Case No 6/93

E du Plooy

IN THE SUPREME COURT OP SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PETER MOREKI SHABALALA Appellant

and

THE STATE Respondent

Coram: SMALBERGER, VAN DEN HEEVER JJA et HOWIE AJA

Heard:	Delivered:
9 November 1993	19 November 1993.

J U D G M E N T

HOWIE AJA:

On the morning of 22 January 1991 and in Mpumalanga Township, Hammarsdale, intruders entered the house where 20 year old Gugu Mkhize lived. They robbed, kidnapped and later murdered her. One of them also murdered her infant daughter. For convenience I shall distinguish the two victims by calling one "the deceased" and the other "the child".

In consequence of those events appellant and another man (accused no 2) were convicted in the Natal Provincial Division (Page J and assessors) of the murder of the deceased (count 1), housebreaking with intent to rob and robbery (count 3) and kidnapping (count 4). Appellant was also convicted of the child's murder (count 2).

Appellant was sentenced to death in respect of both murders. Accused no 2 was sent to prison for 20

years on count 1. They received identical gaol sentences

on counts 3 and 4.

The appeal is brought in terms of s 316A of the Criminal Procedure Act (51 of 1977) in so far as appellant's convictions and sentences on the murder charges are concerned, and with the leave of the trial Judge (sought and granted the day before the appeal) as regards the other convictions.

The prosecution case rested on the evidence of an accomplice, Phumlani Duma; explanations given by appellant while pointing out the scenes of the respective crimes to a Lieutenant Mkhwanazi on 24 January 1991; and the evidence of Joyce Nkosi, who denied appellant's allegation (when pleading not guilty both in the magistrate's court under s 119 of the Act and also at the trial) that he was at her house on the evening of 22 January. Appellant gave evidence denying his involvement in any of the crimes. He said that prior to going to Joyce's he was at home the entire day.

The Court below analysed the relevant evidence with exemplary thoroughness and care before concluding that Duma, Lieutenant Mkhwanazi and Joyce Nkosi were to be believed.

Counsel for appellant, who also defended him at the trial, contended that despite the Court's comprehensive treatment of the evidence and the issues it had nonetheless erred in making the findings it did.

In elaborating upon this submission, counsel criticised Duma for not reporting the offences to the police as soon as they confronted him, for adding detail to his evidence which was absent from the account which he gave when pleading in the s 119 proceedings, and for professing to have been unaware that the deceased was being killed by his two companions. For these reasons, said counsel, Duma should have been disbelieved.

As regards the pointing-out and the accompanying statements, it was accepted by counsel that appellant did do and say what Lieutenant Mkhwanazi

recounted in evidence but it was submitted that grounds existed for the conclusion that these disclosures were unfairly and irregularly obtained. Accordingly, the officer's evidence had been wrongly admitted.

As an alternative to this last submission it was argued that it was reasonably possible, on an acceptance of the truth of appellant's partly exculpatory utterances to the lieutenant, that even if present when the murders were committed, he took no part in them.

In so far as appellant's evidence is concerned however, counsel conceded that appellant was justifiably found by the trial Court to have given untrue evidence on virtually every aspect of the case. That concession, which was responsibly and rightly made, in my view, necessarily constituted a most substantial obstacle to appellant's success on the convictions at the very outset.

As a preface to discussion of the argument for appellant it is appropriate to mention the salient State evidence.

The robbery and the disappearance of the deceased and the child were reported to her brother, Malusi Mkhize, before noon on the fatal day. He and others instituted a search. Between 1 and 2 pm accused no 2 approached one Mbatha, who lived in the vicinity, for the loan of some rope. Mbatha had none and the accused left.

During the afternoon the body of the deceased was found suspended by a piece of wire from a beam in a deserted house in the township. The cause of her death was asphyxiation due to hanging. The rude scaffold employed by her killers had consisted of a bench on which two soil-filled tins had been placed, one on top of the other. In another room her child was found with its head in a container of water and the same bench placed on top

the body to maintain immersion. The cause of that

death was also asphyxia.

