REPORTABLE
CASE NO 585/93
586/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JANUSZ JACUB WALUS	First appellant (accused 1 in the court a quo)
CLIVE JOHN DERBY-LEWIS	Second appellant (accused 2 in the court a quo)

and

THE STATE	Respondent

CORAM: Hoexter, Botha, E M Grosskopf, Eksteen et Howie JJA

HEARD: 7 November 1994

DELIVERED: 30 November 1994

JUDGMENT

HOEXTER, JA
.....

HOEXTER, JA

In the Witwatersrand Local Division the first and second appellants, together with the second appellant's wife ("Mrs Derby-Lewis"), were charged jointly with the commission of the following crimes:-

Count 1: The murder of Mr Martin Thembisile Hani ("the deceased").

Count 2: A contravention of sec 18(2) (a) of the Riotous Assemblies Act 17 of 1956 by conspiring to murder nine persons (including the deceased) whose names appear on a list appended to the indictment.

Count 3: A contravention of sec 1 of the Arms and Ammunition Act 75 of 1969 by the unlawful possession of a 9mm Z88 pistol no P6-101368.

Count 4: A contravention of sec 36 of the Arms and Ammunition Act 75 of 1969 by the unlawful

possession of five rounds of 9mm ammunition.

The trial was heard by a court consisting of Eloff JP and two assessors. Each of the three co-accused pleaded not guilty on all counts and each was represented by his or her own counsel. At the close of the State case the first appellant closed his case without adducing any evidence whatever. The second appellant elected not to give evidence himself but called to testify on his behalf Mr T F H Wolmarans, an expert in ballistics, and íVlr A Czernalow, a long-standing friend of the first appellant. Mrs Derby-Lewis testified in her own behalf.

At the end of the trial Mrs Derby-Lewis was acquitted on all counts. On count 2 (the alleged conspiracy to murder nine persons) the first and second appellants were acquitted. The first appellant was further acquitted on count 4 (the illegal possession of five rounds of 9mm ammunition). For the rest the trial court recorded the following unanimous verdlcts of guilty. On count 1 both the first and the second appellants were found guilty of the murder of the deceased. On count 3 both the first and the second appellants were found

guilty of the illegal possession of a 9mm Z88 pistol. On count 4 the second appellant was found gullty of the illegal possession of five rounds of 9mm ammunition.

In respect of the aforesaíd convictions the following sentences were imposed. On count 3 the first appellant was sentenced to imprisonment for five years. In the case of the second appellant counts 3 and 4 were taken together for purposes of sentence and a sentence of imprisonment for five years was imposed. On count 1 each of the first and second appellants was sentenced to death.

The first appellant appeals only against the sentence of death imposed upon him. The second appellant appeals both against his conviction for murder and the death sentence imposed upon him. With leave of the trial judge the second appellant appeals also against the sentence of five years imprisonment imposed in respect of his conviction on counts 3 and 4.

At the time of his death the deceased, who was widely known as "Chris" Hani, was the Secretary-General of the South African Communist Party

and an executive member of the Afrlcan National Congress. He lived in a house in Deon Street in the suburb of Dawn Park in Boksburg. A short driveway separated his garage from the street. At about 10 am on the morning of Saturday 10 April 1993, and in the driveway of his home, the deceased was shot to death. Parked in the driveway at the time of the kllling were two motor cars. In front of the deceased's garage stood a Toyota. Just behind the Toyota was a red Ford Laser hatchback ("the red Ford") bearing the registration: PBX 231T. Immediately after the shooting the deceased's attacker got into the red Ford and started reversing out of the driveway. The shootlng of the deceased and the imminent departure of his attacker were observed by a passing motorist, Mrs M J Harmse. In a remarkable display of self-possession Mrs Harmse stopped her own car and reversed it far enough to obtain a closer view of the red Ford's registration number. Trying to memorise the registration number she drove at once to her nearby home from where she telephoned the flying-squad. She gave the red Ford's registration number as: PBX 237T. In the event her information to the police proved to

be sufficient. Armed with Mrs Harmse's description of the assassln's vehicle two policemen in a patrol car were able, within minutes of the killing and in a locality some six kilometres distant from the deceased's home, to spot the red Ford and to make it pull over and stop by the roadslde.

The driver and sole occupant of the red Ford was the first appellant. On the rear seat of his vehicle the police found a carry-bag containing a Z88 pistol. Behind the driver's seat there was found a silencer. The first appellant was taken into custody. At the trial the pistol was handed in as exh 2 and the silencer as exh 4.

The killing of the deceased was painstakingly investigated by the South African Police, and at the trial elaborate forensic evidence was comprehensively led by the prosecution. The evidence pointing to the first appellant as the deceased's killer was carefully reviewed in the judgment of the trial court and need not here be recapitulated. Suffice it to say that in the light of all the evidence it is incontestable (and was properly conceded so to be by the first appellant's counsel) that the first appellant was the deceased's

assassin and that exh 2 was the murder weapon. It is common cause that the first appellant was properly convicted of murder.

