32/98

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 16/96

In the matter between:

MFASWE JOHN SMILE	1st Appellant
MONDILE SOLOMON YSTERMAN	2nd Appellant

and

THE STATE	Respondent

Coram: Smalberger, Marais, JJ A et Melunsky, A J A

Heard: 12 March 1998

Delivered: 27 March 1998

J U D G M E N T

MELUNSKY, AJA:

The two appellants are adult males. They stood trial in the Eastern Cape Division of the Supreme Court on two counts of murder (counts 1 and 2) and one of robbery. The offences were alleged to have been committed on 4 April 1993 at 3 Graham Street, Bedford. Despite their pleas of not guilty the appellants were convicted on all counts. They were sentenced to death on each of the murder counts and to twelve years' imprisonment on the third count. They appeal to this court against their convictions and sentences on counts 1 and 2 and, with the leave of the court *a quo*, against their convictions on count 3.

Before dealing with the facts of the appeal, it is necessary to refer to a preliminary issue raised by *Mr Notshe*, who appeared for the appellants in this court and in the court *a quo*. The trial commenced on 7 June 1994 but before evidence was led *Mr Notshe* applied for a postponement of the hearing to enable him to bring an application to the full court or another judge for an order to compel the State to hand over to the defence separate summaries of the evidence to be given by each of the witnesses whom the State proposed to call. The application was opposed by the State (represented both in this court and in the court *a quo* by *Mr Bezuidenhout*) and was dismissed. Thereupon *Mr Notshe* requested the learned trial judge to order the State to furnish the defence with separate summaries of the evidence to be given by each prosecution witness. After opposition by the State this application, too, was dismissed.

The trial then proceeded and, for reasons which are not relevant to this appeal, was adjourned on 24 August and resumed on 6 December by which stage the State case had not been closed. During 22 to 29 July the full court of the Eastern Cape Division heard applications relating to the right of an accused person to be given access to witnesses' statements before prosecution (see *Phato v Attorney-General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape and Others* 1995 (1) SA 799 (E)). The court supplied reasons for judgment on 27 October but it made an order on 29 July in terms of which, *inter alia*, the Attorney-General was ordered to furnish one of the applicants, who was an accused person, with statements of witnesses and other documents contained in the police docket.

During August 1994 and after the terms of the aforesaid order became known to counsel for the State in the trial in the court *a quo,* statements of the State witnesses who had not yet testified were delivered to the appellants' counsel and statements of the witnesses who had already testified were made available to the defence.

In this court *Mr Notshe* argued that the appellants had been deprived of the right to a fair trial on the ground that the State had refused to furnish them with summaries of statements of witnesses before the hearing. He submitted that the subsequent change of stance by counsel for the State, while the State case was already under way, was of no consequence, as the appellants were entitled to the summaries of statements before the commencement of the trial to enable them to prepare properly. The denial of that right, according to the argument, carried with it the inevitable result that the appellants' constitutional rights to a fair trial, in terms of s 25 (3) of the Constitution of the Republic South Africa Act, 200 of 1993 ("the interim Constitution"), had been violated.

Counsel for the appellants submitted, moreover, that the issue of an unfair trial could not be decided by this court. This argument was based on the provisions of s 17 of Schedule 6 to the Constitution of the Republic of South Africa Act, 108 of 1996 ("the new Constitution") which reads:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

According to *Mr Notshe's* submission, as this matter was pending in this court when the new Constitution took effect, it had to be dealt with in terms of the provisions of the interim Constitution which was in force during the trial in the court *a quo*. He argued that the denial of a right to a fair trial was a violation of a fundamental right entrenched in chapter 3 of the interim Constitution; that in terms of ss 98 (2)(a) and (3) read with s 101 (5) thereof this court has no jurisdiction to adjudicate upon the matter; and that the issue should be referred to the Constitutional Court in terms of s 102 (6). It was further submitted by the appellants' counsel that the interests of justice did not require that the issue should be disposed of in terms of the new Constitution.

Nothing turns on the fact that in the court *a quo* counsel had requested to be furnished with summaries of the statements of prosecution witnesses and not disclosure of the complete contents of the statements. The appeal was indeed argued on the basis that the decision of the Constitutional Court in *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 was to be applied to the facts of this case. And in the light of that decision counsel for the respondent, quite correctly, conceded that the defence should have been provided with access to the statements of the State witnesses before the commencement of the trial. He submitted, however, that the appellants' right to a fair trial had not been violated because the statements had been made available to the defence a considerable time before the closure of the State case.

