135/92

Case No 368/1990

JERRY VUSI MUSI RICHARDSON Appellant

and

THE STATE Respondent

HEFER JA.

Case No 368/1990

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JERRY VUSI MUSI RICHARDSON — APPELLANT

and

THE STATE — RESPONDENT

CORAM : HEFER, NIENABER JJA, et KRIEGLER AJA

HEARD : 24 AUGUST 1992

DELIVERED : 8 SEPTEMBER 1992.

J U D G M E N T

HEFER JA:

The appellant was convicted in the Witwatersrand Local Division of kidnapping (counts 1 to 4), assault with intent to do grievous bodily harm (counts 5 to 9), murder (count 10) and attempted murder (count 11). The complainants in counts 1 to 3 and 5 to 7 are Kenneth Kgase, Barend Mono and Gabriel Mekgwe respectively. The victim to whom counts 4, 8, 9 and 10 relate was James (also known as Stompie) Seipei. In this judgment these four will collectively be referred to as the complainants. The kidnapping in counts 1 to 4 is alleged to have been committed on the evening of 29 December 1988 when the appellant and a number of other men took the complainants from a house in Orlando West to Mrs Winnie Mandela's house in Diepkloof Extension. The assault in counts 5 to 8 is alleged to have been committed on the complainants later the same evening at Mrs Mandela's house. Count 9 relates to a further assault allegedly committed the following day on Stompie

Seipei and count 10 to his murder which is alleged to have been committed during the night of 1-2 January 1989. Count 11 (on which there is no appeal) did not directly involve the complainants. The attempted murder was alleged to have been committed on 3 January 1989 on Lerotodi Ikaneng.

The appeal against the conviction and sentence on count 10 was noted in terms of sec 316 A(1)of the Criminal Procedure Act 51 of 1977 as inserted by sec 11 of Act 107 of 1990. Although the appellant also applied for and was granted leave to appeal against the convictions on all the other counts except count 11, his counsel indicated in his written heads of argument that he would present no argument on counts 5 to 8 since he conceded the truth of the State witnesses' evidence relating to the nature of the assault perpetrated on the complainants in Mrs Mandela's house on the evening of 29 December 1988. This concession was unavoidable since

Kgase, Mono and Mekgwe still bore the marks, when they were examined by a doctor shortly after the incident,of precisely the type of assault about which they testified at the trial. These marks gave the lie to the appellant's version. The appeal against the convictions on counts 5 to 8 must accordingly fail; but the facts relating to these counts and to count 11 are relevant to some of the issues before us. For this reason they will be mentioned in the account of events which follows.

During December 1988 the complainants were accommodated in Orlando West in a mission house belonging to the Methodist church and occupied by the Rev Paul Verryn. This house, it appears, offered refuge to the homeless and asylum to political activists like Mono, Mekgwe, Stompie Seipei and others (including Miss Tloliswa Velati whose role will emerge later) who had reason to avoid the attentions of the police. Stompie Seipei was 14 years old. Although criminal charges were

pending against him in the Magistrates' Court in Parys rumour had it that he was a "sell-out" or police informer. His fellow occupants decided to allow him to remain in the house but, as will presently be seen, the rumour must have spread to certain other quarters.

At the relevant time the appellant resided in an outside room at Mrs Mandela's home in Diepkloof Extension. (The house has two such rooms.) He was keenly interested in soccer and at one stage coached the Mandela United soccer team. He testified at the trial that the team broke up during 1986 after some of its members had been detained. This does not accord with the evidence of some of the State witnesses; but whatever the true position might have been, at the time of the events which concern us, a number of men still either lived at or frequently put in an appearance at the Mandela house, whom members of the public apparently still associated with the soccer club. Precisely what

purpose these men served does not emerge clearly from the evidence. According to the complainants they guarded the house and accompanied Mrs Mandela when she left it (eg when she went on a shopping trip to Johannesburg). Some of them accompanied the appellant on 3 January 1989 when he went looking for Ikaneng - the complainant on count 11 - and assisted in apprehending and assaulting him. Beyond this and what will presently appear, the record reveals little about their activities. Yet it is abundantly clear, firstly, that they did not occupy themselves principally with the game of soccer and, secondly, that appellant held a position of authority above the others but below Mrs Mandela.