The first appellant, whose age is given in the indictment as 38 years, is an immigrant from Poland who has lived in South Africa for some ten years. He had business interests in Qwa Qwa but he was also the occupier of a flat in Pretoria. According to the defence evidence the appellant found the yoke of Communist rule in Poland Intolerable. He and his family suffered much deprivation and frustration. It was in order to escape from the rigours of life under a Communist regime that the first appellant settled in South Africa which he saw at the time as a political haven. He became a South African citizen. His political views were strongly rightist. The political changes in South Africa heralded in February 1990, and thereafter put into effect, appalled the first appellant and outraged his staunch anti-Communist sentiments. He was friendly with his two co-accused. In the course of her evidence Mrs Derby-Lewis told the court that the first appellant did not have many friends; and that she and her husband "were probably his closest friends." They called him by

the familiar name of "Kuba".

The second appellant, whose age is given in the indictment as 57 years, lived wíih his wife in a house in a suburb of Krugersdorp. A former Nationalist member of the Transvaal Provincial Council, the second appellant has been a member of the General Council of the Conservative Party since 1982. In May 1987 he became a nominated member of Parliament for the Conservative Party. In September 1989 he was nominated to the President's Council where he served until that body's demise on 20 June 1993. The first appellant and Mrs Derby-Lewis, so the trial court correctly found, "were both prominent in right-wing politics."

Mrs Derby-Lewis is a research journalist. She is the editor of the English section of a weekly newspaper called "Die Patriot" and the press officer for the Conservative Party. She is a prolific writer on political affairs. The attitude of Mrs Derby-Lewis towards the deceased and what she regarded as his revolutionary role is sufficiently mirrored by the following brief excerpts from some of her articles, written both before and after the murder of the

deceased, to which reference was made in the course of her testimony. For example -

> "Hani's Communist Party virtually controls the African National Congress."
>
> "His [de Klerk's, the then State President] impotence gave an enormous kick start to the ANC/SACP/MK alliance's revolutionary plans to seize power, and they are well on their way to getting it if not stopped in their tracks."
>
> "The hysterical press eulogies which mushroomed after the death of S.A. Communist Party boss Chris Hani last week sickened many South Africans ... It is incumbent upon those who are not ignorant of Hani's past to reveal the harsh mettle of the man, and to place on record what he stood for, what deeds he perpetrated and what he had in mind for South Africa. Chris Hani made no bones about his use of terror and murder as tools of the revolution. He was 'a man who enjoyed his atrocities' according to a seasoned SA political commentator, the ANC's 'deadliest killer'".
>
> "Hani's death removed an important roleplayer from the ranks of those who would see a communist Azania."

Exh 2 is an unlicensed firearm. The facts of this case provide a sombre reminder that one of the scourges of South African soclety is trafficking in unlicensed firearms. The train of events which culminated in the killing of the deceased finds its genesis in a theft committed almost three years earlier. During April 1990, and at Pretoria, a quantity of firearms was stolen from the South African Air Force. One of the stolen firearms was exh 2.

During 1990 a friend of the second appellant, Mr S Venter of Krugersdorp, acquired an unlicensed handgun from one'Taylor. Early in 1993 the second appellant inquired of Venter where he might obtain an unlicensed firearm. Venter agreed to let him have the unlicensed firearm which he had obtained from Taylor. The second appellant was friendly with Mr L G Durant and his wife who lived in Boshoff Street, Krugersdorp. The second appellant instructed Venter to deliver the handgun, concealed in a parcel, to the Durants with a message that the parcel contained a pullover for the second appellant. The second appellant further informed Durant that his pullover would be delivered to the Durant home. Venter carried out his illicit mandate. He

concealed the handgun within the folds of a pullover which he delivered at her home to Mrs E E Durant. Venter and both Durants were witnesses for the prosecution. Venter told Mrs Durant that the pullover belonged to the second appellant. Mrs Durant later unfolded the pullover and discovered the concealed handgun. She told the court that it resembled exh 2. Having rewrapped the handgun in the pullover she delivered it to the second appellant at his home on the following day. Mrs Durant fixed the date on which Venter delivered the parcel to her as 24 February 1993.

The scene shifts from Krugersdorp to Cape Town and the tale is taken up by two further State witnesses: Mr F H Darroll and Mr Gavin Smith. On or about 22 March 1993, and at Cape Town, the second appellant handed to Darroll a Z88 pistol with a request that he should have a silencer fitted to it. Gavin Smith has a gunsmithery at his home in Tokai. Darroll took the Z88 pistol to Smith who fitted a silencer to it. Smith handed to Darroll not only the Z88 pistol and a silencer, but also a cap to be screwed onto the muzzle of the pistol; and five rounds of subsonic 9mm ammunition. All the aforesaid articles

Darroll duly delivered to the second appellant at his apartment in Acacia Park.

