IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIBONGISENI NTULI ..... Appellant

AND

THE STATE ..... Respondent

Coram: JOUBERT, ACJ, SMALBERGER et EKSTEEN, JJA

Heard: 16 November 1990

Delivered: 30 November 1990

J U D G M E N T

EKSTEEN, JA :

The fourteen counts contained in the indictment and the evidence led in support of them reflect a saga of unbridled violence and terror stretching over a period of more than a month. Seen chronologically the following picture emerges. Early on the morning of 9 September 1988 three men wearing balaclavas burst into the premises of Coastal Traders at Shakaskraal and demanded "money and the gun". While one man pointed a heavy calibre revolver at the proprietor, Mr. Singh, and another man threatened his assistant with a long knife, the third man stole a brown leather briefcase containing about R800 and a 9 m.m. parabellum pistol that belonged to Singh.

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(Count 1.)

Some eleven days later, on the morning of 20 September 1988, four men walked into the home of Mrs. Ramdan at Buffelsdraai. They had already caught her young gardener, and brought him into the house as their captive. They threatened Mrs. Ramdan with a pistol and a cane knife, and demanded money and guns. They assaulted her by hitting her on her head with the flat side of the cane knife until she lost consciousness. Eventually they made off with a variety of clothing and household goods; R400 in cash; and a 12 bore shotgun in its gun-case with an ammunition belt containing 35 rounds of ammunition. (Count 14.)

Another ten days passed and then early on

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the morning of 30 September 1988 four men came to the house of Mrs. Govender at Tea Estate, Inanda. Two stood outside the house, while the other two, wearing balaclavas, entered the house. One was armed with a pistol, and the other with a knife. They threatened Mrs. Govender, who was still in bed, and demanded money and a gun. She told them to take what they could find. They took an air-gun and a typewriter. When Mrs. Govender's domestic servants arrived for work the robbers fled. As they ran off she heard two shots being fired. The typewriter was subsequently found broken and abandoned in a sugar-cane field. (Count 2.)

Five days later on Wednesday 5 October 1988

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at about 6 o'clock in the morning while Mrs. Dhanmat-
hee Singh was preparing breakfast for her husband and
her four young children in their home at Rietriver,
near Verulam, three men wearing balaclavas walked in-
to her house. One was armed with a pistol, and ano-
ther one with a long knife. The first one to notice
them as they came in was her 15 year old son Divash.
He immediately ran into the kitchen and told his
mother that "there were rogues in the house". She
turned round and saw two men standing in the doorway.
One of them had a fire-arm in his hand which he point-
ed at her. Mrs. Singh got such a fright that she
just snatched up her baby and ran out of the kitchen
followed by young Divash. As she ran she heard a

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shot being fired in the kitchen. The third intruder, whom she describes simply as "a black man" stood just outside the kitchen door, and tried to grab Mrs. Singh as she ran out. She managed to break loose and rolled down an embankment with her baby still in her arms. As she rolled down; she says, she heard another shot being fired. This shot seems to have been aimed at young Divash who was also running away. He was wounded in his left shoulder, but managed to make good his escape. In the meantime Mrs. Singh's husband, Ramesh Singh, had been busy making posters in his little workshop which was situated close to the main house and near the kitchen door. Aroused by all the commotion, he came out with his metre-stick in his hand. When

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he saw what was happening he "became hysterical and started screaming" says Divash, and he too tried to run away. Divash heard another shot ring out and saw two of the intruders chase after his father. They caught up with him. A struggle ensued. Yet another shot ran out. Ramesh Singh had been shot in his back. The bullet passed through both lungs and emerged in the vicinity of his left shoulder. By the time his "neighbours and relatives" got to him he was dead.

