Case No 231/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BAFANA KHUZI	FIRST APPELLANT
ALEXANDER DUMISANI NXUMALO	SECOND APPELLANT
NINGI VIRGINIA KHOWA	THIRD APPELLANT
and	
THE STATE	RESPONDENT

CORAM: HEFER, EKSTEEN, NIENABER JJA

HEARD: 6 MARCH 1995 DELIVERED:

16 MARCH 1995

J U D G M E N T

/NIENABER JA

NIENABER JA:

The deceased, an Italian immigrant, was a well-known landscape artist living and working on the lower South Coast of Natal. At the time of his death he was in his mid sixties. Appellant 3 was 21 years old at the time of her arrest, and apparently still at school. She used to work for the deceased as a domestic servant in the house which he rented at Marina Beach, near Port Edward. Although she herself denied it, the court a quo found that the deceased and appellant 3 had at one time been lovers; that another young Zulu girl, Sylvia Momusa Mhlumayo ("Momusa"), succeeded appellant 3 both in his affections and her job; that appellant 3 then solicited the assistance of appellant 1, an acquaintance of hers, who introduced her to his friend, appellant 2; that the three of them conspired to rob and murder the deceased; and that their plan was executed on 21 February 1993 when the deceased was strangled in the garage at his home. All three appellants were

convicted of murder (count 1) and of robbery with aggravating circumstances (count 2) by Van der Reyden J, sitting with assessors in the circuit local division for Southern Natal. The first and second appellants were each sentenced to death on count 1 and to 10 years imprisonment on count 2.

Dealing with appellant 3 the court a quo said:

> "In your case the one mitigating factor which outweighs the aggravating factors is the treatment you received at the hands of the deceased. I accept in your favour that you were humiliated when the deceased jilted you and took Momusa as his new lover. I must, however, stress that you may view yourself as extremely fortunate in escaping the death penalty."

On the murder count she was sentenced to 20 years imprisonment and on the robbery count to 10 years imprisonment, the two sentences to run concurrently.

This is an appeal by appellants 1 and 2, in terms of s 316 A of the Criminal Procedure Act, 1977, ("the Act"), against their convictions and

sentences on count 1; and by appellant 3, with leave of the court a quo, against her convictions on counts 1 and 2.

The case against all three appellants was a particularly strong one and little purpose will be served in embarking on a detailed analysis of its ramifications. It rests on several pillars, each of which was by itself capable of supporting the entire state case against the appellant concerned. All three appellants, at various times, made statements in which they incriminated themselves. In addition each was found to be or to have been in possession of goods proved to have belonged to the deceased. Their subsequent explanations and attempted exculpations were fanciful and rightly rejected by the court a quo. The statements of appellants 1 and 2, made firstly to separate magistrates, secondly to police officers when pointing out scenes connected to the crimes and thirdly when they were arraigned in terms of section 119 of the Act, all amounted to unreserved confessions both to the

murder and the robbery. Appellant 3 made a so-called warning statement to the investigating officer in which she admitted her presence at the scene of the crimes but claimed that she was coerced by her companions to participate in them. This was also the gist of her evidence in a subsequent bail application. All three of them pleaded guilty when first asked to plead. Before the court a quo appellants 1 and 2 repudiated their earlier statements and advanced an alibi defence, each relying for support on the other, but appellant 3 persisted in her defence of duress.

The trial itself was a protracted and laboriously repetitive one. Appellants 1 and 2 attacked the admissibility of their earlier statements on grounds that they were subtly but nevertheless unduly influenced by the police to make them. Their defence was a somewhat contradictory one: on the one hand that they were influenced to co-operate with the police in, for instance, pointing out certain places which on the face of it indicated

knowledge of and complicity in the crimes; on the other hand they claimed that they in fact made no pointings out at all but were simply posed by the police so that they could be photographed. The incriminating details in their statements and their pleas, so it was now alleged, were an amalgam of information imparted to them by appellant 3 and the investigating officer. They made these statements, they explained, because he instructed them to do so.

There is not even a shred of substance in their defence. There was no proof whatsoever that the police acted improperly in inducing or encouraging their various statements (cf Khumalo en Andere v Die Staat, an as yet unreported decision of this court, matter 254/94, delivered on 28 November 1994).

The court a quo, for sound reasons, believed the state witnesses and disbelieved the first and second appellants. To the extent that the onus

rested on the state to prove the admissibility of what was said and done at the pointings out, the court found that it had been discharged; a fortiori it had not been discharged where the onus rested on the appellants to disprove the admissibility of extracurial statements they made to the respective magistrates who took them down. By the same token they failed to undermine the considerable weight of their responses to questions during the proceedings in terms of s 119 of the Act. What is contained in the exhibits relating to these various occurrences is overwhelming and incontrovertible proof that appellants 1 and 2 murdered and robbed the deceased. No serious attempt was made in this Court to contend to the contrary.

Appellant 3's version that she was first tricked and then threatened to participate in the crimes was so riddled with improbabilities as to be incredible. The court a quo rightly had no difficulty in rejecting it as patently false. Her evidence suffers from the basic improbability that there

was no acceptable innocent explanation why she should have accompanied appellants 1 and 2 to the deceased's house; nor why she should have been prepared to co-operate with them in the manner in which she did. Her actions before, during and after the murder cannot be reconciled with any hypothesis other than that, far from being coerced, she was a willing participant in, most probably the instigator of, the expedition to Marina Beach to kill and rob the deceased.