Smith confirmed that part of Darroll's version which related to him. Smith's further evidence is of crucial Importance. It is to the effect that the silencer which he fitted to the pistol is exh 4; and that the pistol to which he fitted it is exh 2. He testified that in his entire career as a gunsmith he had only once fitted a silencer to a Z88 pistol; and that this was the occasion. He positively identified exh 4 as a silencer of his own manufacture. He explained to the trial court how he had machined the barrel of exh 2 in order that its muzzle might receive the cap or thread protector which screwed onto it. He said that the metal cap was one of his own, and he pointed out in what respects he had modified it. Smith was subjecíed to a pertinacious cross-examination from which he emerged unscathed. He impressed the trial court as an honest and reliable witness and it accepted his testimony. That finding was not challenged before us.

The State witness Mrs Elizabeth Motswane was a domestic worker in the service of the second appellant and Mrs Derby-Lewis. The first appellant

was known to her; and she testified that she had heard Mrs Derby-Lewis address him as "Kuba".

On 6 April 1993, at about 8 am in the morning, Mrs Motswane found the first appellant in the kitchen with Mrs Derby-Lewis who was busy preparing breakfast. The first appellant had breakfast with the second appellant and Mrs Derby-Lewis, whereafter Mrs Derby-Lewis left the house by car. While Mrs Motswane was washing up in the kitchen after breakfast the second appellant came to tell her that she was wanted on the telephone. On her way to the telephone she had a view of the interior of the sitting-room. She saw the first and second appellants seated in the sitting-room with a table between them. On the floor next to the first appellant was his brief-case. The first appellant was holding a firearm with its butt in his hand and with its barrel pointing to the floor. While she did not say so expressly her evidence carried the implication that it was a handgun. On her return to the kitchen from the telephone Mrs Motswane noticed that the first appellant was still holding the firearm in the same position which she had earlier observed.

During the morning of 10 April 1993 the second appellant and Mrs Derby-Lewis had tea and cake at the home of the State witness Venter mentioned earlier. The tea-party is described by both Venter and Mrs Derby-Lewis. According to her she and the second appellant arrived at the Venters before 10 am and left again at about 11 am. Shortly before 11 am the Venters' telephone rang. It was answered by Mrs Venter. Mrs Derby-Lewis said that she heard Mrs Venter say:-

"IVInr Chris Hani is doodgeskiet." Mrs Derby-Lewis further testified that she was unable to recollect precisely how she and the second appellant had busied themselves for the rest of the day in question, except that they had done shopping and gone home for lunch. At about 3 pm in the afternoon they canvassed for a forthcoming by-election.

The State witness Miss M M Ras told the court that for the past ten years she had had an affair with the first appellant. The second appellant and Mrs Derby-Lewis were known to her, and she and the first appellant had occasionally visited their home for a barbecue. Miss Ras was at the flat of the

first appellant at 7 am on the morning of 10 April 1993 when the first appellant informed her that he was golng out to practlse karate, but that he would return at 11 am. After the first appellant had failed to return at the appointed hour there was a telephone call from the second appellant. He asked her where the first appellant was. She replied that she expected him back at any moment; and she inquired whether the second appellant wished to leave a message. The second appellant responded in the negative but asked her to tell the first appellant on his return to telephone him. When later there was still no sign of the first appellant Miss Ras became anxious and she telephoned the police and hospitals. In between these calls, and at about 2.30 pm, the second appellant again telephoned the flat. Miss Ras confided to him her disquiet and again inquired whether he wished to leave a message. According to Miss Ras the second appellant then said that he merely wanted to invite them to a barbecue to be held on the following day (11 April). Thereafter Miss Ras left the flat in order to visit friends. When she returned the first appellant was there, but the flat was swarming with policemen who

were busy searching it in the presence of the first appellant.

In the top drawer of a desk in the flat Det Sgt Grimbeek discovered a three-page document (exh "J"), to which reference was made at the trial and in argument before us as "the hit list". Exh "J" is a typewritten document which contains, in the following order, the undermentioned nine names:- Nelson Mandela, Joe Slovo, Mac Maharaj, Karen Brynard, Chris Hani, Pik Botha, Richard Goldstone, Ken Owen and Tim Du Plessis. With a slngle exception (Joe Slovo) under each name the purported address of the person named is set forth. The whole of the first page is devoted to Nelson Mandela. Below his address the following information is noted:-

> "NOTE: THE HOUSE, SITUATED IN OAK LINED ROAD, IS DELIBERATELY NOT NUMBERED, BUT IS EASILY RECOGNISABLE BY THE WROUGHT IRON BLACK FENCE WHICH HAS HAD BLACK METAL SHEETING PLACED
> BEHIND IT TO LIMIT THE VIEW FROM THE ROAD.
>
> IT HAS HIGH TECH ELECTRONIC SURVEILLANCE SYSTEMS THROUGHOUT, INCLUDING A TELEVISION CAMERA

MOUNTED AT THE GATE BEHIND A GLASS PANEL THE GATES ARE

ELECTRONICALLY CONTROLLED."

