IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIPHO MTETWA First Appellant

RICHARD MBULI Second Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, SMALBERGER, JJA et NICHOLAS AJA

HEARD: 4 November 1991

DELIVERED: 28 November 1991

JUDGMENT

E M GROSSKOPF,

JA

The two appellants, together with two other persons, were charged in the Witwatersrand Local Division with various offences. The two appellants were accused numbers 1 and 3 respectively in the court a quo. The trial court (O'DONOVAN AJ and assessors) convicted all four accused on a number of counts, including two counts of murder. No extenuating circumstances having been found, all four were sentenced to death on each count of murder. The two appellants were also convicted and sentenced on the other counts as follows: First Appellant

Robbery with aggravating circumstances - 8 years' imprisonment

Attempted robbery with aggravating circumstances - 6 years' imprisonment

Rape - 5 years' imprisonment

The sentences on the counts of robbery and attempted robbery were ordered to run concurrently. Second Appellant Robbery with aggravating circumstances - 8 years' imprisonment

Attempted robbery with aggravating circumstances - 6 years' imprisonment

Unlawful possession of a fire-arm - 2 years' imprisonment Unlawful possession of ammunition - 1 year's imprisonment

The sentences on the counts of robbery and attempted robbery were ordered to run concurrently, as also the sentences on the counts of possession of a fire-arm and ammunition.

With leave of this Court all four accused appealed against their convictions and sentences. The appeals were dismissed on 16 August 1989.

On 27 July 1990 the Criminal Law Amendment Act, no 107 of 1990 ("the new Act") came into force. In terms of section 19 of the new Act the death sentences of the four accused were reconsidered by the panel appointed for that purpose. The panel found in terms of section 19(10) that in its opinion the sentences of death would probably have been imposed by the trial court on accused 1 and 3 (the present appellants) had section 277 of the Criminal Procedure Act, no 51 of 1977, as substituted by

the new Act, been in operation at the time the sentences were passed, but that sentences of death would probably not have been passed on accused 2 and 4. The appeals of accused 1 and 3 consequently now come before us pursuant to section 19(12) of the new Act. In terms of that subsection we are concerned only with the propriety of the death sentences imposed on the two appellants.

The events which gave rise to the charges against the appellants were summarized as follows when the matter last came before this Court.

> "During the night of 9/10 October 1986, and on the farm 'Doornkop' in the Roodepoort district, two separate households successively became the victims of acts of ruthless violence. During the night of 9 October four males gained entrance to the house in which Mrs Maria Mahlangu lived with her children S1., R. and N.. The intruders were armed with various weapons, including fire-arms, and some of them had their faces masked. Three of the intruders demanded money. N. was assaulted. S1. was assaulted and shot. After S. had been prostrated the intruders took money, his watch, his belt, and other articles from S1.'s person. The occupants of the house were threatened with death should they report to anybody what had taken place. The intruders left Mrs Mahlangu's house in a

> blue motor car. S1. was removed to hospital where two days later he died of his wounds.
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> Shortly after midnight, that is to say, in the early hours of 10 October 1986, four males gained entrance to the house of Mr M.S. by breaking down the front door which was secured by a padlock. M. was in the house with his common-law wife, Z., with his daughter G., and with one Kenneth Chauke. The intruders were armed with various weapons, including fire-arms, and some of them wore masks on their faces. Under threats of violence the intruders demanded money. Chauke was assaulted, G. was raped by one of the intruders, and M. was shot in the chest at point-blank range. He died at once. The intruders took from the house a substantial sum in cash, six cases of beer, a portable radio and a gold-coloured lock. The lock had been used to secure an ice-chest in the house containing valuables."

At present it is common cause that the four assailants in both the incidents described above were the two appellants and their co-accused.