This brings me to the question whether this is a matter which should be referred to the Constitutional Court to enable that court to rule on the fairness of the proceedings. One of the facts that is of significance in this regard, in my view, is that it has already been held by the Constitutional Court that "blanket docket privilege" cannot be invoked by the State to justify the withholding of witnesses' statements. As *Mahomed DP* put it in *Shabalala's* case at 748 G-H (para 50)

> "there appears to be an overwhelming balance in favour of an accused person's right to disclosure (of statements) in those circumstances where there is no reasonable risk that such disclosure might lead to the disclosure of the identity of informers or State secrets or to intimidation or obstruction of the proper ends of justice."

It is also appropriate to refer to the same learned judge's comments in *S v Shikunga and Another* 1977 (2) SACR 470 (Nm SC) in relation to the consequences of a violation of one or other constitutional right in a criminal trial.. He said the following at 484 b-f:

> "It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits.

Essentially the question that one is asking in respect of constitutional and non- constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon."

The parameters which are relevant for the purposes of this appeal were dealt with in the aforesaid decisions. All that we have to decide, therefore, is whether, within these parameters, the trial court was correct in holding that the appellants were not deprived of a fair trial. It was held in *S v Khan* 1997 (2) SACR 611 (SCA) at 618 b-e that despite the constraints placed on the jurisdiction of this court by the interim Constitution, the court was at liberty, and indeed required, to determine whether the trial in the court *a* *quo* was fair. In *Khan's* case the question was whether the admission of the appellant's confession rendered his trial unfair because he was not informed of his right to legal representation before making the confession. This court held that this was an issue that it should decide in the exercise of its appellate function. A similar situation arises in the present appeal. The principle laid down in *Khan's* case should therefore be applied to the facts of this case unless we are satisfied that it was clearly wrongly decided. We are not so satisfied and no contention to this effect was advanced. From this it follows that this court is competent, if not obliged, to decide whether the appellants were deprived of a fair trial. Consequently this matter does not fall to be considered by the Constitutional Court.

The remaining question on the preliminary point is whether the appellants' rights were violated. The submission of the appellants' counsel was that the failure to supply the summaries of statements of each witness before the commencement of the trial *per se* amounted to a denial of the right to a fair trial which justifies this court in setting aside the convictions. As *Mahomed, C J* pointed out in *Shikunga's* case at 483 i to 484 b, it is not every constitutional irregularity committed by the trial court that justifies the court in setting aside the conviction on appeal. Whether or not there has been a fair trial must ultimately be answered having regard to the particular circumstances of each case (see *Shabalala's* case 743 C-D, paras 35 & 36).

It is common cause in this case that the statements of the prosecution witnesses who had not yet testified were handed to the defence in August 1994. It is true that the statements of the witnesses who had previously testified were not delivered to the defence but counsel for the State offered to furnish the defence with their statements if they were required. No requests for statements made by the defence were refused. There is also no reason to doubt that the court would have acceded to the defence's application for the recall of any witness whose evidence had been concluded, but no application for any such recall was made.

Although the initial refusal to furnish the appellants with statements of prosecution witnesses was a constitutional irregularity, it is not, in the circumstances of this case, a ground for setting aside the convictions. Unlike other conceivable classes of irregularity which are irremediable once they have occurred, this irregularity was potentially remediable. It is therefore not possible to regard it as an irregularity of so fundamental a kind that it immediately vitiated the trial and necessitates setting aside the convictions. It is necessary therefore to have regard to the conduct of the trial as a whole in order to decide whether the irregularity persisted and thus tainted the convictions and resulted in an unfair trial. In August 1994 the statements of prosecution witnesses were made available to the defence. Any initial unfairness attending the trial was thereby purged. At that stage the State case had not been closed, the defence could have applied to recall witnesses who had already testified and sufficient time was available to consider the contents of the statements and to prepare for the further conduct of the trial. Under these circumstances the contentions of the appellants' counsel on the preliminary point cannot succeed. It may be noted that the full court of the Cape Provincial Division in *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 was not prepared to accept the proposition that a failure to make pre-trial disclosure of the statements of witnesses *ipso facto* rendered the trial unfair although later disclosure of statements during the trial was made (at 483 B-D). But it should be emphasised that this does not mean that it is open to the State, as a matter of course, to postpone disclosure of the statements of prosecution witnesses provided only that they are disclosed at some time before the closure of its case. Disclosure of statements should usually be made when the accused is furnished with the indictment or immediately thereafter in accordance with the practice suggested in *Shabalala's case* at 752 A-F (para 56).