The lower half of the first page contains a colour photograph of a double-storey house under a red tiled roof. Exh "J" also reflects certain manuscript additions in ink. One sees that a numeral has been assigned to each name. Thus, for example, the names of Nelson Mandela, Joe Slovo and Chris Hani have been respectively numbered 1, 2 and 3. Next to the name and address of Chris Hani the following has been inscribed:-

"BMW 525i
PWY 525T".

Det Sgt Grimbeek told the court that when they drove away from the flat after the search the first appellant remarked in the car to Warrant-Officer Holmes, the leader of the police investigation team:

"Mike, I think something made you happy, you found something."

After 10 April the next significant date in the chronology of events is

Monday 12 April 1993. However, in order to understand the behaviour of the second appellant and Mrs Derby-Lewis on that date it is necessary first to go back a little in time and to mention a number of earlier occurrences.

The State witness Mr A B Kemp, a supporter of the Conservative Party, has known the first appellant since the late eighties and the second appellant and Mrs Derby-Lewis since the mid-eighties. From the middle of 1989 to the middle of 1992 Kemp served as a journalist on the "Patriot" newspaper, during which period he saw much of Mrs Derby-Lewis. Thereafter and until January 1993 he worked for the "Citizen" newspaper and saw Mrs Derby-Lewis only infrequently. Kemp testified that during January 1993 Mrs Derby-Lewis telephoned him at his work. At her request he agreed to help her establish the addresses of certain persons. Mrs Derby-Lewis then faxed to him a list containing nineteen names. From the list of nineteen names Kemp composed a list ("Kemp's list") of nine persons and their respective addresses.

On 29 January 1993 Mrs Derby-Lewis travelled by bus to Cape Town. Just before her departure Kemp met her at the Rotunda bus station in

Johannesburg and gave her an envelope contalning Kemp's list. Accordlng to Kemp Mrs Derby-Lewis never told him for what purpose she required the information sought by her. He mentioned, however, that in discussions between them during 1992, and even earlier, they had mooted the possibility of Conservative Party demonstrations "outside these people's houses for propaganda value".

Mrs Derby-Lewis had a mail-order buslness. Having left the "Citizen" Kemp started up in invoicing, and he and Mrs Derby-Lewis agreed to exchange business ideas. An arrangement was made that on Monday 12 April 1993 Kemp would have lunch at the Derby-Lewis home, whereafter he would assist her with programming Mrs Derby-Lewis's computer.

For some days after 10 April the assassination of the deceased was a topic which received much press publicity. On 11 April the Sunday newspapers linked the second appellant to the first appellant. On Monday 12 April the morning newspapers reported that a police search of the first appellant's flat had yielded exh "J". While Kemp was lunching at the Derby-

Lewis home on that day the telephone rang and was answered by the second appellant. He announced that the caller was a journalist on the "Pretoria News"; and that he had inquired of the second appellant whether the first appellant was a member of the Conservative Party. Thereupon Kemp asked his hosts:-

> "...whether the list of nine names which I had previously given them was somehow involved with Mr Waluz."

His question, so testified Kemp, elicited the following reactions:-

> "Both Mr and Mrs Derby-Lewis denied it but then immediately Mrs Derby-Lewis said yes, it was, but they did not want to tell me."

Kemp went on to say that the second appellant then suggested that they should inform the police that the list found in the flat of the first appellant was probably Kemp's list. To this suggestion both Kemp and Mrs Derby-Lewis voiced objections. The second appellant then said to Kemp:-

> "...not to worry, Mr Waluz would not speak..."

Having given this assurance the second appellant excused himself. He said

that he was feeling ill and that he wished to lie down.

In the course of cross-examination by counsel for Mrs Derby-Lewis Kemp said that he supplied the photograph of the house on the first page of exh "J" on his own initiative -

> "... and the reason why I did that was I was going to suggest to Mrs Derby-Lewis that she could use it in an article in the Patriot, to show the discrepancy between Mr Mandela's lifestyle and the people he is supposed to be leading..."

At 6 pm on Saturday 17 April 1993 the second appellant was arrested at his home. Shortly after midnight he signed a statement recorded by one of his legal advisers who handed it to Warrant-Officer Holmes. The second and third paragraphs of the statement read thus:-

> "2 Kaptein Deetlefs het my verwittig dat dit 'n emstige saak is en dat ek nie verplig is om enige iets te sê nie en dat indien ek wel iets sê dit as getuien is teen my gebruik sou kon word.
>
> 3 Ek het geweier om enige iets te sê behalwe dat ek 'n sekere Waluz geken het, en dat ek hom in Desember

1992 laas gesien het." (Emphasis supplled)

Next, brlef references must be made to certain portions of the testimony of Mrs Derby-Lewis. She confirmed the evidence of Kemp that she had requested him to supply her with the addresses of certain persons whose names she faxed to him; and that at the Rotunda bus stop she received from him an envelope containing Kemp's list. During her evidence-in-chlef she explained that her main purpose in obtaining Kemp's list had been to write an article for "Patriot" to show the houses in which the persons concerned lived and the nature of their life-styles.

