THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 403/94
No 524/94

In the matter between

D B TSHABALALA — First Appellant
(Accused 1 in the Court a quo)

SIKHUMBUZO SIKHAKHANE — Second Appellant

(Accused 2 in the Court a quo)

and

THE STATE — Respondent

CORAM: VIVIER, FH GROSSKOPF et OLIVIER JJA

HEARD: 25 August 1997

DELIVERED: 25 August 1997

JUDGMENT

VIVIER JA:

The two appellants, to whom I shall refer as accused No's 1 and 2 respectively, appeared before Coetzee J and assessors in the former Witwatersrand Local Division on charges of murder (count 1), robbery with aggravating circumstances (count 2) and the unlawful possession of firearms and ammunition (counts 3 and 4). Accused No 1 was found guilty on counts 2, 3 and 4. On count 2 he was sentenced to 20 years' imprisonment, on count 3 to 4 years' imprisonment and on count 4 to 2 years' imprisonment. The sentence imposed on count 4 was ordered to run concurrently with that imposed on count 3 so that he was sentenced to an effective 24 years' imprisonment. Accused No 2 was found guilty on all four counts. On each of counts 1 and 2 he was under the then prevailing law sentenced to death. On counts 3 and 4 his sentences were identical to those of accused No 1. With the leave of the

Court a quo accused No 1 appeals to this Court against the sentences imposed on all three counts. Accused No 2 appeals to this Court against his convictions and sentences on counts 1 and 2 in terms of sec 316A of Act 51 of 1977. There is no appeal against accused No 2's convictions and sentences on counts 3 and 4.

The charges arose out of an armed robbery early on Thursday morning 17 December 1992 at the Jabulani Civic Centre ("the Centre") in Sowetu during which a guard, Constable Malefetsane Rudolf Makate, who was on duty at one of the gates outside the Centre, was shot and killed and 18 Mossberg shotguns, two 9mm pistols as well as 150 rounds of ammunition for both types of weapons, were stolen from the control room at the gate.

The State evidence against the two accused may be summarised as follows. The girlfriend of accused No 1, Tebogo

Deborah Ngemane ("Ngemane") testified that at about six o'clock on the morning in question she and accused No 1 were asleep in an outside room on his parents' property at 100 Zondi, when she was woken by a knock at the door. Accused No 1 opened the door and told her that it was accused No 2 who was looking for transport to the Centre for a friend of his who wanted to collect something there. She knew accused No 2 who lived one street block away from accused No 1. Accused No 1 left in his mother's yellow Mazda and returned about 15 to 20 minutes later to fetch a blanket. When he came back again he was accompanied by accused No 2 and a policeman, Psapsa Makhubela ("Makhubela") who were carrying something in the blanket accused No 1 had taken earlier. Accused No 2 requested accused No 1 to hide the blanket and when the latter refused accused No 2 and Makhubela put the blanket and its contents under the bed. She saw a large number of firearms

wrapped inside the blanket. Accused No 2 and Makhubela then left together. Later that evening she and accused No 1 met accused No 2 in a nearby tavern and she insisted that accused No 1 tell

accused No 2 to remove the firearms. The two accused left the tavern together and came back after about an hour with Makhubela. Accused No 1 then told her that the other two had removed the firearms. When she returned to accused No l's room that night she found that the firearms were gone. After this day she never saw accused No 2 or Makhubela again. She was present on 30 December 1992 when accused No 1 was arrested at his parents' house at 100 Zondi. He was taken away and brought back later that day and she then saw him pointing out firearms in an outside room on the neighbour's property at 101 Zondi. These looked like the same firearms she had seen in accused No l's room, although they were now wrapped in a blue sleeping bag. It was not in

dispute that the room in which Ngemane and accused No 1 were sleeping on the morning in question is about 3 km from the Centre. Sergeants Nkolongwane and Diko were in charge of the six police guards at the Centre during the night of 16 to 17 December 1992. The guards are armed with either shotguns or pistols which are returned to a safe in the control room at the gate when they go off duty. The guards are taken home in three groups leaving at four o'clock, five o'clock and six o'clock respectively in the morning. Shortly after the first group had left that morning a vehicle with three occupants stopped about 100 metres outside the western gate. Two men alighted and and approached Nkolongwane and Diko who were sitting in the guardroom at the western gate. They recognised one of the men as a fellow policeman, Makhubela, who was due to come on duty only at half past eight that morning. The other man they were unable to identify. Makhubela said that

he was looking for transport to Protea Glen and they told him that the bus going that way had already left. He then wanted to know whether they were the only guards left on duty and they said "yes". Makhubela and his companion then left. Shortly before six o'clock Nkolongwane and Diko also left and Diko, who was the last to leave, handed the safe and gate keys to the deceased who had in the meantime reported for duty. The deceased was then the only policeman on duty at the Centre.

