Case No 44/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIMPHIWE SHABALALA First Appellant

SIPHO MKHIZE Second Appellant

and

THE STATE Respondent

Coram: E M GROSSKOPF, NESTADT et SCOTT JJA

Date heard: 16 February 1996

Date delivered: 12 March 1996

J U D G M E N T

NESTADT. JA

Mr and Mrs Singh, aged 51 and 47 respectively, lived on a farm near Pietermaritzburg. They were last seen alive on 15 January 1992. On the following morning their bodies were

discovered. That of Mr Singh was found lying on the floor of the bedroom of the farm house. Mrs Singh's lay in the kitchen. They had been viciously assaulted during the night. It is clear that each had been attacked in their home with a knife or similar weapon. Mr Singh died as a result of his throat having been cut and stab wounds of the chest. The cause of Mrs Singh's death was injuries of a similar nature. A quantity of their belongings had been stolen. This included clothing, a video recorder and a motor vehicle.

These events led to the prosecution of the appellants on two counts of murder and one of robbery with aggravating circumstances. The matter came before Hurt J, sitting with assessors in the Natal Provincial Division. The State case was that it was the appellants and first appellant's brother, a certain Khehla (he was

initially also charged but died before the trial commenced), who had committed the crimes. Reliance was placed on (i) a confession which the appellants had shortly after their arrest in the Transkei on 13 February 1992 each made to a magistrate in Pietermaritzburg; and (ii) certain other circumstantial evidence the nature whereof I refer to later. The appellants, though admitting that they had until a week or two prior to the crimes, done casual work for the deceased and lived in the area, denied having perpetrated the crimes. Their defence was an alibi. It was, however, rejected. The State evidence was accepted. They were accordingly on 8 November 1994 found guilty as charged. An effective sentence of 18 years imprisonment was imposed on each. This is an appeal, brought with the leave of the trial judge, against their convictions. There is no appeal against

sentence.

The first issue that arises concerns the confessions. It is unnecessary to detail their contents. Each proves the appellants' respective participation in the crimes. At the end of a separate hearing within the trial, they were ruled to have been freely and voluntarily made. This finding has not been challenged before us. It was conceded that the statements were admissible in terms of sec 217(1) of the Criminal Procedure Act, 51 of 1977. Nevertheless, they were objected to. What was relied on was the fact that the initial arrest of the appellants (which, as I have said, took place in the Transkei) was unlawful. This was because it was effected by South African police operating without any extra-territorial authority and in breach of the relevant extradition provisions. (Thus it was that when

the appellants were originally brought to trial, the State, with S vs Ebrahim 1991(2) SA 553(A) in mind, conceded that the court lacked jurisdiction and withdrew the charges against them. It was only later when, subsequent to their release, the appellants were re-arrested in South Africa, that proceedings continued before Hurt J.) When, therefore, the confessions were made, the appellants were in unlawful detention. The submission was that in these circumstances the State should not have been allowed to rely on the statements. This was not because of any constitutional provision. Counsel disavowed any reliance on Act 200 of 1993. Nor was the initial contention that this was a case of illegally obtained evidence persisted in. The argument was rather that but for their unlawful detention, the appellants would not have confessed; they did so in ignorance of their right not to

have been arrested in the Transkei; accordingly, the trial judge should, in the exercise of his discretion, have excluded the evidence. The basis of the argument, as I understood it, was that in the circumstances, it should have been regarded as unfair that the confessions be used against the appellants. I am not sure that the court has a discretion to exclude an otherwise admissible confession (or admission) on this ground. The issue is a controversial one (see Hoffmann and Zeffertt: The South African Law of Evidence, 4th ed, page 284 et seq). I shall, however, assume, without deciding, that there is such a discretion. Even so, I remain unpersuaded that this can avail the appellants. In a careful analysis of the facts, Hurt J came to the conclusion that there was no warrant for exercising his discretion against the State. The learned judge took into account

that the appellants' rights were fully explained to them by the magistrates who took their statements; that they therefore knew that they were under no obligation to confess; and that the illegality of their arrest in no way influenced them to do so. In my opinion, no fault can be found with this approach. Certainly, it cannot be said that there was any improper exercise by the court of its discretion. The attack against the confessions therefore fails.