On the evening of 29 December 1988 the appellant and at least eight of his confederates drove to the mission house in Orlando West in a bus belonging to Mrs Mandela. Upon their arrival they herded the occupants into the kitchen. One of them tried to run

away but was violently brought to heel by one of the men. In the kitchen Mrs Velati identified the complainants and the appellant directed them to accompany him. The remaining occupants were warned not to leave the house or use the telephone. The complainants were taken to the bus where they were ordered to sit apart. The appellant's men started singing and the complainants were ordered to do likewise. Thus the party proceeded to the house in Diepkloof.

On their arrival Kgase and Stompie were separately questioned - the former by the appellant about homosexual activities in the mission house and the latter by Slash (one of appellant's men) about the rumour that he was a sell-out. Thereafter they were offered food and then taken into one of the outside rooms where the appellant and some of his men and Miss Velati were assembled. Mrs Mandela entered. Miss Velati who apparently assumed the role of prosecutor accused Stompie

of having "sold out" comrades. Mono and Mekgwe, she alleged, had slept with Rev Verryn, and Kgase had protected the latter. Mrs Mandela questioned each of the complainants in turn, then abused them saying inter alia that they were not fit to live, and proceeded to assault them first with her fists and then with a sjambok. Thereafter the other members of the assembly joined in the assault which is described in the following passage from Mekgwe's evidence:

> "Yes, please explain what happened? -- We were assaulted with open hands, with fists, with sjamboks. We were also hit with a bottle on the knees, also with a shoe heel on the knees.
> Yes? -- And after we have been assaulted in that fashion we were then grabbed on our feet and arms, thrown in the air and left to fall down.
> And when you fell down what happened then? -- We were kicked and picked up and this process continued.
> How long did this whole assault take? -- It took long, I am not in the position to say whether it was 2 or 3 hours."

Eventually, after Mrs Mandela had left the room and

someone tried to put a plastic bag over Stompie's head the appellant stopped him and called an end to the assault. The complainants were ordered outside where basins of water were provided for washing themselves. Stompie was placed in a bathtub where the appellant and Slash further assaulted him until he finally admitted that he had "sold out" four comrades. Thereafter the complainants were taken to the appellant's room where they were given blankets and told to go to sleep.

The next day (Friday 30 December 1988) the complainants were given the task of washing up their own blood in the room where the assault had taken place. That afternoon a man arrived whom they had not seen before but whom they then got to know as Guybon. What happened on his arrival is described as follows in Mono's evidence:

> "This person wanted to know our names and Jerry (the appellant) did tell him our names. Jerry explained to this person the reasons why we were at that place in question. He also said

> that the 3 of us, being myself, Pelo and Kenny, he said to this person that the 3 of us must not be assaulted further and that the person that needed to be assaulted further is Stompie for the reason that he is an informer."

Having heard this Guybon commenced kicking Stompie saying that he would not use his hands for fear of killing him. According to Kgase

> "....he kicked him against the wall. He kicked him several times,when he tried to roll, you know, pleading for help. He continued to kick him around the room"

until the appellant eventually stopped him.

That night and the next day, which passed without incident, the complainants were still detained in the appellant's room. After sunset on Sunday 1 January 1989 the latter told Stompie in the presence of the other complainants to write down his address because he was going to take him home. Stompie tried to comply but apparently not with great success because the appellant and Guybon - who was also present - insisted that he

"write better". Eventually when the appellant was satisfied he told Stompie to come with him. Stompie complied and the two of them left. That night the appellant did not sleep in the room where he usually slept with the complainants. The next morning when the others saw him again they noticed what they thought to be blood on his shoes which the appellant then washed. That morning he warned the remaining complainants not to say anything about what had happened to Stompie.

It need hardly be said that the other complainants never saw Stompie again. His already decaying body was found on Friday 6 January 1989 in the open veld about 6 kms from the Mandela house. He had been stabbed to death. The post mortem examination in which this was discovered also revealed other injuries consistent with the assaults which had been perpetrated on him according to the other complainants.

The account thus far derives mainly from, and

reflects an outline of the essential parts, of Kgase, Mono and Mekgwe's evidence. Where necessary additions will be made later. The appellant's version will be given when I deal with the various counts separately. But before I do so it is convenient to mention the facts pertaining to count 11 briefly. The complainant, it will be recalled, was Lerotodi Ikaneng.

