Case No 244/91
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

HARRY MFANILE NGCOBO — Appellant

versus

THE STATE — Respondent

CORAM: NESTADT, MILNE JJA et PREISS AJA

DATE OF HEARING: 5 November 1991

DELIVERY DATE: 15 November 1991

J U D G M E N T

/MILNE JA .....

MILNE JA:

On 10 May 1988 the appellant was convicted of attempted housebreaking with intent to steal, robbery with aggravating circumstances as defined in section 1 of Act 51 of 1957, murder (no extenuating circumstances having been found), and housebreaking with intent to steal and theft of a radio, a television set, a video casette recorder and blankets. He was sentenced to death on the murder charge and to various terms of imprisonment in respect of the other offences. His application for leave to appeal against the conviction and sentences was refused by the trial judge. A similar petition to the Chief Justice for leave to appeal was also unsuccessful. In terms of section 19(8) of the Criminal Law Amendment Act No 107 of 1990 ("the amending Act") the appellant's case was considered by the panel appointed in terms of section 19(1) of the amending Act.

The panel found that the sentence of death would probably have been imposed by the trial court had section 277 of Act 51 of 1957 as substituted by section 4 of the amending Act been in operation at the time sentence was passed.

The matter now comes before us in terms of section 19(12) of the amending Act. In terms of that section this court must consider the case in the same manner as if it were considering an appeal by the appellant against his sentence and section 277 as substituted by section 4 of the amending Act had been in operation at the time sentence was passed by the trial court. Our powers in respect of such matters are set out in section 19(12)(b) of the amending Act.

The effect of this is that there is before us an appeal against the death sentence imposed in respect of the

murder charge and in considering that appeal we apply the same tests as this court applies in appeals under section 316A of the Act, as amended. Those tests have been enunciated in a series of decisions of this court: briefly summarised what this court is required to do is to impose the sentence which it considers the proper sentence taking into account all mitigating and aggravating factors and having regard to the objects of sentence.

I deal firstly with the circumstances in which the crime was committed. The deceased was a man of 80 who lived alone in a house in a residential suburb of Pinetown. The appellant, whose age is reflected in the indictment as 38, had worked for him on a casual basis as a gardener. There was no direct evidence as to the precise circumstances of the murder other than certain statements made to the police by the appellant. It is accordingly necessary to consider

the content of and weight to be attributed to these statements in some detail. The appellant contested the admissibility of these statements at the trial and gave evidence alleging that he had been forced to make them. The trial court rejected the appellant's evidence and held the statements to be admissible. At the trial within a trial the appellant denied any knowledge of the killing of the deceased. He did not give evidence save at the trial within a trial. The first of the statements was made to Capt Le Grange and is in the form of notes made by the latter in his notebook. These notes (Exh E) read as follows:

"15H15 Ondervra Ngcobo. Hy was behoorlik gewaarsku die klagte was behoorlik aan hom gestel Pinetown MK 420/4/86. Sy regte was behoorlik aan hom verduidelik. Hy erken die misdaad en beweer dat hy om ongeveer 13H00 by die huis was. Hy het die venster langs die voordeur gebreek toe die oorledene daar aangekom het. Daar was diefwering voor die venster. Ek was nog op die stoep toe ek gekonfronteer was deur die oorledene. Hy het toe vir my gevra wat ek daar soek. Ek het vir hom gesê ek soek werk. Hy het vir my gevra wie het

die venster gebreek. Ek het gesê ek weet nie. Hy die (oorledene) het toe 'n yster opgetel wat op die stoep was. Hy was ongeveer 3 voet lank. Die oorledene het toe na my geslaan. Ons het toe alreeds beweeg tot voor die Garage. Ek het toe die hou ontduik en die ou man die oorledene vas gegryp. Hy die oorledene het my aan my tril gegryp. Ek het toe 'n klip wat daar gelê het opgetel. Hy wys hoe groot die klip is ongeveer 9 duim in deursnit. Ek het toe die oorledene met die klip geslaan. Ek het hom 3 keer geslaan op daardie stadium was ons al binne in die Garage. Ek het hom toe in die Garage gelos. Hy het op die vloer gelê. Ek het hom toe binne in die Garage toegesluit. Ek het die sleutel van hom gevat asook R15. Ek het na die huis gegaan die voordeur oopgesluit en in die slaapkamer het ek 'n radio gevat ek het toe die huis verlaat en is terug na my plek waar ek die radio gelos het. Ek is toe later weer terug na die huis waar ek 'n TV 'n Video set en komberse gevat het. Ek het dit by die voorhek gelos."