Shortly afterwards, when Sergeant Korombi arrived at the Centre he found the deceased lying in a passage some 15 metres outside the guardroom. He had been shot in the head but was still alive. The deceased was rushed to hospital by ambulance where he died shortly after admission. According to the medical evidence he had sustained two gunshot wounds of the head, one of which had fractured the skull and penetrated the brain causing his death.

He had apparently been shot while he was in the guardroom as there were large pools of blood on the floor of the guardroom and two spent 9mm cartridge cases were found in the room.

Warrant Officer Szente, who arrived at the scene of the crime shortly after the alarm was raised, testified that he found the safe in the control room locked and the keys missing. Duplicate keys were obtained and when the safe was opened 18 Mossberg shotguns, 8 cartridge belts and two 9mm pistols were found missing. On 30 December 1992 the investigating officer, Sergeant Crafford, showed him 16 Mossberg shotguns at the Protea Police Station and although their serial numbers had been filed away he was able from other markings to identify them as those which had been taken from the control room at the Centre. The uncontested evidence of Crafford and Detective-Constable Chupa was that after his arrest on 30 December 1992 accused No 1 took them to an

outside room at 101 Zondi where he pointed out 14 Mossberg shotguns wrapped in a sleeping bag under a bed as well as two further Mossberg shotguns which were hidden in a coal bin behind the room.

Accused No 2 was arrested on 31 January 1993. Makhubela was shot and killed by unknown attackers on 19 January 1993.

Both accused made written statements the admissibility of which was contested by the defence. After a trial-within-a-trial the learned trial Judge made a provisional ruling that both were admissible. At the end of the trial the learned Judge in the judgment on the merits reconsidered the admissibility of the statements and reaffirmed his previous ruling. The learned Judge was clearly correct in adopting this procedure (S v Mkwa

nazi 1966 (1)

SA 736 (A) at 743A, 744B). There is no merit in the argument advanced by counsel for accused No 2 that the trial Judge failed to

make a ruling at the end of the trial-within-a-trial on the admissibility of the statements and that he only did so at the conclusion of the trial. It is perfectly clear from the record that the learned trial Judge gave his ruling at the conclusion of the trial-within-a-trial which he later reconsidered and reaffirmed.

Accused No l's evidence at the trial was that at about six o'clock on the morning in question accused No 2 and Makhubela arrived at the room where he and Ngemane were sleeping and accused No 2 asked him to convey them to the Centre where Makhubela wanted to collect his belongings. He took them there in his mother's car and he waited in his car while the other two went up to one of the gates. A few minutes later they came back and Makhubela asked him to wait as the policeman whom he wanted to see had not yet arrived. They waited in the car and after a while a bus arrived and one policeman alighted at the gate. Two

other policemen got into the bus which drove off. Accused No 2 and Makhubela then got out of the car and went to the gate. He heard a sound like a cracker (according to his statement he heard two shots) and when accused No 2 gave a signal for him to come he drove his car through the gate which they had opened and picked up the firearms. He left the premises through another gate. On their way out accused No 2 said to Makhubela: "Did you see when I fired the first shot? The policeman turned and looked at me and then I fired the second shot." They drove back to his room and hid the firearms wrapped in a blanket under the bed. That night he saw accused No 2 at a tavern and at Ngemane's insistence he asked him to remove the firearms from his room. Later the same night he assisted accused No 2 and Makhubela in moving the firearms to the room af his neighbour, one Lennox. After his arrest he showed the police where the firearms were hidden.

