165/94

Case No 657/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MICHAEL BRUCE DECEMBER **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **JOUBERT, HEFER, NESTADT, NIENABER et HARMS JJA**

HEARD: **3 NOVEMBER 1994**

DELIVERED: **22 NOVEMBER 1994**

JUDGMENT

/NIENABER JA

NIENABER JA:

It was no longer in dispute, when the matter reached this court, that the appellant, a part-time gardener in his late twenties, bludgeoned or perhaps stabbed to death Peter Jacob Nanni, a 63 year old pensioner and his 71 year old wife, Erica Aldyth Nanni. This happened on Friday 28 June 1991 at their home on the outskirts of Stutterheim in the Eastern Cape. After killing the two deceased the appellant fled with R3 400,00 which he found in their house and took refuge with his uncle in the Ciskei. He returned to South Africa accompanied by members of the South African police where he was eventually tried and convicted by Kannemeyer J (sitting with assessors) in the Eastern Cape Division of the Supreme Court of South Africa. For the murder of the husband (count 1) he was sentenced to 25 years imprisonment. For the murder of the wife (count 2) he was sentenced to death. And on a

charge of robbery (count 3) he was convicted of theft of the money and sentenced to one year imprisonment, to run concurrently with the sentence on count 1.

This is an appeal in terms of s 316(A)(1) of the Criminal Procedure Act, 51 of 1977 ("the Act") against his conviction and sentence on count 2; and against his convictions on counts 1 and 3 in terms of leave granted to him by the court **a quo**. (The appellant's notice of appeal was filed out of time; to the extent that it is necessary to do so, condonation for this lapse is hereby granted.)

There are two main issues in the appeal: first, whether the court **a quo** had the requisite jurisdiction to try the appellant; second, whether the sentence of death imposed in respect of count 2 was the only appropriate sentence.

The first issue, raised before the court **a quo** in terms of s 106(1)(f)

of the Act, stemmed from the manner in which the appellant was returned to South Africa from the Ciskei. The crimes were committed in the Republic of South Africa on the Friday. The appellant thereafter fled to Phakamisa township, outside King William's Town, in what was then the independent Republic of Ciskei. There he was found during the early hours of Sunday morning by a posse of policemen from South Africa. He returned with them to East London where, after being interrogated, he was formally arrested. Some two hours later he made a confession to Lt. Schwartz, which was reduced to writing as exhibit M, the admissibility of which was contested in the court below but conceded in this court.

According to the appellant he was arrested in and abducted from the Ciskei to the Republic of South Africa - in which event, on the authority of **S v Ebrahim** 1991 (2) SA 553 (A), a South African court lacked jurisdiction to try him; or, at the very least, he was, so it was contended, duped by the

South African police to accompany them to South Africa - in which event, on the authority of **S v Wellem** 1993 (2) SACR 18 (E), he could likewise not be tried in South Africa.

Only the first of these eventualities was canvassed before the court a **quo**. The court dealt with it in two separate judgments: in a provisional judgment focusing exclusively on the jurisdiction issue and again in a later judgment focusing on the admissibility of the confession, exhibit M. The two issues converged because the appellant relied on substantially the same material for his assertion that he was both abducted from the Ciskei and coerced into subscribing to the confession.

The **onus** in both respects rested on the state (cf **S v Mahala and Another** 1994 (1) SACR 510 (A) 511e). The state led the evidence of the policemen who found and escorted the appellant from the Ciskei. They were the investigating officer, Sgt. Radue, his immediate superior, Capt. de Vos,

and two others, Capt. McLaren and Sgt. Jozana, all from the murder and robbery branch of the Border division of the South African police stationed at East London. According to Sgt. Radue there were no eye-witnesses to the killings. But several garden implements were found scattered around the deceaseds' garden, as if a normal gardening routine had suddenly been interrupted, and the appellant was known to be an occasional gardener employed by the deceased. Sgt. Radue was accordingly anxious to interview him. The appellant could not be found at his home at Mlungisi township outside Stutterheim but the appellant's younger brother and girlfriend suggested that he might have gone to his uncle in a township called Phakamisa in Zwelitsha in the Ciskei. The younger brother and the girlfriend guided and accompanied the police to the appellant's uncle's house. According to the police witnesses, all of whom testified either initially or in the later trial within a trial, the whole operation took but a matter of minutes.