I now turn to deal with the evidence. The murder charges arose out of the deaths of Mr and Mrs Taljaard, an elderly couple who resided at 3 Graham Street, Bedford. Their dead bodies were discovered at their home by Sgt Thomas, a member of the South African Police Services, at about 20h30 on Sunday 4 April 1993. Mr Taljaard's body was found in an outside room which adjoined the garage and Mrs Taljaard's in her bedroom. Both deceased had died as a result of strangulation. In addition, Mr Taljaard had received a blow to the right side of his head which had caused a fracture of the skull, and blunt force had been applied to Mrs Taljaard's head and face. Various articles which had belonged to the deceased were missing from the house. It is not disputed that both deceased had been murdered and robbed.

What was in issue at the trial was the identity of the assailants but in this court *Mr Notshe*, quite correctly, conceded that the second appellant's guilt had been established. He submitted, however, that the evidence fell short of establishing the first appellant's guilt beyond reasonable doubt. One of the grounds relied upon by the trial court for convicting the first appellant was that he was in the company of the second appellant - who was described by the trial court as one of the persons who had undoubtedly committed the murders - on the morning of the commission of the offences. For this reason it is desirable to set out the factual findings which formed the basis of the second appellant's conviction.

The trial court held that the second appellant had made two confessions in which he admitted having taken part in the murders and the robbery. The confessions were made to Mlungisi Sydney Mali, an awaiting trial prisoner, on 27 April 1993, and to Francois Nicholaas Vorster, a magistrate of Bedford, two days later. The second appellant was also implicated by the evidence of Mabuti Smile, the fifteen year old son of the first appellant. Mabuti testified that the second appellant, shortly after the commission of the offences, had set alight to a suitcase which had been taken down from the roof of the shack in which the second appellant was living. The suitcase, which had been concealed under plastic sheeting on the roof, fitted the description of a suitcase that had been in the Taljaards' house and had been removed from it on the day of the murders. In accordance with the second appellant's instruction, Mabuti ensured that the suitcase was completely burnt out. On the same day Mabuti noticed a gold pen in the second appellant's room. The pen, which was identified by Mr. and Mrs. Taljaards' daughter, Lea Magdalene Taljaard, as the property of her late father, was inscribed with Mr Taljaard's name. Mabuti also told the trial court that while cleaning a fowl run on the property where the appellants lived, he came across a peanut butter jar that contained, among other things, items of jewellery and a watch. Lea Taljaard testified that the jewellery had belonged to her mother and the watch to her father. According to Mabuti the second appellant had earlier told him that the jar containing these items was in the fowl run and that it belonged to him (the second appellant). Another witness, Caroline Dweza, confirmed that she had observed Mabuti overseeing the burning of the suitcase. The second appellant's evidence, to the effect that he had nothing to do with the killing of the deceased or the robbery, was rejected by the trial court.

Mrs Topsi Lubisi, a 74 year old woman who had worked for the deceased for some 25 years and was employed by them at the time of the murders, testified that the first appellant was in the company of the second appellant on the morning of 4 April.

Before I deal with the evidence of Mrs Lubisi it is to be observed that an accused person cannot be convicted on the grounds that he or she was in the company of a co-accused whose guilt has been established solely by means of a confession. If the alleged association is to be relied upon in proof of the case against the first-mentioned person, there must be evidence of the co-accused's guilt, sufficient to support his conviction, outside of the confession. In other words, it must be proved by evidence admissible against the former that the latter is guilty. This principle which appears, *inter alia,* from the decision of *R v Baartman and Others* 1960 (3) SA 535 (A) at 542 B-H, seems to have been overlooked by the trial court. However, *Mr Notshe* conceded that there was sufficient evidence, apart from the confession, which justified the conviction of the second appellant. And if regard is had to the evidence of Mabuti Smile, which was accepted by the trial court, this concession was correctly made.