Accused No 2's written statement, which amounts to a confession on all the charges, was made to Lieutenant Johnstone at 16h55 on 1 February 1993. Counsel for accused No 2 submitted that the statement was wrongly admitted in evidence. Accused No 2's version at the trial-within-a-trial as to why he made the statement was that after his arrest on 31 January 1993 he was continuously threatened and assaulted by the police and that he said in his statement no more than what he had been told to say by Detective Constable Chupa. Accused No 2 testified that when he was taken to the cells at the Protea Police Station on the day of his arrest Chupa slapped him in the face with his open hand and threatened him. The following day Captain Radley, Sergeant Crafford and Chupa took him by car to an isolated place in the veld where he was told to take off all his clothes. A rubber tube was then placed over his face and an electric current was applied to

various parts of his body. While he was being thus tortured Chupa read to him from a statement which he said accused No 1 had made to him and he was asked to admit the contents of this statement. He eventually agreed to do so. Chupa then told him that he would be taken to Brixton Police Station where he had to make a statement in accordance with what Chupa had read to him. He was then allowed to put on his clothes. At that moment he heard the noise of a helicopter flying overhead whereupon Crafford started firing at it. He was thereafter first taken to the Centre and then to the Brixton Police Station where he made the statement to Johnstone. The latter asked him whether he had sustained any injuries and he told him that he had been shocked with an electrical wire. Johnstone nevertheless did not ask him to undress. Afterwards he was taken back to the cells at Protea Police Station where he complained that he was feeling dizzy. The next day he

was again assaulted by Crafford and Chupa who wanted to know where a man by the name of Solly could be found. According to the uncontested police evidence Solly was not, however, involved in this case.

Accused No 2's evidence was contradicted by Johnstone who testified that when he asked accused No 2 whether he had sustained any injuries the latter replied in the negative. Johnstone said that he asked accused No 2 to take off all his clothes and that he then made the following note "Verklaarder versoek om klere uit te trek. Merk verskeie operasiemerke en ou geneesde wonde oor die hele liggaam op". Johnstone's evidence was confirmed by that of the interpreter, Henry Ndlovu.

Crafford, Chupa and Radley were called as witnesses by the state and they all denied that accused No 2 had in any way been assaulted or threatened or that he had been told what to say in his

statement. In particular they denied that he was ever taken out to the veld and in this regard Radley testified that he had never even seen accused No 2 before and that he was not in any way involved in the investigation of this case.

The trial Judge rejected the evidence of accused No 2 and accepted that of the police witnesses. He found accused No 2 an unimpressive and lying witness and certain aspects of his evidence highly improbable. As the learned Judge correctly points out it is extraordinary for a person who professes to know nothing about an incident to remember such a detailed statement as the one he made to Johnstone. Furthermore, there are details in his statement which are consistent with other undisputed evidence of what happened at the Centre and which do not appear in accused No l's statement and of Chupa could not have known. Accused No 2's evidence that he knew nothing about the incident other than what

Chupa read to him from accused No l's statement is therefore most unlikely. So, for example, accused Nr 2 says in his statement that when they drove to the Centre Makhubela was armed with a 9mm firearm. The Court a quo found that accused No 1 was unaware of this fact and on this basis accused No 1 was acquitted on the murder charge. Accused No 2 also says in his statement that he shot the deceased in the head with Makhubela's firearm, a fact which accused No 1 was unaware of.

Counsel for accused No 2 criticised the learned trial Judge for saying in his judgment on the admissibility of accused No 2's statement that all the policemen mentioned by accused No 2 were called as witnesses. He pointed out that Szente who accused No 2 said saw him in the car when he was taken to the Centre after the assault in the veld on 1 February 1993 was not called to testify at the trial-within-a-trial. In the first place the learned trial Judge

clearly did not intend to refer to every policeman mentioned by accused No 2 but only those policeman who were present during the alleged assaults and threats. It was not alleged that Szente was ever present when accused No 2 was being assaulted or threatened. Secondly Szente had already said in his evidence at the trial that he never saw accused No 2 in a car at the Centre.

Counsel for accused No 2 further criticised the state for not calling the policeman to whom accused No 2 complained of dizziness. Accused No 2, however, never said that he told this policeman that the dizziness was caused by any assault. It is thus not clear what relevant evidence this policeman could have given. The same applies to Captain Kruger, who arranged with Johnstone to take the statement.

