IN THE SUPREME COURT OF APPEAL
SOUTH AFRICA

Case No 406/95

In the matter between:

MLUNGISI DAVID LANGE	FIRST APPELLANT
MAHLOMOLA ENOCH MOKHOABANE	SECOND APPELLANT
ABRAHAM MOSANYANE MOSHAPANE	THIRD APPELLANT
and	
THE STATE	RESPONDENT

CORAM: NIENABER, HARMS ET SCOTT JJA

HEARD: 12 SEPTEMBER 1997

DELIVERED: 19 SEPTEMBER 1997

J U D G M E N T

/NIENABER JA

NIENABER JA:

This is yet another in the seemingly endless succession of appeals in matters involving the murders of farmers and their families. Mr Louwrens Vorster, 57 years old at the time of his death, single-handedly farmed on the farm Dwaalfontein in the district of Burgersdorp, some 25 km from Aliwal North. His wife, Anna Fransina Vorster, 53, ran her own business, a small farm shop, the Witkop Boerewinkel, some 22 km distant. On Thursday morning, 19 September 1991, she left, as usual, at about 8 a.m. in her Toyota pick-up truck with registration number CAE 2447. She was seen to return to the farm that afternoon at about 5 p.m. Shortly thereafter, at about 6.30 p.m., a local farmer, Mr Peyper, was returning from Aliwal North in the direction of Dwaalfontein, when he saw a vehicle approaching at speed, with its lights on. About 500 metres ahead of him that vehicle left the road and overturned. He stopped to investigate but saw no one until, returning to the overturned vehicle, two black men suddenly darted from the bushes ahead of him and scampered away. He shouted at them

to stop and directed his employees to pursue them but they managed to escape. He recognised the Toyota bakkie as belonging to the Vorsters and raised the alarm. Early the next morning Mrs Vorster's body was discovered in a field near the opstal on Dwaalfontein. She had been shot in the back of the head and in the abdomen with a Springfield .22 rifle belonging to Mr Vorster which was found in the house. Her hands had been tied above her head with a plastic coated wire. Later that morning of 20 September 1991 Mr Vorster's body was found submerged in a nearby farm dam, weighted down with two heavy stones, one weighing 78 and the other 18 kg. The immediate cause of his death was found to be strangulation. A ligature of plastic coated wire was tightly applied around his neck. In addition there were multiple penetrating incised wounds on the left side of his chest as well as multiple abrasions on the front of his forehead. The absence of water in his lungs and respiratory passages indicated to the district surgeon who performed the post mortem examination that Mr Vorster was already dead when his body was placed or dragged into the dam.

Three days later, on Sunday 22 September 1991, the three appellants, respectively 26, 21 and 28 years of age, were arrested in Aliwal North. They were eventually charged and, notwithstanding their alibi-defences, convicted. All three appellants were convicted on the count of robbery with aggravating circumstances; the first and second appellants were in addition convicted on both counts of murder but second appellant was convicted on one count of murder only, that relating to Mr Vorster, because the court could not exclude the possibility that the second appellant may have left the farm before Mrs Vorster returned during the afternoon.

On the robbery count each appellant was sentenced to ten years imprisonment and on the relevant murder counts each received the death sentence. This is an appeal in terms of s 316A of the Criminal Procedure Act, 51 of 1977, against both the convictions and the sentences imposed by Jennett J, sitting with assessors in the Eastern Cape Division, Grahamstown, in respect of the counts of murder. Leave was subsequently sought and granted to the appellants by the trial court to appeal against their

convictions, but not the sentences, in respect of the count of robbery.

The main witness for the state was one Bhambushe Mathimba. He worked in Johannesburg for a certain Mr White who occasionally allowed him the use of a truck to visit his parents in Aliwal North.. It was during one such visit that first appellant, in the company of third appellant, his brother-in-law, approached him on the morning of 17 September 1991 with the request that he convey them to the farm Dwaalfontein to fetch, in the words of the witness, the third appellant's 'clothing which he left there, because he was working at that place.' They negotiated a fee of R60. At approximately midday they left Aliwal North in the truck. Along the way they picked up the second appellant. Mathimba followed third appellant's directions. At a certain point, some distance from Aliwal North, the third appellant said to him 'His boss don't want vehicles to come to his place, so it will be better for me to stop and wait for them there until they come back.' He waited for some time, during which he fell asleep, before the three appellants re-appeared. They had in their possession a carry-bag with

goods (subsequently identified as goods belonging to the deceased) and a video machine. 'They said I must go together with accused No. 2. They will follow at a later stage on their own.' He and second appellant then returned to Aliwal North and the next day he left for Johannesburg. About a month later the police, having in the meantime arrested all three appellants on Sunday 24 September 1991, confronted him with the first and second appellants in Johannesburg. In answer to questions put to him under cross-examination he stated:

> The first person who was led into the place where I was seated Your Lordship, is Kawula, accused No 1. When he came he said he knows me and I am the person who transported them to the farm.
>
> And accused No 2 you say also identified you. -— Yes, he identified me and he spoke similarly as accused No 1. He said I'm the person who took them to the farm.'

He was himself arrested and only released during December 1991.

The court a quo described Mathimba as 'a very good witness.' Notwithstanding that strong credibility finding, it was argued on appellants' behalf that he should be disbelieved in toto. It was contended, as a starting

point, that Mathimba was an accomplice and a single witness; but the court a quo, rightly or wrongly, evaluated his evidence precisely on that footing. He was criticised for not insisting on payment; but he had an explanation, namely, that he expected to see the first appellant again. It was said that he implicated the three appellants in order to divert attention from his own involvement in the murders of the deceased; but his involvement was established by his own evidence and he could gain nothing by falsely incriminating the three appellants. It was also suggested that his evidence implicating the appellants was designed 'to exact revenge' because they caused him to be incarcerated; but the first and second appellants, in the passage quoted earlier, themselves forged the link between Mathimba and their presence at Dwaalfontein on the day of the murders. There were one or two other lesser points of criticism raised against his evidence but in the end counsel for the appellant was constrained to concede that there were not enough contra-indications to disturb the court a quo's assessment of Mathimba as a good witness.

