

Editorial note: Certain information has been redacted from
this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No 288/95

In the matter between

NZIMENI BEN NTSANGANA

APPELLANT

and

THE STATE

RESPONDENT

Coram: Vivier, Marais et Zulman JJA.

Heard: 7 November 1997

Delivered: 11 November 1997

JUDGMENT

VIVIER J A:

The appellant ("accused No 2") appeared with one other ("accused No 1") before Jennett J and assessors in the Eastern Cape Division upon charges of housebreaking with intent to rob and murder (count 1), robbery with aggravating circumstances (count 2), murder (count 3), rape (count 4), indecent assault (count 5), housebreaking with intent to steal (count 6), theft (count 7) and the unlawful possession of three firearms and a quantity of ammunition (counts 8, 9, 10 and 11). Accused No 1 was found guilty on counts 2, 3, 7, 8 and 10. On counts 2 and 7 he was sentenced to 10 years' imprisonment, on count 3 to 8 years' imprisonment and on counts 8 and 10 to 12 months' imprisonment

on each count. Certain of the sentences were ordered to run concurrently so that he was effectively sentenced to 16 years' imprisonment. Accused No 2 was convicted on counts 2, 3, 5,

7, 9, 10 and 11. On the murder count he was sentenced to death. On counts 2 and 7, which were taken together for the purpose of sentence, he was sentenced to 12 years' imprisonment, on count 5 to 6 years' imprisonment, on counts 9 and 10 to 12 months' imprisonment on each count and on count 11 to 3 months' imprisonment. In terms of sec 316 A(l) of Act 51 of 1977 accused No 2 appeals to this Court against his conviction and sentence on count 3. There is no appeal against his convictions and sentences on the other counts.

The deceased was the 83 year old Mrs M.M.S. who lived alone on the farm S... near Thomhill in the district of Hankey. During the early evening of Sunday 5 July 1992 her house was broken into, she was severely assaulted and killed and a large quantity of her possessions stolen from the house. Her garage was then broken into and her Opel Ascona car removed.

The stolen goods were loaded into the car and conveyed to Port Elizabeth where it was stored at various addresses. The car was later found abandoned. The stolen property consisted of no fewer than 225 items including clothing and household goods, a Mauser rifle (exhibit 1) a ,45 Bulldog revolver (exhibit 3), 12 rounds of ammunition for it (exhibit 5), a ,32 revolver (exhibit 4) and a Citizen Quartz lady's wrist-watch (exhibit 9). When the police arrived at the deceased's house later that evening they found the partly undressed deceased lying on the floor of one of the bedrooms. She was tied both by her hands and her feet and was already dead. The whole house had been ransacked and was in total disorder. Entry to the house had apparently been gained through the lounge window after three large stones or pieces of rock, later found in the lounge and hallway, had been thrown through the window.

An autopsy on the deceased's body revealed the existence of multiple bruises, abrasions and lacerations over her face, head, chest and other parts of the body. Nine of her ribs were fractured and one lung and the spleen were torn. Her nose was broken. The horn of the thyroid cartilage was fractured with bleeding into the deep tissues. Fingernail abrasions on the right side of the neck and bruising of the left side of the neck indicated that she had been throttled. There was evidence of lacerations to the vagina, anus and rectum which penetrated the abdominal cavity and the retroperitoneal space causing extensive bleeding and tearing of tissues. According to the doctor performing the examination the causes of death were severe blunt force to the body as well as throttling. He said that there had been some form of separate penetration of the vagina and rectum while the deceased was alive.

The depth of the penetration into the abdominal cavity indicated the

introduction of a foreign body rather than a male penis.

The State evidence against the two accused may be briefly summarised. Mr Wellington Maneli ("Maneli") said that his wife is related to accused No 2 and that he has known accused No 1 for a long time. On Sunday 5 July 1992 the two accused arrived at his house in Kwazakele, Port Elizabeth at about eight o'clock in the evening in a vehicle which was loaded with clothes and other household articles. Among the goods were a rifle and two handguns

similar to exhibits 1, 3 and 4. They had previously asked him whether he would store some clothes for accused No 2 who intended moving into a shack near where Maneli lived. Accused No 2 showed him a document which he said authorised his possession of the three firearms. After carrying the goods into his house the two accused left, taking one of the handguns with them saying it needed repairs. A few days later the police arrived at his

house with the two accused and he handed exhibit 1 and the other stolen goods to the police.

Silvia Wakula who lives just across the road from accused No 1 testified that on Monday morning 6 July 1992 accused No 1 brought items of clothing to her which he asked her to keep for him. Three days later the police arrived and took the clothes away.

On Monday 6 July 1992 the deceased's Opel Ascona car was found abandoned in Kwazakela. Accused No 1's fingerprints were found in the car. In the early hours of Wednesday 8 July 1992 accused No 1 was arrested in his house and a large number of the stolen goods, including exhibit 4, recovered from his house. Later the same morning accused No 2 was arrested when he arrived at accused No 1's house. Shortly afterwards the investigating officer, Sergeant Campbell, turned up at accused No 1's house.