There was no violence of any sort and the appellant willingly consented to return with them to East London in order to assist them in their further investigations. He was not, so they all insisted, a suspect because they possessed no information at that stage which incriminated him in any way. But because the police were alive to the legal implications of a police operation in Ciskeian territory the appellant was specifically asked whether he was prepared to accompany them to South Africa to be interviewed. According to their evidence he was. Capt. de Vos made an entry in his pocket book which was interpreted to the appellant by Sgt. Jozana and which the appellant duly signed. The entry is that of Sunday 30 June 1991 at 3h20 and it reads:

> "Te Pakamisa township 2216. Spoor tuinier Michael December aldaar op. Hy word gevra of hy nie bereid is om my na die Republiek te vergesel nie aangesien ek hom wil ondervra deurdat hy by die oorledene gewerk het. Hy deel mee dat hy my uit sy eie vrye wil vergesel en dat ek hom kan saamneem."

According to the police witnesses the appellant had not been arrested at that stage. He could not have been arrested since the police had not yet interviewed him and it would have been inconvenient and inappropriate for them to do so there and then, in the middle of the night, in the middle of the township and in the midst of all the confusion caused by their sudden arrival. He was invited to accompany them to East London and he readily agreed to do so.

According to the appellant and his uncle, on the other hand, the appellant was manhandled, handcuffed and forcibly removed from the Ciskei against his protestations. Both of them denied that the appellant signed the pocket book at that time and at that place. The appellant admitted in evidence, albeit somewhat reluctantly, that it was his signature which appeared in the pocket book. He was adamant that he signed it only on the following Monday without appreciating what it was that he was signing.

Notwithstanding certain discrepancies in the evidence of the various police witnesses and the strong suspicion that they may have painted the lily, the court **a quo** had little hesitation in preferring the version of the state to that of the defence. It found that the appellant did sign the entry in De Vos' pocket book at the time and place alleged by the police. This, in turn, was a clear indication, so it was held, not only that the appellant consented to accompany the policemen to South Africa but also that he and his uncle were untruthful witnesses. Counsel for the appellant was unable to advance any compelling reason why this court should differ from the assessment of the court **a quo**. The matter must accordingly be approached, as the court **a quo** did, on the footing that the appellant was neither arrested in nor abducted from the Ciskei. Where the appellant was not forcibly abducted and his return to South Africa was voluntary there was no infraction of South African or public international law; consequently the decision in **Ebrahim's**

case **supra** did not preclude a South African court from exercising jurisdiction to try the appellant (see too **S v Mahala and Another supra; S v Rosslee** 1994 (2) SACR 441 (C)).

For the purpose of his alternative argument the appellant accepted that he was not forced to accompany the South African policemen to East London but that he did so willingly. Nevertheless, on the authority of **S v Wellem supra,** it was submitted in this court that the rationale of **Ebrahim**'s case **supra** is to be extended to a situation where an accused person's presence within the jurisdiction is obtained by "craft or cunning" (**Wellem**'s case **supra** 31c-f). The argument founders at its berth: there is no basis whatsoever on the facts of this case for a finding that the appellant was enticed into South Africa by devious means. And to the extent that it was further suggested that the appellant should at the outset have been lectured on the nature and details of extradition proceedings in place between South

Africa and the Ciskei at the time (see too **S v Buys and Others** 1994 (1) SACR 539 (O) 550f-552a), this court, in **Mahala's** case **supra** at 516d-e, held that no such duty is cast on the police as a precondition to consent from a person they wish to escort into this country. Failing a duty to speak, there can be no false representation by silence. Consent so obtained is not improperly obtained. Consent properly obtained dispenses with the necessity of seeking formal extradition.

