182/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 682/92 460/93

MABULA MICHAEL SWARTBOOI — 1st APPELLANT

WISEMAN SAKATYA — 2nd APPELLANT

VERSUS

THE STATE — RESPONDENT

CORAM: VAN HEERDEN, VIVIER JJA et NICHOLAS AJA

DATE HEARD: 2 NOVEMBER 1994

DATE DELIVERED: 29 NOVEMBER 1994

NICHOLAS AJA

JUDGMENT

NICHOLAS AJA:

The farm named The Ruins (which is also known to the local population as Freddie's Farm) lies about 10 kilometres west of the town of Bedford in the Eastern Cape.

The late George Wienand, a 77-year old retired farmer, lived there with his 74-year old wife, Mrs Josephine Wienand. On the evening of 3 July 1991 the couple were sitting in front of the fire in the lounge of the farm house. In the kitchen a maid, Present Kula, who was born on the farm and had lived her 42 years there, was preparing the evening meal. Another maid, Gladys Mentoor, was busy in the bedroom.

At about 7 o' clock this scene of domestic tranquility was disturbed by two men pushing open the kitchen door and entering the house. One of them caught hold of Present Kula's dress in front of her chest. The other held a gun against her head and threatened to crack her skull if she screamed. They demanded, "Where are the white people?" Present Kula replied that they were away from home. They escorted her through the kitchen door to the back of the house, saying that they wanted money. She took them to the office, the doors to which were found to be locked. There were other people outside ("two or so"). Two of the group, one of whom was holding the gun, went into the house through a side door. Another two, who were holding Present Kula, led her away through a small gate to a tree where they stood at some distance from the

house. After a while the man who had been holding her on her right side left and ran towards the house.

Meanwhile Gladys Mentoor, who was preparing Mrs Wienand's bed for the night, heard the side door to the house being opened. She paid no attention, thinking that it must be Present Kula. Then she felt a hand at the back of her neck and another across her eyes. She heard the voices of two people. They pulled her down and strangled her. They wanted to know where the white people were. She replied that they were not there. She was lying on the floor and they kicked her in the stomach. One of them left the room, and he was followed by the other. She went out of the bedroom, and when she got to the kitchen, found the door open. She ran outside, screaming,

towards the farm labourers' houses. She reported that there was something going on at the farm.

When the two men left Gladys Mentoor, they went to the lounge. There Mrs Wienand and her husband were listening to the news on the radio. One of the men, who was wearing a balaclava, went towards Wienand; the other came towards Mrs Wienand. They were aggressively demanding, "Where's money, where's money . . ." They pulled the Wienands from their chairs and pushed and kicked them down the passage towards the bedroom, saying repeatedly "Where's money, where's money . . ." Mrs Wienand went to her cupboard from which she took a purse containing about R80-00, which she gave to one of the men. The other man took Wienand's wallet from a drawer. He started kicking

Wienand, who had a disability from the effects of an old rugby injury. As Mrs Wienand moved towards her husband in order to help him, one of the men kicked her in the stomach. Wienand pulled himself up from the floor and said, "Just don't be so rough, I will find the keys and I will give you the money." At that moment a shot went off and Wienand slumped to the floor, dead. After the shot was fired, all the intruders ran away. The Bedford police were summoned.

On post mortem examination, the cause of Wienand's death was found to be a gunshot wound on the front of the chest lacerating the oesophagus and aorta.

Arising out of this occurrence, four men were arraigned in the Eastern Cape Division of the Supreme Court before a court consisting of

Zietsman JP and two assessors. They were:

Accused No 1: Mabulu Michael Swartbooi;

Accused No 2: William Meyi Slatsha;

Accused No 3: Wiseman Sakatya; and

Accused No 4: Shedi Nezile Dyantyi.

Seven counts were laid to their charge, namely -

Count 1: murder of George Wienand;

Count 2: robbery with aggravating circumstances;

Count 3: house breaking with intent to rob;

Count 4: kidnapping of Present Kula, alternatively assaulting Present Kula inside the house inside the house;

Count 5: unlawfully pointing a firearm in contravention of s.

39(1)(i) of Act 75 of 1969;

Count 6: assaulting Present Kula outside the house; and

Count 7: assaulting Gladys Mentoor.

All of the accused pleaded not guilty on all counts. Their counsel informed the court, and the accused confirmed, that they denied all the allegations against them and denied that they were at The Ruins on the evening in question.

