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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FRANS MOFOKENG ..... FIRST APPELLANT

ANTHONY MOKGELE ..... SECOND APPELLANT

and

THE STATE ..... RESPONDENT

CORAM SMALBERGER JA, NICHOLAS et KRIEGLER AJJA

HEARD : 25 NOVEMBER 1991

DELIVERED : 28 NOVEMBER 1991

J U D G M E N T

KRIEGLER AJA/....

KRIEGLER AJA:

This is an appeal against sentences of death imposed on the two appellants in the Witwatersrand Local Division in June 1990. They had been convicted on several charges, including one of murder. No extenuating circumstances were found and consequently the sentences were mandatory in terms of sec 277 of the Criminal Procedure Act No 51 of 1977 as it then read. At the same time the appellants were sentenced to 16 years and 18 years imprisonment respectively on the other charges. Leave to appeal against the death sentences was refused by the the judge a quo but was granted by this court after the Criminal Law Amendment Act No 107 of 1990 had materially altered the law relating to the imposition of sentences of death. The effect and scope of the changes brought about by the latter enactment and their significance in the present case, will be considered once the relevant facts have

been summarised.

On Monday night 14th November 1989 an elderly farming couple were in their homestead watching the 8 o' clock television news; they were Mr and Mrs van der Mescht of the farm Doornkloof in the district of Westonaria (to whom I shall henceforth refer as "the deceased" and "the complainant" respectively). Suddenly the lights went out; the deceased took a torch and went to investigate. As he was crossing the back yard he was set upon and stabbed to death. (His bloodied corpse was found with a stabwound to the heart, another to the liver, a third into the abdominal cavity and a number of relatively superficial wounds to the head, neck and shoulder.) The complainant heard the deceased cry for help and hurriedly fetched a revolver from her handbag in the bedroom. Thus armed and with a small torch in her other hand she went to the back door. Through the screen door she saw two men

in the dark outside. When one of them made to enter she threatened to shoot and enquired what they wanted. On the reply "Jou geld, jou boer", she fired a shot through the door. Not deterred, the men entered, disarmed the complainant and knocked her down. They had the deceased's torch and a knife in their possession. They proceeded to terrorise the complainant, inflicting a number of superficial stabwounds on her left shoulder and upper arm while demanding her money or her life. She produced some change from two containers kept in the kitchen and was then forced into the bedroom where the handbag was found. They returned to the kitchen where the handbag was emptied. The complainant was ordered to remain seated on a kitchen chair upon pain of being killed. Her two assaillants disappeared into the night, taking the revolver, the torches and various other readily portable items.

Early the next morning the two appellants were accosted by a policeman at a taxi rank in Bekkersdal, a black township nearby. Appellant no 2 was in possession of the deceased's revolver and they were both arrested. Upon their arrival at the police station their complicity in the attack on the Van der Meschts was immediately suspected. They were detained and the investigation took its course.

Approximately seven months later they appeared before Solomon AJ and assessors on five counts, to wit (1) housebreaking with intent to rob or murder; (2) robbery with aggravating circumstances; (3) the murder of the deceased and, (4) an (5), unlicensed possession of the revolver and of four rounds of ammunition found in its cylinder. Both appellants pleaded not guilty to all counts, raising an alibi in respect of the first three and alleging that the second appellant had bought the loaded firearm from a passing

stranger at the taxi rank shortly before their arrest. The prosecution had little difficulty in establishing beyond any shadow of doubt that the two appellants were the miscreants who had attacked the Van der Mescht homestead on the night in question. First appellant was duly convicted on the first three counts and the second appellant on all five. The trial court held, indubitably correctly, that the appellants had acted throughout in the execution of a common purpose: they had interfered with the power supply to the house in order to lure the deceased outside; there he had been attacked and killed and the appellants had then entered the house and robbed the complainant at knife point. The palpably false alibi defence advanced by both appellants rendered the trial court's finding with regard to extenuating circumstances well-nigh inevitable. Indeed counsel for first appellant tendered neither evidence nor argument in mitigation.

Efforts by second appellant's counsel to establish some extenuation proved fruitless.

