164/94

CG CASE NUMBER: 258/93 and 259/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIPHO BOY Appellant no 1

JOHN SEBONEKO Appellant no 2

and

THE STATE Respondent

CORAM: **HOEXTER, HEFER et VAN DEN HEEVER JJA**

HEARD ON: **1 NOVEMBER 1994**

DELIVERED ON: **21 NOVEMBER 1994**

J U D G M E N T

VAN DEN HEEVER JA

Four men stood trial before Lategan J and assessors in the Supreme Court at Cape Town on a charge of murder. They were Sipho Boy, John Seboneko, George Eksteen and Boy de Klerk and were numbered in that sequence at the trial. I refer in what follows to the first two as first and second appellants and to Eksteen en De Klerk according to their designation at the trial, namely accused nos 3 and 4. They were all at the relevant time convicted prisoners and inhabitants of cell 545, section B, at Pollsmoor Prison. The State alleged that in the small hours of the morning on 7 November 1991 they wrongfully and unlawfully killed a fellow prisoner and co-inhabitant of the cell, Johnny Fisher, by strangling him.

The appellants and accused no 4 were convicted as charged. Accused no 3 was acquitted. The appellants were both sentenced to death. The trial court held that accused no 4 fell into a category different to theirs in view of psychiatric evidence according to which he suffered

from chronic schizophrenia requiring - and receiving at Pollsmoor - maintenance treatment and supervision to keep this condition in a state of remission. Although it was stable it was possible that he suffered from impaired judgment which made him more vulnerable to being influenced than he would otherwise have been. His record also showed him to be dishonest, not aggressive. He was sentenced to life imprisonment. Only the two appellants noted an appeal, both of them against the sentences imposed on them, but first appellant also against his conviction, the ground advanced being that the State had failed to establish beyond reasonable doubt that the assault by those charged had been the cause of Fisher's death.

At the commencement of the trial all four pleaded not guilty. The appellants and accused no 3 tendered no explanation of plea. Accused no 4 admitted that he had participated in an assault upon Fisher but alleged that he had been threatened with death by another person should he not do so: his own life was therefore allegedly at stake. After the

pleas had been recorded the prosecutor handed up a statement, exhibit B, made by accused no 4 to a magistrate on the 10th of March 1992 and also, with the consent of counsel for the defence, a set of photographs of the cell and the corpse.

The State called only one eyewitness to testify to the events which led to Fisher's death, namely Johannes Godfrey who had at the time been one of the 24 inhabitants of cell 545. He and the deceased had slept next to one another in the centre row in the cell. He was wakened that night when something or someone bumped against his leg. This proved to have been Fisher. He saw that accused no 4 was sitting on Fisher's stomach, pinning Fisher's arms against his body. At Fisher's head appellants, one on either side, were pulling a crêpe bandage which had been wrapped around Fisher's neck. Accused no 3 was in the vicinity of Fisher's feet. After a while accused no 4 stood up and said softly, "The man is dead". The other three also stood up and they all walked away. After a while first appellant came back and removed the bandage from

around Fisher's neck. Sleep eluded Godfrey where he lay next to the corpse, for a considerable time. When day broke and he had arisen and was busy rolling up his bedding, the two appellants and accused no 4 shifted the corpse to lie against the wall of the cell where the warders found it when they came to unlock the door. At that stage the body was covered from head to toe by a blanket.

According to Godfrey all four of those charged were members of the 28 gang. He himself and Fisher were both so-called "Franse" - that is, not members of any gang within the prison. Godfrey's opinion of Fisher was that he was a friendly person, and popular. He knew of no problems between Fisher and any of those charged with his murder. Godfrey testified that the 28 gang are known as "wetslaners", law breakers. A prisoner aspiring to membership must commit some act of violence to prove his courage, or risk having violence inflicted upon him should he fail such a test.

The prosecution closed its case after medical evidence relating to

the post mortem examination; the evidence of detective sergeant Jordaan as to his investigation; and the tender of a list of formal admissions made by counsel for the defence relating to the identity of the deceased and so on.