The case against No 4 accused was never completed. He escaped from custody during an adjournment and did not again appear at the trial. Zietsman JP directed that the case against him be deemed to have been separated from the case against accused Nos 1, 2 and 3. In regard to accused No 2, the trial court considered that although there was a strong

suspicion that he was involved in the commission of the offences, there was insufficient evidence to prove this. No 2 accused was accordingly acquitted on all counts.

The trial court convicted accused Nos 1 and 3 on counts 1, 2, 3, 5, 6 and 7 as charged, but acquitted them of the kidnapping charged in count 4. The alternative charge in count 4 of common assault fell away because the charge of assault on count 6, was regarded as encompassing the assaults on Present Kula both inside and outside the house.

Accused No 1 was sentenced as follows:

Count 1, murder, 15 years' imprisonment;

Count 2, robbery with aggravating circumstances, 5 years' imprisonment;

Count 3, housebreaking with intent to commit robbery, 2 years' imprisonment;

Count 5, unlawfully pointing a firearm, 6 months' imprisonment; and

Counts 6 & 7, common assault, 3 months' imprisonment on each count.

It was directed that all the sentences run concurrently, with the result that the effective sentence on No.1 was 15 years' imprisonment.

Accused No 3 was sentenced as follows:

Count 1, sentence of death;

Count 2, 5 years' imprisonment;

Count 3, 4 years' imprisonment;

Count 5, 6 months' imprisonment; and

Counts 6 & 7, 3 months' imprisonment on each count.

It was directed that the sentences on counts 2, 3, 5, 6 & 7 should run concurrently with the result that the effective sentence in respect of these counts was 5 years' imprisonment.

Accused Nos 1 & 2 were granted leave, where this was necessary, to appeal against all the convictions and sentences. At the beginning of the hearing, however, their counsel informed the court that they were not proceeding with the appeal against the sentences on counts 2, 3, 5, 6 & 7.

Josephine Wienand, Present Kula and Gladys Mentoor were the first witnesses for the State. The account with which this judgment

begins is a conflation of their evidence. None of them was able to identify any of their assailants. The convictions of accused Nos 1 & 3 rested entirely on circumstantial evidence, and on respective statements which they made - to a magistrate and a police officer in the case of No.1; and to a state witness named Thembisile Njobe in the case of No. 3. It will be convenient to give separate consideration to the case against each of them.

The case against accused No.1

Accused No 1 said in his evidence that at the beginning of July 1991, he was living and working on a farm named Albertvale. (This lies about 10 kilometres to the south of Bedford.) On 3 July 1991 the accused left his house at about 1 p m to go to a farm named Vleiplaas,

in order to return to his sister who lived there a blanket, a sheet and a bag which he had borrowed from her at the beginning of 1991. (Vleiplaas is a farm situated about 2 kilometres from The Ruins.) Walking and hitch hiking, he arrived at Vleiplaas at about sunset.

After the shooting, a group of policemen from the Port Elizabeth murder and robbery unit arrived at The Ruins to investigate the murder. They included W/O Pieter Joubert and L/Sgt de Beer.

On Thursday 4 July Joubert drove to Vleiplaas, where he noticed a group of people standing in the sun. One of them appeared to be frightened. It was accused No.1. In answer to a question where he came from, No. 1 told Joubert that he came from a farm on the other side of Bedford and was just there on a visit. Joubert took the accused to

Bedford police station for interrogation.

De Beer was the investigating officer. He detained No 1 in connection with the murder at 16h15 on Thursday 4 July 1991. Early on the Friday the accused was taken from the police station in order to point out suspects, and was then taken to Port Elizabeth. There he was interviewed by Col. Jonker, who was in command of the murder and robbery unit there. The accused indicated that he wished to make a statement, and he made what the police called "a warning statement". At its conclusion he said that he was willing to repeat his statement to a magistrate, and to point out the places which he had just mentioned.

At 2.45 p m on 5 July 1991, accused No 1 appeared before Mr C. E. Schutte, a magistrate, in his office in Port Elizabeth. After answering

the usual preliminary questions, he made a statement which was produced in evidence at the trial by the State. The admissibility of the statement was disputed by the defence and there followed a trial within the trial in the presence of the assessors. At its conclusion the trial judge ruled that the statement to Mr Schutte was admissible in evidence beyond reasonable doubt.