In the result, had this appeal to be determined on the law as it stood prior to the introduction of Act No 107 of 1990, little, if anything, could have been said to assail the sentences of death imposed by the learned judge a quo. The Lawgiver has, however, created an entirely different approach to the death sentence, which has been analysed in a number of judgments of this court (eg S v Masina and Others 1990 (4) SA 709 (A); S v Senonohi 1990 (4) SA 727(A) and S v Nkwanyana and Others 1990 (4) SA 735 (A)). In essence it amounts to this. Although the trial was conducted under the law as it then was, the appeal is to be considered under the new regime. This court is obliged to consider anew whether the circumstances imperatively call for the death penalty. Regard is to be had to the presence or absence of

mitigating or aggravating factors which, if present, are to be weighed in conjunction with the general objectives of sentence, namely, prevention, deterrence, reformation and retribution. The term "mitigating factors" is broader than the corresponding term which had to be considered by the trial court in terms of the law as it then stood, namely, "extenuating circumstances". Although the moral blameworthiness of the appellants' conduct is still a weighty consideration, it is to be evaluated in conjunction with all other relevant factors and no longer carries its former predominant weight. Lastly, the State now bears the onus of proof beyond reasonable doubt in respect of both the presence of aggravating factors and the absence of mitigating factors for which a factual basis exists.

In applying the new set of criteria to the proven facts, it will be logical to start with the identification of aggravating factors. Indeed they are

self-evident. The two appellants, residents of townships on the East Rand, travelled to a lonely farmstead on the fringes of the far West Rand to rob a soft target under cover of darkness. They went armed with a knife and devised the stratagem of interfering with the power supply to facilitate their evil objective. When the deceased emerged from the house he was swiftly attacked and stabbed to death. Notwithstanding the complainant's brave resistance - in the course of which she probably managed to shoot first appellant in the hand - they forced their way into the house. There they manhandled the complainant and terrorised her into submission by prodding her with the knife. After having hurriedly gathered their relatively paltry booty they left, leaving a terrified, injured and badly shaken old lady. In a few minutes of brutal violence for gain they fell upon two harmless old people, killing the one and widowing the other.

But the picture is not wholly bleak. Notwithstanding the spurious defence the appellants put up, the proven facts reveal a number of reasonably possible mitigating factors. The most salient relates to the intent with which the deceased was killed. Clearly the attack on the farmhouse and its occupants was premeditated. Equally clearly the plan entailed the use of armed violence to overcome any opposition. It does not follow, however, that the appellants necessarily planned to kill the one or the other or both of their victims. They had only one knife and no other weapon. The encounter with the deceased took place in the dark. Of the twelve wounds found on the body at the post mortem examination nine were superficial and only one fatal. Although the deceased was 72 years old, he was 1,90 metres tall and weighed 80 kilograms whereas the appellants, judging by photographs taken at an identification parade, are very

much shorter and of slight build. In the circumstances it is reasonably possible that the fatal stab wound was inflicted in the dark in the course of a violent struggle to overpower the deceased, neither premeditatedly nor with the direct intention to kill, but heedlessly. The manner in which the appellant dealt with the complainant lends support to such inference. She was not killed nor even seriously injured, suggesting that the appellants had planned to do no more violence than was necessary to overcome such resistance as they might encounter. The fact that they took only one weapon also supports such inference.

There is a further feature to be considered in the enquiry as to mitigating factors. Although the appellants acted throughout in the execution of a common purpose, the evidence does not establish which of them wielded the knife during the attack on the deceased. Once it is found reasonably possible that

the one who actually inflicted the fatal wound had dolus eventualis only, the possibility applies a fortiori to the other. In view of the uncertainty regarding the roles played by each appellant, it cannot be said that the death sentence is the only appropriate sentence for either. It is true that murder is a most serious crime. It is also true that murder committed in the course of an armed robbery is particularly serious. Moreover, the prevalence of armed raids on the elderly on isolated farms emphasises the need for markedly deterrent sentences.

At the same time, however, the appellants are not hardened criminals. Although 30 and 28 years old respectively, neither had any previous convictions. Indeed their bumbling on the night in question suggests that they are amateurs: they went lightly armed and allowed the complainant to arm herself, then they allowed her to have a sufficiently good look at their

faces to be able to identify them; they took relatively little, left several identifying fingerprints and were arrested in the vicinity the next morning with the corpus delicti in their possession. Having regard to their personal circumstances there is a fair prospect that prolonged sentences of imprisonment will ensure that neither appellant will repeat his criminal folly.

In the circumstances lengthy periods of imprisonment will fit the murder the appellants committed. In assessing such sentences regard must be had to the sentences imposed on the other counts, ie 16 years and 18 years imprisonment respectively. All the crimes were committed in one and the same course of conduct and in any event accumulation should not be permitted to bear unduly harshly. Sentences of 20 years imprisonment would be appropriate for the murder the appellants committed, but 14 years thereof will be served concurrently with the sentences already imposed.

The effective total sentences will therefore be 22 years and 24 years imprisonment respectively.

In the result the appeals of both appellants against sentence are upheld. The sentences of death are set aside and substituted by sentences of 20 years imprisonment of which 14 years are to be served concurrently with the sentences of imprisonment imposed by the trial court on the other counts.

J C KRIEGLER
ACTING JUDGE OF APPEAL

SMALBERGER JA
NICHOLAS AJA - Agree