Mrs Derby-Lewis told the court that she opened the envelope for the first time in Cape Town. The second appellant was present and she showed him Kemp's list. She spent a fortnight in Cape Town before retuming to Krugersdorp by car with the second appellant. She then put Kemp's list on a glass table in the filing room of their home. The by-election referred to earlier, in which the second appellant was to stand as a Conservative Party candidate,

was in the offing. They were so busy registering voters that she did not look again at Kemp's list until the afternoon of Saturday 27 February 1993. On that afternoon a Mrs Van Straaten, a canvasser in the by-election, visited their home in order to collect various articles in preparation for the by-election. Mrs Van Straaten's eye fell on the colour photograph of the house on the first page of Kemp's list. Mrs Van Straaten inquired whose house it was and Mrs Derby-Lewis told her that it was the palatial home of Nelson Mandela.

Mrs Derby-Lewis testified that on the morning of Monday 12 April 1992 she bought a "Beeld" newspaper and was disturbed to read in it a descrlption of a list which had been found [in the flat of the first appellant] containing the names of politicians and journalists. There was atso an article suggesting that the second appellant was connected with the first appellant. They got in touch with "Beeld" and complained about the article. She "started to scratch around" in search of Kemp's list but was unable to find it. She told the second appellant that it was missing. Until 12 April she had never discussed Kemp's list with him but before Kemp's arrival for lunch they had a serious discussion

about Kemp's list. They had no idea at all how it had come to be in the

possession of the first appellant. She sald in this connection -

"It was assumed that he [the first appellant] had been in the house and picked it up."

She herself had made no manuscript additions to Kemp's list. While waitlng for Kemp to arrive she and the second appellant discussed the possibility of going to the police. He wanted to but she was opposed to the idea. She then appreciaíed that the police would inevitably come to them.

When during lunch Kemp asked whether the list described by the newspapers was the one he had given her, initially and out of embarrassment and unhappiness, she had denied that it was. When Kemp "kept persisting" she said -

"It looks as if it is." In Kemp's presence the second appellant again suggested that they should go to the police but she said that they should rather wait and see what happened

"I was a little scared, we were after all high profile CP people and I could not see ourselves being implicated in anything so devastating as Mr Hani's murder..."

Under cross-examination by counsel for the State Mrs Derby-Lewis said she could not recall whether during the conversation at lunch the second appellant had made any reference to the first appellant. Kemp's evidence as to the assurance given by the second appellant, to the effect that the íirst appellant would not talk (which had gone unchallenged during Kemp's cross-examination), was then read to her. She said that she could not remember such a statement by the second appellant but conceded that it was quite possible that he had made it.

With reference to the names on Kemp's list she said, amongst other things, that Ken Owen was the editor of the "Sunday Times" and that having regard to the stance taken by him she wondered whether he had not been "bought". Karen Brynard was a joumalist, she explained, whose vicious writings had cost the Conservative Party the Prlmrose by-election. Tim Du

Plessis she described as a "viciously anti-Conservative Party" journalist. Mrs Derby-Lewis testified that she had definitely not asked Kemp for the sort of detail which he had supplied below the address of Nelson Mandela. She said that she wished to interview the persons on Kemp's list and to see in what manner they lived. During her evidence-in-chief she said that a man's house -

> "..is part of a man's personality and if you look at a person's home you can see who he is, you can see whether ... he is receiving extra money, whether he has got Persian carpets on the wall... journalists are normally poorly paid and if they have got a lot of fancy furniture then it is indicative that maybe there is some extra cash coming in."

She said that on 6 April 1993 she had prepared breakfast at the request of the second appellant; and that she had no idea for what purpose he had invited the first appellant to have breakfast with them.

Mrs Derby-Lewis testified that, although there were no secrets between her and the second appellant, she was quite unaware of the fact that he had acquired exh 2. She said she was further ignorant of the time at which and

the circumstances in which exh 2 had come into the possession of the second appellant. Here it is convenient to mention that although in regard to her explanations of the purpose for which she required the Kemp list the trial court found that Mrs Derby-Lewis was untruthful, the trial court saw no reason to reject her statement that she had no knowledge of the murder weapon; and it accepted it as true.

Lastly, it is necessary to mention certain evidence adduced by the prosecution which throws light on an important issue in the case: how long before 10 April 1993 had preparations for the assassination of the deceased already been in progress?

It will be remembered that next to the name and address of "Chris Hani" in exh "J" there is a manuscript inscription which refers to a particular make and model of a motor car (a BMW 5251) together with what seems to be a car registration number (PWY 525T). The State witness Mr M C Van Zyl told the court that he was the owner of a BMW 525i motor car and that it bore the reglstratlon number PWY 525T. Van Zyl furthertestified that on a number

of occasions his car had been used (by him and also by other persons) to fetch the deceased from his home and to convey him to business meetings. The last occasion on which his car had been used for the purpose, so said the witness, was approximately three weeks before 10 April 1993.