He testified that he found accused No 2 wearing the deceased's wrist-watch (exhibit 9). From there the two accused took the police to the houses of Maneli and Wakule where the bulk of the stolen goods were recovered. Later the same morning accused No 2 took Sergeant Campbell to the house of a Mr Makini in Soweto, Port Elizabeth. Campbell testified that Makini was not at home but that accused No 2 took possession of a red plastic bag (exhibit 8) containing more items stolen from the deceased, including a Penn fishing reel, ladies' clothing and crockery. Accused No 2 also searched for a firearm but could not find it and later that day Makini brought exhibits 3 and 5 to the police station.

Accused No 1 testified that on the Sunday morning in question accused No 2 arrived at his home and suggested that they carry out a robbery at the deceased's farm. They took a taxi and walked part of the way to the farm. At the farm they threw a

stone through the window of the lounge which struck the deceased who was sitting in the lounge. She fell down and after entering the house through the window he grabbed and held her while accused No 2 kicked her on her head and body. They tied her hands and feet and put her in one of the bedrooms. They collected goods from the house after which he broke into the garage and removed the deceased's car. They loaded the stolen goods into the car. Accused No 2 then went back into the house and he heard the deceased crying. Accused No 2 remained in the house for about ten minutes before returning, carrying exhibit 1. The deceased was then quiet. They then left in the deceased's car. They left some of the stolen goods with the State witnesses Maneli and Wakule and some were taken to his own house. Among the stolen goods were exhibits 3, 4 and 5. Accused No 2 stayed with him that night. He knew nothing about the deceased's wrist-watch

until after the arrest of accused No 2 when he saw it lying on the floor in his house. Accused No 1s defence, that he had throughout acted under duress from accused No 2, was rejected by the trial Court.

Accused No 1s wife, Ellen Nkosana, testified in his defence that she arrived home on Monday evening 6 July 1992, after an absence of a few days. She found accused No 2 there and he told her that the previous day he and accused No 1 had been to a farm where an old lady lived alone and that when they left the farm she was cold, which she understood meant that they had left her dead. He did not tell her what happened on the farm. She said that later that Monday evening an argument ensued between the two accused over accused No 2's claim that he was entitled to the firearms because he had found them in the safe. When she intervened accused No 1 slapped her in the face. She was present when

accused No 2 was arrested on the Wednesday morning. He was wearing a wrist-watch at the time and when the police asked him whose watch it was he replied that it belonged to his wife. The police then took the watch from him. She had seen him wearing a watch on the Monday night which his brother who was with him then had said that he should give to her. (The implication being that it was a lady's watch.) Accused No 2 put up an alibi defence. He testified that he went to accused No 1's house at about four o'clock on the Sunday afternoon. Some time after that when he was about to go home a white Mazda bakkie arrived at the house. The two occupants of the Mazda, one of whom was a man called Andile, alighted,

entered the house and spoke to accused No 1 who then asked accused No 2 to look after his house while he accompanied the other two to New Brighton. They drove off and only returned at

about nine o'clock after he had already locked the doors and

fallen asleep. Accused No 1 and the other two men started carrying clothes covered with blankets into the house and when they had finished the other two left. Accused No 1 then asked him to help him carry some of the clothes to Maneli's house in an Opel Ascona car which was parked outside accused No 1's house and which accused No 2 thought accused No 1 had hired. They loaded the vehicle and drove to Maneli's house. Accused No 2 did not go into the house and it was accused No 1 and Maneli who carried the clothes into Maneli's house. He saw no firearms. Thereafter accused No 1 told him to go back to his, accused No 1's, house while he took the car somewhere else. He did as he was told and after accused No 1 had returned he went home.

Accused No 2 testified further that on the Monday evening he and his brother were at accused No 1's house when the latter's wife

arrived back after an absence of a few days. In the course of the evening there was an argument between accused No 1 and his wife and accused No 1 hit his wife. Accused No 2's brother intervened and accused No 1 tried to stab him. Accused No 1 again hit his wife and when she fell he kicked her and said that he would kill her. Accused No 2 managed to calm him down and he and his brother then went home. There was no mention of a watch that evening. The next day he again visited accused No 1 who then told him that he had two firearms. He said he had a buyer for one and he asked accused No 2 to keep the other one with him overnight as he was afraid that his wife might find it and use it to shoot him. Accused No 2 took exhibits 3 and 5 home with him and later that evening he gave it to Makini to keep for him. Accused No 2 denied that he had accepted any other stolen items from accused No 1 and denied that he had given the red plastic bag

(exhibit 8) to Sergeant Campbell. On the Wednesday morning he again went to accused No 1's house and was arrested upon his arrival. He denied all knowledge of the deceased's wrist-watch and said that he was wearing his own watch when he was arrested, which was not taken from him by the police.

