Case No 657/89

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ZEBLON BIYELA	1st Appellant
MBUYISENI NGCOBO	2nd Appellant
JOSEPH FONSECA	3rd Appellant
and	
THE STATE	Respondent

CORAM: HOEXTER, STEYN, JJA et PREISS, AJA

HEARD: 18 February 1991

DELIVERED: 8 May 1991

J U D G M E N T

HOEXTER, JA.....

HOEXTER, JA

In the Circuit Local Division for the Zululand district a court consisting of ALEXANDER, AJ and assessors found the three appellants guilty of murder without extenuating circumstances and sentenced them to death. The trial judge granted each appellant leave to appeal against his conviction and sentence.

The deceased, a man aged 63, was a powerful physical specimen. He was more than 1,83m tall, and weighed 93 kilograms. At the time of his death he was the food and beverage manager at the Umhlali Country Club ("the club"). He lived in a house on the grounds not far from the club-house. The deceased owned a Mercedes-Benz motor car ("the car") in which he daily travelled to and from his work.

In the office at the club-house there was a safe. It was the habit of the deceased to keep on his person a number of keys belonging to the club, including the key to the safe. The keys were suspended from a belt worn by the deceased.

Over week-ends cash takings at the club were kept in the safe for banking on Monday mornings. Over the week-end of 13/14 February 1988 a fund-raising social function was held at the club and in consequence the cash takings deposited in the safe on Sunday 14 February were larger than usual.

During the Sunday night in question a number of intruders broke into the deceased's house and pounced upon him while he was in bed. The intruders had rope and twine with them. A violent struggle ensued between the recumbent victim and his attackers. In the course thereof the assailants trussed up the deceased by binding him hand

and foot as he lay on the bed; and they killed him by throttling and strangling him. Thereafter they looted the house and took therefrom certain goods which they placed in the car. They then drove away in the car.

In due course the three appellants and a man called Msomi were arrested and prosecuted on various charges including the murder of the deceased. Each of the four accused was represented by counsel and, save in the case of Msomi, each testified in his own defence. At the end of the trial a good deal was common cause. In regard to the events on the Sunday evening in question it was not in dispute: (a) that the four accused had got wind of the fact that there was much money in the club safe; (b) that the four accused believed that upon his return home from the club-house after work the deceased would have the safe key in his possession; (c) that in fact the deceased left the key of the safe at the club-house before he returned to

his house; (d) that before the deceased had completed his work at the club-house the four accused lay in wait for the deceased at his house, intending to overpower him with violence in order to gain possession of the key to the safe, and thereafter to rifle the safe; (e) that while they were waiting for the deceased's return the third appellant broke into the house, gaining entry through a kitchen window in which a fan was housed; (f) that the third appellant and one or more of his confederates then entered the house and removed liquor therefrom; (g) that upon noticing the headlights of the deceased's approaching car the four accused fled to a nearby spot on the fairway, at which spot the liquor was consumed and the deceased's house was kept under observation; (h) that at the juncture Msomi backed out of the joint venture and left the three appellants to their own devices; (i) that a while later, and after the lights in the house had been put out, the

first and second appellants entered the house through the same kitchen window earlier used, whereafter they surprised the deceased in his bed and overpowered him; (j) that thereafter the lights in the house were switched on in order to facilitate the search for the safe key; (k) that the third appellant was present in the house while the search for the key was in progress; (l) that, the quest for the key having proved fruitless, the first and second appellants removed from the house and placed in the car various goods including a television set, a radio, a fan, sundry items of clothing, and some club towels; (m) that with the third appellant behind the steering-wheel the three appellants then drove off in the car; (n) that in Tongaat the stolen goods were removed from the car which was then driven further and ultimately abandoned by the three appellants in Pinetown in the early hours of Monday 15 February 1988.

At the trial the four accused were charged: with

housebreaking with intent to steal and theft (count 1); with the murder of the deceased (count 2); and with robbery with aggravating circumstances (count 3). On count 1 the first appellant and Msomi were convicted of housebreaking with intent to rob and theft. On count 2 Msomi was acquitted but, as already mentioned, the three appellants were convicted as charged. On count 3, likewise, Msomi was acquitted and the three appellants were convicted as charged.

