THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER 459/97

In the matter between:

Sandile Gqabi Appellant

and

The State Respondent

CORAM: **Smalberger, Schutz, JJA et**
Madlanga AJA

Date of Hearing: 11 May 1999
Date of Judgment: 18 May 1999

JUDGMENT

MADLANGA AJA:

BACKGROUND

[1] The appellant and eleven co-accused appeared before van Rensburg J and two assessors in the Eastern Cape Division of the High Court charged with three counts of murder, one count of attempted murder and one count of arson. On

16 August 1996 the appellant was convicted on all five counts, the court finding that in respect of the murder and attempted murder counts *mens rea* was in the form of *dolus eventualis*. All his co-accused were acquitted on all the counts. The murder counts were treated as one for purposes of sentence and in respect thereof the appellant was sentenced to twenty years imprisonment. On the attempted murder and arson counts he was sentenced to eight years and five years imprisonment respectively. It was ordered that the latter two sentences run concurrently with the sentence imposed in respect of the murder counts.

[2] van Rensburg J granted the appellant leave to appeal to this court against his conviction on all the counts.

[3] On 5 November 1994 at about midnight a group of men attacked premises situate at 144B Vellem Street, Joza, Grahamstown ("144B"). At these premises there was a main house and, at the back, a detached outbuilding and a toilet. The outbuilding consisted of three rooms. Initially the object of the attack was the outbuilding. Some of the attackers climbed onto the roof of the outbuilding, removed a corrugated iron sheet, poured petrol into the outbuilding through the opening in the roof and then set the outbuilding alight. All the while, those of the attackers who had remained on the ground were pelting the outbuilding with stones. Inside the outbuilding there were six men, amongst whom were Fikile Booi and Tandile Anthony Manyati. Once the outbuilding was ablaze, the six men ran out and hurriedly entered the main house through a broken window. The attackers immediately directed their attack at the main house. They threw stones at it and set it alight, again using petrol. Of the six men who had come from the outbuilding and other people who had been sleeping in the main house, a great many ran away and escaped the fire. Not so fortunate were Akhona Ngeju, a three year old boy and Tandile Anthony Manyati, a twenty-five year old man. These two were incinerated in the house and they are the deceased in the second and third murder counts respectively. The deceased in the first murder count, Fikile Booi, managed to escape from the burning house but died a few days later as a result of burns sustained in the fire. Four of the men who had been in the outbuilding when the attack started survived. The attempted murder count relates to them.

[4] The events set out above were not disputed at the trial. The main issue was the identity of the persons who launched the attack. Insofar as the appellant is concerned, that continues to be an issue before this court. A further issue is whether the appellant acted in concert with the group of attackers - whether common purpose was established. I proceed to deal with these two

issues.

IDENTIFICATION

(a) The evidence

[5] A number of persons witnessed the attack at 144B. However, the trial court relied on the evidence of only two of these eyewitnesses, Nonkululeko Eunice Ngeju ("Nonkululeko") and Luyanda Ntamo ("Luyanda"). Its judgment sufficiently and correctly sets out the reasons for rejecting the evidence of the remaining witnesses and of this I need say no more. In setting out the evidence of Nonkululeko and Luyanda, I shall deal only with the instances involving their identification of the appellant.

[6] Whilst sleeping in a bedroom of the main house at 144B, Nonkululeko was awakened by the noise of an impact on the bedroom window. The window broke. She rushed to the sitting room. Through its window she saw people entering the premises. Though saying that she did not see these people clearly, she claims that they were the appellant, accused 6 to 9, accused 11 and other persons who were not charged. At a later stage she went back to the bedroom where she had been sleeping. The window of this bedroom is at the back and thus faced the outbuilding. Nonkululeko peeped through this window. She saw (clearly this time) accused 2 and 3 on the roof of the outbuilding. The appellant, accused 4 to 10 and a certain Boyboy (not one of the accused) were on the ground throwing stones at the outbuilding. Nonkululeko also testified that she had known the appellant for a long time prior to the attack ("**van lankal af**"). She used to visit a certain house in the vicinity of the appellant's home and on such occasions she would see the appellant at his home.