The trial Court accepted the evidence of accused No 1's wife and described her as a fairly impressive witness. It was submitted on behalf of accused No 2 that the trial Court should have rejected her evidence as unreliable. It was submitted that she tried to protect her husband and that in doing so she testified selectively and disclosed no more than was necessary to incriminate accused No 2 and to shift the blame from her husband. It was submitted that accused No 1 had briefed her fully on what had happened on the deceased's farm and that her evidence was designed to minimise his role in the commission of the crimes.

I am unable to agree with counsel's submissions. If accused No 1's wife had wanted to protect her husband by shifting the blame on to someone who was not even on the farm one would have expected her to have given a totally different version of what accused No 2 was supposed to have told her. She would then surely have said that accused No 2 told her that he was the one who had killed the deceased or played the major role. Instead she repeatedly said in reply to questions put to her by counsel for accused No 2 that she did not know who committed the crimes or who was the main perpetrator, as the following extract from the record shows:

"Now in your mind are you satisfied that Ben (accused No 2) is the person who, who committed the crimes out there on the farm? – No I don't know because I was not there (interrupted) No but (interrupted) – He who told me. Ja you must have a feeling, you must, do you feel that, that he is the one who is responsible? – I don't but he is the

person who told me about the incident and he said that (indistinct).

So your feeling is that he must have been the principal actor? – I don't know I was not there.

I'm not asking you whether you were there or not I'm asking you about a feeling you had. Say yes or no answer required.

– I don't know."

Furthermore, if accused No 1 had told her his full version of what had happened on the farm as was suggested by counsel, one would have expected her to support his version of having acted under duress. Her evidence of what accused No 2 told her did not in any way advance the defence put up by accused No 1 that he acted under duress.

Counsel for accused No 2 submitted that the fact that she minimised the injuries she had received at the hand of her husband showed her loyalty to her husband and that she would fabricate evidence to help him. I do not agree. It was only accused No 2

who said that she was severely injured and his evidence was rejected by the trial Court. In any event her loyalty to her husband does not justify the inference that she would lie to protect him.

In my view there is no reason to interfere with the trial Court's acceptance of the evidence of accused No 1's wife. Her evidence about the argument over accused No 2's claim to the firearms has the ring of truth about it. Her evidence that he wore the wrist-watch taken from him by the police (exhibit 9) was corroborated by Sergeant Campbell. In this regard I do not find her evidence about the suggestion that the watch be given to her as a gift improbable at all, as was submitted by counsel for accused No 2.

Although accused No 1 was a bad witness who clearly lied to reduce his own role, and although when he was arrested he was prepared to implicate one Chris as his co-perpetrator, the trial

Court's acceptance of his evidence in so far as it implicated accused No 2 cannot, in my view, be faulted. There was material corroboration for that evidence. There was the evidence of his possession of exhibits 3, 5, 8 and 9 and the evidence of his claim that he was entitled to the firearms because he had taken it from the safe in the deceased's house. There was his own unsatisfactory evidence.

The trial Court found that accused No 2 was an unimpressive witness and rejected his evidence as being untruthful. No good reason exists to reject this finding. Indeed a reading of his evidence shows that he clearly lied on more than one occasion and that his evidence is totally improbable on a number of aspects. A few examples will suffice. He denied all knowledge of exhibit 8 which was found at Makini's house. In this regard there is no reason to disbelieve Sergeant Campbell's evidence that it was

accused No 2 who took him to Makini's house and obtained the bag from Makini's house. Accused No 2 also lied when he said that he saw no firearms on the Sunday evening. His counsel had previously put to Maneli that he saw exhibit 1 but not exhibits 3 and 4 on the Sunday night. According to both Maneli and accused No 1 he was aware of the firearms and indeed showed Maneli a document justifying his possession. There is no reason to doubt that evidence. Accused No 2's explanation for his possession of exhibit 3 is so far-fetched that it can safely be rejected. Why would he be handed the gun only on the Tuesday when accused No 1 already feared for his life on the Monday, and then be told to return it the next day? Accused No 2 also lied about his possession of the deceased's wrist-watch.

According to accused No 2 he did not ask a single question when accused No 1 arrived at his home the Sunday evening with a

huge load of goods in the Opel Ascona. His evidence that accused No 1 told him nothing and that he was not curious is highly unlikely. So is his evidence that he visited accused No 1 on four consecutive days for no apparent reason.

In all the circumstances there is, in my view, no good reason to interfere with the trial Court's rejection of accused No 2's alibi. On all the evidence it is clear that he participated in the commission of the crimes and that he was correctly convicted on the charge of murder. As I have said there is no appeal against his other convictions.

That leaves the appeal against the death sentence. That sentence must be set aside in consequence of the decision of the Constitutional Court in *S v Makwanyane and Another* 1995(3)SA 391. The case will be remitted to the Court a quo to enable it to consider an appropriate substitute for the sentence of death.

In the result the appeal against the conviction of accused No 2 on the murder count is dismissed. His appeal against the sentence of death imposed in respect of the murder count is upheld. The sentence of death is set aside and the case is remitted to the Court a quo for further hearing and the imposition of an appropriate substitute for the sentence of death.

W VIVIER JA.

MARAIS JA)

ZULMAN JA) Concurred.