The body of the deceased was discovered in his house on the morning of Monday 15 February 1988. It was lying spreadeagled on the bed in his bedroom. The bedroom presented a scene of complete disorder, and the entire house had obviously been ransacked. A specialist forensic pathologist, Dr S B Akoojee, was a State witness at the trial. Within hours of the discovery of the body Dr Akoojee visited the scene of the crime where she inspected

the body in the position in which it had been found. Dr Akoojee made notes of her observations at this inspection; and on the following day she performed a post-mortem examination on the body of the deceased at the Gale Street Laboratories in Durban. Dr Akoojee's evidence at the trial was a model of precision and clarity. Dealing with her observations at the scene of the crime Dr Akoojee said that the body of the deceased was lying across a double-bed with both legs dangling over the side of the bed. Clothed only in a sleeveless vest, the body was covered by a quilted blanket. Near the deceased's face were two blood-stained pillows. Removal of the quilt and pillows revealed the presence of two pieces of rope alongside the left arm of the body. Scattered injuries were noted around the lower end of both legs. The neck and face were intensely congested. The sheet and mattress beneath the body were blood-stained and wet.

In her post-mortem report Dr Akoojee recorded the following in regard to the external appearance of the body. There were abrasions on the right side of the forehead; multiple abrasions on the nose; upper lip; left lower jaw; left side of the neck; angle of the jaw; superficial abrasions on the right cheek and the left side of the face; linear abrasions extending from below the right ear across the lower jaw to the chin area; abrasions on the chin; multiple abraded lesions on the left pectoral area and of the left hip area; superficial abrasion of the left buttock; a 1,5 cm penetrating wound, to a depth of 3 cm of the left buttock; abrasion across the left little finger; and multiple linear and circumscribed areas of abrasion and bruising on the lateral and anterior aspect of the lower limbs.

The chief internal post-mortem findings indicated a

haemorrhage into the underlying soft tissue of the neck together with a fracture of the hyoid bone. There was marked congestion of the head, neck and scalp, with small subconjunctival haemorrhage of the left eye. Petechial haemorrhage was noted in the pleura and pericardium. Dr Akoojee concluded that the deceased had died of neck trauma. She explained in her evidence that a significant degree of force must have been applied to the deceased's neck in order to fracture the hyoid bone; and, in her opinion, for death to result from the rupture of the hyoid bone and the occlusion of the arteries sustained pressure had probably been applied to the neck of the deceased for a period of between five and ten minutes. She further concluded that pressure in the form of a ligature had been applied to the neck of the deceased, which had the effect of asphyxiating him through the interruption of both the passage of air and the blood circulation. In her opinion

death was caused by the application of the ligature or the fracture of the hyoid bone or both. From the nature and extent of the deceased's injuries the trial court concluded that the deceased had vigorously resisted the attack upon him, and that his death had been preceded by a violent struggle between him and his attackers.

During the period April to October 1987 the third appellant had been employed at the club as its caddy master. Following upon certain differences between him and the deceased the third appellant resigned from his post as caddy master. Shortly thereafter the vacant post of caddy master was filled by Mr Musawenkosi Joseph Mdluli. In what follows I shall refer to him simply as "Mdluli". In February 1988 Mdluli was still the caddy master at the club. The three appellants and Msomi were all known to Mdluli.

At this juncture the nature of the defences

respectively put up by the appellants at the trial may be shortly stated. Each testified that the robbery had been planned by Mdluli; and that on the evening in question the three appellants had been conveyed to the club in a motor vehicle owned and driven by Mdluli. The first appellant told the trial court that on the way to the club Mdluli interrupted their journey by stopping his vehicle at a certain spot. There Mdluli produced a firearm, and, having threatened the appellants therewith, he ordered them to gain entry to the deceased's house, to tie up the deceased and then to search for, and find the key to the safe. Out of fear for Mdluli, so testified the first appellant, he agreed to carry out Mdluli's instructions. According to the first appellant at the time of the actual attack upon the deceased, he (the first appellant) was in the house together with the second and third appellants. The first appellant went on to explain that he had bound the

feet of the deceased, whereafter he set about looking for the keys. He did nothing further to the deceased; and he was unable to describe the appearance of the deceased when he left the bedroom to search for the key. The deceased struggled but feebly and the first appellant held him gently. There was no violent struggle and he was unable to describe what roles the second and third appellants had played in subduing the deceased. The key to the safe could not be found.

The second appellant's version as to how Mdluli had allegedly press-ganged the three appellants and Msomi into embarking upon the robbery corresponded broadly with the account given by the first appellant. The description given by the second appellant as to what happened in the house after he had entered it for the second time was characterised by extreme vagueness and inconsistency. At one stage of his evidence the second appellant placed all

three appellants in the house at the critical time of the attack upon the deceased. Later he asserted that the third appellant had not then been present; and thereafter he again changed his story and said that the third appellant had in fact been present. Having heard the voice of the third appellant say "Hold here" he (the second appellant) held the deceased by the wrists. He did so out of fear for the third appellant. Thereafter the deceased was tied up. The second appellant was, however, unable to say by whom the deceased was tied up. When the lights in the bedroom came on again the deceased was still conscious; but according to his evidence the second appellant saw no blood or any injuries upon the deceased. He was unable to say how many people had attacked the deceased; and he denied that he had seen the deceased being killed.