Later in the day Malusi Mkhize came across Mbatha who mentioned accused no 2' s request for a rope. This led the searchers, who by then included the police, to accused no 2. On apprehension he, in turn, disclosed the names of appellant and Duma. As a result Duma was arrested that evening and made a statement to the police the following day.

During the morning of 23 January appellant was arrested and in the afternoon he was interviewed by the investigating officer, Detective Sergeant Mkhwanazi, who took a statement from him. Appellant later declined to make a statement to a magistrate but agreed to show the police certain places. The pointing out to Lieutenant Mkhwanazi occurred the next day.

The s 119 proceedings were held in May 1991. Appellant, accused no 2 and Duma were before the Court. As already mentioned, appellant pleaded not guilty and

claimed to have been at Joyce Nkosi's house on the day of the killings. Duma also pleaded not guilty but in indicating the nature of his defence professed detailed knowledge of the offences. He admitted participation in the removal of the stolen goods and incriminated appellant and accused no 2 in various respects as regards all the offences in question .

Subsequent to the proceedings in the magistrate's court the charges against Duma were withdrawn and a further statement was taken from him by the police, no doubt for the purpose of his testifying for the prosecution in due course.

Duma's evidence at the trial was that he was passing the home of accused no 2 on the day concerned when appellant, who was at accused no 2's house, summoned him. Appellant said he wanted the witness to accompany them to recover certain articles from Malusi Mkhize which the latter had bought from appellant but not paid for. Duma consented and the three of them departed.

Spying out the Mkhize home from an adjoining garden, they noticed that there was a young man present in the house. Appellant announced that because he did not get on with this person they would delay their arrival until he left. When the young man went about 30 minutes later they climbed the fence and entered the Mkhize's property. They proceeded to the kitchen door. Appellant opened the unlocked security gate and they walked inside.

The deceased was working in the kitchen. Appellant, who had been at school with the deceased, grabbed her and put his hand over her mouth, exacting her submission by brandishing a home-made firearm. At his instance the other two then removed numerous articles including a TV set, a hi-fi set, radios and a video recorder. They took these things to a vacant house next door, making two trips in the process. When they returned, appellant said he was going to take the

deceased with them. She asked to have the child with her

and appellant agreed.

When the group was outside, the deceased tried to escape by running off. However, appellant pursued her and brought her back. From there they all proceeded together to another vacant house where they stopped for about 10 minutes. The deceased said she was hungry and appellant sent Duma to buy bread, margarine and some cooldrink. On his return Duma noticed that accused no 2 was no longer there. (From Mbatha's evidence, as I have already said, it is clear that this was the stage at which accused no 2 had gone to find some rope.)

The deceased was given food and drink and when she had finished, appellant said that they were to proceed to another part of the township where there were yet more deserted houses. Duma explained in this regard that political unrest in the township had caused many families to abandon their homes.

Having arrived at the designated area, the group entered one of these unoccupied dwellings and waited in a bedroom. After a while appellant sent Duma to look for accused no 2. Duma could not find him and went back to the others. Not much later the appellant called the deceased into the kitchen. She left the child on a blanket on the floor. Duma then heard her being spoken to by appellant and also by accused no 2, whose return Duma had not noticed. When the witness looked through the bedroom door he observed the deceased and the two men standing in the middle of the kitchen. He then decided to go into the dining room where he stood looking out of the window. Some minutes later appellant called to him to bring matches. Duma moved to comply but on reaching the door into the kitchen saw the deceased hanging there. Too afraid to go any further, he threw appellant the matches. He then saw how appellant and accused no 2 both lit cigarettes and applied the

burning tips to the deceased's upper arms apparently to

determine if she was still alive. There was no reaction.

Duma then left the house and saw the other two men do the same. As they were departing, the child cried out. Appellant went back alone and entered the house while Duma and accused no 2 went off in different directions. On his way home Duma went to the house of one Mlaba intending to report what happened but found nobody there. When approached later in the day by a large crowd, including accused no 2 in the custody of the police, Duma said he noticed that accused no 2 had been injured and suspected that he had been assaulted by reason of what had happened to the deceased and the child. Fearing that if he admitted anything he would also be assaulted, he did not initially tell the police what had occurred. He only made disclosures when he subsequently claimed ignorance of appellant's whereabouts and was assaulted by one of the policemen in whose custody he then was. He was also assaulted, so he

alleged, by Detective Sergeant Mkhwanazi during the latter's interrogation the following day.