Ikaneng used to be a member of the Mandela United soccer club. At one stage he also stayed at Mrs Mandela's house. He left when suspicion arose that he was an informer. His evidence is to the effect that he received a message that Mrs Mandela wanted to see him in her office; that when he went there Mrs Mandela's daughter told him that she knew about information given by him to the police whereupon she and Mrs Mandela attacked him with their fists; that Mrs Mandela then ordered two of his erstwhile teammates to drive him to Diepkloof but that he escaped when they arrived with him

at the car. After hiding in Sharpeville for a while he returned home. On Tuesday 3 January 1989 the appellant and some of his men went looking for him. They found him walking in the street with his girlfriend. He managed to escape but was caught and taken to the open veld where the appellant stabbed him in the throat with one of the blades of a hedge clipper. He was thrown into a ditch and left for dead but miraculously survived. Kgase, Mono and Mekgwe were witnesses to this attempted murder since the appellant had decided to take them along in the search for Ikaneng. An important part of Kgase's evidence about the incident is that, when Ikaneng asked the appellant why they were going to kill him and leave him where no one would find him, the appellant answered that this was the price for having double-crossed them. Equally important, as will presently be seen, is Mono's evidence that the appellant also told Ikaneng that they were going to "dump" him.

For the sake of completeness it should be mentioned that the appellant's version of this incident differed only slightly from that of the State witnesses. He went looking for Ikaneng, he said, because the latter had allegedly stolen some soccer jerseys. His intention was to take him to the soccer club. Initially he came along willingly but then he started resisting. This angered the appellant and he stabbed Ikaneng with a knife. The trial court rejected his evidence and, as mentioned earlier, there is no appeal against the conviction on this count.

The trial court accepted Kgase, Mono and Mekgwe's evidence. In this court the appellant's counsel referred us to what he claimed to be inconsistencies in their evidence; otherwise he did not seriously challenge it. (Indeed, as mentioned earlier, he candidly and correctly conceded their version of the nature of the assault on the evening of 29 December to be the truth.)

I am by no means convinced that their evidence is inconsistent in any material respect since they were not always speaking about the same incident and one of them often heard or saw things being said or done which the others did not. Moreover, the so-called inconsistencies were also brought to the attention of the trial court and that court, having seen and heard their performance in the witness box, nevertheless found them to be honest and dependable witnesses. We have no reason to differ. Appellant's counsel placed no reliance whatsoever on his client's evidence. And rightly so. The appellant's evidence is riddled with blatant lies; in material respects it flies in the face of incontrovertible real evidence; his demeanour was bad and any attempt at salvaging his credibility would have been doomed.

His guilt must accordingly be determined on the accepted evidence of the State witnesses.

I turn now to consider the various counts

separately.

The appellant's ludicrous assertion on counts 1 to 4 that the complainants were courteously requested to make the trip to Mrs Mandela's house and agreed to do so, requires no further comment. His counsel was constrained to argue that it has not been shown beyond reasonable doubt that the complainants left the mission house against their will. The argument is plainly without substance. It is based on nothing more than the complainant's meek submission to their abductor's demands. That they did not demur is perfectly understandable because, as Mekgwe said in his evidence, they were terrified. Their passivity can therefore not be regarded as an indication of willingness nor is there any justification for ignoring their insistence at the trial that they had been forced to leave the house and enter the bus. The appellant's guilt on counts 1 to 4 is beyond doubt.

On count 9 the appellant denied that the assault perpetrated by Guybon on Stompie to which Kgase, Mono and Mekgwe deposed, ever occurred. The trial court, having accepted the evidence of these witnesses, found that Stompie and Guybon were both under the appellant's control and that the latter permitted the assault after explaining to Guybon what the charge against Stompie was. In this court his counsel challenged the finding relating to the appellant's control over Stompie and Guybon and argued further that a common purpose which might render the appellant liable, has not been established. The finding relating to control is so patently correct that there really is no need to analyse the evidence. And the short answer to the second argument is that the appellant's liability does not depend upon the existence of a common purpose at all. The case against him on count 9 is simply that he brought one of his underlings into the room and informed him that Stompie was a sell-

out who, unlike the others, needed to be assaulted further. This was plainly intended and understood as an invitation to Guybon to do the necessary, which he promptly proceeded to do. The appellant's guilt as the procurer of the offence has been clearly established.

In his evidence on count 10 the appellant denied the evidence of Kgase, Mono and Mekgwe relating to the events on the evening of Sunday 1 January 1989. He swore that those events never took place and that Stompie must have left the house on his own during the night of Saturday 31 December - Sunday 1 January because on Sunday morning he could not be found. The trial court rejected his evidence.