After the arrest of the first appellant the red Ford was kept in police custody. On 11 April 1993 Sgt J Slingerland, a member of the police investigating team, searched the red Ford, and found in addition to many other articles, a bag containing adhesive plastic "Snapstix" letters and numerals, together with a receipt relating to their purchase. The testimony of Det Warrant-Officer O R Manser established that the "Snapstix" in question could be superimposed upon the registration plates of the red Ford in order to display the false number "PLB 577T". The State's evidence further established that "PLB 577T" was the registration of another red Ford Laser motor car. The receipt in question was followed up by the police. The evidence of Mr M Sebeko, a salesman at a hardware shop in Sandton, established that the "Snapstix" found in the red Ford had been purchased

there on the afternoon of 2 March 1993.

On two important issues of fact which loomed large in the case the trial court, in the course of a carefully reasoned judgment, made findings on the probabilitles adverse to the second appellant. The court considered it extremely unlikely that in the course of a visit to the Derby-Lewis home the first appellant would surreptitiously have removed Kemp's list. In all the circumstances, so concluded the trial court, the likeliest alternative was that the second appellant had given it to the first appellant. In my view no criticism can be levelled at the above appraisal of the probabilities.

Turning to exh 2, and inasmuch as no other feasible explanation had been brought forward, the trial court deduced as "the clear inference" that the second appellant it was who put the first appellant in possession of the murder weapon. Suffice it to say that in my judgment such inference is well-nigh inescapable. The time and place of the delivery cannot be determined with certainty, but (as the trial court correctly pointed out) there exists a very distinct possibility that it took place some four days before the killing and at the

home of the second appeltant.

in addition to the above inferences based on antecedent circumstances the trial court listed the following four subsequent evidentiary facts, which also point the finger to the second appellant's complicity.

(1) The telephone calls made by the second appellant to the flat of the first appellant on the day of the murder and after the second appellant had heard that the deceased had already been killed. In this connection the írial court was also right, I consider, to attach some sígnificance to the fact that mention of the invitation to a barbecue was made only in the course of the second telephone call.

(2) The second appellant's suspicious utterance at lunch on 12 April 1993 that the first appellant would not talk.

(3) The false statement made by the second appellant to the police more than a week after the murder that he had last seen the first appellant in December 1992. Here I would venture the following interpolation. While our law properly recognises that a suspect's lie may sometimes

be inspired by a motive other than the natural endeavour of a guilty person to escape detection and conviction, in the instant case one may at least discount the possibility that the false statement was made on a sudden and without an opportunity for prior reflection. From the evidence of Mrs Derby-Lewis it is clear that already by lunch-time on 12 April 1993 she and the second appellant knew perfectly well that it was merely a matter of time before they would be questioned by the police.

(4) The second appellant continued after the deceased's death to keep Mrs Derby-Lewis in ignorance of his acquisition of exh 2, his modification thereof by having a silencer fitted to it; and of his subsequent dealing with it.

Now although each of the four retrospectant evidentiary facts summarised above, taken by itself and in isolation, hardly carries declsive probative potency, it cannot be gainsaid that at least each points in the same direction and each tends to prove that the existence of the factum probandum (the

second appellant's complicity in the murder) is more probable than his innocence.

In regard to the question at what stage before 10 April plans for the murder of the deceased were already afoot, the trial court concluded, quite correctly in my respectful opinion, that from the evidence of steps of active preparation on the part of the first appellant, it had been planned long before the date on which it was actually executed. In this connection the learned Judge-President made the following observations in his judgment:-

> "It can reasonably be inferred that accused no. 1 [the first appellant] had planned this assassination quite some time before 10 April 1993. The ... evidence to which I alluded earlier was that he probably kept surveillance over the Hani residence, and observed that a certain car which we now know had been there three weeks previously, came to the residence. We know that he had previously acquired the wherewithal to conceal the registration number of his car. In short, the assassination was planned well in advance."

Before examining the manner in which the trial court dealt with the first

appellant's failure to go into the witness box, it is perhaps as well to say somethlng more about the role Kemp's list plays in the whole body of circumstantial evidence against the second appellant.

The description of the elaborate security devices installed at the Mandela residence (and to a lesser extent at the home of Joe Slovo) in exh "J" excites suspicion as to the purpose for which Kemp's list was designed. Such íechnical data would seem to be of more immediate interest to an intruder bent on access unannounced and by stealth, rather than to a journalist hoping to achieve a formal interview with the house-owner, and an opportunity of examining the sumptuous interior which she thought might confront her critical eye. However, Kemp testified that he had furnished this additional information unasked and on his own initiative. In passing I am constrained to say that his explanation for the inclusion thereof appears to be somewhat lame. In all the circumstances, however, it seems to me, with respect, that the trial court correctly held that the prevarications of Mrs Derby-Lewis were Insufficient to ground a finding that as far as she was concerned

Kemp's list was a hit-list.