The body of the statement reads as follows:

"Op Woensdag so ongeveer 8:30 was ek oppad na Vleiplaas vanaf Bedford. Toe ek naby die huise was het ek 2 manne ontmoet - ek was oppad na my suster se huis. Voor ek by die huis kon kom het die twee manne gesê ons moet terug draai en na 'n ander plaas toe gaan. Die plaas is bekend as Freddie se plaas. Die twee manne se name was Meyana en Shelete. Ek vra toe wat moet ons gaan doen by Freddie se plaas. Hulle het gesê ons gaan soek geld by

die oubaas by Freddie se plaas. Ons het toe so gestap en daar is 'n voertuig pad en 'n grond pad en toe ons by die grondpad kom het ons ander twee manne ontmoet. Een van die manne het toe 'n haelgeweer gedra en die geweer het 'n vêrkyker. Ek het toe agter gekom dat Meyana en Shelete bekend is aan hierdie manne. Die twee mansmense het toe aan my gesê dat hulle woonagtig is te P.E. Ons het toe gestap na die plaaseienaar se huis.

Ons 5 het toe daar gekom en om gegaan na die kombuis se kant. Daar is toe twee werknemers daar - hulle is vroumense. Die 2 manne wat ons ontmoet het het toe gevra waar is oubaas. Die vrouwerknemer sê toe hy sit en T.V. kyk. Shelete en die 2 mansmense wat ons ontmoet het het toe binne gegaan en ons is toe beveel om die vrouwerknemer te neem oorkant die huis sodat sy nie kan bel nie. Toe ons die vrou daar moes gehou het het sy nie gehuil nie - haar voorkoms was asof sy geskrik het. Toe ons die vroumens nog daar hou het Meyana 'n mes by my geleen. Ek het toe die mes gegee en hy het weg gegaan en ek het agter gebly by die vroumens. Toe ek nog so staan daar buite het ek 'n skoot van

die huis af gehoor. Hierdie 3 manne het toe uit die huis uit gehardloop en Meyana was ook tussen hulle. Hulle het toe verby my gehardloop en toe los ek ook sommer die vroumens en ek hardloop toe ook. Shelete het my vertel dat hulle geld gekry het so ongeveer R5000, maar ek is nie heeltemal seker nie. Ons het so langs die rivier gehardloop en dis gesê dat ons die geld gaan deel. Een van hulle het toe gesê dat hulle die oubaas geskiet het. Ek het toe na Vleiplaas gehardloop en met my aankoms het ek sommer geslaap. Ek het Shelete en Meyana die volgende oggend gesien. Die speurders het daar gekom en gevra of ek daar werk toe sê ek nee en hulle laai my toe op die voertuig en hulle is toe weg met my. Die gebeure wat gebeur het met die oubaas pla my want hy was 'n goeie man. Toe ek by die gevangenis kom het ek ook die polisie vertel. Na ek hulle vertel het het hulle na Vleiplaas gery om die manne te kry maar hulle het hulle nie gekry nie. Hulle het ook die helikopter gebruik. Hulle is vroeg vanoggend gevind deur die polisie. Daar die ander 2 manne wat gesê het hulle is van P.E. het ek nog nie gesien nie en ek ken

hulle nie. Die geld het ons ook nog nie gekry nie. Mense wat hulle kan ken is Shelete en Meyana want Meyana kom van die P.E. af.

Die is al wat ek gesien het."

On the morning of Monday 8 July 1991 No 1 accused was brought before Capt JG du Plessis of the South African Police in his office at Port Elizabeth. In the course of questioning he told the captain that he wished to point out "waar ek die 'girl' gevang het." The two left Port Elizabeth at 11h00 accompanied by an interpreter. On the directions of the accused they drove to Bedford. The accused then directed Capt du Plessis to "The Ruins." The following contemporaneous notes by Du Plessis record what then occurred.