First appellant gave no evidence at this stage. His counsel called further medical evidence. The crux of that was that it is notionally possible that the deceased could have been left merely unconscious as the result of strangulation but asphyxiation followed from another cause. The cause suggested, namely the blanket found covering Fisher, would depend on the nature of the material of which the blanket was made and the manner in which it covered his face. The remaining accused, who supported the main features of Godfrey's account of events, admitted that deliberate action had been taken aimed at killing the deceased. They left him when they were satisfied that that object had been achieved. The suggestion that they may have failed in what they set out to do but fate intervened to supplement their vigorous, but for some unaccountable

reason ineffectual, violence, can at best be described as fanciful. The attention given this defence at the trial was unmerited. Mr Hitchcock who appeared for first appellant both at the trial and before us wisely abandoned the appeal against his client's conviction.

The evidence of second appellant may be summarized as follows and in doing so, I omit detail which has no bearing on the ultimate result. He is 30 years of age, unmarried but the father of one child. He got as far as sub B at school and can neither read nor write. In 1978 he joined the 28 gang. (According to his SAP 69 his criminal career commenced in that year. I return later to the course of that career.) His exposition of what one may call the organogram of the 28 gang, was perhaps somewhat confusing to an outsider and not necessarily reliable in all respects, particularly in regard to the names he accords the various ranks within the gang. The gang has two divisions catering for two entirely different fields of operations. The military wing attends to violence, the civilian wing is to a large extent there to provide "wyfies" -

catamites - for the members of the military wing. In both divisions ranks are acknowledged and there are possibilities of promotion dependant on the commission of offences. At some stage the difference between the operations of the two sections fades somewhat since a member of the civilian division may, once he has reached the rank of lieutenant, participate in the violent activities of the military wing. Until such person has reached that rank, he may not. The civilian line apparently does not initiate offences of violence. Members in that division may not murder but nevertheless on that particular night did so. An applicant for membership undergoes a probationary period. Upon acceptance he is taught the laws of the gang by someone of senior rank. The laws include the provision that a member who disobeys the order of anyone his senior in rank, is liable to punishment. That punishment may even be a death sentence. Second appellant claimed personal knowledge of the implementation of that law: in 1984 when he was also at Pollsmoor "was daar 'n ander man wat die wette oortree het en hy was toe vermoor,

sy hart is uitgehaal en sy keel is afgesny". In cell 545 all bar two of the members of the 28 gang were civilian members and those two were mere soldiers, without any rank. In fact there was a measure of doubt as to whether one of these was a member of the gang at all. The 28 member with the highest rank in the cell was accused no 4. He was a captain. Accused no 4 woke second appellant that particular night and instructed him to get dressed. He did so and reported in the corner to the other three who were already sitting on the bed of first appellant or possibly that of accused no 4. There first appellant told of an earlier incident in which a fellow gang member had been murdered, Fisher allegedly having had some part in that crime: he was supposed to have dragged that deceased down stairs by his leg so that his head bumped against each of the steps. As a result of this report by first appellant, accused no 4 decided that Fisher had to be eliminated. Accused no 4 asked each of the others if he was strong enough for the task. All three answered in the affirmative. First appellant, having an injury to his leg, had crêpe

bandages in his locker. It was his suggestion that one of those bandages should be used as the instrument with which to do the deed. First appellant fetched the bandage and wrapped it around Fisher's neck. At the same time accused no 4 sat on appellant's stomach and the appellants, one on either side, pulled at the crossed-over bandage until accused no 4 reported that the man was dead after which second appellant removed the bandage.

