Case No 274/91
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

ELLIOT MZOTHENI SHEZI — Appellant

versus

THE STATE — Respondent

CORAM: E M GROSSKOPF, MILNE et GOLDSTONE JJA

DATE OF HEARING: 21 November 1991

DELIVERY DATE: 27 November 1991

J U D G M E N T

/MILNE JA .....

MILNE JA:

On 3 May 1988 the appellant was convicted of murder and robbery. The trial court found that there were no extenuating circumstances and sentenced him to death on the murder charge. On the robbery charge he was sentenced to 10 years' imprisonment. The trial court granted leave to appeal against the sentence of death and that appeal ("the first appeal") was dismissed by this court on 29 May 1989.

This all took place before the coming into force of Act No 107 of 1990 ("the amending Act"). In terms of section 19 of the amending Act the matter was considered by the panel referred to in that section. The panel found that the trial court would probably have imposed the death sentence had section 277 of the Criminal Procedure Act No 51 of 1977 as substituted by section 4 of the amending Act been

in operation at the time the sentence was passed.

The matter now comes before this court in terms of section 19(12) of the amending Act. Section 19(12)(b)(ii) enjoins this court to apply the same test as that applied in appeals under section 316A of the Criminal Procedure Act as amended. This is a substantially different test from that applied by this court when it heard the first appeal. There the court had a much more limited power of interference and, what is more, the enquiry itself is now a wider one. That is apparent from a number of decisions of this court to which it is unnecessary to refer.

The factual background is as follows: the appellant, then a man of 23, had worked as a gardener for the deceased and her husband at their home in Vanderbijlpark for approximately two years at the time when he committed

these offences. During this period the appellant and the deceased had apparently been on quite good terms. On 3 June 1987 the appellant murdered the deceased in or near the deceased's garage by stabbing her approximately 24 times with a hunting knife. At least 8 of these wounds were fatal; namely, the four stab wounds to the head which penetrated the deceased's brain and four stab wounds which penetrated her liver. The appellant having originally pleaded not guilty, eventually conceded while giving evidence that he had murdered the deceased and that he had on that same day removed a radio, a cine-camera, clothing, watches and various other items from the house belonging to the deceased. The trial court found the appellant guilty of robbery and it is implicit in this that these items were taken by the appellant after he had murdered the deceased. There was no direct evidence other than the appellant's evidence as to why he killed the deceased. He gave a number

of different versions as to why he had attacked the deceased namely

(i) The deceased threw tea into his face.

(ii) The deceased attacked him with a broom stick and a garden fork.

(iii) The deceased refused to pay him money which she had said she was going to pay him.

(iv) The deceased caught him while he was in the act of stealing from the house.

The trial court rejected all of these versions and found the appellant to be an out and out liar. The learned judge commented

> "So maak hy dit vir ons baie moeilik om vas te stel wat sy geestesvermoëns of gemoed was ten tyde van die pleging van die misdaad. Die enigste persoon wat vir ons kan sê is die beskuldigde self. Al wat ons het, is leuens en leuens en leuens."

This comment is justified on the evidence and indeed the

trial court made no finding as to the appellant's motive. It was submitted for the State that the only reasonable inference from the proved facts was that the appellant's motive was purely and simply robbery. It is, however, difficult to reconcile the extraordinary savagery of the attack and the number of lethal wounds with the notion that the appellant's motive was robbery. One or two lethal blows would have sufficed. There is the further factor that the appellant and the deceased had got on well together during the preceding two years. The appellant had, furthermore, what is for practical purposes a clean record. (His only previous conviction was for unlawful possession of dagga in 1986 for which he was sentenced to a fine of R30 or 15 days' imprisonment) In these circumstances it seems more probable than not that the reason for the attack was that the appellant was beside himself with rage. Because of the contradictory and patently untruthful nature of the

appellant's evidence it is not possible to determine the cause of his rage but the factors I have referred to satisfy me that on a balance of probabilities robbery was not the motive for the killing.

There are undoubtedly aggravating factors. The deceased was 59 years old and completely defenceless. This was a horrifyingly savage attack. Murderous attacks on elderly persons occur with distressing frequency and they are on the increase. They are, furthermore, offences which are

"... vir die gemeenskap inherent verderflik"

and the interests of the community accordingly carry more weight. **S v Bezuidenhout** 1991(1) SACR 43 (A) at 51e.

For the appellant it was submitted that the following were mitigating factors:

(a) the relative youth of the appellant;

(b) his low educational standard;

(c) the fact that he is a product "of deprived socio-economic background";

(d) that the form of intention the appellant had was **dolus eventualis**;

(e) the fact that the appellant is for all practical purposes a first offender.

The appellant's relative youthfulness is certainly a mitigating factor and is, furthermore, relevant when considering the prospects of reform. I am far less certain about (b) and (c). For reasons which it is not appropriate to examine here, the vast majority of the population of this country have a low educational standard and come to a greater or lesser extent from a "deprived background". I doubt whether of themselves they constitute mitigating

factors in the absence of any evidence as to their effect upon the particular individual e.g. that they produced a blunting of moral sensibilities or a diminution of the ability to refrain from serious crime. It may be a matter of degree. Factors which were described as "... swak maatskaplike agtergrond ..." were regarded as strongly mitigating factors in **Bezuidenhout's** case **supra** at 50i.

I do not accept that the form which the appellant's intention took was **dolus eventualis.** The judgment of the trial court is not clear on the point and I agree with the statement in the judgment of this court in the first appeal that

> "Te oordeel aan die beserings wat hy die oorledene toegedien het, kan ek my nie voorstel dat hy enigiets anders as haar dood gewil het nie."

Had the intent of the appellant taken the form of **dolus eventualis** that would not in the circumstances have

constituted a mitigating factor since it is inevitable that the appellant foresaw the possibility of death to the victim as strong if not overwhelming. **Cf S v Mabizela & Another** 1991(2) SACR 129 (A) at 132d-e.

I have already referred to the relative youthfulness of the appellant and the fact that he is to be regarded as a first offender. These factors tend to show that there is a reasonable prospect of reform. Taken together with the fact that, in my view, the murder was, on the probabilities, not committed in order to facilitate the robbery these factors pursuade me that the death sentence is not the only appropriate one. This is, however, a border-line case and the interests of the community require that the appellant should be kept in prison for a very long time.

The appeal succeeds; the sentence of death is set

aside and a sentence of 25 years' imprisonment is substituted therefor.

A J MILNE
Judge of Appeal

E M GROSSKOPF JA]
] CONCUR
GOLDSTONE JA]