Counsel for accused No 2 next submitted that the probabilities favoured accused No 2's version of how he came to make the

statement to Johnstone. He submitted that if accused No 2 was as co-operative as Crafford said he was when he questioned him on the morning of 1 February 1993, Crafford would have taken a statement from him there and then. Crafford was, however, the investigating officer and it is well established that statements should not be taken by anyone connected with the investigation (S v Mofokeng 1968 (4) SA 852 (W) at 858 H). It was further submitted that it was highly improbable that Crafford would have made arrangements for accused No 2 to be taken to Johnstone without knowing what accused No 2 would say in the statement. I can find nothing improbable in that. On the contrary, it was Crafford's duty to arrange for the statement to be taken once accused No 2 had expressed the wish to make a statement.

The evidence of Johnstone, Crafford and Chupa was criticised in a number of other respects which I regard as of minor

or no importance and which I find unnecessary to set out in detail.

It is sufficient to say that these points of criticism do not in any

way affect their reliability as witnesses. On the whole I am not

persuaded that the learned trial Judge erred when he ruled accused

No 2's statement to Johnstone as admissible evidence. The

relevant portion of the statement reads as follows :

> "Op Maandag die 17 laaste jaar Desember dit myself Kst Makubela Daniel Shabalala dit was ons drie. Kst Simon Makubela het gesê dat ons by sy werkplek moet gaan om wapens daar te gaan vat. Ons het van die ding die hele week gepraat voor die 17de. Op die 17de het ons daar gegaan, ons het met 'n Mazda GLX nee SLX geel van kleur na die plek gery. Dit was die voertuig van Daniel Shabalala se ma. Toe ons daarnatoe ry Makubela het 'n vuurwapen gehad. Ons het gery tot by U.B.C. dit is naby Jabulani Polisiestasie. Daniel Shabalala was die bestuurder van die voertuig. As ons daar kom Makubela het gesê ons moet die voertuig parkeer naby die huise nie naby die kantore nie. Na ons die voertuig geparkeer het, het ek en Makubela uitgeklim en geloop tot by die kantore. Makubela het gesê ek moet naby die boom staan. Makubela het vir my die vuurwapen gegee dit was 'n

9mm. Makubela het toe gesê ek moet horn volg. Makubela het gese dat hy eers met die polisieman by die hek sal gesels en terwyl hy met die man gesels moet ek horn twee keer op sy kop skiet. Toe Makubela met die polisieman praat het ek twee skote op die polisieman geskiet en hy het op die grond geval. Makubela het toe vir my gesê ek moet vir Daniel gaan roep waar hy by die voertuig gewag het. Ek het vir Daniel met die hand gewys hy moet kom. (Verklaarder wys met sy linkerhand soos wat 'n persoon vir iemand wink om nader te kom.) Daniel het toe met die voertuig na ons toe gekom. Makubela het by die kantoor by die hek ingegaan en uitgekom met sleutels.

Ons het almal in die voertuig geklim en om die gebou gery en agter gestop.

Makubela het die kantoor met die sleutel oopgemaak en ingestap. Makubela het ons toe geroep waar ek en Daniel by die voertuig gewag het. Ons het by die kantoor ingegaan en ek het gesien dat daar 'n kluis is wat oop is. Binne was daar agtien haelgewere en twee pistole. Ons het die wapens gevat en dit in die toot' van die voertuig gesit. Ons het toe weggery. Ons het eers by Daniel se huis gery en die wapens daar gebêre. Ons het 2 haelgewere en een pistool verkoop by die hostel. Ons het Rl 400 gekry vir die wapens. Die polisie het die ander wapens gekry."

The statement contains an unequivocal admission of guilt on the murder and robbery charges. When he came to give evidence on the merits at the trial, however, accused No 2 raised an alibi and said that on the day of the commission of the crimes he was at 237C Kwa Mashu near Durban visiting a friend, Sikhumbuzo Dube. He had been there since 5 December 1992 and only returned to Johannesburg on 28 January 1993. He said that he knew nothing about the charges against him. At the end of his evidence his counsel applied for, and was granted a postponement in order to call Dube as a witness. When the hearing resumed his counsel informed the Court that he had consulted with Dube and had decided not to call him. The State was then granted leave to re-open its case and the prosecutor called Dube's mother, Dumisela Eve Montklazi, who said that accused Nr 2 was not at her house at 237C Kwa Mashu during December 1992 but that he only

arrived there on 3 January 1993. The trial Court accepted her evidence and rejected accused No 2's alibi as false. It was not contended before us that the trial Court erred in doing so.

