruit police station. Warrant officer Vorster interviewed him. He was the investigating officer. He testified that the appellant expressed his willingness "om toneelaanwysings te doen". He accordingly arranged for Colonel Alberts, the district head of the murder and robbery unit, to take the appellant to the scene of the crime. This Colonel

Alberts did. Constable Mdluli acted as interpreter. I do not propose to set out in any detail what according to them the appellant pointed out or said. In summary it was that he indicated where, outside the store, he and another lay in wait; where he held Da Silva up; and where he stood when he shot the deceased. Photographs were taken of the appellant at each stage of this procedure.

The pointing out of the deceased's firearm, even taking account of the appellant's admission that he had hidden it, may not, on its own, have been sufficient to connect him to the murder. But together with what he showed and told Colonel Alberts, the case against the appellant was undoubtedly proved. He, in effect, confessed. This is, of course, on the assumption that the evidence referred to was admissible and acceptable.

In support of his alibi defence, however, the appellant denied the State version relating to the recovery of the Astra firearm. And, on the basis that he had not acted voluntarily, he contested the admissibility of Colonel Alberts' evidence. The appellant alleged that in the interval between his arrest and being taken to the scene, the police had assaulted him.

This led to the usual trial within a trial. Evidence was given both on behalf of the State and by the appellant. It is convenient to commence with that of the appellant. He testified that on his arrival at the police station after his arrest the police "het vir my geslaan en my forseer dat ek oor ('n) ketting moes spring terwyl my hande aan my rug vasgeboei is en my voete". Thereafter and consequent upon his having denied that he participated in the robbery of Da Silva,

he was taken to a "waarkamer" in the police station. This was at about 2 pm (on 11 December). A balaclava was placed over his head. His hands were bound together by a rope. So were his feet. The tube of a tyre was put over his face and "elektriese skokke (is toe) aan my bene toegepas". After that and in another room he was hit with a sjambok. That night the appellant spent in the police cells. The following day he was again confronted by his captors. They asked him "waar is die ander vuurwapen?". Having denied all knowledge of it, he was tied up and for a second time subjected to electric shocks. On both occasions he was assaulted by the same four policemen. He identified them as Vorster, Vuma, Nxumalo and Magakoa. The electric shocks caused certain marks on his legs which he showed the Court. They were described by the trial

judge as "vier merke...klein kolletjies". The beating with the sjambok had also, so the appellant testified, left permanent scarring in the form of "merke...aan my lyf". These too were shown to the Court but, save that certain of them were said to be weals, were not described. They were, it seems, on his back and upper left arm. He said that at the scene he did not of his own accord point out anything. What happened was that he was told what to point out. Nor did he make any admissions or indeed say anything to Colonel Alberts.

The policemen concerned denied the appellant's allegations. The effect of their evidence in the trial within the trial was that the appellant had at no stage been assaulted; that he had pointed out the places and made the statements referred to; and that in doing so he had acted voluntarily. Colonel Alberts handed in as

an exhibit the prescribed form used by the police in matters of this kind and in which he noted what questions had been put to the appellant prior to the pointing out and his answers thereto. Included was an acknowledgment by the appellant not only that he was acting voluntarily but that he had not been assaulted. But in answer to a question whether he had any injuries, the appellant replied that he had "merke aan rug...en op linker arm" and that he sustained these "tydens arres met polisie toe hulle my gevang en aangeval het". Colonel Alberts recorded his observation of what the appellant showed him as "sigbare (skynbaar ouerige merke wat roof op het) ou merke - moontlik snymerke". Vuma was asked about this. However, he denied that the appellant sustained any injuries on his arrest.

It will be apparent that the trial judge was

faced with two conflicting versions. He had to resolve the resultant credibility issue bearing in mind that the onus was on the State to establish its version and in particular that the appellant had acted freely and voluntarily. Only then would the pointings out and the accompanying statements be admissible (s vs Sheehama 1991(2) SA 860(A)). CURLEWIS DJP had little hesitation in accepting the State's evidence and in rejecting that of the appellant. He accordingly found that the appellant had acted freely and voluntarily and that he had pointed out and inculpated himself as alleged by Colonel Alberts. In the result, the evidence in question was held to be admissible.