S v Mahala supra also provides the answer to a further submission based on **S v Wellem supra** at 29e-h, namely that the police contingent acted unlawfully when, without proven authority given to them pursuant to s 6(6) of the Police Act 7 of 1958, they entered the Ciskei in order to investigate a crime committed in South Africa; and that considerations of public policy precluded the appellant's consent from rendering conduct otherwise unlawful, lawful. That very situation also occurred in **Mahala's**

case. Nevertheless this court, with knowledge of **Wellem**'s case which was cited to it, decided that the trial court had the jurisdiction to try the accused. In **Mahala**'s case **Wellem**'s case and, following it, **Buys**'s case **supra**, were impliedly overruled. It is now done expressly.

In the absence of unlawful or improper conduct in the sense referred to in **Ebraham**'s case **supra**, on the part of any of the organs or functionaries of the South African state, a South African court is not precluded from trying anyone for crimes committed within its borders. Here was no unlawful conduct. The special plea was accordingly rejected.

This was the only ground on which the correctness of the convictions on all three counts was contested in this court. The appellant's appeal against his convictions must therefore fail.

I turn to the second main issue, the sentence of death imposed in respect of the murder of Mrs Nanni, count 2.

The appellant was either 26 or 28 years old when these events took place. He had by then progressed no further than standard 5 at school and his only employment at the time was that of a part-time gardener. The only other relevant factor, extraneous to the circumstances in which the crimes were committed, was that the appellant had no previous convictions.

The two deceased lived alone. No servants lived on the premises. Mr Nanni was a frail man for his age. A portion of his stomach had been removed surgically. Mrs Nanni, although older than her husband, was described by the court **a quo** as "a robust lady in good health". Their bodies were discovered on the Friday afternoon in what, if they had domestic servants, would have been the servants' quarters. Mr Nanni's body was found in a lobby leading to the toilet; and Mrs Nanni's body was in the toilet itself with her legs astride the toilet basin.

Both post mortem examinations were conducted by the same district

surgeon, Dr Wingreen. In regard to Mr Nanni he found that there was a total destruction of the skull with multiple fractures, depressed and driven into the brain tissue, as well as a penetrating stab wound into the chest. There were several incised wounds caused by a sharp cutting instrument such as a knife. The force of the blows to the skull caused brain tissue to gush to the ground. The injuries to Mrs Nanni were similar in nature. She had a fractured skull and brain injuries, two incised wounds into the lung and an incised wound of the trachea. The instrument causing that wound, assuming it to be a knife, had passed right through her throat from side to side. The district surgeon concluded that she had died of head and chest injuries and he recorded a list of 12 or more of them. In one of the photographs an axe can be seen on the floor of the toilet in which her body was found. The side of the door and the door frame were spattered with blood. According to the district surgeon the head wounds to both the deceased were consistent with the axe being

used. The stabbing instrument was never recovered. When Mr Nanni's body was discovered it was partially concealed beneath a foam mattress. A pool of blood outside the door of the outhouse had compost or manure heaped on it. In the house itself a frying pan was found on the stove with its contents charred and the stove still on. On the veranda there was knitting lying on a chair and a sewing bag had been left on the ground. The motor vehicle of the two deceased was still on the premises but it had bloodstains on it suggesting that someone with blood on his hands had tried to start it. There were indications that the house had been searched. The court **a quo** found:

> "It seems quite clear that the two deceased were murdered where they were found outside the house. The blood at various spots in the house was not indicative of any assault upon them within the house. All of this is indicative of somebody having killed the deceased outside and thereafter having searched the house. A very considerable amount of blood would have flowed as a result of the injuries and it is to be expected that the assailant under such circumstances would have had

blood on himself and on his clothes, traces of which were eventually found about the house."