[7] Luyanda was amongst the six men who were in the outbuilding. Whilst they were there, an object struck the door, which flew open. Just outside the outbuilding he saw a group of people. Others were in a dirt road nearby (Vellem Street being a tarred street). One of the six shut the door. Luyanda, using an inside door, went to an adjoining room. He peeped through a hole in the door leading outside and saw that the appellant was amongst the people in

front of the outbuilding. These people were pelting the outbuilding with stones. After escaping into the main house, he hid behind a wardrobe. While hiding there he could see outside through a window. His evidence is not clear as to which window this was. Through it he saw the appellant moving about. After he had eventually got out of the main house, the police called him to their van. They asked him to identify a person inside the van. They shone a torch on his face. Luyanda identified him as one of the attackers. That person was the appellant. Luyanda and the appellant were acquaintances and shared two mutual friends, Nqoyi and Zola. Luyanda had a girlfriend, Nqabisa, whose home was in the same passageway (**"***gang***"**) as the appellant's home. As at the date of the attack, he had known the appellant for two years. During that period he used to see the appellant fairly regularly.

[8] Constable Tamboer, a detective ("Tamboer"), testified that at about 1h20 on 6 November 1994 he and Detective Sergeant de Jongh ("de Jongh") received a telephonic report concerning the incident at 144B. They drove there, de Jongh being the driver. According to de Jongh, whose evidence is dealt with later, they drove in a sedan. As they approached the scene, they travelled from east to west in Vellem Street. Before the motor vehicle stopped, Tamboer saw a man on the roof of an outbuilding of the premises adjacent to 144B. From the roof, the man jumped over a fence and landed in the yard of adjoining premises (i.e. two premises to the east of 144B). The man immediately ran away in an easterly direction within the premises alongside Vellem Street. As their motor vehicle was coming to a standstill, Tamboer got out and gave chase, running in Vellem Street parallel to the man he was pursuing. Just before the corner of Vellem Street and a dirt road, the man disappeared behind a house. When Tamboer reached the corner of the two streets, he saw the man jump over the wall of the second house from the corner (down the dirt road) into the yard. From the time the man disappeared behind the house to the time Tamboer saw him again only about four seconds had elapsed. The man disappeared behind the wall. Tamboer went down the dirt road and looked inside the yard but did not see him. On continuing his search, and next to this yard, he found the man lying on his stomach between a wall and a motor vehicle. From the time the man jumped over the wall to the time he was found about one to two minutes

had elapsed. This man was the appellant. Tamboer testified that although he could not recall what the appellant's attire was, the attire of the man he had seen jump from the roof and that of the man he found between the wall and the motor vehicle was the same. He arrested the appellant. At that stage de Jongh joined him. On taking the appellant back to 144B, they found that a number of other police vehicles and firemen had arrived. They placed the appellant in the back of a police van. He was the only person in that van. In fact, he was the only person arrested at the scene. On the way back to the charge office their sedan and the van in which the appellant was followed each other. Tamboer next saw the appellant when he was called to testify at the trial. A somewhat strange feature of Tamboer's evidence is that when he and de Jongh arrived back at the charge office, he went straight to the detectives' offices and did not enter the charge office to see to the booking in and locking up of the appellant. This should be contrasted with what appears in the summary of the evidence of de Jongh and Sergeant Kiti ("Kiti").