On a conspectus of the evidence as a whole there can be no doubt that the three appellants were properly convicted on both counts. Their appeals against their convictions must accordingly fail.

Appellants 1 and 2 also appealed against the death sentences imposed on them in respect of count 1. For the purpose of sentence the various strands of evidence can be weaved into the following broad picture:

Appellant 3 had previously worked for the deceased. Her own sister

was at one stage his lover. She denied that she herself slept with him but admitted that he had invited her to do so. According to appellant 1 she told him that the deceased was her lover but had jilted her for Momusa. Momusa herself testified that she was installed as the deceased's paramour. There was an angry scene, about a month or so before the murder, when appellant 3 approached the deceased at his house but he turned her away. Appellant 3, most probably for reasons of jealous revenge, as the court a quo found, decided to have the deceased "punished" for taking up with her rival Momusa. They were rivals for the affections not only of the deceased but also of one Chris Thushini. She approached appellant 1. According to the latter's statement she asked him if he needed money and when he replied in the affirmative she suggested that he help her kill the deceased and that they would be able to obtain R89 000,00. She said they needed someone who could drive a car and he told her about his friend, appellant 2. According to

statements of all three of them and the evidence of appellant 3, they agreed to meet. They did so at Marina Beach on the Friday before the murder but the expedition was aborted when there were too many other people around. They agreed to try again and on the following Sunday morning, 21 February 1993, they convened at the deceased's residence and took up a vantage position in a vacant neighbouring property. Someone was washing the deceased's car. They waited until the late afternoon when the deceased left with this person but, after a while, returned and entered the house. To lure him out again it was decided (so all three of them at some or other point stated) that appellant 3 would telephone him from a nearby public phone booth, pretending to be Momusa and asking him to fetch her, the idea being that when the deceased went to his car to do so the other two would overpower him. And this, according to their various versions, is what happened. As the deceased entered his garage appellants 1 and 2 grabbed

him. A rope was tied around his neck. Appellant 3 had by then returned. She caused him to write out a cheque for R89 000,00. (The cheque was never cashed or recovered.) Thereafter he was throttled until he died. The three of them then ransacked the house. They loaded the spoils in the deceased's car. His body was dumped in the boot. They drove to the house of an inyanga who, according to appellant 3, was anxious to obtain the penis of a white man, but he was not at home. At Ramsgate they refuelled the car, keeping some petrol in a container. Appellant 3 was then dropped at her place of residence with a suitcase filled with linen. Appellants 1 and 2 proceeded to drive the car into a sugar cane field. Appellant 2 removed the registration number plates and threw them away. They then set the vehicle alight with the remaining petrol and fled. Appellants 1 and 2 later left a speaker and a suitcase containing clothes which belonged to the deceased with a friend of theirs for sakefeeping. They also sold a camera which

belonged to the deceased to another acquaintance of appellant 1.

So much for the events.

Both appellants were relatively young at the time, appellant 1 approximately 23 years of age while appellant 2's age was estimated to be between 21 and 23. For the purpose of sentence both can be treated as first offenders. Appellant 1 reached standard 4, appellant 2 standard 8 at school. It was contended that the killing of the deceased was not premeditated, that they were not in the same bracket as hired killers (cf Zondi v The State 1992 (2) SACR 706 (A)). 1 am afraid that 1 cannot agree. On their own showing appellant 3 canvassed them to kill the deceased. It is true that appellant 2 in one of his statements said that they were only invited by appellant 3 to rob the deceased, not to kill him. It is also true that they did not arm themselves in advance with knives or firearms. But these are lesser considerations when the continuum of events is considered. Appellant 3,

who orchestrated the attack, had no motive to rob - her explicit purpose was to harm the deceased. From her perspective the contemplated robbery was a mere lure to secure her companions' co-operation. Once she accompanied them to obtain the cheque the murder became inevitable, as appellant 2 said himself in his statement, in order to avoid detection. Their actions in first reconnoitring the lie of the land, in aborting the first mission, in biding their time on the second occasion before luring him out of the house on the pretext that it was Momusa calling, all testify to careful planning in the knowledge that he would eventually have to be permanently silenced. They had ample opportunity to reflect and repent. Their actions after the event, in hiding the deceased's body in the boot of the car of which they removed the number plates and in setting it alight, all point in the same direction that their aim was to cover their tracks by destroying evidence in accordance with

a carefully prepared programme. The murder itself was a gruesome one, inspired by greed, executed without compassion. The deceased was first strangled until he wrote out the cheque and then choked to death. There is no cause to distinguish between the two appellants when it comes to sentence. In all the circumstances their moral blameworthiness is such as to deserve, beyond any other form of punishment, the ultimate penalty.

The appeals of all three the appellants must accordingly be dismissed. But because the constitutionality of the death sentence as such is still under consideration by the Constitutional Court that issue must for now be left in abeyance.

The following order is made:

(1) The first, second and third appellants' appeals against their convictions are dismissed.

(2) The first and second appellants' appeals against the death sentences imposed in respect of count 1 are adjourned to a date

to be determined by the registrar of this Court.

P M Nienaber
Judge of Appeal

Hefer JA) Concur
Eksteen JA)