It seems to be reasonably clear that Mr. and Mrs. Taljaard were killed on the morning of Sunday 4 April, in all probability before 08h00. It was Mr. Taljaard's habit to go by car to buy the newspaper in the morning and to return to his home in time to listen to the 8o'clock news. He would leave his car parked in front of the house. On 4 April his car had not been taken out of the garage and his clothed body was found in an outside room. Topsy Lubisi said that the two appellants arrived at her house on the Sunday morning. The first appellant was to have repaired a cupboard for her on that day but he came to tell her that he was not feeling well and would attend to the repair on the following day. *Mr Notshe* criticised her evidence mainly on the ground that she was confused and uncertain about dates and times. The trial court, however, accepted that the appellants had been at her house on the Sunday morning. She was convinced that the visit to her house took place the day before the appellants were arrested and it is common cause that they were arrested for the first time on 5 April. In my view the trial court's assessment of her evidence cannot be faulted.

The fact that the appellants were together at Mrs Lubisi's home on the morning of 4 April is not in itself a matter of crucial significance. There was no certainty about the time when they arrived at her home, which was a considerable distance from the deceased's house. What is of greater significance is the fact that it was put to Mrs Lubisi under cross-examination that the appellants would deny that they had been to her house on the morning in question. Furthermore, Mrs Lubisi testified that the first appellant had worked in the Taljaards' garden on Saturday mornings. Her evidence in this regard was confirmed by Mabuti Smile and Falithanwa Gilbert Nyatela, who worked for the Taljaards as a gardener on week days, and was accepted by the trial court. It was put to those witnesses by counsel for the appellants that the first appellant would deny having worked for the Taljaards. But the first appellant did not give evidence.

Caroline Dweza testified that after she had seen Mabuti burning the suitcase she came across the first appellant. He wanted to know what she had asked Mabuti about the suitcase and he struck her in the face. She was suspicious about the burning of the suitcase and reported the matter to the police. It was put to Mrs Dweza that the first appellant would deny that he had struck her.

Mr Notshe argued that Mrs Dweza was an unsatisfactory and unreliable witness whose evidence should be disregarded. Her evidence is indeed open to some criticism but it was accepted by the trial court and was not contradicted by the first appellant. In my view there is no reason why we should not take her evidence into account in assessing whether the first appellant's guilt has been proved beyond reasonable doubt.

The most crucial evidence implicating the first appellant was the discovery of certain items in his shack by members of the police. The first appellant's shack was one of a few structures in a complex that also contained a fairly substantial dwelling house. The first appellant, according to the evidence, used his shack as a shop from which he sold groceries and as a place where he sometimes slept. One of the other shacks was occupied by the second appellant who had arrived in Bedford from Cradock five days before the murders and had rented the shack from the first appellant. In the grounds of the complex there was also a dog enclosure and the fowl run where Mabuti had found the peanut butter jar.

On the morning of 29 April members of the South African Police Services, in the presence of the first appellant, carried out a search of his shack. Concealed above the ceiling were various items of jewellery, including an engagement ring, that had previously belonged to Mrs Taljaard, and items of clothing that had belonged to Mr Taljaard. Hidden behind a panel near the door were two of Mr Taljaard's pens, including the gold pen inscribed with his name, and, on the floor of the shack among some tools, was a knife which was identified as a knife usually kept on the refrigerator in the Taljaards' kitchen. When the police found the goods, Lieutenant Rautenbach, who was in charge of the operation asked the first appellant for an explanation. The first appellant said that he did not know how the goods had come to be there. One of the police witnesses, Sgt

Maswili, testified that the first appellant had made an attempt to flee when the goods were found in the ceiling and that he, Maswili, had prevented him from doing so.

The second appellant also gave evidence about this incident. He said that he was present when the goods were found, that the first appellant had asked who had put them in his room and that he, the second appellant, had replied that it was Maswili. According to the police, however, the second appellant was not present when the goods were found and moreover the second appellant's evidence was properly rejected as false by the court *a quo*. His version of this incident does not require further consideration.

While the search of the first appellant's shack was being carried out, two members of the police, Sgt Botes and Sgt van Zuydan, discovered certain goods that had been buried in the dog enclosure on the property occupied by the first appellant. The goods consisted of a carry bag which contained shoes and toiletries all of which had come from the Taljaards' house.