"Besk. dui aan dat ons met 'n pad agter die huis verby ry. Besk.

wys 'n klein hekkie aan die agterkant van die huis uit. Deel mee dat ons na die huis moet gaan, neem ons na die agterdeur en binne die kombuis wys hy die plek uit waar hy en Meyana die vrou gegryp het en haar uit die huis uit geruk het. Hulle het die vrou gevat tot by die hek - klein hekkie aan agterkant van huis. Hulle het haar geneem tot in bosse anderkant die hekkie. Haar daar vasgehou. Thelete en die 2 mans van die Baai het toe die huis ingegaan, na 'n ruk het ek 'n vuurwapen skoot gehoor. Terwyl besk. en Moyana in die bos die vrou vasgehou het, het Meyana 'n mes gevra en besk. het sy mes aan Meyana gegee wat met die mes ook na die huis gegaan het. Besk. deel mee dat een van die swart vroue wat nou by die huis werk is die vrou wat hy die aand

vasgehou het. Besk. wys 'n vet swart vrou uit as die vrou wat hy die aand in die kombuis gegryp het . . .

NS Die vrou wat besk. op die plaas uitgewys het was tussen 4 ander swart vroue. Stel vas dat haar naam Present Kula is."

The admissibility of these notes in evidence was not challenged. Indeed, they were put in by the defence, and accused No.1 agreed in answer to a question by his counsel that he was not forced to do the pointing out, and admitted that the notes recorded what he had said to the police. But when asked whether he told the police what actually happened, he replied:

"I was not really serious, I just took it for granted. I did not really know that it was in fact what actually happened."

He said that the source of what the statement contained was Maswili, a sergeant in the South African Police who assisted in the investigation. Maswili related this while they were on their way to Vleiplaas to look for suspects. "He was talking to other policemen who were in the combi, I was listening."

This story is unacceptable. There were details in the statement which could not have come from Maswili - for example his journey to Vleiplaas; his arrival there; his meeting with Mayana and Sheleti; their walk to Freddie's farm; and his identification of Present Kula. Apart from its fatuity, the story leaves it unexplained why he should have felt impelled to want to point out "waar ek 'die girl' gevang het," or why he, an innocent man, should enmesh himself in the web which was being

revealed.

The trial judge's finding that No.1's confession was admissible in evidence was not challenged on appeal. What was argued was that the confession could not safely be relied on because there were statements in the confession which were clearly incorrect.

It is plain that where the case against an accused is the single evidence of a confession the court must, before it can satisfied that the accused is guilty beyond reasonable doubt, examine whether the confession is reliable. In S v Kumalo 1983(2(SA 379(A) Botha JA said at 383 G - H:

> "In general, the danger of an innocent person freely and voluntarily confessing to a crime he did not commit is no doubt slight (R v Sikosana 1960(4) SA 723(A) at 729C), but it is

> nevertheless real: and, when once it appears that a purported confession contains a material untruth, as is the position here, the need for the Court to be on its guard against the danger of the confession being false in its essence, ie as to guilt of the 'confessor', is immediately more compelling. Experience in the administration of justice has shown that people occasionally do make false confessions, for a variety of reasons."

It was argued on behalf of accused No 1 that the confession was not reliable by reason of the evidence of three witnesses, namely, Moxolo Kwetha, Shelete Simon Joni, and Poni April, who were called by the defence in an attempt to show that at the time of the occurrence accused No 1 was at farm Vleiplaas, and so could not then have been at The Ruins.

In evaluating this evidence, the time of the occurrence is of crucial

importance. The evidence of Mrs. Wienand, which was not disputed and was accepted by the trial court, was that the occurrence took place at ten minutes past seven, when she and her husband were listening to the weather report on the radio. At Bedford in July it is quite dark by 6 p m, and the evidence of Present Kula was that it was already dark when the intruders entered the kitchen of the Wienand home.

Moxolo Kwetha is a girl who lived with her mother, the accused's sister, at Vleiplaas. She knew accused No 1 and accused No 2, whose name she gave as Mayana. She said in her evidence that No.1 had passed the home at dusk on the Wednesday the day before he was arrested. It was not dark. He was going to visit Sheleti Joni. Later that night he came back from Sheleti Joni and it was then that they were told

by Poni April that the white man had been killed at Freddie's farm. It was then dark.

Shelete Simon Joni said that when accused No 1 arrived at his house "definitely it was dusk, it was really not dark, but it was twilight." He said that No 1 was there for a short time ("less than an hour") before Poni arrived. When Poni arrived there, 'it was just after twilight' . . . but definitely not late . . ."