In his evidence on the merits the appellant flatly denied everything. He was elsewhere. He knew nothing about the death of the two deceased. The blood on his clothes and shoes resulted from an assault on his girlfriend when they quarrelled on the Thursday. (She admitted the assault but denied the blood.) The only evidence, such as it is, as to what actually happened on that fatal day is therefore contained in his confession, exhibit M. In it he stated, inter alia:

"On Friday morning I left the hotel where my girlfriend works I went to town to do my casual jobs I went to the house of the deceased, I had worked for him as a gardener I used to wash the car, clean the windows and paint the house, the deceased had borrowed me a R100,00 and I wanted to borrow another R70,00. I did not get the R70,00 because he told me he did not have the money because he is not working, we then had a quarrel because they did not want to give me some money, they told me that they had already given me some money and told me not to refund it so they could not give me more money because they did not have it. We then had an argument I told

them that I had a problem, I told them, that I had worked for them for one year why can they not help me when I have got a problem. Then this old white man called me a stupid and hit me with an open hand on the left side of my face because we were in the spare room I picked up an axe and I chopped him on the head with the axe just then the old white woman the wife of this old white man appeared from outside and grabbed hold of me by my face. ("Indicates by placing his hands over his eyes"). I wrestled myself loose and I chopped her on the head with an axe and she fell to the ground inside the spare room. I then went and searched for money inside the house I did find money in a drawer in the bedroom I did not count this money it was in a yellowish wallet. ("Gets up and walks over to a Kohler calendar in my office and points to the yellow background"). I also found the car keys on the table in the kitchen I took the car key to the brown bakkie Toyota Hi-lux I wanted to drive away in the bakkie but I could not get it out of the yard. I then left the key in the ignition and I went away to my home at Mlungisi Location. I took off the clothing I was wearing and I changed into clean clothing and I went back into town I bought the clothing I am now wearing. I bought myself a pair of brown shoes, pair of socks blue jeans, a ANC T-shirt and a jersey as well as a hat. I then went to the bottle store and bought myself four beers and a half-bottle of Smirnoff. I then went home changed into new clothes I had just bought and I went to Amatola Sun to gamble but I lost, I do not know how much I spent at Amatola Sun because I was already under the influence of alcohol. From the Amatola Sun I went to my uncle's house in Phakamis: Location, Zweilitsha."

The remainder of his confession deals at some length with his subsequent movements and it concludes as follows:

> "What made me do this thing is that I needed money I am paying support for two children I am a sportsman by training needs some money I am a boxer and a brown belt in karate and I also did not have decent clothing, since 1980 after I was involved in an accident I must work and rest, work and rest therefore nobody employs me permanently so I can only engage casual labour, casual jobs don't pay enough money. My father has seven children I am the first born all the others are still at school and he does not manage to maintain all seven of us. If it was not for those reasons I would not have being in this trouble I was trying to help my father."

Statements contained in a confession which are not supported by credible evidence can obviously not be taken for the truth, especially when they are exculpatory in nature (see **R v Valachia and Another** 1945 AD 826, 835; **S v Nduli and Others** 1993 (2) SACR 501 (A) 505f-h.) But they may serve to alert a court to a possibility of events or circumstances not otherwise revealed by the evidence (cf **S v Cloete** 1994 (1) SACR 420 (A) 428f-h).

And if that possibility is a reasonable one having regard to the evidence and the probabilities as a whole the appellant, even if he repudiates the statement, is entitled to have his conduct and state of mind assessed in the light thereof.

In the instant case the court **a quo** found as a fact that the appellant had not been intent on robbing the deceased. It was purely coincidental that they happened to have had the amount of R3 400,00 in the house. These were wages which Mr Nanni was asked, as a favour, to distribute to a relative's workmen during the latter's temporary absence. That is why the appellant was convicted of theft and not of robbery - since the money was taken after the assault and not because of it (cf **S v Dlamini and Another** 1975 (2) SA 524 (D) 527 A-C).

Once it is found that the appellant did not plot a robbery, it follows that the murders were likewise not premeditated. According to the confession there was an altercation between the appellant and Mr Nanni. On

his own version the appellant was insolent and unreasonable and Mr Nanni was perfectly justified in refusing his demand for a further loan. This, unlike **S v Dlamini** 1991 (1) SACR 128 (A), was not a case where an appellant became enraged because he believed that he was cheated out of money due to him, or where he felt aggrieved because his employer obdurately refused to discuss his unsatisfactory working conditions with him (cf **S v Mvuleni** 1992 (2) SACR 89 (A) 94f-h).

