IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO: 56/91

In the appeal of:

BONGANI KHEVE MKHIZE APPELLANT

and

THE STATE RESPONDENT

Coram: **CORBETT CJ, NICHOLAS *et* VAN COLLER AJJA**

Date heard: 6 September 1991

Date delivered: 27 September 1991

J U D G M E N T

VAN COLLER AJA:

On 28 March 1990 the appellant was convicted of murder in the Natal Provincial Division. The trial court, composed of Wilson J and two assessors, found no extenuating circumstances and the death sentence was imposed. Appellant's application for leave to appeal was refused, but leave to appeal against the sentence was granted by this court.

The deceased was a nine year-old girl. She was the niece of appellant. According to the medical evidence the deceased died as a result of multiple stab wounds. No less than 107 stab wounds were inflicted. Some of these wounds penetrated

the heart and lungs. There were stab wounds to the chest, stomach, back and legs. Even part of the tongue had been cut away. One cannot but agree with the trial judge's impression that there was a long, deliberate and sadistic attack on the body of this child. Appellant admitted that he killed the deceased.

Appellant and the deceased left his mother's kraal at about noon on 24 September 1987. The deceased accompanied appellant to fetch his belongings from another kraal. According to the evidence of appellant's mother, Tembile Mkhize, appellant was sober and there was nothing wrong with him. During cross-examination she mentioned that there was no trouble between him and the deceased but that there was some ill-feeling between appellant and the mother of the deceased. A state witness, Gaza Chili, testified that on the day in question he gave appellant and the deceased a lift in his car. He picked them up at a place called Obisana and dropped them in front of his store in the

Macekane area between 5.00 and 5.30 pm. They were with him for approximately 20 minutes. During this time he spoke to appellant but detected nothing abnormal in his speech or appearance. The body of the deceased was found on Friday 25 September 1987 near a river about one and a half kilometres from the store owned by the witness Chili. It is not clear from the evidence how far from the kraal of appellant's mother the body was discovered, but it does appear to have been in the same area. The police found a blood-stained shirt and a pair of shoes in the vicinity of the body. The evidence established that the shirt belonged to the deceased and that the shoes were those of appellant.

Appellant's evidence was as follows. He drank stout and sorghum beer at a store not far from his mother's kraal. His mother was present at the store and she also drank liquor. When he and the deceased left the store on the way to his kraal, they were talking to each other and she walked in front of him. The deceased carried a bottle containing

Coca-Cola. After they had walked some distance, the deceased handed the Coca-Cola bottle to him at his request. He asked her to do that so that she could walk faster. Eventually they reached a river where he hit her with the bottle. He then stabbed the deceased with his knife while she was lying on the ground. Save for stating that he was heavily under the influence of liquor and that he had not intended to kill her, appellant could not explain why he attacked the deceased. He could also not explain how it came about that he left his shoes at the scene of the crime. A perusal of appellant's evidence shows that his evidence was unsatisfactory and evasive in many important respects. The trial court concluded that appellant was an unmitigated liar and that he clearly knew what he was doing when he stabbed the deceased. The motive for the killing could not, however, be determined on the evidence.

After appellant's conviction the trial was adjourned so that he could be examined by a clinical psychologist. When the

hearing was resumed the defence called Mrs Mkhize, the clinical psychologist who interviewed appellant and who submitted a report in respect of her findings. Mrs Mkhize has a master's degree in clinical psychology and she is a senior lecturer in psychology at the University of Zululand. The evidence of this witness could not resolve the uncertainty with regard to the motive for the killing. She stated that there was nothing forthcoming from appellant to indicate what could have influenced him. It is possible, according to Mrs Mkhize, that appellant could be a person with a "conduct disorder" - a more recent diagnostic term for psychopathy. According to the witness, this is a serious personality deviance, often resulting in criminal behaviour. In severe cases this disorder may manifest itself in the infliction of considerable harm to others. She conceded that the origin of this protracted attack could have been sexually related. It must, however, be pointed out that, according to the medical evidence, the deceased had not been sexually tampered with. If appellant is really

a conduct-disordered person, provocation of whatever nature could, according to Mrs Mkhize, have resulted in the infliction by him of serious physical injury upon another person.

In its judgment on extenuation the court a quo stated that it was satisfied on the evidence that appellant, on the afternoon in question, was not under the influence of alcohol to such an extent as to render him unaware of precisely what he was doing. This finding and the finding that appellant has not seen fit to tell the truth as to what happened, appears to be fully justified on the evidence. Although the court a quo mentioned that it appeared probable that the initial cause of the attack was some sexual or sadistic aberration it could not make any finding in this regard.

It is not necessary to consider the correctness of the finding of the court a quo that "there is no evidence as to

circumstances which could constitute extenuating circumstances." Since the trial in this matter, the Criminal Law Amendment Act 107 of 1990 has come into operation. The compulsory imposition of the sentence of death has been abolished and the concept of "extenuating circumstances" has been eliminated under the provisions of this Act. The effect of the amendment has been considered in a number of recent decisions of this court. It is not necessary to repeat what has been stated with regard to the new approach. Suffice it to refer to the following summary of Nestadt JA in Sv Matshili and Others 1991 (3) SA 264 (A) at 268 C - D about the effect of the amendment and the task of this court:

> "In brief, our task is to consider the sentence afresh. We have to decide whether, having due regard to the presence or absence of mitigating and aggravating factors, and bearing in mind the main purpose of punishment, the death sentence is the only proper sentence. So no longer is it necessary for an accused to prove extenuating circumstances in order to avoid its imposition."