Poni April said that on his return from work at about 5.15 p.m on the Wednesday of the occurrence, he went to fetch wood in the company of Mayana (accused No.2) because it was winter it was already a little bit dark when a police van appeared. The van stopped and the police informed them that five people wearing balaclavas had shot baas

George Wienand. The time was about 7 o'clock. He was wearing a watch. When it was put to the witness during cross examination by the State that it must have been 9 or 10 o'clock at night when the police spoke to them. Poni replied -

> "No at that time at night, what can you do on the road, at this time, late at night, what can you do on the road."

This evidence does not prove an alibi for No.1 even as a reasonable possibility.

Moxolo Kwetha saw the accused passing her mother's home at dusk, and she did not see him again until Poni April reported that Wienand had been murdered. Thus she had no knowledge of what accused No.1 did in the interval.

According to Sheleti Simon Joni, when Poni April arrived with news of the murder, after the occurrence, it was just after twilight. This cannot be true.

Similarly Poni's evidence that he was told by the police at about 7 p.m that Wienand been murdered cannot be correct.

In the result the evidence of the alibi witnesses did not throw any doubt on the correctness of No.1's statement.

Counsel for the appellant submitted that there were other discrepancies which pointed to the conclusion that the statement was not reliable.

Some point was sought to be made of the fact that whereas Present Kula said that she saw four intruders at the scene, the confession refers

to five participants. This is not a real contradiction. Present Kula saw two men in the kitchen and a group outside ("two or so").

Then reference was made to the first sentence in the confession. "Op Woensdag so ongeveer 8.30 was ek op pad na Vleiplaas vanaf Bedford." (See also the record of the preliminary questioning of the accused: "18. Wat is die datum van die gebeurtenis in verband waarmee u die verklaring wil aflê: Woensdag - eergisteraand ongeveer 8.30.")

The time 8.30 was obviously incorrect, but the error is not such as to suggest that the confession was false in its essence.

There are other differences between what is contained in the statement and the evidence given by Present Kula. In answer to the

question "Where are the white people?, her evidence was that she said that they were away from home, while No.1 said in his statement that she said that they were watching TV. No.1 referred to the fact that one of the two men they met was carrying "'n haelgeweer . . . en die geweer het 'n vêrkyker." I do not think that these difference were material or throw any doubt on the trustworthiness of the confession.

In my opinion there is so much correspondence on points of detail between Present Kula's evidence and what is contained in the accused's statements and between the statement to Schutte and what was said to Du Plessis during the pointing out, that there is no reason to doubt the truth of these documents in all essential particulars.

On the evidence it is clear that it was not accused No.1 who fired

the fatal shot, and that he was not present when it was fired in the bedroom. Nevertheless it is equally clear that he was a full participant in the robbery in the course of which Wienand met his death. Accused No.1 knew that one or more of the other participants was armed, and he must have realised that one or more of the people in the house might be killed in the course of the robbery, and was reckless whether that occurred or not. In my view the trial Court was correct in its finding that No.1 was guilty of murder and that his mens rea was in the form of dolus eventualis, and that he was also guilty (subject to what is said later in regard to counts 2 and 3) on the remaining counts.

The case against accused No.3

The main witness against accused No 3 was Thembisile Njobe,

who described himself as a witchdoctor. He is a practitioner in Xhosa medicine, using plant material collected in the forest. In 1991 he lived with his wife at New Tinis township in Fort Beaufort, which is about 40 kilometres east of Bedford. Accused No 3, whom he knew as "Wiseman", was a family connection of Njobe's wife.

On Tuesday 2 July Njobe was at his house in New Tinis. With him was a man named Bonani Mentoor, who used to visit him, and who had apparently at some stage lived at The Ruins. No.3 accused arrived at the house together with a man named Dyantyi (accused No 4) and Dyantyi's brother. No.3 said to Bonani, "Don't you want money?" When Bonani said that he did, No. 3 said "Fine, lets go to the farm where you lived." He asked, "Who stays at the farm?" Bonani answered, "The

people who stay there, it's the missus and the oubaas. I know the money, where the money is there, I know where the money is." Njobi noticed that No.3 had a gun protruding from the waistband of his trousers.

On the following morning 3 July 1991, No 3 borrowed R30 from Njobe's father in law, and said that they were going to Bedford. He, Bonani, and the two Dyantyi's, left in the afternoon.

On the next day, the Thursday, Njobe returned to his house at about 8 p.m. He found No 3 and Bonani there. No 3 was complaining of an injury to his left knee and of scratches on the shin of his left leg, which he said had been caused by thorns. He explained that they had gone to Baas George Wienand to look for money, and but they had only got R50. He sustained his injuries when they ran away from a patrolling

helicopter.