The second statement (Exh F) was made in the usual form to Major Earle. It reads as follows:

" Last Thursday it was the day the crime was committed, I boarded a taxi proceeded to Pinetown. I went to Pinetown because I was looking for a temporary job as it was a holiday on Friday to Monday. I went to several houses in Pinetown but I could not get a temporary job. As I proceeded towards the deceased's house, I saw him driving

away in his car. I now was tempted to break into his house as I saw him driving away. I entered the premises. I went to the front security gate. I saw a toolbox with tools near this gate. I took out a screwdriver and forced open the padlock of this security gate. I entered and tried to open the front door but I found it to be locked. I then broke the window pane next to the front door. There was a burglar guard in front of the window, so I could not enter. At this stage the deceased arrived back home. He opened the garage doors and parked the car in the garage. I now tried to escape but I noticed that the deceased had already come out of the garage and that he might have seen me. I could see that the deceased noticed that the security gate was open. I tried to hide myself so that he could not see me. As he was looking around, he saw me and asked me what I want. I told him that I was looking for some work. He asked me who broke the window. I said that I do not know. He then picked up a piece of iron which was next to the toolbox. He attacked me with the iron. I saw three white males walking in the street. I was scared to run away as I was thinking that they might shoot me should I run away. As the deceased tried to strike me with the iron, he missed me and I then grabbed hold of him as I wanted to push him out of my way. The deceased then got hold of my private parts. He pulled me towards the garage. He then pulled me into the garage and tried to get hold of something to hit me with. I then got hold of a piece of concrete block. I struck him with it on his

forehead.
He then fell onto the garage floor. I left him there. I noticed that on the floor was a keyholder with some keys. I took the keys and locked the deceased inside the garage. I then went back to Claremont with a taxi.
I went to my home. After a while I decided to go back to the deceased's place. When I arrived at his place, I opened the front door with the keys I found on the garage floor. Inside the house, I took a TV, a video, a radio and two blankets. The TV, video and radio I took outside and left it, the TV and video, in the garden. I covered it with the blankets. I took the portable radio with me. Near the garage I picked up fifteen rand in cash consisting of silver coins. I went back to my place. I became afraid. That same night I gave the radio to my neighbour who I know as Ngcobo. I then again went back to the deceased's place. When I now arrived there, I saw a car on the premises of deceased. I then decided to go back to my place. That is all."

Thereafter Major Earle asked the appellant certain questions and it is necessary to refer to only one of these questions and the answer thereto, which were as follows:

"Were you sober on the day that this crime was committed? --- Myself and a friend of mine had half a bottle of vodka and two cartons of iJuba to drink at about half past nine that morning."

The confessions having been admitted in evidence the appellant was, despite his repudiation of them, entitled to have any favourable portions considered. It does not follow, however, that the court must accept everything contained in such a statement. It is the duty of the court to weigh the credibility of the portion in question and to give such weight to it as in its opinion it deserves. **Rex v Valachia & Ano** 1945 AD 826 and **S v Nkwanyana & Others** 1990(4) SA 735 (A) at 745I. The fact that the statements were not made on oath and were not subject to cross-examination detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath. **Valachia's** case **supra** at p 835. In the light of the fact that counsel for the appellant sought to rely upon the passages in the

appellant's statements which suggested that the deceased had "attacked" the appellant it is perhaps relevant to refer to the following portion of the appellant's testimony at the trial within a trial:

> "Did any of the policemen suggest to you that the deceased in fact attacked you first? -- They asked me the following question, 'As you were coming out of the house what did you do?' They then said, 'No, the deceased was not present when you broke in there.' And the next question was, 'At the time when you killed the deceased how did you kill him?'
>
> My question is whether it was suggested to you that the deceased was the first - that he actually struck a blow at you first. -- No, that came from me. I am the one who said that. The police said to me, 'The deceased would not have fought you for no reason.'
>
> But why did you tell them that the deceased fought with you? -- It was merely to satisfy them, because they would not have accepted what I may have said.
>
> BROOME J How would that satisfy them, you making up this story about the deceased attacking you first? -- Well, when I explained it like that, M'Lord, they then said, 'Okay, we are proceeding or passing that.'
>
> MRS STEYN I fail to understand your reply. His Lordship wished to know how would it satisfy the

police if you told them that the deceased fought with you? -- M'Lord, they asked me how I got into the house, I explained it to them. They had already told me that the house had been broken into, but they wanted to know from me how I had gained entrance into the house.