On the morning of 24 January 1991 Lieutenant Mkhwanazi was requested to oversee and report on a pointing out by appellant. He gave evidence concerning this expedition and what he recorded during the course of it. According to him he warned appellant of his right to silence and that any disclosures would be noted and possibly used in evidence. The appellant then took the officer and an interpreter to four houses in the township. At the first, appellant said that that was where (in Mkhwanazi's account of appellant's words) "they grabbed the deceased where she was standing in the kitchen", and where he guarded the deceased during the removal of the goods. At the second house (next door to the first), appellant said that this was where "they first kept the deceased and the goods". Then he pointed out a third house where the deceased and the goods were "kept". The fourth house, according to appellant, was

where accused no 2 killed the deceased by hanging her

with electric wire from a rafter and where accused no 2 also killed the child.

Other evidence in the case makes it plain that the four houses indicated by appellant were the houses referred to by Duma and that the first and fourth were the sites where the crimes were committed.

Lieutenant Mkhwanazi's evidence was only allowed in after a challenge to its admissibility had been rejected pursuant to an interlocutory trial. That challenge was founded upon allegations, put by counsel and repeated by appellant in evidence, that various policemen had assaulted him so severely that his disclosures to the lieutenant were thereby improperly compelled. It was also claimed that the lieutenant had not given the required warning and had also refused to arrange for appellant's representation by an attorney when appellant had specifically requested this. Lieutenant Mkhwanazi denied these allegations.

Appellant's counsel called Duma as a witness in the admissibility trial and he testified that when he was interviewed by Detective Sergeant Mkwanazi the day after his arrest the sergeant struck him with a cane in order to persuade him to give a version consistent with what the appellant and accused no 2 had already told the police. The trial Court accepted this testimony when evaluating the evidence presented for and against appellant on the admissibility issue. Despite Duma's evidence the Court found against appellant on all the later's allegations pertinent to that question.

Reverting to Duma's evidence on the main case, the trial Court found that it would not have been sufficient, standing alone, to have carried the day for the State. The Court remarked in particular upon the strong improbability that Duma would have been ignorant of the reason for taking the deceased with them and unaware of the hanging until it was over. Nonetheless the Court found that on the whole Duma had been honest

and satisfactory and, moreover, that he had been

corroborated with telling effect by appellant's pointing-out and concomitant explanations. The Court held, too, that a further safeguard against a false conviction had been provided by appellant's profound mendacity.

Turning to the earlier-summarised contentions which appellant's counsel advanced on appeal, it was argued that the shortcomings in his evidence justified the finding that, as a reasonable possibility, accused no 2 and Duma were the only wrongdoers and that Duma had falsely introduced appellant as a third participant in order to create the role for himself of a mere bystander as far as the killings were concerned.

The trial Court's reasons reveal that it was well aware of the discrepancies and omissions which are evident upon a comparison of Duma's evidence with his statement in the s 119 proceedings. In fact, the Court below made specific reference to the very two features with which, on counsel's argument, Duma had gratuitously

embroidered his story. It was held that their omission from his statement before the magistrate was not particularly significant considering that he was then concerned with putting up a defence and not with furnishing a comprehensive description appropriate to evidence in court. That reasoning appears to me to be sound.

The Court below was also fully cognisant of the improbability in Duma's alleged ignorance of the hanging that was taking place in the adjoining room. It was chiefly that aspect that led the Court to conclude that it would have been unsafe to convict on Duma's evidence in the absence of corroboration implicating the two accused. I am of the opinion that this material weakness in Duma's testimony was accorded all due weight in the evaluation process.

As to the fact that Duma failed to report the killings to the police at the very first opportunity, he explained that he feared that any admission of knowledge,

or especially complicity, on his part would have elicited

an assault upon him such as he suspected had been the case with accused no 2. Considering that when he first encountered the police they were accompanied by a no doubt vengeful throng of local residents, this explanation is convincing, particularly coming from a 13 year old boy. In addition, he would in all likelihood have been naturally reluctant to launch into a disclosure that would inevitably have led to admitting his involvement in the robbery.