Mrs. Singh's clothes had been thrown out of her ward-robe but all she could ascertain having been taken was some "O.K. Bazaars' money" i.e. paper tokens resembling money issued by the O.K. Bazaars to members of their staff, and which could presumably be exchanged for goods

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acquired from their employer. The value of the tokens taken by the robbers was between R60 and R70. These events - the murder of Ramesh Singh, the attempted murder of Divash, and the robbery on the Singh household - formed the subject matter of Counts 3, 4 and 5.

The very next day, on 6 October 1988 this gang of robbers continued their reign of terror. By way of a change they now struck at night, and not early in the morning as they had hitherto done. At about 10 o'clock that night while Mavis Ngubane and her husband Johnny Nene were asleep in their bed, they were awakened by a knock on their window and bright torch light shining into their room. A voice from

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outside told them to open up as they were policemen. Before Mavis could get to the door, however, it was kicked open, and three men came into the room. One of them wore a balaclava. Another wore a widebrimmed hat. Mavis could not see what the third one wore as she was blinded by the light of the torch. One of them was armed with a fire-arm which he pointed at her and demanded money. She gave him R46. They were not satisfied with this, and after hitting her and threatening to shoot her they induced her to give them a further R300. They also took two wrist-watches, an overcoat, a yellow torch and a pot of meat. Johnny Nene was made to kneel on the floor. They demanded of him, to show them where he kept his fire-arm. His

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reply that he did not possess one seemed to satisfy them and they left. (Count 7.)

From Mavis Ngubane's house they proceeded to the nearby house of Sylvia Luthuli. She and her daughter Khanyisele Dlamini were awakened by a knock on their door. A voice from outside announced that they were the police. Before Sylvia could open the door, it was kicked open. Five black men entered. One was armed with a "revolver", another had a knife, and two of them had torches. They demanded money, hit Sylvia with a stick, and forced her to open her wardrobe. They threw everything out of the wardrobe until they found R190 in cash which they took. They then stabbed Sylvia in her chest, and turned their

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attention to her daughter. Sylvia managed to jump out of the window and ran to her neighbours for help. When she returned with her neighbour the robbers had fled. They found Khanyisele cowering under the bed. She had been stabbed in her left buttock. (Count 8.)

The appellant in the Court a quo pleaded not guilty to all the counts I have so far referred to and denied all knowledge of the events, and consequently denied that he had been present at any of them.The Court however disbelieved him and convicted him on counts 2, 3, 4, 5, 7, 8 and 14. On count 1 he was acquitted on the ground that there was insufficient identifying evidence.

Despite the fact that the Court a quo had granted appellant leave to appeal against his convictions on all counts, Mrs. Collett, who appeared on his

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behalf before us, conceded that she was unable to advance any argument against the convictions were not justified on the evidence. This concession was, in my view, wisely made. There was cogent evidence linking the appellant to each of the counts on which he was convicted. The remaining counts on which he was convicted viz. counts 10, 11, 12 and 13 fall into a somewhat different category in that the appellant concedes that he was present at these events but denies complicity on the ground that he was so drunk that he did not know what was happening about him. The events giving rise to these latter counts are as follows.

On 18 October 1988 just before 7 p.m. Stanford

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Nkonzo, the owner of the Zamukuzakha Store was relaxing in the kitchen rondavel of his residence after having had his supper. His wife, Gretta, and his daughter Thokozile were with him. Thokozile was busy making tea for them when the appellant burst into the room with a fire-arm in his hand and said

> "Yes Stan, here we are. Produce the money and also if you have a fire-arm bring it along."

Thokozile says she recognized the appellant at once. She knew him well. In fact he was related to them. She says he appeared to be perfectly sober.