The principles which are to be applied in terms of the new Act in determining whether the death sentence is the proper sentence in a particular case have been settled by a number of decisions of this Court and I need not repeat them here. They entail that a court must, inter alia, have regard to the presence

or absence of any mitigating or aggravating factors, and to this I now turn. I shall first consider the aggravating factors. The main aggravating factors are the premeditated nature of the attacks on the two households, the ruthlessness of the attacks, and the extent of the appellants' participation therein. To demonstrate these features it is necessary, even at the risk of some repetition, to refer to the salient facts. According to the evidence the four accused came to Maria Mahlangu's house at a time when the inhabitants were already in bed, and stated that they were members of the police. Three of them, who were known to Maria, wore masks. They were all armed. They demanded money from the deceased. The deceased said that he did not have money, and reminded them that they had said that they were policemen. The second appellant (accused 3) thereupon fired three shots at the deceased, of which the third hit him in his leg. The deceaséd collapsed, whereupon some of the assailants, including the first appellant (accused no 1) attacked the deceased with pangas. Thereafter the two appellants and one

or more of the others emptied the deceased's pockets, took off his shoes, and stole clothes from his room. As the intruders left, they threatened the occupants of the house with death if they were to report the matter.

The facts concerning the nature of the attack speak for themselves and require no further comment. I would, however, emphasize that, as appears from the above summary, the two appellants clearly took an active part in the fatal attack on the deceased. The second appellant fired the shot which felled the deceased, and the first appellant thereafter joined in an attack on him with a panga. According to the medical evidence the deceased's death was caused by a head wound occasioned by a blow on the head. There were also further injuries to the head. It seems clear, therefore, that it was the panga attack which caused the fatal injuries and not the bullet wound. However, the nature of the attack on an unresisting man, first by shooting him, and thereafter by hitting him with pangas, leaves no doubt that the participants had the dírect intention to kill the deceased.

The same features of premeditation, ruthlessness and active participation by the two appellants characterize the second incident on the night in question. The four accused went to S.'s home provided with masks and weapons. They broke into the house. Accused number 2 demanded money from Zodwa Khumalo. She complied. Thereafter the second appellant shot the deceased in his chest at point blank range. The shot was immediately fatal. Accused no 2 and the second appellant then attacked Chauke, while the first appellant raped G.. On leaving, accused no 2, in the presence of the others, threatened to kill the occupants of the house if they made a report.

When one seeks to establish what the state of mind was of the various participants in the murder of M.S., it firstly seems clear that the second appellant, who fired the fatal shot, had the direct intention to kill the deceased. As far as the other accused were concerned, they had some hours previously joined in the fatal attack on S1.M.. They burst into the S. household armed and with knowledge that

the second appellant was in possession of the fire-arm which he had used during the previous incident. The attack on M. commenced in the same way as that on S1., with a shot by the second appellant. This was not followed by violence on the part of the others, as had happened with S1., but then, no further violence to M. was necessary - the first shot was fatal. The first appellant did not seem put out at all by the death of M., but proceeded with the attack on the inhabitants. It will be recalled that he was the one who raped G.. The inference is irresistible that the four accused persons all had the direct intention to kill M.. Indeed Z. testified that when the four accused arrived, accused no 2 stated that they had come to kill the deceased. Even without this evidence, however, the evidence leaves no doubt that this was what they had in mind.

To sum up: the two deceased and the other victims of the attacks were innocent persons, set upon in their dwellings at night for purposes of robbery by an armed and masked gang.

In the course of the robbery the two deceased were killed in attacks in which the two appellants participated with the direct intention of causing the death of each deceased. The whole operation was premeditated and ruthlessly executed. These features are severely aggravating.

A further aggravating factor is the record of the two appellants. The first appellant has two previous convictions for assault, one for assault with intent to do grievous bodily harm, two for housebreaking with the intent to steal and theft, one for possession of housebreaking implements and one for unlawful possession of ammunition. These convictions stretched from 1962 to 1979. The longest sentence of imprisonment imposed on him was one of 2 years and 6 months, imposed in 1979 for housebreaking with intent to steal and theft. In addition the first appellant was sentenced on 22 October 1987 to 12 years' imprisonment for murder with extenuating circumstances. This sentence was imposed after the commission of the offences to which the present appeal relates, and is therefore not a previous conviction in the

ordinary sense of the word. It may, however, be taken into account for purposes of sentence. See R v. Zonele and Others 1959(3) SA 319 (A) at p. 330 E to 331 A; S v. Theron 1986(1) SA 884 (A) at p. 894 B to 895 F; and S v. S 1988(1) SA 120 (A) at p. 123 H.