The trial proceeded. The appellant testified again, this time on the merits of his alibi defence. He explained that he worked and lived on a farm situate

between Nelspruit and White River. On the day in question, viz 10 December 1991, he returned to his compound at about 5.30 pm. He never left it again until the following morning when he returned to work. Later that day he visited a neighbouring farm. That is when he was arrested. He was standing outside the room of accused 2 (whom he did not know). The police having emerged from it, approached him. They asked him about the jacket (which it will be recalled had been found with a firearm in it in accused 2' s possession). He said he knew nothing about it. He was then arrested and together with accused 2 taken to the Nelspruit police station. He denied that he had attempted to hide away; or that he had shown the police where the Astra firearm was; on the contrary, he had just after his arrest seen accused 3 hand the pistol over to the police.

This part of the appellant's evidence was also rejected. The trial court found that the appellant had on his arrest shown the police where he had hidden the deceased's firearm. On this basis, together with the evidence of what the appellant had pointed out and said to Colonel Alberts, the appellant was found guilty as charged.

I do not quite share the trial judge's apparent confidence regarding the reliability of the State evidence. It has certain features which give rise to a measure of disquiet. I say this for a number of reasons. No detail is given as to how often and for how long the appellant was questioned after his arrest. Vorster should have been asked about this. Colonel Alberts had his office in the same building as the team of policemen investigating the crime. It was therefore

not desirable that he should have undertaken the pointing out by the appellant and this despite the fact that he was not personally involved in the investigation (see S vs Mdluli and Others 1972(2) SA 839(A) at 841 A-B). Then there is the matter of the appellant's injuries. Colonel Alberts noted their presence when he saw the appellant two days after his arrest. Yet despite this, he made no enquiries as to what had happened on the appellant's arrest to allegedly cause these injuries. Nor did Colonel Alberts take the precaution of having the appellant examined by a doctor. I would have thought that he should have done both. Vorster too would seem to have been remiss in the same respects (though he does say that the appellant declined his offer of medical treatment). But the matter does not rest there. I have in mind the

following evidence (which has not yet been referred to). On 3 January 1992 (ie after a delay of some three weeks which Vorster unconvincingly sought to explain on the basis that no magistrate was available), the appellant was taken to one to make a confession. What then happened is not without significance. He was asked whether he had been influenced to make a statement. This elicited a complaint by the appellant in the following terms:

> "Ja ek is...gedwing. Daar net bale dinge gebeur wat daartoe gelei het dat ek goed erken het wat nie gebeur het...ek is aangerand. Ek is met elektriese skok toegedien en ek het die indruk gekry die mense wil my doodslaan. . .dit was 'n poging dat ek moet erken wat ek glad nie gedoen het nie. Ek het dit toe erken".

In view of this the magistrate declined to take any statement from the appellant (though unfortunately he did not note whether the appellant had any injuries).

And finally there is the evidence that on the second day of the trial (9 March 1993) the appellant was examined by a district surgeon. The doctor found that the appellant had signs of old injuries, namely (i) on his back and left arm and (ii) on his left ankle and right leg. He was of the opinion that they could have been caused "deur skerp trauma (of rottang met metaal in)" and "derde graadse brandwonde of ander penetrerende trauma" respectively.

Before us, counsel for the appellant rightly stressed the factors referred to in support of his attack on the judgment a quo. They have given me cause for anxious consideration more particularly seeing that the convictions primarily rest on the appellant's incriminating statements made during the pointing out. Yet I have come to the conclusion that the attack cannot

prevail. The trial judge made strong credibility findings. He was impressed with the State witnesses. In particular he regarded Colonel Alberts as "a good witness". On the other hand, the appellant was classified as "a very bad witness". It is true that this assessment was partly based on the appellant's assertion that he never pointed out or said anything to Colonel Alberts. With justification this was rejected. But, for the reasons mentioned by KUMLEBEN JA in the unreported judgment of this Court in Potwana and Others vs S delivered on 30 November 1993 (case no 189/93) at pp 30-32, one has to guard against attaching undue importance to this feature. So to this extent the credibility findings of CURLEWIS DJP may be flawed. Even so, however, due weight must be given to them. Moreover, there are, judging from the record, other

reasons for finding the appellant's evidence to be unsatisfactory and that of the State acceptable.