The third appellant's defence to the murder charge was that he was not in the deceased's house at the

crucial time when the deceased must have met his death. The third appellant was arrested on 1 March 1988. During the afternoon of the following day he made a statement before a magistrate in Durban. In the course of the State case the statement was handed in by consent as exh S. When the third appellant came to testify he sought in some respects to qualify and depart from what is set forth in the body of exh S; a feature of his evidence which I shall touch upon briefly in due course. It is convenient here to quote the body of the statement in full because it indicates in summary form the broad lines of the third appellant's defence to the murder charge. In exh S the third appellant referred to the first appellant as "Zebulon", to the second appellant as "Ngcobo", and to Msomi as "Temba". The body of exh S reads as follows:-

> "During February 1988 a Caddy Master at the Umhlali Country Club Golf Course spoke to me at his house at Tongaat. I was with Temba Msomi. The Caddy Master told me and Temba that on a

Saturday about R60,000.00 is collected at the Golf Course. It was then agreed that a man named Zebulon, Temba and Ngcobo would go and rob the manager at the Golf Course from the money. I was to show the three of them where the Manager's house was because I was Caddy Master during 1987.

The Caddy Master dropped the four of us near the house of the Manager of the Golf Course at about 7.00 pm on 14 February 1988. We sat for about half an hour outside the house of the Manager. I then suggested we should go in through the kitchen window and steal his beer. The four of us then entered the house through the kitchen window. I took beer from the fridge and put it in a packet. I also took a bottle of Whisky from a counter. As we were leaving the house through the same kitchen window the Manager drove into his yard. We then ran to a nearby bush. Temba suggested since we missed the Manager we must forget about the robbery and go with the liquor. I told Temba I was still drinking. Zebulon and Ngcobo stayed with me.

After about an hour's drinking we noticed the lights in the house were switched off. Zebulon and Ngcobo went back into the house through the kitchen window. After a while Zebulon came out and called me. He had opened the front door. I entered and immediately unplugged the telephone. I went into a spare room and put the telephone under a mattress. When I came out of the spare room Zebulon was standing in the deceased's

> bedroom. Zebulon handed me a knife and told met to cut the ropes with which the Manager's hands and feet were tied. I also cut a rope what was tied around the Manager's neck. After I cut the ropes I went to the lounge where Zebulon and Ngcobo were packing the car with the TV, a radio, a fan and a packet. I do not know what was in the packet. There was also a black metal box. I then drove the deceased's car to Tongaat. There we offloaded the goods in a sugar cane field. I then drove the car to Pinetown. Zebulon drew out his knife for me. I stopped the car. Zebulon pulled out the keys from the ignition telling me I think I was clever. I loaded nothing in the car and after he had given me the keys for the car Zebulon tried to stab me. I ran away. I then went to Kwa Mashu and hired a taxi that evening to take me to Tongaat. I took the fan and sold it in order to go to Empangeni. I then went to Empangeni."

It is necessary next to deal at some length with the version of events given by the third appellant when he took the witness stand. He told the trial court that a few weeks before the night on which the deceased was killed he (the third appellant) was approached by Mdluli in connection with the contemplated robbery. Mdluli told him that senior members of the Inkatha movement had decided

that the third appellant should commit the robbery. He regarded Mdluli as a leader of Inkatha; and he was scared of Mdluli. Mdluli further told him that should he not carry out Inkatha's instructions his wife, who was pregnant, would have her belly ripped open and their house would be burned down. These threats were uttered in the presence of Msomi who was instructed to keep an eye on the third appellant until the time appointed for the robbery. Thereafter, so testified the third appellant, Msomi stayed at the third appellant's house day and night. The third appellant explained that he did not seek the help of the police because he did not think of doing so. On the Friday before the fateful Sunday the three appellants and Msomi met with Mdluli to discuss the means whereby the robbery plan should be put into execution.

