THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 269/95

In the matter between:

JOSEPH MUYULA MKHWANAZI — Appellant

and

THE STATE — Respondent

Coram: VAN HEERDEN, F H GROSSKOPF et HARMS JJA

Heard: 11 March 1997 Delivered: 20 March 1997

J U D G M E N T F

H GROSSKOPF TA:

This is an appeal against conviction and sentence in terms of s 316A(1) of Act 51 of 1977. The appellant was charged in the Witwatersrand Local Division with housebreaking with intent to commit robbery and robbery with aggravating circumstances (count 1) and with murder (count 2). The court a quo (M J Strydom J and two assessors) convicted the appellant on both counts. He was sentenced to death in respect of both counts.

The State case is that the appellant and another person, referred to as Clement, committed robbery and murder after breaking in at the house of the complainant, Mrs Weinstein, in Yeoville Johannesburg on the night of 22 May 1993. The complainant in the robbery charge was a 73 year old widow whose daughter stayed with her in the house. They shared the house with a male tenant who was 86 years old at the time. On the night in question the complainant and the tenant were the only persons at home. The daughter went out for the evening and only returned home at about midnight. Some time

before midnight the complainant encountered two male intruders in the passage outside her bedroom. When she confronted them they immediately attacked her. She screamed and shouted for help but there was no response from the tenant. The one attacker threatened her with a dagger while the other one forced bed socks into her mouth. The first one then grabbed her by the throat and started to choke her. They took her wrist-watch and gold chain and dragged her into her bedroom. She became unconscious and when she regained consciousness she was lying on the floor with her hands tied together. The two attackers later returned and asked her where she kept her firearm and money. She told them where to find the firearm, but they assaulted her nonetheless once again. Her hands were then tied behind her back with a telephone cord, while her feet were tied to the leg of a kist in her bedroom. They also tied her gown over her mouth. At that stage her daughter returned and when she saw what was happenning she started shouting for help. The two intruders then left the premises.

It was later discovered that the tenant had been murdered and that he was

lying dead in his bed. The post mortem examination was conducted by Dr Klepp, a senior specialist in forensic pathology. According to her evidence the cause of death was a fractured cervical spine. The deceased's neck had in fact been broken completely, severing the spinal cord. According to Dr Klepp this was probably caused by moving the deceased's head rapidly backwards with force resulting in almost instantaneous death.

The appellant chose to close his case without giving evidence on the merits. This was done despite the fact that there was credible evidence implicating him in the commission of these crimes. I need refer only to some of the incriminating evidence.

Patrick Nene was a key witness for the State. The trial court found him to be a credible witness. Counsel for the appellant criticized his evidence in so far as important aspects thereof were not included in his statement to the police. Nene explained that his statement to the police was given in response to questions put to him by the police and said that he could not recall whether these aspects were raised by the police. Nene's evidence is that during May

1993 when these crimes were committed he stayed in a room in Berea Road in Bertrams. The evidence shows that this was not far from the house where the complainant lived. Nene's brother, Emmanuel, as well as one Clement and a certain Jerry stayed with Nene in this room. Nene knew the appellant. On the night in question Clement and the appellant were present in Nene's room until about 21:00 when they left. They returned to Nene's room after midnight with three suitcases containing radios, tape decks, a video machine and liquor.

The appellant and Clement subsequently gave Nene one of these suitcases and he kept his clothes in it. Some time later the police arrived at Nene's room in the company of the appellant and Emmanuel, and the appellant then pointed out (his suitcase to the police. Nene's testimony relating to the suitcase was not challenged in cross-examination. This suitcase was exhibit 1 at the trial where it was identified by Miss Weinstein as her mother's suitcase. In my view this evidence clearly implicates the appellant in the commission of the crimes at the Weinstein residence, yet he failed to controvert it.

The testimony of Nene implicated the appellant in another respect as well.

According to Nene he and the appellant had a discussion the day after the appellant and Clement had brought the suitcases with goods to the room. The appellant then told Nene that he and Clement went to a place where they "did something wrong" and that somebody died at that place. The appellant further told Nene that they tied up the old woman who lived there. He also mentioned that they strangled her, and forced something into her mouth. They later returned to the room with the stolen goods. This extra-judicial admission of the appellant accords with the objective facts in all material respects. It is unlikely that Nene could have made it up. There is no suggestion that this admission was not freely and voluntarily made. It was put to Nene in cross-examination that the appellant would deny that he ever made such a report to Nene, but the appellant failed to give evidence to that effect.

There is further incriminating evidence on which the court a quo relied in convicting the appellant, but in view of the conclusive nature of the evidence referred to above there can in my view be no reasonable doubt that the appellant was present when the crimes were committed and that he took part in

the robbery. In these circumstances I do not find it necessary to deal with such further evidence proving his complicity.

Counsel for the appellant submitted that the State failed to prove that the appellant had the necessary mens rea to commit murder. There can in my view be little doubt that the culprit who actually broke the deceased's neck must have had the direct intention to kill. This conclusion is borne out by Dr Klepp's testimony that the deceased's head had to be pulled back with considerable force to have caused the fractured cervical spine. There is of course no evidence to show that the appellant killed or assisted in killing the deceased. He was, however, a party to a common purpose to commit robbery, as appears from the evidence referred to above. In entering a house where lights were burning the appellant surely realised that there were probably occupants in the house who might resist any attempted robbery, and that any resistance would have to be overcome. In these circumstances the appellant in my view foresaw the possibility that death might ensue, yet he persisted, reckless of such consequences. He therefore had the necessary mens rae in the form of dolus

eventualis. I may add that the life-threatening manner in which the appellant and his associate dealt with the complainant shows that they both had little respect for life. And when the appellant told Nene the following day that someone died at the place where they "did wrong" he admitted by implication that they were responsible for the death of that person. I accordingly find that the appellant was properly convicted of murder on count 2.

There remains the question of sentence. The court a quo imposed the death sentence in respect of both counts. These sentences were imposed after the date of commencement of the Constitution of the Republic of South Africa Act 200 of 1993. Although the robbery involved a very serious assault on the complainant I am of the view that the death sentence was not the proper sentence in respect of count 1. The Constitutional Court has in any event since decided in S v Makwanyane and Another 1995(3) SA 391 that legislation sanctioning capital punishment is inconsistent with the Constitution and accordingly invalid. It further decided that with effect from the date of its order, i e 6 June 1995, the State is forbidden to execute any person already sentenced

to death. The death sentences imposed in the present case therefore have to be set aside and substituted by lawful punishments. In my view the case has to be remitted to the trial court for the imposition of a proper sentence in respect of each count. Counsel appearing for the appellant and the State also requested that the case be remitted to the trial court for the reimposition of sentence. The following order is made:

1. The appeal against the convictions on counts 1 and 2 is dismissed.

2. The appeal against the death sentences imposed in respect of counts 1 and 2 is upheld and both sentences of death are set aside.

3. The case is remitted to the trial court for the reimposition of sentence on counts 1 and 2.

F H Grosskopf JA Van Heerden JA
Harms JA Concur