[9] de Jongh testified that on arrival at 144B he saw a man jump over a fence of a neighbouring yard. He also saw six to eight people run out of the yard of 144B. About two other people who were already in the street when he first saw them also ran away. As he was stopping the motor vehicle, Tamboer jumped out and ran down Vellem Street in the direction whence they had come. According to standing police instructions, police partners are supposed to "stick with" each other and provide each other with backup. For that reason, as soon as de Jongh had stopped the motor vehicle, he followed Tamboer at a distance of about ten to fifteen metres. At that stage he could only see Tamboer. He did not know what had become of the man who had jumped over the fence. After they had turned into the dirt road, he saw Tamboer look inside certain premises surrounded by a brick wall. Tamboer quickly came out and went around a motor vehicle which was parked in the driveway of these premises and pulled the appellant from the ground.

[10] As will appear later, it is necessary to describe these premises. Photograph 8 of Exhibit "B", an aerial photograph, fairly depicts these premises. The one side of the brick wall extends in a straight line right from the wall of the house itself towards the dirt road. The wall then forms a 90° turn so that it stands in front of the house. About halfway down the length of what appears to be a very big house (it may be two houses which are not

detached but nothing turns on this) the wall again turns at 90° and stretches towards, and makes contact with, the house. There is thus an enclosed yard infront of this first portion of the house. The remaining half of the big house (if not the second house) extends parallel to the last-mentioned portion of the wall towards the dirt road, so that there is a passage between this part of the house and that portion of the wall. This passage extends from very close to the dirt road right up to the house itself. It is this passage which has been referred to as a driveway. The clear impression created by this scene is that if the front door/s of the house/s was/were locked (which must have been the case at that time of the night), the only way anybody who found himself in the enclosed front yard or in the driveway could have left the premises was by going onto the road in front. According to Tamboer's evidence, the man he saw jump over the wall would have landed in the enclosed yard. The significance of this is dealt with later.

[11] de Jongh further testified that they arrested the appellant and took him to 144B where they placed him in the back of a police van which, together with other police vehicles and fire engines, had since arrived. At the scene he met and spoke to Luyanda who claimed to have witnessed the attack. He took Luyanda to the back of the van and shone a torch in the appellant's face. Luyanda confirmed that the appellant was one of the attackers. Much later they left for the charge office where de Jongh instructed Tamboer (who complied) to attend to the booking in and locking up of the appellant whilst he (de Jongh) remained in the charge office attending to other duties. His evidence also confirms that only one person was arrested that night. Other suspects were only arrested a few days thereafter. Under cross-examination he said that he could not tell whether the man he saw jump over a fence was the appellant. He also said that he never saw anybody on top of a roof.

[12] During the night of 5 and 6 November 1994 Kiti was in charge of the police cells at the police station which is at Beaufort Street, Grahamstown. He personally made an entry in the occurrence book concerning the arrest and locking up of the appellant. He confirmed that it was Tamboer who had the appellant locked up and who signed for the entry made by him. The entry makes specific mention of the appellant's name. It was the appellant himself who gave his name to Kiti.

[13] The appellant's version was that he was coming from his sister's home very late at night. He saw smoke and heard motor vehicles making a noise - under cross-examination he seemed to accept that the noise was that of sirens. He decided to go to the place where the smoke was, which was at 144B. On arrival there he stood on the pavement opposite 144B. After a very short while he departed homeward bound. Whilst walking on a dirt road which is some

distance from the one Tamboer and de Jongh claim to have arrested him beside (in fact in roughly the opposite direction), a police van approached him from behind. It stopped and police got out, walked up to him and arrested him. None of these police was either Tamboer or de Jongh. In fact, he never saw Tamboer and de Jongh at all that night. When cross-examining Kiti, he went so far as to suggest that the person brought to the charge office by Tamboer and who gave his name as Sandile Gqabi (the appellant's name) must have been somebody else. He was taken back to 144B. Whilst the police van was parked there, a light was shone in his face. The light blinded him and he could not tell who it was. All he heard was "*kumshaing*" (the speaking of a European language or a derivative thereof which in this case could either have been English or Afrikaans) and he did not understand what was said.