Given the admitted falsity of appellant's alibi I can find nothing in the proven circumstances of the case, or in the argument for appellant, that creates the alleged reasonable possibility that Duma falsely introduced appellant into his story as one of the perpetrators. The suggestion that there were only two culprits - accused no 2 and Duma - is inherently far-fetched. More importantly, the fact that the deceased was abducted and permanently silenced is a strong

circumstantial pointer to appellant's presence. He was

well-known to her. She did not know the others. It was therefore pre-eminently he who would have had the motive to dispose of her.

Finally as far as Duma is concerned, the trial Court was fully alive to the implications of its finding in the admissibility trial that the witness had been assaulted by the investigating officer. It concluded nonetheless that the assault had not caused Duma to change his version or to incorporate in it material emanating from other sources. I can find no fault with that conclusion.

As far as the pointing-out is concerned, there is first of all the submission by counsel that, as an essential element of a fair investigation, and therefore a fair trial, appellant ought to have been informed by Lieutenant Mkhwanazi that he was entitled to legal representation. The lieutenant's admitted failure so to advise appellant, said counsel, rendered the pointing-out

and accompanying statements unfair, irregular and

inadmissible.

This contention concerns an issue of considerable importance. In the majority decision in S v Mabaso and Another 1990 (3SA 185 (A) the comment was made (at 209 A-B) that although there was much to be said for the view that an individual should be informed immediately on arrest of the right to legal representation it had never been suggested that a failure to inform an accused person of that right might render inadmissible an admission or pointing out by him. In the minority judgment, on the other hand, it was remarked (at 215F) that the effect of a failure to inform an accused of the right to legal representation upon the admissibility of an admission or pointing out by him

might have to be considered in future. See, too, S v

Mlomo 1993 (2) SACR 123 (A) at 130 b-g.

In my view, however, the issue referred to does not arise in the present matter. As was pointed out in

the Mabaso case at 204D, the question whether an irregularity has been committed will depend on the facts of each case and in that regard much turns on an accused person's knowledge of his rights. Appellant's own evidence is that before the pointing out he asked Lieutenant Mkhwanazi to contact his aunt and ask her to obtain a lawyer for him. The prima facie inference from this is that appellant was aware that he could obtain the services of a legal representative at that stage. Such inference was never displaced by other evidence from appellant.

In his heads of argument appellant's counsel did not seek to attack any of the trial Court's credibility findings relative to the admissibility question. This was not surprising. The evidence was exhaustively examined and unerringly analysed. The conclusions drawn from it are persuasive.

The matter of credibility in this connection was only raised on appeal when counsel realised that the

question as to legal representation was not one of

procedural law at all but one of mere credibility. He then contended that despite the trial Court's damning conclusion as to appellant's dishonesty it was still reasonably possible that his evidence as to his request for a lawyer was reasonably possibly true. This belated submission has no merit. No criticism was levelled in either Court against the lieutenant's evidence and appellant was found on all material points, both in the interlocutory hearing and the main case, to have been consummately untruthful. Those findings are unassailable.

The remaining submissions advanced concerning the admissibility issue were that the trial Court attached insufficient weight to the fact that appellant declined to make a statement to a magistrate, that he pleaded not guilty in the lower court and that accused no 2 also claimed to have been assaulted by the police in order to extract incriminating admissions from him.

The allegations made by accused no 2 were, of course, not part of the evidence in the admissibility trial but it suffices to say that his evidence was, on substantial grounds, found to be untrue. In any event, assuming that the assault found to have been perpetrated on Duma leads to the possibility that some policemen assaulted the two accused, the trial Court found, again on fully acceptable reasoning, that whatever befell appellant prior to his being handed over to Lieutenant Mkhwanazi was, on appellant's own case, not causally connected with the pointing out.

Appellant's refusal to make a statement to a magistrate and his pleading not guilty in the lower court were not overlooked by the Court below. They were pertinently discussed and their impact evaluated. I am not persuaded that the Court erred.