Stanley's reaction to this challenge was to get up and push the door to. Gretta helped him push. It would appear that appellant retreated out of the

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rondavel but kept his foot in the doorway so that the door could not be closed. He and his companions tried to push the door open. While this pushing to and fro was in progress a torch was thrust into the rondavel through the opening and it shone into Gretta's eyes. She grabbed the torch and tried to wrest it from the person holding it. A shot was then fired which hit her on the left side of her chest, causing her to fall. The door was now forced open. Stanley Nkonzo was grabbed by the attackers and pulled outside. Gretta managed to get up and also ran out. So did Thokozile. Thokozile says as she ran out she noticed that her father had been forced down onto the ground next to the door of the rondavel and was being shot at point-blank

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range as he sat. Stanley Nkonzo died of his injuries and at a post mortem examination he was found to have been shot some 2 cm. from the midline of the sternum - the bullet passing through the 6th costal cartilage, the diaphragm, the liver, stomach, small intestines and emerging in the left flank. He had also been stabbed in the right loin and in his back.

Thokozile says she just noticed a number of men standing round her father and one of them shooting him. She could not say who fired the shot nor could she recognize any of the other men. She ran to her sister's kraal which was close by. As she ran she saw a motor car parked near a water pump, and she noticed someone sitting in the car. When

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she got to her sister's kraal and imparted the news, her sister and her sister's children came out and started screaming. She then saw four or five men running away from her parents' home, getting into the waiting car and driving off.

Gretta says when she emerged from the kitchen rondavel she also saw her husband being shot. She was grabbed by two men and hustled into a two-roomed structure comprising their diningroom and bedroom. She says that the men demanded that she show them where the money was. When she did not respond another shot was fired and she lost consciousness. She later regained consciousness when Thokozile and her neighbours came to pick her up. Her

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clothing had been thrown out of her wardrobe and an amount of about R100, which had been on top of the wardrobe, had been stolen.

These events comprised counts 10 (the attempted murder of Gretta Nkonzo), 11 (the murder of Stanley Nkonzo) and 12 (the armed robbery of the Nkonzo household).

Appellant and his companions drove off from Stanley Nkonzo's house along the Deemount Ridge road in the direction of Port Shepstone. After they had gone some 5 kilometres, at the Mbande bus stop, their car left the road and overturned. None of the occupants seems to have been injured in this mishap.

Shortly afterwards, at about 8 o'clock that night,

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one Cecil Mbotho happened to be passing this spot in his Toyota Corolla motor car. He was accompanied by some friends. As they approached the scene they noticed people next to the road flashing a torch as if in distress. They stopped and one of the men came to the car and asked Mbotho whether they wouldn't take an injured person to hospital. While this person was talking to Mbotho, another man came up to the driver's door. This man had a gun and he promptly fired a shot into the car. At this stage there were five men standing round the car. They ordered Mbotho and his passengers to get out, and then, at gunpoint, took them to a "trench" or culvert next to the road where they were made to lie down. The robbers then got

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into Mbotho's car and drove off with it. This robbery formed the subject matter of count 13.

The appellant's defence of excessive drunkenness was rejected by the trial Court and he was convicted on all four counts. Again the correctness of these convictions was not contested before us.

The appellant was sentenced to various terms of imprisonment in respect of all but two of these offences. Leave was granted to appeal against the sentences on all counts, but once again no argument was addressed to us to suggest that any of these sentences of imprisonment was not appropriate. In my view they are, and there is no need to refer to them any further. In respect of the two convictions of

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murder i.e. on count 3 (the murder of Ramesh Singh) and count 11 (the murder of Stanley Nkonzo) no extenuating circumstances were found and the appellant was consequently sentenced to death on each count. Argument in this appeal was directed solely at the sentences on these two counts.

The requirement of a trial court having to consider whether extenuating circumstances exist or not has fallen away by the promulgation of Act 107 of 1990 ("the new Act"). In terms of section 4 of the new Act a trial court is enjoined to make a finding "on the presence or absence of any mitigating or aggravating factors", and the presiding judge will then, "with due regard to that finding", only impose the

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sentence of death if he is satisfied that it is the proper sentence - i.e. that it is the only proper sentence (S. v. Nkwanyana and 2 Others, an unreported judgment of this Court delivered on 18.9.1990, and S. v. Mdau, also an unreported judgment of this Court delivered on 28.9.1990) Section 13(b) of the new Act gives this Court an unfettered discretion on appeal to set aside a death sentence if it is of the opinion that it would not itself have imposed it, and to "impose such punishment as it considers to be proper". Furthermore section 20 requires us to consider the present appeal "as if sections 4 and 13(b) had at all relevant times been in operation".