Having been dropped by Mdluli near the house of the deceased on the night in question, so testified the

third appellant, he explained his theft of the deceased's liquor by saying that he felt in need of Dutch courage. When the four of them sat down to consume the stolen liquor the first and second appellants became very hostile in their attitude towards the third appellant. Save that they asked the third appellant to indicate to them the location of the deceased's bedroom, there was no conversation between them. Not even the defection and departure of Msomi was discussed. When the lights in the deceased's house were put off the first and second appellants went off on their own to commit the robbery without making any further arrangements with the third appellant as to when and where they would meet him later. Thereafter, so the evidence of the third appellant proceeded, he betook himself to another place in the vicinity of the deceased's house where he awaited further developments. A while later he was called over to the

house by the first appellant, and he went in through the front door. He removed the telephone and hid it. Brandishing a knife in a threatening fashion the first appellant told him that the deceased had fainted, and that the third appellant should untie him. The third appellant entered the deceased's bedroom by crawling along the floor. In so doing he encountered nothing on the floor to suggest any disorder in the room. He found the deceased pinioned to the legs of the bed. He cut these ropes and then noticed a rope which was simply looped, but not tied, around the neck of the deceased. He saw no rope tied as a ligature. When asked to explain why in exh S he had said to the magistrate -

> "I also cut a rope what was **tied** around the Manager's neck...."

the third appellant replied that this had been a mere slip of the tongue. According to the third appellant he pulled the quilt up to the deceased's neck on leaving the bedroom;

and the deceased was then lying in a normal position with his head to the headboard. He stuffed the cut ropes into his pocket and left no ropes behind in the bedroom. When confronted with a police photograph depicting the deceased as he had been found dead on the bed with one rope under his left arm and another rope very close to it, the third appellant offered two explanations. First, that the ropes might have fallen out of his pocket. Second, that during the night some stranger had entered the bedroom in order to rearrange the room and the position of the body. Indeed, the third appellant suggested that the later intruder might have been none other than Mdluli himself. The third appellant further testified that he noticed no injuries whatever on the face or head of the deceased. However, as the deceased was not breathing and had no pulse, he concluded that he was already dead.

Later, and while they were in the sitting-room,

so the evidence of the third appellant proceeded, the first appellant handed him a bunch of keys. According to the third appellant he was satisfied that one of these keys was the safe key. He firmly denied that he had told the first appellant that the safe key was not there; or that any further search for the safe key was undertaken. But despite the discovery of what the third appellant conceived to be the safe key, his two confederates not only decided at that juncture to leave the scene of the crime with their business unfinished, but in addition they forced the third appellant at knife-point to accompany them.

The third appellant further testified that when the car in which they made their getaway reached Pinetown he realised for the first time that the deceased was dead because the first appellant then informed him of the fact. When challenged with his earlier evidence that he had already concluded as much from his own earlier observations

of the deceased, his response was to say that upon their departure from the house he had only been ninety-five percent sure; and that this "second opinion" provided certainty for him. A day or two thereafter, so testified the third appellant, he spoke to Mdluli. But although he told Mdluli of the goods they had removed from the house he omitted to mention that they had left a corpse behind them.

In the course of a comprehensive judgment the learned trial judge carefully scrutinised the evidence and weighed all the probabilities. In considering the role played by the third appellant at the time of the killing the trial court rightly regarded it as significant that originally four men had been considered necessary to carry out the plan; and that upon the defection of Msomi the task-force was reduced to three. In this connection the trial judge observed:-

> "It was then a matter of two men left to overpower the deceased, if in fact accused no 4

> (the third appellant) had to wait in the wings, as it were, until the keys had been secured. We think it would be taking an extraordinary risk as a matter of probability, that two men, even big men like accused Nos 1 and 2, could effectively do what three were required to do."

The trial court considered that the third appellant was a lying witness. It found as a fact that at the critical stage of events the three appellants re-entered the deceased's house together and in the same fashion as before. I quote again from the judgment of the court below:-

> "In rejecting the story of accused No 4 as to what he did at that particular time, not only because of its inherent improbability which has attracted scepticism and its ultimate rejection, but because of the lies he has told in recounting his part, we conclude that he entered the house at the same time as accused Nos 1 and 2. Not only was his courage stimulated by the liquor he had consumed but it seems to us that, if the lights remained off in the bedroom at the time of the attack, the chance of his being identified by his victim was extremely remote. It seems to us furthermore that his assistance was required to make assurance doubly sure. It was he .... who knew the size of the deceased. He must have

known him to be a powerfully built man whose weight would not make him an easy person to subdue, and whose temperament as known to the accused may well have suggested.....that he would fight for his life. So it does not seem to us unlikely, but in fact extremely probable, that in devising the attack on the deceased there must have been an apportionment of duties between those who were to seize him. And what No 1 has had to say in that regard is not inherently improbable at all, namely that he seized the legs while his companions tackled the torso of the deceased.