In this court the argument on the appellant's behalf was that he should not have been convicted even on the acceptance of the facts deposed to by the State witnesses since the only reasonable inference to be drawn from these facts is not that the appellant killed

Stompie. I do not agree. The approach in matters where the case against the accused is based entirely on circumstantial evidence was stated as follows in R v Mlambo 1957(4) SA 727 (A) at 738A:

> "In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

(See also S v Rama 1966(2) SA 395 (A) at 400H; S v Sauls & Others 1981(3) SA 172 (A) at 182 fin - 183C.) Naturally, the two so-called cardinal rules of logic mentioned in R v Blom 1939 AD 288 at 202-203 must be met and the passage from the judgment in Mlambo's case is cited to indicate the measure of certainty required.

In the present case the appellant's departure

with Stompie under what is alleged by the State to have been a pretext to take him home must be viewed in the light of the preceding events which have been partly related and will now be elaborated upon.

The enquiry commences with the reason for Stompie's abduction. Before his admission to the mission house he had in one way or another become involved in what some of the witnesses referred to as "the Struggle", which is their designation of the drive for political power conducted, at that stage largely clandestinely, by unlawful organisations. A police informer within the ranks of those taking part in such a struggle would hardly be tolerated and, should he be caught, one would expect him to be dealt with severely. This is evidenced by the treatment which Ikaneng received first from Mrs Mandela and later from the appellant.

On the accepted evidence of the State witnesses, the appellant and his associates abducted

Stompie primarily by reason of the rumour that he was an informer and for the purpose of dealing with him. The other complainants were taken along for a completely different reason and to them the risk of reprisal was obviously less. That is why the appellant's attitude towards Stompie was much more unyielding than towards them. Thus, on the evening of 29 December, after stopping the general asault upon the complainants and allowing the others to go outside to clean themselves, he and Slash again set upon Stompie in the bathtub and beat him to the point of confessing; and we know about the appellant telling Guybon the following afternoon about Stompie being the one who needed to be assaulted further. Kgase testified that the appellant actually told them that they had committed only a minor offence and that no one would touch them again but that the man who was in danger was Stompie. That he thereby conveyed that Stompie was indeed in danger of his life is clear in view

thereof that he repeatedly told the other complainants and others who enquired about them that he was going to "dump" Stompie. We know by now what he meant.

Stompie's confession must have sealed his fate. Apart from the retribution that it called for it revealed him to be a person who could no longer be trusted and accordingly was of no further use. Moreover, he could not be detained indefinitely; in one way or another the appellant, being the person in immediate command, had to get rid of him. Because of what had happened the previous evening he could not simply let him go; and the only other alternative was to silence him permanently. But to do so in Mrs Mandela's home would obviously cause embarrassment. Therefore he had to be taken elsewhere and killed. (It is worth mentioning that the appellant had to some extent the same problem with the other complainants who had also been abducted and assaulted. But, since their loyalty was not in doubt, they could be

dealt with in another manner. The appellant therefore tried to persuade them to join his team and, when Kgase proved to be hesitant, procured their active involvement in its criminal activities by taking them along to what was intended to be Ikaneng's execution in which they were called upon to assist. What he did not count on was Kgase's escape when the first opportunity to do so presented itself. After his escape Kgase went to Bishop Storey who, after considerable resistance on the appellant's part, arranged the release of the other two.)

Bearing in mind what has been said thus far it is clear that the appellant could not possibly have intended to take Stompie home as he promised to do that Sunday evening. We know in any event that he did not do so - whether it be to the mission house or to his mother in Parys. And we know that Stompie was killed. The only direct evidence of what happened to him after his

departure could have been furnished by the appellant himself. But instead of presenting the trial court with that evidence he falsely denied that such an event ever occurred. This false denial must obviously count heavily against him. As was indicated in R v Mlambo supra at 738C

> "...if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

(Cf S v Steynberg 1983(3) SA 140 at 147 C-D.) Making due allowance for the considerations mentioned in cases like Goodrich v Goodrich 1946 AD 390 at 396 and S v Mtsweni 1985(1) SA 590 (A) at 594 B-D the present is indeed a suitable case for applying this observation. Why,

might one ask, if there is an innocent explanation for Stompie's death, did the appellant not furnish it and why did he prefer to lie? Moreover, why did he warn the remaining complainants the following day not to reveal what had happened to Stompie? His counsel suggested that he might have resorted to lies in order to protect the real culprit. This suggestion is not entirely without force but does not assist him. If he did not personally kill Stompie the only reasonable inference from all the evidence is that he took him to his executioner well knowing what his fate would be. Even on this basis he would still be guilty of murder. In my view his guilt on count 10 has also been established.

What now remains is the sentence on count 10. There is no need to restate the effect of the provisions of Act 107 of 1990 on the imposition of the death sentence which was discussed in several reported judgments of this court. The only question is whether,

according to our own assessment of any mitigating and aggravating factors, the death sentence is the only proper one.