We are therefore required to have regard

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to all the mitigating and aggravating factors which may emerge from the evidence as a whole (S. v. Senonohi, an unreported judgment of this Court delivered on 17.9.1990 and S. v. Mdau, supra). In this regard it must be borne in mind that a "mitigating factor" has a wider connotation than an extenuating circumstance (S. v. Masina and Others, an unreported decision of this Court delivered on 13.9.1990).

In the course of her argument Mrs. Collett submitted that in the present case the "mitigating features" outweigh the "aggravating features" and that therefore the death sentence was not the only proper sentence. Mr. Paver, on behalf of the respondent, on the other hand submitted that the "aggravating

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features" far outweigh "the mitigating features" and that therefore the death sentence was the only proper sentence. I do not think that the issue can be as simplistically resolved as that. It is true that the new Act requires the trial judge to have due regard to the aggravating and mitigating factors found by the court, and in considering an appeal against a death sentence this Court will also have due regard to them. In this sense one may talk of a weighing up of the one against the other. The ultimate exercise of the discretion both of the trial judge and of this Court, however, remains untrammelled. In addition to the aggravating and mitigating factors regard may also be had to other considerations such as the interests of society.

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The recognized purposes of punishment - i.e. the deterrent, preventative, reformative and retributive purposes - would also be relevant considerations to be weighed. So even if the aggravating factors do outweigh the mitigating factors when considered on their own, it does not follow that the death sentence would, in the circumstances of the case be the proper sentence. Other considerations, such as those that I have mentioned may well be not only relevant, but decisive (S. v. Nkwanyana, supra).

The appellant was initially charged together with one Boy Mthembu. At the commencement of the trial, however, the prosecutor informed the Court that Mthembu had escaped from custody, and that he was still

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at large. The trial then proceeded against the appellant alone. An important part of the evidence against him was a confession made to a magistrate on 23 November 1988. In this confession he admitted his complicity in several of the charges against him and he named those who were with him on each occasion. Boy was mentioned as having been present on each occasion. Ballistic evidence showed that the pistol stolen from the complainant in count 1 (Mr. Singh) had been used in several of the subsequent robberies and in both the murder charges. This pistol was subsequently recovered by the police from one Leonard Sosibo to whom Boy Mthembu had sold it for R400. Boy Mthembu would therefore seem to have played an important part in the

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crimes referred to in the indictment.

With reference to the murder of Ramesh Singh the appellant in his confession alleged that Boy had fired the shot that killed Singh. From the evidence of Mrs. Singh and her son Divash, three men attacked their home that fateful morning of 5 October 1988. They were unable to recognize any of their assailants and could give no indication as to who had shot Singh. The appellant's guilt on this count before us rests on the doctrine of common purpose. He clearly made common cause with his two companions, and is as guilty of the murder of Ramesh Singh as the man who fired the fatal shot. Where, however, it cannot be shown that he actually fired the shot, his intention to kill must

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be seen as dolus eventualis. This would make no difference to the conviction but would be a relevant consideration when it comes to sentence.

The appellant was a comparatively young man at the time the offences were committed. On 8 December 1989 a district surgeon, after examining him, fixed his age at "between 22 years and 24 years and most probably 24 years". This would make him between 21 and 23 years old at the time of the commission of the offences. He appears to have been a somewhat unsophisticated person who worked as a casual labourer. He only had one previous conviction viz. for housebreaking with intent to steal and theft committed in 1983. He was treated as a juvenile at the time and was given corporal

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punishment.