The aggravating factors in this case speak for themselves. A young and defenceless girl was brutally murdered. There can be no doubt that the attack on the child was a deliberate one and that appellant acted with <u>dolus directus</u>. The trial court also found that the attack was a planned one. It seems to me, however, that it cannot be determined on the evidence when appellant decided to kill the deceased. It is reasonably possible that the attack could have taken place on the spur of the moment. That the attack was planned a considerable time before it actually took place is not, in my view, the only reasonable inference that can be drawn from the facts and it cannot therefore be considered as an aggravating factor.

What is indeed a serious aggravating factor is the fact that appellant was convicted of rape during November 1979. He was sentenced to 4 years imprisonment of which half was conditionally suspended for 5 years. There is no clarity on

the record with regard to the exact age of appellant. It does appear though, that he was approximately 25 years old when the murder in question was committed. It follows, and some allowance must be made for this, that the rape must have been committed when appellant was only seventeen years of age. During 1983 appellant was sentenced to one year imprisonment in respect of housebreaking and theft. Apart from these convictions, appellant has three other previous convictions in respect of theft and housebreaking, dating back to 1974 and 1975. At that stage he must have been approximately 13 and 14 years of age. It does not appear that the fact that appellant was sent to a reform school in 1974 and that he subsequently served two prison sentences has had any reformative effect. It is also significant that Mrs Mkhize testified that she does not know of a rehabilitation programme which could assist appellant.

The evidence of the clinical psychologist is important with regard to mitigating factors. The trial court's view of Mrs

MKhize's evidence is as follows:

> "Mrs Mkhize put up a detailed and helpful report as to her interviews with the accused, but it is clear that she found nothing organically wrong with the accused or that he was suffering from any recognised defect of the intellect. Her assumption from her interviews was that the accused, from an early age, had deliberately chosen to behave in a certain way. This involved a complete disregard of the feelings of others. A summary of her evidence would perhaps be that the accused chose the path of evil."

It is true that Mrs Mkhize said in answer to a leading question that appellant chose the path of evil. It is, however, also clear that her evidence strongly suggests that appellant is suffering from a conduct disorder. A psychiatrist was present during the trial and although he and a second psychiatrist had kept appellant under observation and reported on his condition prior to the commencement of the trial, they were not called by the state to contradict the evidence of Mrs Mkhize. There appears to be no reason why Mrs Mkhize's evidence should not be

accepted. I have already referred to certain extracts from her evidence. To this may be added that, according to her evidence, appellant did not express or display any feelings about the murder. If one has regard to the nature of the crime and the large number of stab wounds; the fact that the evidence disclosed no reason or motive for this gruesome attack; and the irrational conduct of appellant, then it seems probable that appellant suffered from some disorder or disability of the mind at the time. This conclusion is strengthened by the evidence of Mrs Mkhize. It is not necessary to decide whether or not appellant is in fact suffering from a conduct disorder of the nature described by Mrs Mkhize. If he suffered from some disorder or disability of the mind at the time when he committed the murder and if it was in fact related to the commission of the murder then it may constitute a mitigating factor. We are no longer concerned with extenuating circumstances and it is therefore not necessary that the defect should have been substantial. Cf S v Sibiya 1984 (1) SA 91 (A). However, a substantial

mental disability must necessarily weigh more heavily than one of a lesser degree. In the instant case it is not possible to determine the extent of appellant's mental disorder. I am satisfied, however, that it should be accepted as a mitigating factor of some consequence. There can also be no doubt that there is a causal connection between this mental disability and the purposeless and brutal murder committed by appellant.

There are very few other mitigating factors. The fact that appellant is an unsophisticated person who received very little education can be regarded as mitigating factors. Little weight, however, can be attached to these factors because it appears from the evidence that appellant is articulate and according to Mrs Mkhize, he "could be functioning far above the average range of intelligence". It seems to me that the following view of the trial judge, expressed immediately prior to the death sentence being imposed, can also not be ignored:

> "I think it only right that I should also, at this stage, say that had I had a discretion as to an alternative sentence, I would have imposed an extremely long sentence in the light of the evidence we have heard."

Apart from the fact that the aggravating circumstances far outweigh the mitigating factors, it is clear from the evidence that appellant is a danger to society. He committed theft, rape, and now this brutal murder. The prospects of rehabilitation are negligible. Appellant should be permanently removed from society. It remains to consider whether life imprisonment would be a proper sentence. If it would, then the death sentence would not be the only proper sentence. Taking all the circumstances into account, it seems to me that this is not a case where society would demand the supreme penalty. It also seems to me that a sentence of life imprisonment would satisfy the deterrent, retributive and preventive elements of sentencing.

The appeal is upheld. The death sentence is set aside and it is ordered that appellant be imprisoned for life. A copy of this judgment is to be sent to the appropriate official of the Department of Correctional Services and his attention is to be directed to the findings concerning the mental disorder of the appellant.

VAN COLLER AJA

CORBETT CJ)
) CONCUR
NICHOLAS AJA)