The trial court found in terms of sec 277(2)(a) of the Criminal Procedure Act, as amended,that there were no mitigating factors and that the brutality of the murder, the fact that it was premeditated and planned and carried out with care, and the absence of any compulsion on the appellant who as an adult exercised a free choice, were aggravating features. Subject to one qualification which will presently emerge the trial court's formidable list of aggravating factors cannot be faulted. It may even be extended by adding the appellant's callousness in leaving Stompie's body in the field to rot and which is evidenced further by his conduct towards Ikaneng two days later. He is obviously a ruthless and vindictive person to whom violence comes easily even when it involves the life of a fellow human being.

But however denounceable his conduct, and however wicked as a person he may be, I do not agree that the case is entirely without any mitigating features. His counsel pressed upon us that Stompie was not killed for reasons involving the appellant's personal interests but because he was considered to be an informer who had betrayed his comrades. That this was the motive for the murder is true but I do not regard it as particularly significant for, although the treachery of a comrade may inspire a natural feeling of resentment, it cannot be said generally that slaying a traitor is not as reprehensible as the slaying of anyone else. If Stompie had indeed informed on others (according to a police officer who testified at the trial this was not the case) one would have to enquire who those others were and what the information was about; had his information led the police to people who deserved the visitation of the law, he would have done no more than his civic duty - which

would earn him commendation rather than condemnation. Be that as it may it does count in the appellant's favour and may be accepted as a mitigating factor that he did not kill Stompie to serve his personal interests.

What is of greater significance is the reasonable possibility that the appellant acted, if not on the express orders, then at least under the influence of Mrs Mandela. According to a statement which he made to the police in connection with another matter Mrs Mandela had asked him to harbour two armed men - obviously trained terrorists - in his house. The police became aware of the presence of these men and apparently went to arrest them. A gun battle ensued in which both of them and a policeman were killed and the appellant's house was extensively damaged. Mrs Mandela then asked him to come and stay at her house. This is the first incident which reveals his preparedness to do Mrs Mandela's bidding even though it entailed serious personal risk to himself.

Another such an incident is the attempt on Ikaneng's life which was preceded, as it has already been shown, by Ikaneng's visit to Mrs Mandela's office and his escape from the men whom she had sent to take him to her house. Judging by what had happened in the office and later when the appellant and his men found him, his escape at that stage was indeed a fortunate one but it did not earn him a reprieve; even after he had been in hiding for a while he was hunted down, relentlessly pursued and ruthlessly assailed to within an inch of his life. It is more than reasonable to infer that the appellant did not act on his own initiative.

Then there is the abduction of the complainants. Miss Velati testified that she had discussed certain allegations about homosexual activities at the mission house with Mrs Mandela but that she (Miss Velati) in the absence of Mrs Mandela requested the appellant to bring the people concerned to the house in

Diepkloof. That Miss Velati would make such a request which entailed using not only Mrs Mandela's bus but also her official driver and house for a plainly illegal purpose is beyond belief. These very facts coupled with Mrs Mandela's conduct later that evening point strongly to her involvement in the decision to kidnap the complainants. (To this must be added, of course, that Stompie had been abducted to face the charge of having informed on his comrades and not in connection with the relatively harmless activities of the others.) According to psychological evidence presented to the trial court the appellant is a somewhat unintelligent person who is readily susceptible to the influence of others. Within the ranks of the men who frequented Mrs Mandela's house, he was no doubt a leader and a person in authority. But it is quite clear that the chain of command extended beyond him to the owner of the house whom, on all accounts, he and the others idolised. With her wishes he

was ever ready to comply.

The evidence as a whole does not exclude the reasonable possibility that the appellant acted under Mrs Mandela's influence but rather tends to confirm it. It is significant that Mrs Mandela, although invited to do so by appellant's attorney, declined to testify for the defence. Her influence must, in the circumstances of the case, be regarded as a mitigating factor. Taking only the aggravating features into account, the death sentence would plainly be a proper one but, allowing also for the mitigating factors, I do not regard it as the only proper sentence. Obviously the appellant must still be severely punished for an extremely heinous offence. He should, in my view, be imprisoned for life.

The appeal against the convictions is accordingly dismissed. The appeal against the sentence on count 10 succeeds to the extent that the death sentence is set aside. Substituted for it is a sentence

of imprisonment for life.

J J F HEFER JA

NIENABER JA)

CONCUR.

KRIEGLER AJA)