Although second appellant under cross-examination unreservedly admitted that the murder was committed purely from considerations of revenge, he also alleged that three of the attackers were members in the civilian line while accused no 3 was still on probation at that stage, which suggests that the story of the motive for the murder may not be the full truth. Second appellant also said that Fisher had been a catamite with whom both second appellant and accused no 4 sometimes had intercourse. Fisher had a few days before the incident asked to be taken out of cell 545. He was, but was returned again at the request of

accused no 4 (according to what the latter had told second appellant). Second appellant himself was never informed by Fisher that he wished to terminate any relationship with anyone in the cell and second appellant "het maar altyd gekry wat ek wou hê daar by hom en ek het baie - ek was baie verlief op hom". He denied that any gang violence is committed out of fear: when you join the gang you take an oath and appreciate that that oath may lead to your being obliged to commit murder.

Accused no 3 testified that he had been born in 1973. He attended school to standard 6 but did not pass that examination. He was in a single cell in Pollsmoor when accused no 4, with his consent, arranged for him to be transferred to cell 545. Although in the juvenile section he had apparently become a member of the 28 gang already, there was no member there with sufficient rank and therefore jurisdiction to confer effective membership (after proper instruction) on him. In cell 545 he was accordingly not accepted as a full blown member, but regarded as

a Frenchman. As regards the events of that night, he was invited by first appellant to participate in a murder and threatened by accused no 4 to do so or feature as a corpse himself. He tried, surreptitiously but unsuccessfully, to make a noise so that people would wake up. He was ordered to hold Fisher's feet and took up his station there but in actual fact did not obey the order. It was in any event unnecessary. Fisher was effectively pinned down by accused no 4 who sat on him and held down his arms and prevented his struggling. After the cell was opened in the morning the four of them were at first held together in one cell. There he was accepted by the other three as a full member of the 28 gang. That was possible because both first appellant and accused no 4 had sufficient jurisdiction, both being captains though in the civilian line. It was also necessary for them to confer membership on him since they could not acknowledge that they had called in the assistance of a "Frenchman" to commit the murder. That constituted a contravention of the law of the gang. Having been so accepted he was ordered by second

appellant to make a statement to the authorities accepting responsibility for the murder because he, as a minor, would receive a lighter sentence. He pretended to agree to do this after he had been threatened with a razor blade but nevertheless told the truth in the statement which he made to a major at Pollsmoor, after which he was transferred to a different section.

Another inhabitant of the cell at that stage, N Witbooi, was called on behalf of accused no 3. Witbooi is also a member of the 28 gang and although his evidence was contradictory and differed in certain respects from a statement he had made earlier, he was adamant that apart from four "Frenchmen", the inhabitants of the cell were all members of the civilian line of the 28 gang and that the murder of Fisher was not one committed as gang vengeance. Pollsmoor is a transit institution from which prisoners are posted elsewhere. According to gang laws, gang activities are neither planned nor executed there.

The evidence of accused no 4 followed the same pattern as that of

the other inhabitants of cell 545 who testified, with variations in regard to detail. According to him it was second appellant who decided that a murder had to be committed because he was cross with Fisher, with whom he had a relationship, because Fisher wanted to leave the cell. He, accused no 4, was afraid of first appellant who had in the past stabbed him with a knife. (In his statement to the magistrate which had been handed up at the commencement of the trial he alleged that first appellant threatened him with a knife to persuade him to participate in the murder. According to his evidence in court first appellant was in possession of a knife but did not handle it in any fashion which caused accused no 4 to think that he himself was in any immediate danger.) He did not dispute the fact that he had sat on Fisher's stomach while the appellants pulled on the crêpe bandage around Fisher's neck. According to him he had to murder or be murdered, there was no escape for him; a claim undermined by his ready concession that the murder was not a procedure ordered in gang "interests" but had been triggered by jealousy.

According to him, Fisher had not yet come to Pollsmoor when the event now offered as the motive for "necessitating" Fisher's death, had occurred.

In convicting appellants and accused no 4, Lategan J found that the murder had been a planned operation and committed with *dolus directus*. There was no reason to regard the explanation of plea proferred by accused no 4 as being reasonably possibly true. He was no subordinate in the cell but held a rank at least equal to that of first appellant. His evidence of alleged compulsion had no foundation and was in any event full of contradictions. On the other hand the evidence of accused no 3 that he had no common purpose with the other three and had only pretended to participate while actually performing no action at all against Fisher, was corroborated by certain of the other witnesses and could reasonably possibly be true.