What we have already concluded from the nature of the injuries sustained by the deceased is that he put up such a battle for his very life. It is known he had cried out on their arrival. If a reason has to be found for the fact that his hyoid bone was fractured, which is consistent with manual pressure being applied, then to our way of thinking it was to stifle his cries, and to prevent the security guards from coming nearer. It is known that that would not immediately kill him, so we have the impression of a man struggling desperately to save himself .....he had to be secured, and there seems no doubt in our mind that the ligature was applied to him order to subdue him completely. It was tied round his neck in such a way as to strangle him. It seems to us that in endeavouring to free himself or to prevent further loops being put round his neck, he put his hand there and his finger was cut deeply. It needs no emphasising

> that if you put a rope like that round a man's neck you must know by tightening it to that extent he will be killed."

In the situation which then confronted the three appellants, so the trial court found, extreme measures to subdue the deceased became necessary. The trial court concluded that, whoever in fact may have used the rope in order to strangle the deceased, did so in pursuance of a common purpose to which all three appellants were party; and that each of the three appellants was therefore guilty of murder.

The appeals of the appellants were argued by three counsel who appeared **pro Deo.** Mr **Lupton** argued the appeal of the first appellant while Mr **Singh** appeared for the second appellant. They were also counsel for the first and second appellants respectively at the trial. Mr **Gerber,** who did not appear as counsel at the trial, was prepared at comparatively short notice to argue the appeal

on behalf of the third appellant. This court is indebted to all three counsel for their assistance in the matter.

Both in his typewritten heads and in his argument before us Mr **Lupton** confined his submissions to the matter of sentence. We consider that in so doing he exercised a proper discretion. On the merits of the conviction of the first appellant there is not the slightest reason for disturbing the finding of the trial court. The first appellant was a lying and patently unreliable witness. His evidence that no violent struggle had taken place between the deceased and his assailants was transparently false. The trial court rightly disbelieved his story that he did not know what his fellow-attackers did to the deceased. His tale that he took part in the robbery under compulsion by Mdluli was likewise rightly rejected as untrue.

The heads of argument prepared on behalf of the

second appellant included an attack on the propriety of the second appellant's conviction, but in argument before us Mr **Singh**, wisely we think, abandoned the appeal of the second appellant on the merits and limited his submissions to the matter of sentence. On the merits of his conviction no argument of any substance can be advanced in favour of the second appellant. He was rightly described by the trial judge as a thoroughly unsatisfactory and untruthful witness who created a most unfavourable impression. Suffice it to say that the second appellant was a witness quite unworthy of credence. To the matter of sentence in so far as the first and second appellants are concerned I shall return after dealing briefly with the case on the merits against the third appellant.

In the case of the third appellant, the merits of his conviction were fully explored in argument by his counsel. Mr **Gerber** strenuously submitted that the trial

court had erred in excluding as a reasonable possibility that at the time when the deceased was being done to death the third appellant may well have been outside the house. Having given due consideration to all the arguments on behalf of the third appellant in regard to his conviction I am unable to find any good ground for disturbing the conviction.

There is, so I consider, no reason at all for disagreeing with the trial court's assessment of the probabilities. That assessment appears from a lengthy passage of the judgment of the court below which has already been quoted. In my view the reasoning adopted by the trial court is cogent; I agree with it. The probabilities point overwhelmingly to the conclusion that immediately before the attack upon the deceased the three appellants entered his house together and attacked the deceased in concert.

To this must be added the fact that the third appellant, an articulate person of considerable intelligence, was shown to be a thoroughly mendacious witness whose testimony was riddled with inconsistencies. A few examples will suffice. Mention has earlier been made of the fact that, although prosecuting counsel at the trial handed in exh S by consent, the third appellant sought in his evidence to depart from his statement to the magistrate. In regard to what is said in the body of exh S and as to what transpired while the statement was being recorded, the third appellant in the course of his evidence revealed himself as an evasive and transparently untruthful witness. It is furthermore a significant fact, and one which reflects adversely on the credibility and reliability of the third appellant, that exh S contains not the slightest hint that the deponent's participation in the whole criminal venture was the result of any coercion on

the part of Mdluli.

In regard to that part of the third appellant's story involving the Inkatha movement and the threats allegedly uttered by Mdluli, the trial court rightly entertained the gravest doubts. No inkling of this part of his defence was betrayed before the trial itself, either in exh S or at the sec 119 proceedings in the magistrate's court (at which the third appellant was represented by an attorney and a written statement outlining his defence was handed in). In my opinion it was a dishonest afterthought.