For the second appellant the matter does not end there. The question is not so much to what end Mrs Derby-Lewis (who was acquitted on all counts) intended to devote Kemp's list. The question is rather for what purpose the second appellant intended the first appellant to use it. To what use the first appellant in fact devoted it in regard to the deceased is plain. The significance of the manuscript notes next to the name "Chris Hani" has already been explored. On a balance of probabilities the trial court correctly found that the second appellant furnished the first appellant both wíth the murder weapon and with Kemp's list. He used the list to record notes reflecting results of the surveillance of the deceased's home; and he used exh 2 to kill the deceased. These facts, taken together with all the other evidentiary facts, sustain as a ready inference, that the second appellant gave not only exh 2 but also Kemp's list to the first appellant in furtherance of a plot, to which both the appellants were party, to murder the deceased.

In weighing the consequences of the second appellant'sfailure to testify

the trial court pointed out that the matters under scrutiny related to the knowledge and state of mind of the second appellant. The learned Judge-President proceeded to deal with leading cases dealing with the inferences to be drawn from the silence of and accused person, and then remarked:-

> "He [the second appellant] and he alone could have refuted the prima facie inference that the weapon which Faan Venter handed over was Exhibit 2. He and he alone could have dealt with the vital question whether the weapon was handed over to accused no 1 [the first appellant] and for what purpose.
>
> In our view his omission to do so is highly significant and has the effect of converting prima facie proof into conclusive proof."

In the result the trial court was impelled to the conclusion that:-

> "the inference can and must be drawn that accused no 2 [the second appellant] handed over the murder weapon to accused no 1 [the first appellant] knowing full well what the object was for which accused no 1 acquired it and to what use it would be put. Any inference consistent with innocence is so far-fetched and unlikely that it must be left out of account."

Counsel who argued the appeal against the second appellant's conviction for murder undertook a series of separate dissections involving each individual piece of circumstantial evidence upon which the trial court had relied in convicting the second appellant; and in respect of each such item he would pose the question: "Does that item by itself prove beyond reasonable doubt that my client was a party to the murder of the deceased?" That approach to the problem, it need hardly be said, is misconceived and unhelpful. It may be that each piece of circumstantial evidence, separately viewed, has not a very powerful probative value. But all of the facts adduced in evidence have to be considered, each one in relaion to the whole; and it is all of them taken cumulatively which must be examined in order to test the soundness of the conviction. The oft-cited summing up to a jury by Chief Baron Pollock more than a century ago in R v Exall (1866) 4 F& F 922 at 929 indicates, I think, as well as any modern authority the nature of the logical inquiry which confronts the court in such a case. What Pollock CB said was this:-

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty, as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved."

The classic statement of the position in our own law is to be found in the judgment of this court in Rex v De Villiers 1944 AD 493. In delivering the unanimous judgment of the court Davis AJA put the matter thus at 508-9:-

> "The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of

> any reasonable doubt which it may have as to whether the inference of guilt is the only Inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

Immediately before the above-quoted passage in the judgment the learned judge of appeal had (at 508) quoted with approval the following passage from Best, Evidence (5th ed sec 298):-

> "Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone ...It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them."

In the present case the second appellant was firmly enmeshed in a web

of circumstances which were cohesively linked to each other. Their cumulatlve effect was, I conslder, a damning case whlch called for an explanation. The crucial facts were unquestionably within the second appellant's own knowledge. He could not through lapse of time have forgotten them; he was brought to trial within eight months of the events in issue. If in truth he had an innocent explanation it would have been a simple matter for him to displace the prima facie case he had to meet.

This was manifestly a case in which evidence by the second appellant himseH was essential to make an innocent explanation appear reasonably possible. No explanation was forthcoming. In my judgment the trial court correctly concluded that the second appellant's failure to propound any innocent explanation effectively removed it from the range of reasonable possibility. Cf the remarks of Schreiner J in Ex Parte Slabbert and Prinsloo 1944 TPD 327 at 330.

There was a grave case for the second appellant to answer. The possibility of his silence being explicable on some or other hypothesis

unrelated to his guilt appears to me to be entirely remote and inherently improbable. In my opinion the second appellant was properly convicted on count 1 of the murder of the deceased and his appeal against his conviction on that count must fail.

I turn to the appeals of both appellants against their sentences. In respect of the murder charge [count 1] each appellant was sentenced to death. For the first appellant the only witness who testified in mitigation of sentence was his elder brother, Mr W S Walus, who had shared much of his early life with the first appellant in Poland. On behalf of the second appellant no evidence in mitigation was adduced.

Both counsel for the defence (IVIrs van der Walt who appeared pro amico for the first appellant, and Mr Prinsloo who argued the appeal for the second appellant) urged upon us every submission that could reasonably be advanced in favour of their respective clients in regard to the sentence on count 1. We have given careful consideration to thelr arguments. Before us, as in the court below, the debate largely revolved around the questlon whether

in the case of each appellant the death sentence was to be regarded as the only proper sentence.