BROOME J No, you are not dealing with the question. You have said that you volunteered, it came from you, it was not something they suggested, this statement that he, the deceased, attacked you first. Is that correct? That came from you, not from them? -- As I said earlier, M'Lord, I do not remember a lot of things that I said to them.

Well, did you say that the deceased attacked you first? -- I can neither deny nor confirm that I said this.

MRS STEYN Then why did you tell us just now that it came from you that the deceased fought with you? It was your idea? -- Yes, because they were questioning me. The question put to me was, 'You met the deceased there. What happened to the deceased?' I then said, 'We fought.'

Why did you give that reply? -- I wanted to give them a satisfactory answer to their question. The deceased was an old man. I had worked for him. He would not have been able or capable of fighting me in view of his age.

Then why did you give that reply? -- Or they would have started from the beginning and hit me.

I beg yours? -- They would have started from the beginning again and hit me.

BROOME J We get back to this. Do you or do you

not remember telling the police that the deceased attacked you first? -- As I said earlier, I do not remember a lot of things. Something that I personally said I no longer remember, because it did not happen the way I was explaining it. I was merely making up a story, M'Lord, to be able to answer the questions that they were asking me.
MRS STEYN Was it part of this made-up story that the deceased grabbed you by your private parts? -- M'Lord, the police had asked me, 'Why did you hit and kill the deceased?' I then made up a story and said he had grabbed me by my private parts. That is the reason why I did not run away.' I made up that story then. M'Lord, the deceased was old, so old that he could not have been able to grab me by my testicles, not at his age."

The position is therefore that the appellant gave evidence on oath making it perfectly clear that the deceased did not "attack" him. This must very much detract from the cogency of the argument that the deceased did attack the appellant. There are, in any event, two answers to this submission. In the first place, I agree with the following remarks of the trial judge:

> "... the deceased was aged about 80 at the time. It is highly improbable that he would have launched an attack on the accused, an able-bodied man in his mid-thirties, whom he had previously employed and apparently been on quite good terms with, but it is absolutely unthinkable that the deceased would ever have looked like getting the better of the accused."

Reference was made to the fact that some trifling injuries were found on the appellant when he was examined by the District Surgeon some five days after the killing of the deceased, but there is nothing to indicate that these injuries were received in the course of a struggle with the deceased and in fact, at the trial within a trial, the appellant gave an explanation of these injuries which was wholly inconsistent with them having been received in any such struggle. Secondly, even if the deceased did attack the appellant because the appellant was going to break into his house or was threatening to attack him, that situation was wholly one of the appellant's own making.

Counsel for the appellant, who did not appear at the trial and did not draw the heads of argument (and to whom we are indebted for his assistance) did not advance the argument advanced in the heads that the appellant's consumption of intoxicating liquor was a mitigating circumstance. In my view he exercised a wise judgment in not advancing this submission. In the first place the appellant did not volunteer the information about having had anything to drink in either of his statements - the information was elicited by Major Earle. Secondly, there is nothing to indicate how much of the liquor in question the appellant personally drank. Thirdly, on the appellant's own version some three and a half to four hours elapsed between the time he had anything to drink and the commission of this offence. In any event, I fully agree with the following remarks of the trial judge:

" Looking at all the evidence, there is no

suggestion that liquor affected the accused or reduced his self-control or blunted his sense of morality. The whole tenor of this statement, Exh F, and of the statement to Captain Le Grange, Exh E, is to the effect that he was in full control of himself, and knew and appreciated everything that he did. There is no suggestion that his memory of the events at the critical time was clouded or in any way imperfect or adversely affected by liquor. There is far too much detail in these statements to allow for a finding that the accused must to some extent have been affected by the liquor he said he consumed.

Looking at all the evidence and at the statements, it is highly significant that there is no suggestion that the accused after the incident went away, sobered up, reflected on what had happened and then felt remorse. In other words, there was no suggestion that it was on account of liquor that he had acted in this way, and had there been no liquor he would not have done this.

In fact, the accused returned to the scene and continued where he had left off; that is to say when he had been interrupted by the arrival of the deceased. On his return, of course, he had the benefit of the use of the deceased's keys which he had taken. In both the statements he said that he took the deceased's keys, locked the deceased in the garage and later returned to enter the house with the use of the keys, and then removed the TV set, the video recorder and the blankets.