The trial Court found Ngemane an impressive and reliable witness and accepted her evidence that accused No 2 came to the room where she and accused No 1 were sleeping early on the morning in question and that he requested accused No 1 to convey him and Makhubela to the Centre. It also accepted her evidence that accused No 2 later arrived at the room with the stolen firearms. The trial Court furthermore, after warning itself against the dangers inherent in the evidence of a co-perpetrator, accepted the evidence of accused No 1 insofar as it implicated accused No 2 in the commission of the crimes charged under counts 2, 3 and 4.

Counsel for accused No 2 submitted that the trial Court failed to evaluate Ngemane's evidence properly. In this regard a number

of what he called contradictions, inconsistencies and improbabilities in her evidence were relied upon. It is not necessary to refer to any of the points of criticism in detail as they are all without substance. It was submitted that there was a conspiracy between Ngemane and accused No 1 to falsely implicate accused No 2. Accused No 2 in his evidence could furnish no reason why they should conspire to incriminate him and I have been unable to find any. I am accordingly unpersuaded that the trial Court erred in accepting Ngemane's evidence.

Ngemane's evidence affords strong corroboration for the evidence of accused No 1 insofar as it implicates accused No 2 and in my view the Court a quo was fully justified in regarding it as such and accepting accused No l's evidence where it implicates accused No 2.

For these reasons I have come to the conclusion that accused

No 2 was correctly convicted on all counts and that he was correctly found to have shot the deceased with dolus directus.

I turn to deal with accused No l's appeal against sentence on counts 2, 3 and 4. The Court a quo accepted his evidence that when accused No 2 and Makhubela arrived at his room on the fateful morning he was merely asked to convey the other two men to the Centre to collect Makhubela's belongings. It also accepted his evidence that he was unaware of the fact that Makhubela was armed. The trial Court's ultimate finding that accused No 1 was one of the three conspirators who had preplanned the robbery was therefore, in my view, not justified on the evidence. This is a clear misdirection and this Court will accordingly have to pass sentence afresh in respect of the robbery charge. Accused No l's relevant personal circumstances are that he has passed matric; he is a first offender and he was 28 years old at the time when the

crimes were committed. He assisted the police in locating 16 of the 18 stolen shotguns and he has shown remorse.

The extreme seriousness of the robbery in the present case can hardly be over-emphasised. As the learned trial Judge correctly pointed out in his judgment on sentence, the shooting and killing of innocent persons in this country with unlawfully owned weapons has become an everyday occurrence. In such circumstances the interests of society come to the fore. Even accepting that accused No 1 only became aware of the intention of the other two men when they were at the scene of the crime, the fact remains that he thereafter fully participated in the commission of the crime by helping the others to remove the firearms in his car and to hide and dispose of it. In doing so he played a vital role in the commission of the robbery. In my view justice will be done if a sentence of 15 years' imprisonment is imposed in respect of the

robbery.

With regard to the sentences on counts 3 and 4 there is, in my view, no basis upon which this Court can interfere with the sentences imposed by the learned trial Judge. There is no misdirection and considering the quantity and nature of the weapons and ammunition involved, it cannot be said that the sentences are so heavy as would justify interference by this Court.

That brings me to the sentences of death imposed upon accused No 2 on the murder and robbery charges. The sentences were imposed and the trial was completed before the Constitution of the Republic of South Africa Act 200 of 1993 came into force. The Constitutional Court has since held in S v Makwanyane and Another 1995 (3) SA 391 (CC) at 453 A-D that from the date of the order in that case the death sentence is not a competent sentence and that the execution of death sentences already imposed would be

unconstitutional. Accused No 2's death sentences must accordingly be set aside and replaced with other sentences. In my view this is a proper case for the matter to be remitted to the Court a quo in order that sentences on accused No 2 be imposed afresh on counts 1 and 2.

The following order is made :

1. Accused No l's appeal against the sentence on count 2 is upheld. The sentence of 20 years' imprisonment is set aside and a sentence of 15 years' imprisonment is imposed instead.

2. Accused No l's appeal against his sentences on counts 3 and 4 is dismissed.

3. Accused No 2's appeal against his convictions on counts 1 and 2 is dismissed.

4. Accused No 2's appeal against the sentences of death on counts 1 and 2 is upheld and the sentences of death are set

aside. 5. The matter is remitted to the Court a quo for the imposition of competent sentences upon accused No 2 in respect of counts 1 and 2.

W. VIVIER JA.

F H GROSSKOPF JA)

OLIVIER JA) Concurred.