After the appellants and accused no 4 had been convicted, each of the three admitted an impressive list of previous convictions and first

appellant gave evidence for the first time. He told the court that he was 34 years old, was born and raised in the Transkei, by an older brother, since he had been orphaned when young. He never attended school. He came to the Cape in 1981, got employment as a guard at a factory but it is clear from his SAP 69 that that career must have been short-lived. He became a member of the 28 gang in 1989. In 1990 there was trouble between members of the 26 and the 28 gangs who had been put into the same cell. He himself was assaulted and landed in hospital and a fellow member of the 28 gang was killed. He got no satisfaction from the prison authorities when he complained. Instead he was transferred to Brandvlei. A detective came to him there and took a statement from him relating to both the assault upon him and the death of his fellow gang member but he never heard what the outcome of that matter was. The present deceased had been killed because he had participated in the 1990 action against the 28 member who died and

> "onse wet werk nou so, U Edele as ons weet wie onse lid doodgemaak het, U Edele, dan moet ons nou ook vir hom

> doodmaak ... As ons dit nie doen nie, U Edele, dan word dit nou gesê ... dat ons ook nou saamstem ... met wat gebeur het en dan word ons daarvoor gestraf omrede dat ons gesweer het, U Edele dat ons as een eenheid sal werk, U Edele".

He did not suggest that he had been ordered by anyone to murder Fisher and admitted that the very morning before judgment on the merits was to be given, he had stabbed someone at Pollsmoor with a knife. Asked whether second appellant had also stabbed the person with the knife, he said that he hadn't seen that "want ek was kwaad". Cross-examined on his record he offered a reason for all of his offences, very few of which he conceded were his fault. When it was put to him that if he were returned to prison indefinitely, he as a member of the 28 gang who regarded himself as totally bound by its laws might be instructed to murder again, he glibly replied that that was not possible. The gang would not order him to commit a second murder when he already had one chalked up against him.

In dealing with mitigating and aggravating factors for purposes of

sentence the trial court found that appellants' membership of the 28 gang and the influence which that had on the commission of the murder, constituted a mitigating factor. In the relevant judgment, Lategan J then referred to evidence of coercion and of the consequences of disobedience of gang leaders' orders and to argument advanced that second appellant must be found to have obeyed gang orders, in view of his uncontradicted evidence that he was in love with Fisher and had no quarrel with him. From what follows later in the judgment it is clear that the court made no finding that either that evidence or that argument was accepted. That would have conflicted with concessions made by the appellants that none of the participants in the murder were members of, or had received orders from officers in, the military wing of the gang. It follows that the court's finding amounts to no more than that loyalty to fellow members probably made each feel obliged to implement the decision to murder, once that decision had been arrived at. But that decision originated in their own minds and did not come from any "higher authority".

It is by now trite law that this court has an independent discretion to determine whether the death penalty is the only appropriate one for the offence committed by these men.

It is unnecessary to look for condemnatory adjectives to describe the offence committed. The murder was carefully pre-planned and efficiently executed to ensure success. Not only were the odds against Fisher overwhelming but he was attacked in his sleep. He had not a dog's chance of survival. The motive was reprehensible. Whatever the merits of fourth accused's evidence that the origin of the murder lay in resentment that Fisher wished to terminate his "services", appellants themselves insisted that their motive was revenge arising out of earlier inter-gang violence. The place where the murder was committed - within one of the very institutions created by society to render criminals either rehabilitated or harmless - places the murder high on the list within the category of crimes so serious that they undermine the foundations of orderly society.

Looking at the next leg of the triad relevant to determining sentence: the criminals, I set out below the SAP 69 of each.