So, the contention that his conduct was to some extent affected by liquor, or caused by the

intake of liquor, is rejected."

It was, however, submitted that the murder was not premeditated and that the appellant went to the house intending only to steal and was not armed when he went there. This submission is supported not only by the State's summary of substantial facts and the two statements by the appellant, but also by the findings of the trial court. The trial court found that the deceased was not present when the appellant broke the security gate and the front window of the deceased's house and that at that stage the appellant intended simply to steal what he could. This does constitute a mitigating factor. It is, however, the only mitigating factor for which there is any evidential basis.

There was no attack upon the trial court's finding that the appellant's intention to kill the deceased took the

form of **dolus directus.** I agree that such a finding was fully justified on the evidence. It appears that the appellant's motive for killing the deceased was one or both of the following namely, (a) to prevent the deceased from identifying him as a person who had attempted to break into deceased's house, and (b) in order to effect his purpose of robbing the deceased and then completing the housebreaking.

There are a number of aggravating factors. In the first place the appellant committed a ferocious, brutal and sustained assault on an 80 year-old man for whom he had previously worked and with whom he was, according to his own evidence, on good terms. The injuries he inflicted were summarised by the trial court as follows:

> "1. There was extensive and deep haemorrhage of the neck structures extending to the vocal chord. The hyoid bone was fractured on the left side and down the midline. The thyroid cartilage was fractured down the midline. The hyoid bone is, according to

Dr Van Straaten, not easily fractured, and the injury to the thyroid cartilage was deep down. This, in the opinion of Dr Van Straaten, indicated force applied from the front.

2. The sternum was fractured through the midline, and the third, fourth, fifth, sixth and seventh ribs were fractured, and there was extensive deep bruising over these fractured ribs. This caused Dr Van Straaten to think that someone had jumped on the deceased while he lay on the ground, but he did say that it was not impossible that the piece of concrete or stone, Exh 1, had been dropped on him; the inference being that these injuries were caused to the deceased while he lay on the ground.
3. The deceased's lower jaw was fractured on the right side.
4. Extensive bruising and abrasions were found on -
   (a) both fore-arms;
   (b) the orbits of both eyes, the left cheek and the front of the throat, the left temple and the bridge of the nose;
   (c) to the mid-forehead;
   (d) to the right knee; and
   (e) to the top of the bald head.

   In addition there were lacerations: 1,5 centimetre long on the inner left and right eyebrows, and 3,5 centimetres long under the right side of the chin."

These injuries were inflicted with a large piece of concrete and a steel rod.

A further aggravating factor is that the conduct

of the appellant after killing the deceased was callous and indicates a complete lack of remorse. After killing the deceased the appellant left him inside the garage and locked the door. In the circumstances his motive in locking the door was obviously to prevent the body of the deceased being found before he, the appellant, had carried out his criminal purposes. Thereafter the appellant unlocked the front door using the keys which he had taken from the appellant and stole a radio. He then took the radio he had stolen to his neighbour. He returned later and re-entered the house whereupon he stole more items and left them on the premises to be collected later. He returned again but by that time others were on the scene and he then left.

A further relevant factor is the record of previous convictions, rightly described by the trial judge as "appalling". His first brush with the law was in 1958.

Since that time he has been convicted on nine occasions of housebreaking, on one occasion of theft and on one occasion of robbery. In 1967 he was imprisoned for the prevention of crime and in 1976 he was declared an habitual criminal. He was released on parole on 14 November 1985 and sixteen months later committed the crime in question in this case. This record demonstrates that the prospects of reforming the appellant are remote. It is also apparent that by reason of the appellant's inside knowledge as a former employee of the deceased he knew the age and condition of the appellant and the lay-out of the premises and undoubtedly selected the house because of the probability of "easy pickings".

The aggravating factors far outweigh the single mitigating factor. It does not necessarily follow that the death sentence is the only proper sentence. The fact, however, that murderous attacks of this kind on elderly

people living on their own are on the increase is a relevant matter and the deterrent effect of the sentence to be imposed must, in the circumstances, loom large. **S v Khundulu & Ano** 1991(1) SACR 470 (A) at 479i. See also **S v Sesing** 1991(2) SACR 361 (A) at 365g.

In all the circumstances I am satisfied that the death sentence is the only proper sentence and the appeal is accordingly dismissed.

A J MILNE
Judge of Appeal

NESTADT JA]
] CONCUR
PREISS AJA]