(b) Evaluation of the evidence

[14] Nonkululeko's evidence is open to some criticism. The trial court held an inspection *in loco* at 144B between 19h15 and 20h00 on 8 November 1995. Amongst others, the findings were:

> "1. Lighting:
>
> (a) The external lighting in the area is furnished by three high-masts each with a battery of lights affixed thereto;
>
> (b) None of the masts is close to the premises at 144B Joza;
>
> (c) At the back of the main house where the outbuilding, which was burnt down on the night in question, was situated, the lighting cannot be described as good;
>
> (d) The outbuilding which was burnt down has not been rebuilt and the area where the outbuilding was situated is now simply a flat piece of ground;
>
> (e) A large portion of the area at the rear of the main house where the outbuilding was situated and between where the outbuilding was situated and the rear wall of the main house was covered in shadow;
>
> (f) The shadow was cast by the main house and the outside toilets standing at the rear of the main house;
>
> (g) On observation it was possible to identify a person some

four metres away while standing immediately outside the window of the bedroom at the rear of the main house if he was known to you, but even then it required fairly close scrutiny;

(h) From our observations a witness would have experienced difficulty in identifying someone who was not known to him from the said distance of four metres;

(i) It would appear that in all probability the outbuilding which was burnt down would have cast further shadow in the four metre area between the rear of the main house and the outbuilding;

(j) Visibility in the area in front of the main house at 144B Joza was markedly better.

2. The distance from the wall of the building on the roof of which constable Tamboer said he saw a person standing and the fence over which the person jumped directly from the roof is approximately 90 centimetres."

From the aforegoing it is clear that between the bedroom window through which Nonkululeko peeped and the outbuilding the lighting and visibility were not good. This is the area where Nonkululeko claims to have seen the appellant. Secondly, as the appellant was throwing stones at the outbuilding, he had his back to Nonkululeko, this minimising chances of proper observation. The only times Nonkululeko could have seen the appellant's face (or at the very least the side of his face) were when, according to Nonkululeko, the appellant was standing at an angle in relation to the bedroom window. A suggestion by Nonkululeko that at some stage the appellant faced her squarely and that she then had a good view of his face seems to be an afterthought and I shall say no more of it. Thirdly, the scene was a moving one. She said, "... *hulle het hier op en af beweeg.*" Later on she added, "*Nee dit was net 'n deurmekaarspul***.**" Fourthly, she was frightened. To a degree, all of these militate against proper identification.

[15] Save for the fact that as Luyanda was peeping through the hole in the door of the outbuilding the appellant was facing him (as opposed to giving his back to him), Luyanda's evidence may be criticised on similar grounds to

Nonkululeko's. Indeed, the trial court did level criticism at the evidence of these two witnesses. The trial court was quite alive to the inherent dangers attendant upon their testimony. In addition to the criticism raised above the trial court considered a few more grounds for criticism which in its view added to the necessity for circumspection. I need not discuss these other factors any further. Suffice it to say that because of the cumulative effect of all these factors, the trial court, quite correctly in my view, treated the evidence of Nonkululeko and Luyanda with extreme caution. The court went so far as to suggest that in all likelihood a verdict of guilty could not have been returned had it not been for the evidence of the police witnesses. It is, therefore, necessary to consider to what extent the evidence of the police assists the State case.

[16] The evidence of de Jongh clearly suggests that the attack was not yet over when he and Tamboer arrived at the scene. This is deduced from the fact that about six or eight people and about two others ran away from the yard of 144B and the street respectively as soon as the two policemen arrived. These people must have been part of the group that was launching the attack. It would be fanciful to suggest that those people were either onlookers or people who had either come to offer assistance or were there for any other lawful purpose. The fact of running away discounts any such possibility. Further, the fact that **all** ten or so of the people ran away once the police arrived dispels any possible suggestion that some people may have run away from the police for any number of reasons, even if not guilty of any wrongdoing. It is worth noting that at the same time Tamboer saw one person jump from the roof and also run away.