In the light of these circumstances and in view of the fact that his intention was in the form of dolus eventualis I do not think that it can rightly be said that the death sentence is the only proper sentence to be imposed. As was pointed out in S. v. Nkwanyana (supra) the death sentence will under the new Act be confined to exceptionally serious cases where it is imperatively called for. This does not in the circumstances seem to me to be one of those cases. Taking all the relevant features into consideration I consider a sentence of 20 years' imprisonment a proper sentence.

As regards count 11 (the murder of Stanley

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Nkonzo) different considerations would seem to apply. The offence was a very serious one in that Stanley Nkonzo was dragged from the sanctity of his own home, and shot in cold blood without any provocation at all. The sole motivation for this brutal murder was greed - the desire to rob the unfortunate Nkonzos of whatever money they may have had in their possession. As it turned out this was not very much.

What makes it worse for the appellant is that he knew Nkonzo and was related to him. He had often visited the Nkonzo home in the past, and probably guided his fellow robbers to the scene. Having got there he played a leading role by bursting into the kitchen rondavel and threatening Stanley Nkonzo with a fire-

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arm. The trial Court rejected his excuse that he was so drunk that he could not remember what had happened or what he had done.

There was no direct evidence as to who had fired the shot that killed Stanley Nkonzo, but in view of the fact that the appellant was seen shortly before in possession of a fire-arm the probabilities would seem to point to him. In fact in the section 119 proceedings before the magistrate when the appellant was asked what he had done he replied -

"I killed Stanford Nkonzo with a fire-arm."

Thokozile says that she only saw one fire-arm that evening, and that that was the one the appellant had. Thokozile, however, did not see the other

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people who were outside the rondavel until she herself ran out. Then she gave them no more than a cursory glance as she ran off in terror. She was unable to say who the person was who shot her father. The trial Judge unfortunately refrained from making any positive finding on this issue. Presumably because of the view he took of the appellant's guilt on the doctrine of common purpose, he says in his judgment:

> "Despite what the accused said in his plea explanation in the Magistrate's Court, we are prepared to assume for the purposes of this judgment that it has not been established beyond reasonable doubt by the evidence who fired the shots which killed the deceased in counts 3 and 11, or the shots which wounded the complainants in counts 4 and 10."

As I have pointed out the trial Judge was

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perfectly entitled to take this view as far as the conviction was concerned, but when one comes to a consideration of the proper sentence to be imposed it is of considerable importance to decide whether the mens rea was dolus directus or dolus eventualis. In the present case the Court a quo made no such finding, but expressly left the matter open despite what the appellant had said in the section 119 proceedings. On appeal therefore, despite those indications to the contrary to which I have referred, I am not disposed to find against the appellant that he killed Stanley Nkonzo with dolus directus, but must accept as the trial Court did, that it was dolus eventualis. This, as I have already indicated, has an important

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bearing on sentence.

The offence, as I have said, is a serious one, and had it been shown that the appellant had had the direct intention to kill this may well have been one of those cases warranting a death sentence. Even on the assumption that he acted with dolus eventualis the offence remains a serious one and it is only on a very careful consideration that I have come to the conclusion that, in all the circumstances of the case including the personal circumstances of the appellant, it cannot be said that the death sentence is the only proper sentence. A sentence of 25 years' imprisonment seems to me to be a proper sentence.

In the result the appeal against the

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convictions is dismissed. So too is the appeal against the sentences on counts 2, 4, 5, 7, 8, 10, 12, 13 and 14. The appeal against the death sentences imposed in respect of counts 3 and 11 succeeds and a sentence of 20 years' imprisonment is imposed in respect of count 3, and a sentence of 25 years in respect of count 11. It is ordered that both these sentences will run concurrently with each other and with the sentences imposed in respect of the other counts on which the appellant was convicted.

J.P.G. EKSTEEN, JA

JOUBERT, ACJ)
SMALBERGER, JA) concur