In that sort of case, while the test is not whether an accused's rage should objectively be justifiable in order to diminish his moral blameworthiness (cf **S v Prins** 1990 (1) SACR 426 (A) 431g-h), one can more readily accept that an accused, as a reasonable possibility, would lose complete control of himself. The appellant in this case does not say or even suggest that he lost control of himself. Yet something untoward must have happened to unleash the events which followed. That it happened suddenly

and unexpectedly is apparent from the disruption of the appellant's work in the garden, from the food left simmering on the stove, and perhaps from the knitting on the veranda. One can accept as a reasonable possibility that a heated exchange developed between the appellant and Mr Nanni and that Mr Nanni may have said something which aggravated the situation and caused the appellant to lose his composure. According to the appellant's confession Mr Nanni insulted and slapped him in the face. The court **a quo** regarded it as so unlikely that this frail old man would have attacked a strapping athlete in his late twenties, a boxer and, he says, a karate expert (thereby almost inevitably inviting a violent reprisal), that it refused to accept that part of the confession. Nevertheless it found that there was what was described as "a modicum of provocation" and it was mainly for that reason that the death sentence was not imposed in respect of count 1. I have not been persuaded that the court **a quo** was wrong in its assessment of the

probabilities in this respect. The chances of Mr Nanni striking the appellant are so remote as to be discounted. But even if it did happen it cannot adequately explain the events that followed. This was not an instance of a single, sudden, spontaneous act of retaliation; it was a sustained, prolonged and savage annihilation of two elderly people who posed no threat to him. The appellant does not mention the knife or other sharp instrument with which he inflicted a number of stab wounds on both his victims. The district surgeon could not say which of the fatal wounds, caused by the axe or the knife, were inflicted first. If he crushed Mr Nanni's skull with the axe first, as his confession implies, why stab him afterwards? Or vice versa? Why do the same with Mrs Nanni? Whatever the sequence it suggests a measure of perversity. The force and extent of the violence is so wildly out of proportion to the suggested provocation, that it is difficult to credit the incident as a mere reaction to an insult. It may be that the killings were not

premeditated; that does not mean that his actions were not deliberate. The calculated and callous manner in which he conducted himself (covering the body of Mr Nanni with a foam mattress, hiding the body of Mrs Nanni in the toilet, obliterating traces of blood with compost or manure from the garden, before he methodically ransacked the house and tried to steal the vehicle), coupled with his utter lack of remorse after the event, is not indicative of an irrational loss of control or of an act committed in a sudden rush of panic.

The iniquity of the first murder was compounded by the second. In considering an appropriate sentence for the second murder the first murder cannot simply be ignored: it is part of the history, part of the pattern, and emphasises the enormity of the crime and the depravity of the appellant. Such a person shows little prospect of true rehabilitation, notwithstanding his lack of previous convictions. On his own showing he was committed to violence. He assaulted his girlfriend on the Thursday and killed both of his

employers on the Friday. Society yearns for protection against thuggery of this kind. Instant violence and gratuitous killing have lately become conditioned responses. It is a tendency which must be resisted with sentences which are commensurate with the outrage and disgust which such savagery inspires (cf **S v Nkambule** 1993 (1) SACR 136 (A) 147c-i).

In the present case the futility and the barbarity of the appellant's assault on the two deceased are in my view fully deserving of the most extreme penalty which society, through the courts, can impose. I would accordingly dismiss the appeal on sentence as well. But because the constitutionality of the death penalty is due to be considered by the constitutional court I propose to follow the practice of adjourning this matter until that court has clarified the position (cf **S v Makwanyane en 'n Ander** 1994 (2) SACR 159 (A) 162c-f).

The following order is made:

(1) The appeal against the appellant's convictions on counts 1, 2 and 3 is dismissed;

(2) The finalisation of the appellant's appeal against the death sentence imposed in respect of count 2 is adjourned to a date to be determined by the registrar of this court.

P M Nienaber
Judge of Appeal

Joubert JA]
Hefer JA] Concur
Nestadt JA]
Harms JA]