[17] The evidence has revealed that in the vicinity where de Jongh witnessed the act of jumping over a fence Tamboer saw a man jump from a roof and over the same fence as that referred to by de Jongh. The attack at 144B was characterised by the throwing of stones and the climbing onto the roofs of both the outbuilding and the main house. The record of the trial court's

observations at the inspection **in loco** which has already been referred to also indicates that the roof of the main house at 144B was so close to the roof of the adjoining house at 145B which, in turn, was so close to the roof of the outbuilding at 145B, that a person could have walked from one roof to the next with ease. That being so, and as the attack was still on when Tamboer and de Jongh arrived at the scene, the inference is inescapable that the man who jumped from the roof over a fence was one of the attackers. This is fortified by the fact that he escaped from the scene at the same time as the other ten or so people already mentioned. That he was on top of a roof at 145B and not at 144B is no answer to this conclusion because, as already indicated above, 144B was quite close by and movement from roof to roof in the course of the attack presented no difficulty. In my view, the suggestion by Mr *Glover* who appeared for the appellant that an innocent bystander could have decided to climb the roof of the outbuilding at 145B so as to have a good view of what was happening is so fanciful as to require no further comment.

[18] Mr *Glover*, in an attempt to distance the appellant from the man who had jumped from the roof, submitted that the man de Jongh saw jump over the fence was not the same as the one Tamboer saw jump from the roof. Inexplicably (but fortunately I do not have to delve into this), he preferred the possibility that the appellant jumped from ground level over the fence and that he was the man seen by de Jongh. He submitted that his running away and hiding did not necessarily translate to guilt and that if it was the appellant who was fleeing, he could have been fearful of the police purely because of his long criminal record. The suggestion that **two** men jumped over the fence flies in the face of the available and credible evidence. Tamboer, not being the driver, had an opportunity to look and did look as the man jumped over the fence. He did not see another man jump over that same fence from ground level. de Jongh, being the driver and still having to bring the motor vehicle to a standstill, did not have as good an opportunity to observe what was going on. Indeed, he was frank enough to say that he did not even see what the man next did after he had jumped over the fence. Even when he followed Tamboer down Vellem Street, the man was nowhere in sight. In my view, only one man jumped over the fence and he jumped from the roof. de Jongh's evidence can be explained on the basis that he must have seen the man when he was already in the air and in the process of jumping.

[19] In paragraph [17] above it has already been concluded that the man who jumped from the roof was one of the attackers. It must next be considered whether that man was the appellant. The man from the roof disappeared from Tamboer's view for the first time when he ran behind a house at the corner of Vellem Street and the dirt road. This disappearance lasted only about four seconds. The man disappeared again when he jumped over the wall of the premises described in paragraph [10] above. This disappearance lasted no more than one to two minutes. The position in which Tamboer found the

appellant suggests that he was hiding. As appears from the description given above, short of getting inside the house (which, because of the hour, seems unlikely unless the person was not only known but was also welcome), there was no route of escape once the man jumped into the enclosed yard. The only way out was the dirt road by which the police were approaching. The man was thus cornered. Attempting to hide between the wall and the motor vehicle was the man's failed and last resort. According to Tamboer, the clothing of the man who jumped from the roof and that of the man he arrested was the same. The cumulative effect of all these factors leads to the conclusion that the man who jumped from the roof and the appellant are one and the same person. To conclude this part of the debate, I must mention that Mr *Glover* accepted that the appellant was untruthful about where, and by whom, he was arrested. He thus accepted that he was the man arrested by Tamboer in the presence of de Jongh. This concession, in my view, was correctly made. It thus becomes unnecessary to deal with what I referred to as a strange feature in Tamboer's evidence, and that is the question of who it is that booked the appellant in at the charge office. If there had been some semblance of truth in the appellant's version, it would have been necessary to deal with this aspect of Tamboer's evidence to establish a clear contemporaneous chain of events culminating in the appellant being locked up in the cells so as to discount any possibility that the appellant was arrested elsewhere and by other police officers. Suffice it to say that this strange feature of Tamboer's evidence may be explained by a lapse in memory occasioned by the long time lapse (about two years) from the time of the appellant's arrest to the time Tamboer testified in court. I did not understand Mr *Glover* to be questioning the credibility of Tamboer and de Jongh.