SIPHO BOY

"83.12.20	R30 of 60 dae G/Straf	Besit van dagga - 2,5 gram
84.05.21	12 Maande G/S waarvan 8 maande opgeskort word vir 3 jaar op voorwaarde dat besk nie weer skuldig bevind word aan die volgende misdrywe gepleeg gedurende die tydperk van opskorting; aanranding of 'n aanklag waarvan aanranding 'n bestanddeel is ten opsigte waarvan besk veroordeel word sonder 'n keuse van 'n boete of opskorting van G/S	Aanranding met die opset om ernstig te beseer - stuk yster
85.02.06	4 maande g.s	Besit van dagga - 4 g
85.02.20	R30 of 30 dae g.s	Aanranding - stok
85.04.25	R180 of 90 dae g.s opgeskort in die geheel vir 'n tydperk van 3 jaar op voorwaarde dat die besk nie skuldig bevind word	Aanranding op polisie - vas gegryp en op grond gegooi

	aan o/a 27(2)(a) wet 7/58 gepleeg in die tydperk van opskorting nie.	
	Gewaarsku en ontslaan.	Onregmatige betreding
85.09.19	R150 of 100 dae g/straf.	Opsetlike saakbeskadiging, vensterruite, R60
86.05.20	6 maande g/s Dagga verbeurd aan staat verklaar	Besit van dagga - 0,5g
86.10.21	12 Maande g/s	Roof, baadjie, horlosie R30 kontant -waarde R133,00
86.12.19	OPGESKORTE VONNIS [VAN 1984] WORD IN WERKING GESTEL	
87.11.05	VRYGELAAT OP PAROOL TOT 87/12/15 35/6298	
88.04.07	3 Jaar g/s	Roof - Kontant - mes - R12
89.05.25	12 Maande g/s	Aanranding met die opset om ernstig te beseer - Beker in sokkie
89.06.12	HERTOEGELAAT OM 11 DAE G/A UIT TE DIEN WEENS PAROOLBREUK	
89.09.17	6 Maande g/s	Opsetlike saakbeskadiging - 1 Toilet pot in sel R60
91.04.30	ONVOORWAARDELIK VRYGELAAT RAAD No	

35/6298

91.10.08	5 jaar G/S	Strafbare manslag - skerp voorwerp
91.12.12	6 maande G/S	Opsetlike saakbeskadiging - ruite en buislig - R200"

BOY DE KLERK

"72.07.20	R20 of 40 dae g/s	Besit van gevaarlike wapen
73.11.20	R45 of 90 dae g/s	Diefstal - kontant R20
73.11.20	3 Maande g/s	Huisbraak met die opset om 'n misdryf te pleeg en diefstal - klerasie - woonhuis - R5
74.06.06	6 Maande g/s	Huisbraak met die opset om 'n misdryf te pleeg en diefstal - kontant en koffer - woonhuis - R40
75.03.12	R20 of 40 dae g/s en 50 dae g/s opgeskort vir 2 jaar op voorwaarde dat besk nie skuldig bevind	Diefstal - horlosie - R4

	word aan diefstal, roof of huisbraak met die opset om te steel wat gepleeg is gedurende die tydperk van opskorting nie.	
75.05.01	Ingevolge Art 334 Wet 56/55 ter - G/S vir korrektiewe opleiding.	Huisbraak met die opset om te steel en poging tot diefstal - woonhuis
77.12.12	R60 of 90 dae g/s	Besit van gevaarlike wapen
77.12.22	4 Jaar g/s waarvan 3 jaar g/s opgeskort word op voorwaarde dat die besk nie skuldig bevind word aan enige aanklag wat oneerlikheid inhou nie, gepleeg binne 5 jaar vanaf vandag.	Huisbraak met die opset om te steel en diefstal - klerasie - woonhuis - R151
78.09.12	VRYGELAAT OP PAROOL TOT 78.10.10 - G8/K106/78	
79.01.24	3 Jaar g.s. en besk word gewaarsku dat by 'n latere skuldigbevinding daar 'n wesenlike moontlikheid bestaan dat hy as gewoon-	Huisbraak met die doel om te steel en diefstal - klerasie - woonhuis - R325,26