The third appellant's version that after the raiding party had been deserted by Msomi there was no further planning or discussion, and that the first two appellants simply moved away without so much as a word to the third appellant, is palpably false and was properly rejected out of hand by the trial court. In this

connection the trial judge remarked:-

> "The merit of course of that part of No 4's story is, that he would not have to enter the house at all..... But (it).....carries with it this telling criticism.....that he did not discuss those arrangements with either accused Nos 1 or 2, namely that he would be moving across the fairway to another part in the bushes, there to be found, and be summoned when the key was found .....and we may ask rhetorically how is it then.....that according to No 4 he was found in that particular spot after presumably the man had been killed."

Then there is the third appellant's version, bordering on the ludicrous, that when a key had been discovered which he considered to be the safe key, and when therefore the success of the criminal venture was finally in sight, it was suddenly abandoned. Equally unconvincing, and plainly false, is the testimony of the third appellant as to his observations in the bedroom of the deceased.

There can be little doubt that the third appellant's evidence in regard to when and why he removed the deceased's telephone was false. This part of his

story was rightly rejected by the trial court in the following passage in its judgment:-

> "If the plan was to be carried out as originally anticipated, namely that Mr Agar was to be trussed up with ropes, what fear was there that he would get loose and use a telephone. We can find no logical reason why, without any inquiry on the part of accused No 4 or explanation by accused No 1, that the telephone should have been hidden at that particular time. **Per contra**, if the story of No 1 and No 2 is correct that No 4 had entered the house with them; then that would have been a salutary precaution to take before they got into the bedroom where Mr Agar was sleeping. It could well have been anticipated by his would-be assailants that there could be some running skirmish, as it were, where the deceased could have got to his telephone and perhaps raised the alarm."

Lastly, the third appellant's suggestion that some subsequent nocturnal intruder might have been responsible for the disorder in the bedroom and the position of the body as discovered on the following morning hardly merits serious consideration.

Suffice it to say that in giving evidence the

third appellant fared no better than the first and second appellants. He left the witness stand a thoroughly discredited witness. The appeal against his conviction cannot succeed.

I turn to the appeals against the three death sentences. The appellants were sentenced to death in November 1988. The appeals against their sentences are, however, governed by the Criminal Law Amendment Act, 107 of 1990, which was promulgated on 17 July 1990 and whose provisions have abolished the compulsory imposition of the death sentence. Accordingly in each case the appeal against the death sentence will have to be decided in terms of Act 107 of 1990 and conformably to the principles laid down in recent judgments of this court such as **S v Masina and Others** 1990(4) SA 709 (A); **S v Senonohi** 1990(4) SA 727 (A); **S v Nkwanyana and Others** 1990(4) SA 735 (A);

S v Mdau 1991(1) SA 169(A); **S v P** 1991(1) SA 517 (A); and **Joseph Cele v S** (an unreported judgment handed down on 16 March 1991).

At the date of sentence each appellant was a man in his early thirties. No previous convictions were proved against the second appellant. The third appellant had a clean record. The first appellant had a single previous conviction dating from October 1975. This was for a robbery in which no weapon had been used. For purposes of sentence the trial judge was prepared (correctly, in my view) to deal with the first appellant as if he too were a first offender.

The enormity of the murder in question is accurately described in the judgment in which the trial court recorded its finding that no extenuating circumstances were present -

> "However we scrutinize the facts we are left with the inevitable conclusion that these men were

> motivated by greed. They had determined on violence as a means to this end and, when faced with a victim who proved more formidable than they had obviously expected, set about him with a wicked determination to bring about his death."

Having regard to the test and the incidence of **onus** formerly applicable, it seems to me that the trial court's finding that no extenuating circumstances existed is hardly open to criticism. However, as is well known, Act 107 of 1990 requires that a radically different approach to the death sentence be adopted. The concept of "extenuating circumstances" has been displaced by the notion of "mitigating or aggravating factors." The death sentence is to be imposed only after the court has made a finding on the presence or absence of any mitigating or aggravating factors and if, with due regard to that finding, the presiding judge (or, on appeal, this court) is satisfied that the death sentence is the proper sentence. The current position is described in the following words by

E M GROSSKOPF, JA in **S v Senonohi (supra)** at 734 D-F:-

> "Die appellant se morele verwytbaarheid, wat die wese gevorm het van die ondersoek na versagtende omstandighede, is nie meer allesoorheersend nie (hoewel natuurlik steeds belangrik) maar moet nou in die skaal geplaas word met die ander faktore wat verband hou met die doelstellinge van straftoemeting. Na behoorlike inagneming van al hierdie faktore, mag die Verhoorregter (en hierdie Hof op appèl) die doodvonnis oplê slegs as hy 'oortuig is dat die doodvonnis die gepaste vonnis is' (art 277(2)(b) soos gewysig deur die nuwe Wet - in Engels 'satisfied that the sentence of death is the proper sentence'). Die uitdrukkings '**die** gepaste vonnis' en '**the** proper sentence' laat blyk dat die doodstraf nie opgelê moet word nie tensy die Hof oortuig is dat geen ander straf gepas sou wees nie....."

