CASE NO. 642/93 & 448/94

In the matter between

PETRUS MAHLANGU FIRST APPELLANT

SIPHO CHARLES NKOSI SECOND

APPELLANT

AND

THE STATE

RESPONDENT

BEFORE: E M GROSSKOPF, NIENABER, and

SCHUTZ JJA

HEARD: 5 MAY 1997

DELIVERED: 9 MAY 1997

SCHUTZ JA

J U D G M E N T

SCHUTZ JA:

Both appellants were found guilty of murder and robbery with aggravating circumstances. Both were sentenced to death on the murder count and to 12 years imprisonment on the robbery count. Only the second appellant has appealed against conviction. Both the death sentences are unconstitutional - see S v Makwanyame and Another 1995 (3) SA 391 (CC). The first appellant's death sentence will have to be set aside and also that of the second, if his appeal against conviction fails. Second appellant's conviction

On the night of 31 July 1992 the deceased Jacob Blignaut was

brutally murdered at his home at 73 McDonald Street Belfast. His assailants also seized a large number of articles. The first appellant has not appealed against the finding of Labuschagne J, sitting with assessors, that he was one of the assailants. The question is whether the Court was right in finding that the second appellant was another.

The evidence has been carefully reviewed by the trial Judge so that it is unnecessary to deal with it at length.

Early on the morning of 1 August 1992 the deceased's stolen bakkie was found by the police crashed into a fence outside Siyathuthuka, near Belfast. Inside it were certain articles stolen from the house. Identification of the vehicle's owner led to the finding of the deceased lying dead on the lawn outside the back door. His head had

been battered in, his wrists tied together. The back door was standing ajar. There was no indication of forcible entry.

The main evidence incriminating the second appellant fell into four categories. 1. In the early hours of 1 August he was in the company of the first appellant when goods stolen from the house were brought to various places. 2. The witness Sibanyoni saw the second appellant in the company of the first near the deceased's house on the evening of 31 July before the murder took place. This evidence was denied. 3. The same witness described a conversation in a cell after the arrest of the appellants and himself, in which the second appellant sat silent while the first appellant described the murder, allocating an active role to the second appellant. 4. Whereas the second appellant denied knowledge

of the murder or the lie of the deceased's house, he pointed out certain things there to Major Combrink, and made certain statements to him, in a way that implicated him in the murder. I shall deal briefly with the evidence and the Court below's findings. 1. Association with stolen goods

During the early morning of 1 August 1992 the two appellants knocked Stephen Maseko up at his home in Siyathuthuka. There is a complaint that the date was put into Maseko's mouth, but there was other evidence which established the date. They were carrying various goods including blankets, eating utensils, a gas cylinder and a suitcase. He helped them carry the goods to the house of Lucky Mokoena, where the goods were left. He kept some blankets and hand towels for his pains.

They had been stolen from the deceased. The police later recovered them from him. It was put to this witness that the second appellant had been nowhere near his house on that night, which he had spent with his wife at Belfast. That was not to be the second appellant's evidence.

Lucky Mokoena confirmed that on that night the two appellants and Maseko arrived at his house bearing goods. The trio departed, but some time later the second appellant came back on his own and gave Mokoena a pink blanket. It also was part of the loot and was recovered by the police. To him as well it was put that the second appellant was with his wife, not at Mokoena's house.

Despite what had been put twice, in his evidence the second appellant conceded that he had been with the first appellant that night

after they had met at a pub. The first appellant had certain goods with him, which he said he had got from his employer. He asked the second appellant to find a storage place for him, and so they did indeed attend at the abode of Mokoena. 2. Sibanyoni saw second appellant near deceased's house

Sibanyoni, whose evidence was accepted by the trial Court, worked for the deceased and lived in a back room. At about 20.00h on the evening of 31 July he was visiting the shops when he saw the two appellants in company walking in the direction of McDonald street. He knew the second appellant by sight. Although it was put that the latter was with his wife and not with the first appellant, as has been stated above, in his evidence he conceded that he had been with the first

appellant that evening. However, he denied having been sighted at the

shops as stated by Sibanyoni.