Njobe overheard Bonani and No 3 talking to each other about the wrong thing they had done. No 3 said, "If you people had tied that white woman and that white man and those girls, we would have got the money then." Bonani said to No 3, " You shouldn't have shot because I know where money is, because I used to work there." No 3 then said, "I had to shoot him because you did not tie him."

Njobe said that he did not then believe that No 3 had shot Wienand. But he did believe it on the Friday when he went to Bedford to work in the location there and heard that there were people who had shot Mr George Wienand, and that people had been arrested. He then went to a policeman called Maswili and told him that the people who

shot the white man were at his place. He gave the names of Bonani and Wiseman (No 3 accused) as the people who shot the white man.

When he got home from Bedford, Njobe found No 3 there. He saw him taking a gun, which he identified as exhibit 2, from a hole in the ceiling. No 3 said that he was going to hide the gun.

On 26 July 1991 accused No 3 was arrested at Fort Beaufort. In his possession was found a gun, exhibit 2. It was established by the ballistics evidence that this was the gun with which Wienand was killed.

It was submitted on behalf of No 3 accused that Njobe was a single witness to whom the cautionary rule applied, and that his evidence was not truthful and reliable.

The trial court considered that there was ground for criticism of

Njobe as a witness in some respects. As was pointed out in the judgment, however, much of what Njobe says he heard from accused No 3, and much of what he observed on 2, 3 and 4 July 1991, was shown by other evidence to be true. The pistol exhibit 2 which Njobe saw in the accused's possession on 4 July 1991, and with which Wienand was shot, was found in the possession of No 3 on 26 July 1991. Accused No 4 was one of the group which on 2 July planned the attack on the Wienand home and his palm-print was found on the side door of the house through which access was obtained to the passage leading to the bedroom and the lounge. No 3 told Njobe that his left leg was injured by thorns on 4 July, while he was running away from a helicopter. According to police evidence, a helicopter was patrolling the Bedford

area in a search for suspects on 4 July.

I agree with the finding of the trial court that there is no doubt on the evidence that No 3 accused participated in the operation and that it was accused No 3 who fired the shot which killed Wienand.

The conclusion is that No 1 and No 3 accused were both properly convicted of murder. It follows that, subject to what will be said in regard to counts 2 and 3, they were correctly convicted also on the remaining counts.

Appeals against sentence in respect of count 1.

The trial court found the following to be aggravating factors which applied to both accused:

"The attack by the accused and the persons who accompanied them upon the deceased and his wife, with the intention of robbing

them, was premeditated and planned. The evidence shows that they went to the farm with the intention of obtaining money by robbing the occupants of the house. The offences included an attack on elderly people at night, in their own home on an isolated farm. This type of offence is very much on the increase throughout the country and particularly within the area of jurisdiction of this Court. The shooting and killing of the deceased was senseless and entirely unnecessary. The deceased and his wife were helpless victims who put up no resistance but were prepared to hand over to their attackers whatever they wanted. Despite their complete submission to their attackers they were struck, and kicked and treated roughly before the unnecessary, senseless and brutal shooting and killing of the deceased."

Subject to my reservation on the question: whether the killing of the deceased was with dolus directus, I entirely agree.

In passing sentence on accused No 1, the learned trial judge

referred to his personal circumstances. He is about 32 years old, is unmarried and has no children. He is unsophisticated and illiterate. He has spent almost his whole life on a farm, and in July 1991 was earning R300 per month as a kudu herder. He did not play a leading role in the commission of the crimes. On the other hand he associated himself with and assisted in its perpetration. He accompanied the other robbers, knowing what their purpose was, and knowing that at least one of them had a firearm. He himself had a knife which he gave to one of his fellow attackers before the other ran off to enter the house. However, the trial judge considered that the sentence of death was not the proper sentence in his case - because he did not play a leading role, because of his personal circumstances, because he had only one previous conviction

(for theft of poultry, in October 1985) and because he can probably be rehabilitated. (Added to this, it may be mentioned that he appears to have experienced some remorse. He made a full confession within two days of the murder and told Mr Schutte, the magistrate, that he did so for the reason that "Die gebeure wat gebeur het met die oubaas pla my want hy was 'n goeie man." Nevertheless, the trial judge said, accused No 1 had been convicted of extremely serious offences. "Attacks on helpless elderly people in their own isolated homes constitute particularly serious offences and society demands that they be treated as such."