The second appellant also has a substantial record. He has two previous convictions for housebreaking with intent to steal and theft, one for theft, one for unlawful appropriation of the use of another's property, two for malicious injury to property, one for assault with intent to do grievous bodily harm, one for escaping from custody and a further one for attempting to do so, one for possession of dagga and one for robbery of a motor car. For the last mentioned offence he was sentenced to three years' imprisonment. The above convictions stretched from 1965 to 1975. This appellant has not been convicted (apart from the present case) sihce his release on parole in 1978 from imprisonment for the above mentioned robbery.

I turn now to mitigating factors. The major mitigating

factor relied upon by the appellants was their intoxication. Maria Mahlangu testified that the assailants were under the influence of intoxicating liquor during the attack on her house. As far as the second appellant was concerned, she said she could smell liquor on his breath. Generally speaking, they were loquacious, like drunk people. The second appellant walked normally, but the others seemed unsteady on their feet. Their eyes seemed bloodshot. However, their speech did not seem siurred. Under re-examination she said that, in her view, "they were medium under the influence of liquor, they were not much under the influence of liquor". Maria was the only witness to suggest that the accused may have been intoxicated. The accused all denied that they had been present at either of the incidents, and could therefore take the matter no further. Maria's children R. and N. could not confirm or deny Maria's evidence in this regard. Witnesses who testified as to the second incident, ie, that at the house of M.S., denied that any of the intruders were under the influence of liquor. They were Z.

Khumalo and G.S.. Kenneth Chauke was unable to express an opinion.

The position then is that only Maria Mahlangu noticed that the intruders were under the influence of liguor, but only moderately so. The reason why the witnesses at the S. household denied this might well be that the assailants had sobered up in the interim. But be that as it may, there is nothing to suggest that the commission of the offences was influenced to any degree by the consumption of liquor. We are not dealing here with a sudden impulsive act which might have been occasioned by an alcohol-induced lack of inhibition. These offences were, as already stated, planned beforehand, and were executed over a period of hours. In my view no reasonable possibility emerges from the evidence that the consumption of alcohol played any mitigating role in the commission of these offences.

The second class of mitigating factors relied upon by the appellants consists of their personal circumstances. The

first appellant is a Zulu man of forty. He grew up in a rural area, and was an orphan, having been raised by an aunt. He received no formal education. He is divorced, and has six children. At the time of his arrest he was a self-empioyed vegetable hawker. He suffers from tuberculosis.

The second appellant is a 37 year old Zulu man. He was compelled to leave school in Standard 6 to go and work. He is married and has four minor children. At the time of his arrest he was a self-employed panelbeater in Soweto.

I do not consider these personal circumstances to be either aggravating or mitigating in relation to the present offences. They seem to me to be entirely neutral.

From what I have said above it emerges that in my view there are extreme aggravating factors and no real mitigating ones. From this it does not necessarily follow that the death sentences should be confirmed - the Court must still consider whether the death sentence is the only proper sentence to be imposed, regard being had to the main purposes of punishment.

In the present case the nature of the offences is such that the deterrent and retributive purposes of punishment require strong emphasis. In the light of the appellants' ages and criminal records the chances of their reformation and rehabilitation seem to be so remote as to be negligible. The major purpose of punishment in their cases must accordingly, in my view, be to prevent their committing similar offences in future, to deter others from committing such offences, and to express society's revulsion at their misdeeds. This Court has often stated that the death sentence should be imposed only in exceptíonally serious cases. In my view the present case falls within a category of seriousness which justifies, and indeed requires, the imposition of the severest sentence provided by law. Nothing less will in my view suffice.

In the result the appeals are dismissed and the death sentences confirmed.

SMALBERGER, JA )
E M GROSSKOPF, JA ) Concur
NICHOLAS, AJA )