His evidence goes a long way to establish the appellants' presence on the farm on the day in question.

It was not, moreover, the only evidence implicating the three appellants. So, for example, it was forensically established that a hair from Mrs Vorster's head was found on a pair of swimming trunks, exhibit 9. The court a quo ignored that piece of evidence because of the possible confusion on the part of a police witness as to whether the swimming trunks belonged to the first or to the third appellant. Either way, however, it serves as powerful corroboration for Mathimba's evidence.

Then there is the evidence of Dr Groencwald, the district surgeon for Aliwal North. On 18 October 1991 the second appellant, then detained in the police cells in Rouxville, in a dramatic gesture drew attention to himself. Sgt Le Roux described the incident which happened when he inspected the cells at 6 o'clock that morning in these terms:

> ' ... die beskuldigde [het] reg agter die traliedeur gestaan. In sy regterhand net hy gewys het hy 'n bietjie fyn glas gehad, glasstukkies, spieël glasstukkies en in sy linkerhand 'n blikbeker met water. Hy het hierdie glas in sy mond gegooi en dit afgesluk met

water voordat die deur oopgesluit kon word om hom te keer.'

That afternoon he was taken to Dr Groenewald. Groenewald testified:

'Het u vir hom gevra waarom het u dit gedoen? --- Nee, ek het aan hom gevra wat hy gedoen het, en sy antwoord daarop was spontaan, hy het toe vir my 'n spontane verduideliking gegee wat gebeur het.'

In his form J 88 report, Dr Groenewald recorded the second appellant's reply as follows:

'Opmerkings om ± ()6hl5. Persoon sê die toordokter gee hom buikpyn (L) wat vreet en die Oubaas en Oumies wat hulle doodgemaak het spook by hom. Om die vreet in sy maag stil te kry het hy die spieël geëet.'

It was argued that this statement, which on any reading thereof is highly inculpatory, should be disregarded, not because it was elicited by improper means but because, coming from a district surgeon, it would be unfair to take it into account against the appellant concerned. It was not, so it was submitted, the function of a district surgeon 'to gather evidence for the state'. But that is not what Dr Groenewald purported to do. The second appellant's reply was a spontaneous response to a legitimate

question. No grounds exist for properly excluding this evidence, which serves the dual purpose of corroborating Malhimba and of implicating the second appellant.

The first and second appellants sought to rely on alibis, whilst the third appellant declined to testify. The alibis were rejected by the court a quo, and rightly so, as counsel for the appellants readily conceded. Both the first and second appellants were demonstrably mendacious witnesses. The third appellant too was shown to be untruthful when, in the section 119 proceedings before the magistrate, he claimed that blood found on the jacket in his possession was his own whereas it was established to belong to a different but relatively rare blood grouping which, coincidentally, happened to match that of Mrs Vorster. His silence, in the face of compelling evidence of guilt, proves the case against him.

For all these reasons the appellants were correctly convicted, in my view, on all the counts.

The court o quo, in addition, relied on certain statements made by

first and second appellants to Constable September on 23 September 1991. Constable September questioned them about the accident with the bakkie without mentioning the murders of which he was then aware. Both of them admitted that they were passengers in the bakkie driven by the third appellant when it overturned. These admissions, innocuous in the context of a charge of reckless or negligent driving, were severely damaging to them in the context of the murder counts. Second appellant's admission docs clash with the evidence of Mathimba (that he had earlier conveyed second appellant to Aliwal North) and one can only speculate as to the reason for the contradiction. One explanation, favoured by the court a quo, but not an entirely satisfactory one, was that it was an attempt to divert attention from Mathimba, a potential witness against them. Failing any other explanation the contradiction does not necessarily reflect adversely on Mathimba's credibility.

There was no suggestion that Constable September, investigating as part of his normal duties the possibility of a charge of reckless or negligent

driving in respect of the accident, obtained these admissions in collaboration with the police team investigating the murders. Indeed, the unchallenged evidence was that the team investigating the murders only learnt about the statements a month or so later. This was not, therefore, an instance where the appellants were tricked or deceived by the police into making admissions they would not otherwise have made. Nevertheless, counsel for the state, after some prompting, made the concession that the statements should be disregarded because the attention of the two appellants was not specifically directed to the full implications which their admissions may have in regard to the murders. That may be so. But because the case against the two appellants is so conclusive, even without September's evidence, I regard it as unnecessary to express a view on whether the concession, in the absence of sharp practice on the part of the police, was properly made.

The appellants, as stated earlier, were correctly convicted. There is no appeal against the sentences of ten years imprisonment in respect of

count 1 (robbery with aggravating circumstances). Those sentences accordingly stand. Since the death sentence as such has now been declared to be unconstitutional, the appeals against the death sentences must, however, succeed. The current practice of this court is to remit a matter of this nature to the trial court for a reconsideration of the sentence. The following order is made:

1. The appeals of all three appellants against their convictions are dismissed.

2. The appeals of all three appellants against the sentences of death imposed on them are upheld and such sentences are set aside.

3. The matter is remitted to the court a quo for the imposition of competent sentences on the counts of murder.

P M Nienaber
Judge of Appeal

Concur
Harms JA
Scott JA