I turn to an assessment of the other evidence referred to earlier ((ii) above). I do not propose to deal with it in any detail. For the most part, it is adequately summarised in the judgment a quo. It was to the effect that at about 8 pm on the night when the deceased were killed, the appellants and Khehla (he had also worked for the deceased until shortly before their deaths) were in the area;

they visited Thembinkose Nzimande in his room on a farm adjoining that of the deceased; they told Nzimande that Mr Singh had failed to pay them the full amount of their wages and that they were going to kill him; about an hour later he saw them again driving away in the deceaseds' vehicle (which appeared to be loaded with goods); some four weeks later, on their arrest in the Transkei, certain of the deceaseds' clothing and other possessions were found in a hut which the appellants and Khehla were occupying; and a week or two before the appellants' arrest, Khehla, accompanied by the appellants, brought the deceaseds' vehicle and a video machine, which was also part of the stolen property, to one Simon Matima in the Transkei (the former for repair and the latter for testing).

As I have indicated, the appellants' version was that they

were in the Transkei when the crimes were committed. First appellant's evidence was that he left the Pietermaritzburg area on 11 January 1992. Later, under cross-examination, he said it was "just after New Year's day". According to the second appellant, he arrived in the Transkei "at the beginning of January (1992)...the first Saturday after New Year's day". Though admitting that they knew Nzimande, that they were in the company of Khehla in the Transkei, and that with him they occupied the hut in which the deceaseds' property was found, they denied the alleged visit to Nzimande or that they were owed any money by the deceased or that they were at any time in possession of the deceaseds' property or that they were present when Khehla allegedly handed over the vehicle and video to Matima. In support of their defence they called two witnesses. One

was Lucia Shabalala, the first appellant's mother. She lived on a farm in the neighbourhood of that of the deceased. She testified that the appellants left the area on 2 January 1992 and never returned until after their arrest. The other was Goodness Mokoatle. She let the hut in the Transkei to the appellants and Khehla. She said that this was from about the first week in January 1992.

The trial court was thus faced with a credibility issue. As I have indicated, it resolved this in favour of the State. Before us, Mr Padayachee. on behalf of the appellants, strongly attacked this finding. In my opinion, however, there is no reason to depart from it. Hurt J was alive to the fact that the State evidence was not without blemish. In particular, Matima was (in the judgment admitting the confessions) found in certain respects not to be a good

witness. On the other hand, Nzimande created a favourable impression. He was described as an excellent witness whose evidence was not "open to serious doubt". This seems to be a justifiable conclusion. There was no room for any mistaken identification of the persons who visited him. Nor was there any basis for impeaching his honesty. His implication of the appellants was moreover corroborated by the evidence of the first appellant's father, Johannes Shabalala. He lived on the deceaseds' farm. He confirmed that two days before the crimes, the appellants were still there. On the other hand, although the appellants' demeanour did not attract any adverse comment, their evidence, as the trial judge points out, was subject to serious criticism. In particular, it appears that both made admissions which significantly detract from their alibi

defence. In the sec 119 proceedings, the Erst appellant conceded that on 15 January 1992, far from being in the Transkei, he was in the area of the deceaseds' farm and in fact saw Mrs Singh on that day. Under cross-examination the second appellant for his part gave the date of his arrival in the Transkei as well after the date of the murders.

In the result therefore the State proved that hours before the deceased were killed, and contrary to their alibi, the appellants were in close proximity to the deceaseds' home; that arising from non-payment of their wages, they had a grudge against the deceased or at least Mr Singh; that they told Nzimande that they intended to kill him; that shortly thereafter and at a time when it may be assumed the deceased had already been killed, they were in

possession of the deceaseds' vehicle and other property or at least in the company of someone (Khehla) who was in such possession; and that some weeks later they were still associating with Khehla who alone or with them was in possession of items of the deceaseds' belongings.

The probabilities are such that it can be accepted that the deceased were killed and the robbery committed by more than one person. In my opinion, the cumulative cogency of all these factors is such as to allow of only one inference, namely, that the appellants participated in the attack on the deceased. Of course, on the evidence under consideration, we do not know exactly what part each appellant played. Plainly, however, they must be taken to have acted pursuant to a common purpose to rob the deceased and, in view

of the nature of the injuries inflicted, intentionally to kill them. On this basis alone, therefore, the guilt of the appellants was proved. The result is an a fortiori one if regard is had to the confessions.

The appeal of both appellants against their convictions is dismissed.

HH Nestadt

Judge of Appeal

E M Grosskopf, JA )

) Concur

Scott, JA )