This Court has held that the phrase "mitigating factors" used in the new Act imports a concept broader than that signified by the former phrase "extenuating circumstances". In **S v Nkwanyana and Others (supra)** it was pointed out that what is comprehended under "aggravating circumstances" in relation to a grave crime must await clarification by the courts. Considerations relevant to the

inquiry would include -

> "....the degree of planning, the manner of commission of the murder, its motive, the circumstances of the victim and an accused's previous convictions....."

What mitigating and aggravating factors are respectively to go into the scales in the instant case, and how do they weigh up against each other? That the second and third appellants have clean records and that the trial judge rightly treated the first appellant as a first offender constitute an obvious and important mitigating factor. It shows that the appellants were not innately criminal; and, more significantly, it shows that before committing the murder in question none of them had displayed a propensity towards crimes of violence.

In my view the evidence adduced at the trial also affords a sufficient factual basis for the finding of a further, if rather less weighty, mitigating factor. It

emerges in the following way. In order to forestall a defence that in embarking upon the robbery expedition the four accused had acted under compulsion of threats made to them by Mdluli, the prosecution called Mdluli as a State witness at the trial. This witness testified at considerable length. In the course of his evidence Mdluli stoutly denied any participation by him in either the planning or execution of the robbery; and in respect of the events on the night of 14 February 1988 he advanced an alibi which was supported by the evidence of other State witnesses. In its judgment the trial Court described Mdluli as a "man of very strong personality" and as "a formidable person who, in a given situation, could well have exercised authority over others." He was subjected to prolonged cross-examination, but although he appeared to maintain his composure in the witness stand the trial Court recorded that his testimony was "not always to our

satisfaction."

In regard to the possible role played by Mdluli in the whole affair the trial Court in the course of its judgment posed various questions:-

> "....was he completely innocent in this matter as he claims to be? Was he the instigator and willing co-conspirator with the accused, or did he threaten the accused in the manner stated at the time of plea so as to force them to take part in these crimes?"

For the purposes of determining the more immediate issues before it the trial Court found it unnecessary to provide firm answers to all the above questions. It concluded that the four accused -

> "....whether in conjunction with Mdluli or not, had embarked upon a plan to rob the Country Club of the takings that weekend."

On the evidence as a whole the trial Court found as a fact that the participation of the three appellants in the robbery had not been induced by any compulsion on the part of Mdluli. Suffice it to say that

in my view that limited finding was plainly correct. However, while the trial Court stopped short of any specific finding that Mdluli had collaborated with the appellants in planning and executing the robbery, it nevertheless recorded its firm impression that a number of suspicious features in the case tending to implicate Mdluli -

> ".....are peculiar enough to place a question mark over his alleged participation in the events of the 14th February....."

These suspicious features (as for example that Mdluli received possession of a portion of the loot from the wife of the third appellant and concealed it, and that Mdluli gave the third appellant certain financial assistance) are detailed and discussed at length in the judgment of the court below and need not here be recapitulated. Suffice it to say that in my view the evidence as a whole contains a number of significant pointers to the conclusion that, although he was not a member of the actual raiding party

which entered the deceased's house, Mdluli may well have been the originator of the whole of the robbery; and the person who recruited the accused to put it into execution.

At the time of the trial of the appellants the burden of proving extenuating circumstances rested upon accused persons. Under the new Act the burden of proof is upon the prosecution to negative beyond reasonable doubt any mitigating factors raised by an accused or suggested by the defence. The possibility that the entire enterprise may have been master-minded by Mdluli and that the appellants participated therein at the suggestion and instigation of Mdluli is, in my opinion, a real one. That possibility was not negatived by the State, and for purposes of sentence it must rank as a mitigating factor.