No 1's counsel submitted that the trial court failed to consider how and when he joined his companions - there was no evidence to gainsay what he said in his confession, which indicated that he was never part of

the planning of the robbery; and that his role was relatively minor. In the circumstances the sentence of 15 years' imprisonment was excessive.

In my view there is doubt as to the truth of No 1's assertion in his confession, that it was while he was on his way to his sister's house that he fortuitously met Meyane and Shelete who said they must turn around and go to Freddie's farm to look for money. The accused did not live in the area, and the reason he gave for undertaking the four-hour journey from Allanvale was unconvincing.

As to his allegedly minor role, it was nevertheless an essential one. His task was to neutralise Present Kula and to ensure that she did not frustrate the proceedings by giving the alarm.

I am not persuaded that the sentence of 15 years' imprisonment in respect of count 1 was inappropriate.

In respect of accused No 3 the trial judge said that he was 27 years old. He did not grow up with his own parents, but was looked after by his paternal grandparents. According to a psychiatric report, his intellectual level was at the lower end of normality. He had little, if any, education. He played a leading role, if not the leading role, in committing the offence. He had previous convictions including several for housebreaking with intent to steal and theft. A little more than three weeks after this occurrence, he used exhibit 2 in committing the offence of attempted murder.

It was submitted on behalf of No 3 that the trial court was in error

in finding that he was the person who fired the fatal shot: this was not the only reasonable inference from the proved facts. I do not agree. He admitted in the presence of Njobe that he fired the shot. Njobe's evidence was that he saw a firearm in the possession of No 3 on 2 July. He saw No. 3 take exhibit 2 from a hole in the ceiling on 4 July. No 3 was in possession of exhibit 2 on 26 July.

In the judgment on sentence, Zietsman JP said that the third accused was the one who "deliberately" fired the shot which killed Wienand, and that his intention was in the form of dolus directus. What it was which caused No.3 to fire the shot does not appear from the evidence, but I am not sure that the finding was justified that No.3 fired deliberately in order to kill Wienand. The shooting took place at a time

when Wienand was ready to cooperate with the robbers, and it is unlikely that No 3 would in such circumstances have fired with a direct intention to kill him. Nevertheless, I do not think in the circumstances that it would be a mitigating factor that the form of intention was dolus eventualis.

In my opinion the sentence of death in the case of accused No 3 was the proper sentence. However, in view of the fact that the constitutional court is to pronounce on the question whether the death sentence is constitutional, this aspect of the appeal will not be disposed of at this stage. (See S v Makwanyane en 'n Ander 1994(3) SA 868(A) at 873 C-F.)

Counts 2 and 3.

Counts 2 and 3, should not have been charged separately. The rule is stated in Burchell and Hunt, SA Criminal Law and Procedure, Vol II, 2nd ed. 724:

> "Where the crime for the purpose of committing which the housebreaking takes place is actually perpetrated, the two crimes, viz. housebreaking with intent to commit the crime in question and that crime, are chargeable in one count of an indictment, and should not be prosecuted separately."

See the cases cited in note 216 on p. 724.

Consequently the convictions on counts 2 and 3 cannot both stand. It may be that the convictions on count 2 could be set aside and that count 3 be amended to allege housebreaking with intent to rob and

housebreaking with intent to rob and robbery with aggravating circumstances. However, no practical purpose would be served by an amendment, because of the directions of the trial court in regard to the concurrent viewing of sentences. The convictions and sentences on count 3 will therefore be set aside.

The following order is made:

1. In respect of accused No 1:

   (a) The conviction and sentence in respect of count 3 are set aside.

   (b) The appeal against the convictions and sentences in respect of counts 1, 2, 5, 6 and 7 is dismissed.

2. In respect of accused No 3:

(a) The conviction and sentence in respect of count 3 are set aside.

(b) The appeal against the conviction in respect of count 1 is dismissed.

(c) The disposal of the appeal against the death sentence on count 1 is postponed to a date to be arranged by the Registrar in consultation with the Chief Justice.

(d) The appeal against the convictions and sentences in respect of counts 2, 5, 6 and 7 is dismissed.

H C NICHOLAS
ACTING JUDGE OF APPEAL

VAN HEERDEN JA)
CONCUR
VIVIER JA)