[20] Regard being had to the fact that all that the trial court found is that there was a risk that Nonkululeko and Luyanda were mistaken in their identification of the appellant (and not that they were mendacious or dishonest), such risk is eliminated by the cogent corroborative evidence of Tamboer and de Jongh. The evidence against the appellant thus amounted to so strong a case that in the absence of a reasonably possibly true explanation his guilt had to follow. Is there a reasonably possibly true explanation?

[21] With the aid of aerial photographs the appellant mapped out where he was coming from and where he was when he first saw the smoke at 144B. Even though no measurements were given, it seems that this was quite a long way off. Appellant also indicated where his home was. In moving from

where he first noticed the smoke towards 144B he was going away from his home. To go all that way, leaving his home behind in the dead of night, he must have been extremely curious and intent on seeing what was going on at 144B. Strangely enough, he testified that on arrival at the scene, he stood for a short while and left. When cross-examined on his observations at the scene he was very evasive. He said that on arrival he observed that there were motor vehicles. When asked whether any of these were police vehicles or fire engines, he said that, because he did not stay for long, he could not tell. Further, in answer to the question as to what he found going on at the scene, he said that he did not know and that the reason for this was again the fact of departure soon after arrival. It eventually became clear that in essence at the scene the appellant took particular note of only the smoke and fire, something very strange for somebody who had come a long way apparently intent on looking on. Without going any further, the appellant's version was correctly rejected. The submission by Mr *Glover* that lies do not necessarily translate to guilt is misplaced. As indicated above, a strong case which can only be displaced by a reasonably possibly true explanation exists without any reliance on the appellant's untruthful testimony. In no way does this approach offend against the principle set out in **S v Mtsweni** 1985 (1) SA 590 (A).

COMMON PURPOSE

[22] If I understood Mr *Glover* correctly, his submission under this point related to whether the appellant was shown to have been associated with the attackers. A short answer to this is that this enquiry is sufficiently dealt with in paragraphs [16] to [19] above. That the appellant only ran away from the scene at the tail end of the events, and only because of the arrival of the police, sufficiently demonstrates his association with the acts of the group that launched the attack. Therefore, in the absence of evidence tending to show that he ever dissociated himself from the group which launched the attack in a manner

which recklessly disregarded the **real** possibility of the death of people who were in the outbuilding and the main house, he, in my view, is guilty of murder and attempted murder. He is also guilty of arson. The group of attackers went to 144B with the obvious intention of attacking in the manner already described. That they were recklessly careless as to whether the death of people in the premises ensued sufficiently demonstrates *dolus eventualis*.

[23] This appeal is not only purely factual but, as appears from the aforegoing debate, the factual issues raised in it are by no means complex or of such importance as to warrant the attention of this court. Accordingly, van Rensburg J should not have granted leave to this court without any indication as to why such leave was not granted to the full court of the Eastern Cape Division. In its present form the wording of section 315(2)(a) of the Criminal Procedure Act 51 of 1977 clearly **enjoins** a trial judge to first be satisfied that the questions of law and of fact and other considerations involved in the appeal are of such a nature that the appeal requires the attention of this court before he/she can grant leave to this court. If he/she is not so satisfied, it is obligatory that leave be granted to the full court of the division concerned. The absence of reasons on this issue makes it difficult to understand why leave was granted to this court. Trial judges should always be wary not to unnecessarily burden the roll of this court with appeals that may be adequately disposed of by the full court of the division concerned (cf **S v Myaka** 1993 (2) SACR 660 (A)).

[24] The appeal is dismissed.

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M R MADLANGA
ACTING JUDGE OF APPEAL

SMALBERGER JA)
SCHUTZ JA) CONCUR