Despite certain contradictions in the respective descriptions of Vuma, Nxumalo and Magakoa as to how and where the appellant was hiding just prior to his arrest, there is no warrant for differing from the trial court's acceptance of their evidence in this regard. The inconsistencies relied on by Mr Pio on behalf of the appellant are not material; they are understandable; and CURLEWIS DJP was alive to them. The allegation that the appellant was hiding in a box has the ring of truth. The same cannot be said of the appellant's evidence. I find it improbable that the police would, for no apparent reason, arrest him as he stood outside accused 2's room. Moreover, this was not the version that was put to the State witnesses in

cross-examination. It was unequivocally and repeatedly stated that the appellant would say that he was arrested at a quite different place, namely on the farm where he stayed.

One proceeds then on the basis that Vuma, Nxumalo and Magakoa are telling the truth about the circumstances of the appellant's arrest. This must bear positively on their credibility generally. But it goes further than that. The appellant (who did not testify to having been assaulted on his arrest) was obviously prepared initially to co-operate with the police. Nxumalo says so expressly. His evidence was that on emerging from the box the appellant (possibly because, having seen that the police had recovered the one firearm, he realised the game was up) said "hy alles sal vertel...en gaan uitwys". This lends support to the

State version that the appellant subsequently acted voluntarily in his dealings with Colonel Alberts.

To what extent, if any, does the evidence concerning the appellant's injuries detract from this conclusion? On the appellant's version Colonel Alberts was a party to a gross impropriety; a fabrication of evidence against the appellant (on a capital charge). Were this so, I regard it as improbable that Colonel Alberts would have noted (I should say admitted) that the appellant complained of an assault and that he was injured. He would rather have suppressed this fact. That he did not do so is an indication of his honesty. So too, I think, is the absence of any allegation by him that the appellant disclosed where he had obtained the Astra firearm from. This would have been damning evidence against the appellant; and the allegation

would have been easily made. Is it not similarly unlikely that Vorster would arrange for the appellant, albeit belatedly, to be taken to a magistrate - had he been instrumental in assaulting the appellant as the appellant alleges? I think so. Why take the risk of a complaint by the appellant to the magistrate? That Vorster did so, tends to show an innocent state of mind on his part too.

In assessing the cogency of the State case that the appellant was not assaulted, there is this further consideration. It involves a comparison of the nature of the assault alleged by the appellant (ie electric shocks, suffocation and a beating with a sjambok) with the complaints he made thereanent and his injuries (ie to his legs, back and upper left arm) . I leave aside the nature of the report that the appellant

supposedly made to the magistrate. As will have been seen, it is confined to an allegation that he was subjected to electric shocks. According to the appellant, however, he also said that "die polisie slaan vir my...en hulle trek 'n binneband oor my gesig". He was not cross-examined about this discrepancy. Nor did the magistrate testify. But what is indisputable is that the appellant gave conflicting evidence as to what he told Colonel Alberts. At first, he suggests that he made no report to him about having been assaulted. This is almost immediately followed by "Ja, ek het aan die Kolonel vertel". What he says he complained about was that "ek deur die polisie geslaan is met a sjambok. Dit is al". He therefore concedes that he made no mention of electric shocks or of any injuries to his legs. He was unable to satisfactorily explain the

omission. It is a significant one and must seriously detract from his credibility. More particularly is this so seeing that Colonel Alberts (on his recall by the court) denied that the appellant mentioned that he had been assaulted with a sjambok. And, so he further testified, he saw no injuries which could have been caused by a sjambok. Nor did he observe any marks on the appellant's ankles. Had they existed "sou ek dit absoluut opgemerk net". As to the scars on his back which the appellant showed the court "geen van daardie merke het hy (my) gewys nie". The same applied to the one on his left upper arm.