Finally on the convictions, appellant's allegation to Lieutenant Mkwanazi that it was accused no 2 who committed the murders is wholly valueless in the

light of the trial court's credibility findings

favourable to Duma and adverse to appellant.

For these reasons the appeal against the convictions cannot succeed.

On the matter of the capital sentences imposed on the murder counts, counsel stressed that appellant was, on the evidence, little over 19 at the time of the killings and that he had no previous convictions. Moreover, said counsel, long term imprisonment or, at most, life imprisonment, would sufficiently meet the need in the present case for a punishment with appropriate retributive and deterrent effect.

The relevant evidence has, in the main, already been referred to. However, two further material facts must be mentioned. One is that on the medical evidence the hanging of the deceased would have taken 3 to 4 minutes to cause death. The other is the length of time which passed from the invasion of the Mkhize home until the killing of the child. Duma estimated that they

entered that house at between 1 and 2 pm and that the murders took place between 3 and 4 pm. It seems to me that Malusi Mkhize and Mbatha were probably more reliable when they said, respectively, that the robbery had already been discovered by noon and that it was between 1 and 2 pm that accused no 2 came in search of a rope. Be that as it may, there is every reason to conclude that the entire episode must have taken at least two hours.

The only mitigating factors are appellant's age at the time and his clean record.

The aggravating factors found by the trial Court were these. Firstly, the killings were effected with a particularly base motive: the deceased was murdered to eliminate her as a witness to the robbery, and the child was put to death to delay discovery of the mother's murder. Secondly, the decision to kill the deceased must have been made after reflection and at the latest when she was taken from her home. Thirdly, both killings were callous and pitiless. Fourthly, the

victims were innocent and helpless. In the fifth place, appellant exhibited no remorse. Finally, he played the leading role. There is no question but that those findings, save one, were fully justified.

The aspect on which I am uncertain is whether the decision to kill the deceased had already been formed by the time she was kidnapped. But such uncertainty cannot assist appellant. The starting point is that she was, manifestly, taken prisoner so as to prevent her reporting the robbery. Even if the decision to kill her was made materially later it simply means that appellant had that much more time to reflect on his actions and that despite this opportunity he nevertheless came to the considered conclusion that she was to be killed. And I say that it was he that reached that decision because his leading role and the absence of any evidence by him to the contrary prevent the inference that he was influenced in this regard by accused no 2.

The length of time which appellant had to consider the implications before he killed the deceased -and it goes without saying that the mens rea involved in both killings was direct intention - clearly serves to render this case worse than those, extremely serious in themselves, in which killing is merely foreseen as a possible corollary to robbery or when, in the execution of robbery, killing is resorted to on the spur of the moment.

Then there is the manner in which the deceased was killed. The worst murder cases do tend, almost as a characteristic, to involve extraordinary and disturbing callousness but it is hard to imagine very much greater cold-blooded deliberation than was involved in setting up the relevant apparatus, applying it to the deceased, seeing it take minutes for her to die and then burning her arm to make sure she was dead.

The killing of the child although not planned beforehand, exhibited the same abject lack of humanity as

did the murder of her mother. It is chilling testimony

to the abysmal depths to which appellant as a person is inherently liable to sink.

I make no underestimation of the importance of appellant' s age at the time but this was no case of the rash, heedless impetuosity of youth. He had long since left school and gone out to earn his living. He had held employment as an assistant hotel cook and bar steward for more than a year in all. He was not drawn into these frightful events by the influence of an older person. On the contrary, it was, by inference, he who caused accused no 2 to become involved. The latter was 2 years older. Nothing in the evidence points, in my opinion, to appellant's conduct in this case having been the product of youthful immaturity.

From the point of view of the community, these murders inevitably revolt and horrify. The appropriate sentence must necessarily reflect that reaction. It must also convey to potential perpetrators of the kinds of

crime involved here that similar conduct will be liable

to exact the most extreme punishment for which the law provides.

Anxious consideration of all the facts and circumstances of the case has led me to the conclusion that the death sentence is the only proper sentence to impose upon appellant for the murders of which he was convicted.

The appeal is dismissed.

C.T. HOWIE
Acting Judge of Appeal.

SMALBERGER JA
VAN DEN HEEVER JA Concur.