3. The conversation in the cell

Sibanyoni described how when he and the appellants were in a cell together (he had also been arrested for the murder although he was not charged) the first appellant had described how he had requested the second to fetch something to tie up the deceased, at which the second appellant fetched a stick and beat the deceased to death. The second appellant did not respond, although he was within earshot. On his behalf it was put that although he was in the cell when the first appellant spoke to the witness, he denied the witness' version. But when he gave evidence he made no mention of the incident in the cell, so that in this

regard Sibanyoni's evidence stands uncontradicted. It was argued that the second appellant may have remained silent out of fear, but there is no evidence to that effect.

There may be a question whether Sibanyoni did not know more about the murder than he professed, so that his evidence of sighting the second appellant must be approached with caution, but, as I have indicated, what passed in the cell is not disputed. 4. The pointings out

A trial-within-a-trial was held concerning the admissibility of pointings out and statements allegedly made by the second appellant to Major Combrink at the house on 28 August 1992. The challenge to admissibility was that the second appellant had been assaulted and

threatened so that he did not act freely and voluntarily, and that the police had told him what to say, he himself knowing nothing about the murder.

The State's evidence in the trial-within-a-trial was accepted and that of the second appellant rejected as not being reasonably possibly true. There were ample grounds for doing so, which do not need to be repeated.

On appeal the challenge to admissibility was dropped, but two points were argued concerning the reliability of the State's evidence. The first was that there was a disparity between the contempary notes made by Major Combrink as to what the second appellant said and did, and the notes of the accompanying police photographer Sergeant Coetzee. The

argument was that those differences raised a doubt as to the reliability of the notes of the major (who gave evidence) and as to his statement that he was independent and knew nothing of the case before the pointing out. No attempt was made to call the sergeant or have him called. Nor were his notes proved. The result is that there is no factual foundation for this criticism of the major. In any event any disparity that there may have been does not lead anywhere, as it was not argued that Combrink had lied.

The other point was that on arrival at the deceased's house a woman was waiting there with the keys. This was Mrs Snyman, the deceased's daughter, who did not live at the house. The suggestion is that far from the second appellant taking the police to the house, they

took him there, it being identified by Mrs Snyman and not by him. There is no basis for this suspicion that I can see on the record. The obvious likelihood is that Mrs Snyman was at the house to open it up. The reason for her presence was not explored in cross-examination.

In consequence I consider that Major Combrink's record of events at the pointing out was correctly admitted. It fully implicates the second appellant in the murder and robbery. According to the record the second appellant identified the house and showed where he and the first appellant had entered through an unlocked door. A description of the murder followed. Later he pointed out where they had abandoned the deceased's bakkie.

Criticisms were raised of the evidence of Maseko and Makoena.

Their evidence was fully and fairly considered by the trial Court, which was, in my opinion, not to be faulted for accepting it. Also, I consider that the evidence of the second appellant in the main trial was rightly rejected as not being reasonably possibly true. To take only one point, already alluded to, he changed his story fundamentally as to whether he had been in the company of the appellant on the night.

In the result the Court below correctly held that there was an overwhelming case against him and the second appellant's appeal against conviction must fail. The death sentences

The execution of the death sentences would be unconstitutional in the light of the decision mentioned at the beginning of this judgment.

They must be set aside and replaced with another sentence. Although there is as yet no legislation as to how this is to be done, I consider that this is, as was the case of Masemeni v The State (A D 2.5.1997), one in which the matter should be remitted to the trial Court, in order that sentences on both the appellants be imposed afresh.

The second appellant purported to appeal against the robbery conviction as well as the murder conviction, but as leave was needed before there could be an appeal against the former and none was sought, there is no appeal on the robbery conviction before us.

The following order is made:

(a) The appeal against second appellant's conviction on the count of murder is dismissed.

(2) The appeals of both appellants against the sentences of death are upheld and the sentences of death are set aside.

(3) The matter is remitted to the Court a quo for the imposition of competent sentences on the count of murder.

W P SCHUTZ
JUDGE OF APPEAL

E M GROSSKOPF JA)
)CONCUR
NIENABER JA)