In the course of the judgment on sentence Eloff JP observed that he found it difficult to differentiate between the two appellants, and he added:-

> "They have not taken me into their confidence as to exactly who did what. We found that they were both in it together."

In argument before us no good reason was advanced why the same punishment should not be meted out to both appellants. Both were first offenders. It is true that the first appellant executed the actual assassination, but the known facts, as far as they go, create a distinct impression that the second appellant it was who master-minded the operatlon.

In the case of each appellant the mitigating and aggravating factors found by the trial court were carefully and comprehensively set forth. It is unnecessary to repeat them here. The court below took the view that the aggravating factors entirely overshadowed the mitigating factors. With that assessment I agree.

An argument strongly pressed upon us had also been unsuccessfully employed in the trial court. The nature of the argument appears from the following passage in the judgment on sentence; a passage which, in my respectful view, carries at the same time a complete refutation of the argument:-

> "I was reminded of the fact that in several judgments of our courts, where sentence of death was considered in relation to brutal, cold-blooded acts, the courts have taken into account the state of mind, for example, of people involved in the so called liberatory struggle, who saw themselves as soldiers fighting a legitimate war and acting under instructions. The present case has no element of that sort. The accused could not have thought that they were in a military struggle. They certainly did not testify that they committed the murder as part of a military action. They simply arrogated to themselves the right to destroy the life of the person because of their own political perceptions. And for that, as Hefer JA said in the Botha case [S v Botha and Another, S v Marais 1993 1 SACR 113 at 119 in fin], they have to pay."

Later in his judgment on sentence Eloff JP, quite properly in my view,

stressed certain of the aggravating features. The learned Judge-President remarked:-

> "The murder was a deliberate, cold-blooded one. The act was cowardly in the extreme. It was preceded by weeks of planning. The deceased was felled in front of his own residence, when he was completely defenceless. And, as I mentioned earlier, none of the accused has showed any remorse."

In my view the passage just quoted is an accurate portrayal of the essentlal character of the murder here committed. Upon a careful perusal of the trial court's judgment on sentence I am not in the least persuaded that it overlooked any relevant matter proper for its consideration; or that it was actuated by any misdirection. The trial court correctly pointed out that in cases of this sort the elements of retribution and deterrence naturally come to the fore. In regard to the latter factor Eloff JP had this to say:-

> "As a deterrent, I wish, in imposing the sentence which I have ín mind, to send out the message loud and clear to any one who contemplates assassination of political leaders as an acceptable option, what view the court takes of such conduct."

Few crimes can be regarded by a court as more atrocious, or as being more calculated to arouse the revulsion of decent members of society, than the sort of murder of which the appellants were duly convicted. The trial court ultimately concluded that in the case of each appellant the death sentence was the only proper penalty. So far from being assailed by any doubts in the matter, I entirely agree with that conclusion. I would therefore confirm the death sentences.

There remains the appeal by the second appellant against the sentence of five years imprisonment imposed in respect of counts 3 and 4, taken together for the purposes of sentence. Counsel for the second appellant was unable to persuade me that in so sentencing the second appellant the trial court had in any way misdirected itself; and the sentence does not induce any sense of shock in me. The appeal against the sentence on counts 3 and 4 must likewise fail.

Counts 3 and 4 involved contraventions of the Arms and Ammunition

Act, 75 of 1969. I would add only this. It is a notorious fact that there exists in our country a huge reservoir of unlicensed arms and ammunition to which violent criminals have easy and cheap access. lí is also an unpalatable fact that such is the rising tide of violent crime that despite their strenuous efforts the members of our understaffed and underpaid Police Force are unable effectively to combat it. Until this arsenal of illegal firearms is destroyed there will continue unabated the almost daily slaughter of young policemen, of defenceless old people living on remote farms, and of innocent travellers in taxis.

I have already mentioned that I am disposed to confirm both the death sentences. However, for the reasons set forth in this court's judgment in S v Makwanyane en 'n Ander 1994(3) SA 868(A) at 873C-D it is appropriate that the further consideration of the appeals against the death sentences by this court be deferred until the constitutional court shall have ruled upon the constitutionality of the death sentence in a case such as the present.

For the reasons aforegoing the following orders are made:-

(4) The second appellant's appeal against his conviction for murder on count 1 is dismissed.

(5) The second appellant's appeal against the sentence of imprisonment for five years imposed upon him in respect of counts 3 and 4 (taken together for purposes of sentence) is dismissed.

(6) The final disposal by this court of the appeals of both appellants against the death sentence imposed upon each of them in respect of their convictions for murder on count 1 is postponed to a date to be determined by the registrar of this court after consultation with the Chief Justice.

GG HOEXTER
JUDGE OF APPEAL

BOTHA JA)
E M GROSSKOPF JA) CONCUR
EKSTEEN JA)
HOWIE JA)