The fact remains, of course, that the appellant (i) had, prior to the pointing out, certain injuries; (ii) complained to a magistrate that he had been coerced into making a statement by the

administration of electric shocks; and (iii) at the trial bore scars which could have been caused by him having been electrically shocked and beaten with a sjambok. In my opinion, however, neither individually nor cumulatively are they sufficient to detract from the acceptability of the State case that the appellant was not assaulted. There is no reason to think that the injuries ((i) above) were part of an assault that was in any way related to the voluntariness of the pointing out. The appellant himself connects them to his arrest. The impression of Colonel Alberts was that the one on the appellant's left arm (being near the wrist) was caused by a handcuff; and that the injuries on the appellant's back (or two of them) were small stab wounds. Obviously these could have been inflicted before his arrest. By the time the appellant complained to the

magistrate ((ii) above), more than three weeks had gone by since the pointing out. It is not unknown that with the passage of time, especially where it is spent in prison (as was the case with the appellant), accused persons regret having confessed; they seek to undo this by for example falsely making allegations that would make the confession inadmissible. This leaves for consideration the marks which the appellant displayed at the trial and which the doctor observed ((iii) above). As I have already indicated, they do not accord with what Colonel Alberts saw at the time. And there was ample opportunity for the appellant to have sustained the wounds that caused them during the approximate fifteen month period that had elapsed.

In the result, I remain unpersuaded that the appellant was wrongly convicted. His defence

necessarily involved the proposition that there was a conspiracy on the part of the police (ie Colonel Alberts, Mdluli, Vorster, Vuma, Nxumalo and Magakoa) to manufacture a case against him. In my opinion the evidence as a whole negatived this. It established that the appellant showed the police where he had hidden the deceased's firearm and that he later voluntarily pointed out the places and made the statements that Colonel Alberts said he did. This part of the appeal must therefore fail.

Our task, in relation to sentence, is to determine whether, having due regard to the presence or absence of any mitigating or aggravating factors as also the purposes of punishment, the death sentence is the only proper sentence. The aggravating factors are manifest. The appellant was part of a gang which had

planned to rob the deceased. The deceased was attempting to flee when the appellant callously shot him. This was obviously done in order to facilitate his nefarious purpose. The only reasonable inference is that the appellant acted with dolus directus. He fired three times at the deceased, the fatal one at his head from close range. In these circumstances one cannot disagree with CURLEWIS DJP's description of what happened as "a bad case...(a) cold-blooded murder". Moreover, as the learned judge also observed, this type of crime is "of the order of the day". It is alarmingly prevalent. It is a threat to ordered society. The interests of the community require that it be severely punished. Often (though compare S vs Mabizela and Another 1991(2) SACR 129(A)) the death sentence is imposed in this kind of case.

Notwithstanding these considerations, however, I have come to the conclusion that the death penalty is not merited in casu. The State sought to prove one previous conviction against the appellant, namely for stock theft. However, the judge a quo, apparently on the basis that there was a doubt whether it had properly been proved (the appellant denied having the previous conviction) treated him as a first offender. Obviously this is an important factor in his favour. But of even greater significance is the appellant's age. He was born on 3 February 1972. This would have made him not quite 20 at the time of the crime. So he was still a teenager. The tendency of our courts is, save in exceptional cases, not to impose the death sentence on persons of this age (S vs Lehnberg en 'n Ander 1975(4) SA 553(A) at 561 A-C; S vs Dlamini 1991(2) SACR 655(A)

at 666-8; S vs Mofokeng 1992(2) SACR 710(A)). Perhaps the view of Seneca, Troades, 259 that "(i)t is the fault of youth not to be able to restrain its own violent impulse" is too pessimistic. But certainly young persons are regarded, in the absence of contrary indications, as emotionally and intellectually immature (S vs Lehnberg, supra; S vs Cotton 1992(1) SACR 531(A) at 536 c) . Even where an accused's actions are not solely attributable to his youthfulness, his age can be mitigating (S vs Lengane 1990(1) SACR 214(A) at 220 c-d). Unfortunately we do not have a pre-sentencing report. Even so, and although he left school in 1985 (whilst in standard three), there is no reason to think that the appellant had a maturity beyond his years. It will be apparent from what has already been said that I do not underestimate the seriousness of the crime which

the appellant committed. But in my opinion it does not fall within the type of case where the death sentence would be justified on so young a person. I think a long term of imprisonment would satisfy the retributive and deterrent purposes of punishment.

The appeal against the convictions is dismissed. However, the appeal against the death sentence succeeds. This sentence is set aside. There is substituted therefor one of 21 years imprisonment. It is to run concurrently with the sentence of 12 years imprisonment imposed on counts 2, 3, 4 and 5.

H H NESTADT, JA

BOTHA, JA )
) CONCUR
NICHOLAS, AJA )