So much for the mitigating factors. The aggravating factors in the case are many and glaring. Whether or not Mdluli was behind the robbery, the fact

remains that the motive which impelled the three appellants to take part therein was simply greed. The robbery was carefully planned and the appellants were privy to the plan. Its execution involved a sustained and brutal assault ruthlessly carried out upon an elderly man who lived alone in his secluded home at a time of night when he was lying helpless and defenceless in his bed. Although the victim was heavily-built , he was a man in his sixties. He was outnumbered three to one by his assailants each of whom was almost half his age. Of their respective physiques the trial Court said the following. The first appellant was "a powerfully built man ....agile and muscular"; the second appellant was likewise "a powerfully built man"; and the third appellant was "a very tall man and well built."

In my judgment the aggravating factors characterising what can only be described as a dreadful murder distinctly outweigh the two mitigating factors

earlier described. By itself, however, such an imbalance will not operate decisively in favour of the imposition of the death sentence. The death sentence imposed by the trial judge must stand only if, having had due regard to such mitigating and aggravating factors as are present, this Court is satisfied that the death sentence is the only proper sentence.

Having given anxious consideration to all the circumstances of what represents a troublesome borderline case, I have come to the conclusion that the death sentence is not the only proper sentence. It need hardly be said that in the case of a crime of murder as heinous as the present one the deterrent and preventive objects of punishment predominate. It seems to me, nevertheless, in all the circumstances - and having regard in particular to what has been said about their previous records - that in the case of each of the three appellants the most

appropriate and just sentence would be imprisonment for life.

The punitive effect of a sentence to life imprisonment has recently been stiffened by Parliament. In this regard two recent decisions of this court dealing with the problem of an appropriate sentence in a murder case are instructive. In **S v Mdau (supra)** the accused had a previous conviction for murder for which he had been sentenced to imprisonment for six years. Less than two years after his release on parole he committed the murder with which the appeal was concerned. This Court considered that this aggravating factor in the case far outweighed the mitigating factor (that the accused had been subjected to provocation and that he had killed in anger); and that the death sentence was therefore a proper sentence. The court nevertheless decided that the death sentence was not the proper sentence. One of the considerations upon which the

latter conclusion was based was that Act 107 of 1990 had amended the provisions of sec 64 of the Prisons Act, No 8 of 1959, in respect of prisoners serving life sentences in such a way that it is now the Minister of Justice and not the Prison Board who has to initiate the release of such prisoners. Accordingly, so it was held, the passing of a life sentence would reflect the court's manifest intention that the offender should be removed from society for the remainder of his life. In this connection **EKSTEEN, JA** observed at 176 F-G:

> "Die bepalinge van hierdie artikel hou dus in dat 'n Hof sy plig om die gemeenskap te beskerm teen die aanslae van so 'n geweldenaar soos wat die appellant is, kan nakom deur hom lewenslang gevangenisstraf op te lê. Wat die Hof betref, sal so 'n persoon finaal uit die gemeenskap geneem word en die res van sy lewe in gevangenisskap deurbring. Die enigste manier waarop hy weer tot die gemeenskap kan terugkeer, is as die Minister die inisiatief neem en die vrylatingsadviesraad vra om hom te adviseer oor sy moontlike vrylating. Die vrylatingsadviesraad moet dan 'met behoorlike inagneming van die belange van die gemeenskap', sy vrylating oorweeg."

In **Mdau's** case (**supra**) the court was concerned to protect society against a hardened miscreant with a proclivity for violent crime. In the present case there is, so I consider, no good reason for fearing that any one of the three appellants is likely again to inflict extreme violence on a fellow human; and accordingly the safeguarding of society is not here the vital consideration. But, as pointed out in **Joseph Cele v S (supra)**, at p 16 of the typewritten judgment, even where the protection of society is not the imperative consideration -

> "....life imprisonment is also appropriate where the circumstances of the case call for punishment which is so severe that no lesser period of imprisonment would suffice."

Having regard to the nature of the murder committed by the three appellants it seems to me that no sentence less rigorous than imprisonment for life would meet the justice of the case. Each matter must, of course, be dealt with

on its own particular facts and merits, but I am fortified in my view that here no shorter term of imprisonment would be regarded by society as an adequate deterrent to others by the following indisputable fact. Of recent times this country has suffered a spate of cruel and dastardly murders perpetrated by gangs of robbers upon elderly and defenceless persons living in isolated places. This is a scourge which must be stamped out.

The appeal of each appellant against his conviction for murder is dismissed. The appeal of each appellant against the sentence of death imposed by the trial Court succeeds. In each case the sentence of death is set aside and there is substituted therefor a sentence of

imprisonment for life. The remaining sentences of imprisonment imposed by the trial Court will run concurrently with the sentences of imprisonment for life.

G G HOEXTER, JA

STEYN, JA)
PREISS, AJA) Concur