	te misdadiger verklaar kan word.	
79.02.15	OPGESKORTE VONNIS GEDATEER 77.12.22 WORD IN WERKING GESTEL	
82.01.24	ONVOORWAARDELIK VRYGELAAT : RAAD No 18/3610	
82.03.04	5 Jaar g.s.	Huisbraak met die opset om te steel en diefstal - klerasie bandspeler - woonhuis - R365,13
86.01.29	ONVOORWAARDELIK VRYGELAAT RAAD No 18/3610	
86.05.16	4 Maande G/S opgeskort vir 'n tydperk van 2 jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan die misdaad van sodomie wat gedurende daardie tydperk gepleeg is nie.	Sodomie
86.07.24	O/A 286 van Wet 51/77 Tot gewoonte misdadiger verklaar.	Huisbraak met die opset om te steel en diefstal - Woonhuis - Klerasie - Laken - Kassetspeler -

R300,00"

So at the age of 34, first appellant had been at odds with the law for almost a decade and his record shows that he has progressed from violence to combining that with dishonesty. He had already been responsible for the death of one man when he killed another and it is clear that he has learned nothing from the sentences so far imposed upon him, whether fines, suspended sentences, short term imprisonment or long term imprisonment. He does not submit to authority or discipline, is a trouble maker in gaol where he assaulted someone and damaged property and was barely out when he was back inside again. Most important is his admission that once more he has stabbed another person, after the events which form the basis of his present conviction. He displays no remorse whatsoever.

The court *a quo* correctly pointed out in regard to the third leg of the triad that the interests of society include the interests of fellow prisoners. We are reminded daily in political speeches, journals,

judgments, newspapers that Correctional Services have problems with overcrowding in its institutions. I have difficulty in envisaging how fellow prisoners can be protected against first appellant short of putting him in a cage for life. Apart from that probably constituting a "cruel and unusual punishment", a sentence of life imprisonment would lessen both the man-hours and money available to Correctional Services to be expended more profitably on others put under their jurisdiction. Where imprisonment has not in the past served to deter him or fellow members of the gangs that hold sway inside prisons, in my view the interests of society both within and outside the prison establishment demand that the death sentence be imposed and executed as the only appropriate method of dealing with first appellant. Mere incarceration would leave fellow prisoners and warders constantly at risk.

The record of second appellant is in one respect less serious than that of first appellant, in another respect more so. His offences relate primarily to dishonesty rather than to acts of violence. He has however

clashed with the law for a far longer period, having started at a younger age. Like first appellant, this man learns nothing from experience: neither fines, suspended sentences nor long-term imprisonment have discouraged him. Released in January of 1986 he was back in months and serving an indeterminate sentence when Fisher was murdered. Although he has not in the past indulged in violence, his evidence that he killed Fisher apparently without any qualms despite being fond of him, is chilling. He has spent more of his life inside prison than outside, in terms of the sentences actually imposed upon him. There is no ground whatsoever to suggest that he is capable of rehabilitation. I cannot envisage life imprisonment as being any deterrent for him whatever. The only effective method of preventing him from killing again (and hopefully of deterring other gang members from ordering or committing prison murders) is by the imposition and execution of the death sentence.

I am accordingly of the view that the death sentence is the only sentence which could have any meaning in the present matter. However,

in view of the attitude adopted before us in other matters, that the death sentence conflicts with the Constitution of South Africa, Act 200 of 1993, and the fact that counsel in this matter requested an opportunity for their clients similar to that granted in other cases to contest the issue, the following order is made:

1. The appeal of first appellant against his conviction is dismissed.

2. The final determination of the appeal of both appellants against the death sentences imposed on them is postponed to a date to be arranged by the registrar in consultation with the Chief Justice, pending a decision by the Constitutional Court on the issue whether confirmation of those sentences by this court in this matter would be unconstitutional.

L VAN DEN HEEVER JA

CONCUR:

HOEXTER JA)
HEFER JA)