That concludes a brief summary of the relevant evidence and it now becomes necessary to consider whether the trial court was correct in inferring that the first appellant had committed the crimes with which he was charged. In assessing the evidence against the first appellant the court *a quo* held that the most important evidence against him

> "concerns the finding of property identified as having been stolen from the deceased in the ceiling of the shack in which he slept, and buried in the dog enclosure in his yard."

The discovery of the stolen goods in the dog enclosure does not seem to me to be evidence that necessarily implicates the first appellant in the commission of the offences. The second appellant, who is known to have taken part in the murders and the robbery, had access to the dog enclosure and so did other persons living on the property. There is no evidence which is admissible against the first appellant that shows that he buried the property himself or that he knew that it was there. It follows, therefore, that the presence of stolen goods in the dog enclosure is not a fact that should be taken into account against the first appellant.

The same considerations do not apply to the stolen property found in the first appellant's shack. Counsel for the appellants submitted that, according to the evidence, the goods could have been placed in the gap between the ceiling and the roof by someone outside the structure. This is a possibility, although a remote one, but it does not explain how the pens came to be concealed in the panel next to the door or why the Taljaards' knife was among the tools on the floor. *Mr Notshe,* submitted, however, that other persons had access to the first appellant's room while he was in prison during certain periods between 5 and 29 April. It is true that on one or two occasions during the first appellant's detention his son, Mabuti, had obtained the key to his shack. But the structure had remained locked at all times and there seems to be no reason why any person other than the first appellant would have kept the Taljaards' property in the room which he occupied. The first appellant did not give evidence and, while there was no *onus* on him, it is significant that he furnished no explanation for the presence of the goods in his shack.

The question that remains is whether, on the facts that I have outlined, the first appellant's guilt on the murder and robbery charges was proved beyond reasonable doubt. His counsel submitted that the evidence against him was purely circumstantial and, at worst for the first appellant, it established only that he was guilty of theft or receiving stolen property knowing it to have been stolen. It was also submitted in this regard that the trial court inferred that the first appellant was guilty of the crimes of which he was convicted because it assumed that the murders had been committed by two people. Very little was said in support of this submission and, in my view, there is nothing in the judgment of the court *a quo* that suggests that it acted on the assumption that there were two perpetrators or that it convicted the first appellant by relying on this supposition.

It is, of course, quite clear - and this was accepted by *Mr Notshe* - that an accused person's possession of recently stolen goods may give rise to the inference that he or she stole them. It may also be possible, in an appropriate case, to infer that the possessor of the goods had committed some other offence (see *S v Nkomo and Another* 1966 (1) SA 831 (A) at 833 C; *S v Parrow* 1973 (1) SA 603 (A) at 604 C-D). What has to be decided in each case is whether the only reasonable inference to be drawn from the totality of the particular facts is that the accused committed the offences in question.

The facts of this case show that the first appellant had worked for the Taljaard couple. He must have had some knowledge of their habits and the lay-out of their house. Through his counsel, however, he falsely denied that he had worked for the deceased or, indeed, that he had ever set foot on their property. It was also established that he was in the company of the second appellant at Mrs Lubisi's house on the morning of the murders and at some time after the offences had been committed. Again, through his counsel, he denied that he was at Mrs Lubisi's house on the day in question. On 29 April, some three or four weeks after the murders and robbery, an assortment of the stolen goods was found in his room. He failed to give evidence. There is also a clear link between the two appellants. The second appellant, who, as I have pointed out, undoubtedly took part in these offences, had arrived in Bedford only five days before the murders. He did not know the Taljaards. He rented a shack from the first appellant in the latter's yard, the two appellants were together on the morning after the Taljaards had been killed and the stolen pen that was seen in the second appellant's room was later found in the first appellant's shack.

The only reasonable conclusion to be drawn from the totality of all of the facts, including the first appellant's failure to give evidence, is that he stole the goods from the Taljaards' house. According to the evidence the Taljaards' property could only have been removed from their house at the time of the murders. It follows from this that the first appellant must have taken part in the murders and the robbery and that in doing so he and the second appellant had acted in concert. It cannot be reasonably inferred, in all the circumstances, that only the second appellant was a *particeps criminis.*

The result is that the appeals of both appellants against their convictions on all three counts are dismissed. As the sentence of death is no longer competent the sentences on counts 1 and 2 are set aside and the matter is remitted to the court *a quo* to enable it to pass sentence afresh on those counts.

L S MELUNSKY, A J A

Smalberger J A)
Marais J A) concur