119/92

Case number 643/91

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IN THE SUPREME COURT OF SOUTH-AFRICA

(APPELLATE DIVISION)

In the matter between:

LINDILE TUNKI MOYO Appellant

and

THE STATE Respondent

CORAM: E.M. GROSSKOPF ET GOLDSTONE JJA ET KRIEGLER AJA

DATE OF HEARING: 17 August 1992

DATE OF JUDGMENT: 28-08-92

J U D G M E N T

KRIEGLER AJA/.....

KRIEGLER AJA:

On Friday morning, 18 September 1987, the appellant, assisted by his girlfriend ("accused number 2"), robbed, raped and murdered a 58-year old widow in her home in East London. Upon their arraignment in the Eastern Cape Division during August 1989 both pleaded not guilty to charges of murder, rape and robbery with aggravating circumstances. A written plea explanation in terms of Section 115(3) of Act 51 of 1977 was submitted on appellant's behalf. With regard to the charge of murder, he alleged self defence and denied that he had intended to kill the deceased. On the rape count his defence was one of consent and with regard to the robbery he contended that the deceased had given him a set of keys for the purposes of his employment and a radio-alarm combination in part payment of his wages. The trial culminated in both accused being convicted

on all counts. In the case of the appellant no extenuating circumstances were found and he was sentenced to death on the murder charge - as was mandatory in terms of the law as it then stood. On the other two counts he was sentenced to 11 years imprisonment. An application for leave to appeal against inter alia the finding with regard to extenuating circumstances and the imposition of the death sentence was refused by the trial court. Subsequent to the adoption of Act 107 of 1990 the death sentence was submitted to a panel appointed in terms of section 19 of that Act. The panel's conclusion was that a sentence of death would probably have been imposed by the trial court even had section 277 of Act 51 of 1977 at the time read as it now reads pursuant to its substitution by section 4 of Act 107 of 1990. It is now this court's duty in terms of section 19(10)(a) of Act 107 of 1990 to consider afresh whether the

imposition of the death sentence is appropriate.

The proper approach to a case such as this and the criteria to be applied in answering the crucial question have been clearly stated in a number of judgments of this court. A detailed discussion thereof would be superfluous. In the context of the present case it suffices to say that regard should be had to any aggravating factors proved beyond reasonable doubt, to any mitigating factors not negatived beyond reasonable doubt and to the general objectives of punishment. In the light of such findings this court must decide whether the death sentence is the only appropriate penalty in the circumstances.

That question is to be answered against the following factual background. In May 1987 the deceased returned to her home in East London after an absence of several years. She intended rendering it fit for sale and putting it on the

market. She set about restoring the house and engaged the services of the appellant as a handyman. Some time thereafter she also employed accused number 2 to assist. The refurbishment progressed satisfactorily and was to have been completed on the fatal day. Around midmorning that day the appellant attacked the deceased while she was sitting in her lounge reading a newspaper and enjoying a snack. He grabbed her by the throat with both hands, threw her to the ground and, straddling her torso, proceeded to throttle her. The appellant then gagged the deceased with a dish-cloth, repeatedly stuffing it into her mouth until she could no longer eject it with her tongue. Thereupon the appellant twisted a bathroom towel around the deceased's neck and strangled her by pulling the ends tight. At some stage he added depravity to brutality by raping his helpless victim.

The deceased had managed to utter a scream before the appellant silenced her and two next door neighbours went to investigate. The one called from her backyard opposite the deceased's kitchen door. Accused number 2 thereupon opened the kitchen door and successfully diverted the enquirer's attention by saying that she, too, had heard a scream but that it had emanated from elsewhere. The other neighbour walked to the deceased's front door. Before she reached it accused number 2 emerged and managed to allay her suspicions as well. In the interim the appellant had been pursuing his attack on the deceased. Then, leaving the deceased dead or dying on the floor, the appellant went to change from his working clothes while accused number 2 searched the house for valuables. They departed shortly thereafter with the deceased's wallet (containing R37,00 in cash), the deceased's jewellery and two

plastic bags stuffed with clothing and the deceased's radio-alarm. Some time thereafter the one neighbour, still uneasy, instructed a young African gardener to gain access to the deceased's locked house via an open toilet window. He discovered the deceased lying on the floor of her lounge. The police were summoned and within hours all relevant features were photographed and a post mortem examination was conducted in situ. A full autopsy was subsequently conducted at the government mortuary. A number of points noted by the district surgeon warrant emphasis. First, the cause of death was both strangulation and suffocation; second, considerable difficulty was encountered in removing the dish-cloth because of the force with which it had been stuffed into the deceased's mouth; third, the towel had been twisted tightly around the neck; fourth the clinical and pathological findings established that considerable

manual pressure had been applied to the deceased's throat for a prolonged period.

In the meantime the two miscreants had spent the stolen cash and the proceeds of the sale of the alarm-radio on liquor. The two carrier bags were left with a relative and the two went to a remote hideaway. The police were quickly onto their trail and arrested them the following night. They were both in an advanced state of intoxication, accused number 2 dressed in the deceased's clothes and wearing some of her jewellery. The investigating officer interviewed his two suspects the following evening and, as a result of their co-operation, managed to locate the wallet and the two carrier bags. The next morning he arranged for them to be taken to magistrates to make statements. The manuscript recording of the appellant's detailed narrative to the magistrate covers more than four full sheets of paper. Its

significance lies not so much in what is stated, but rather in what is omitted: There is no suggestion of any altercation preceding the attack on the deceased; indeed there is no mention of any provocation at all. On the contrary, in his statement to the magistrate the appellant sought to create the impression that accused number 2 had summoned his assistance after she had attacked the deceased. There is no mention of manual strangulation and it is alleged that it was accused number 2 who had forced the dish-cloth into the deceased's mouth. The statement also suggests that the appellant played no part in the collection and removal of the deceased's possessions. Moreover not a word is said about any sexual involvement with the deceased.

In his evidence at the trial, however, the appellant took an entirely different tack. The attack had not been initiated by accused number 2

but had been precipitated by an an argument between himself and the deceased regarding his remuneration. Indeed his version at the trial was clearly directed towards exculpating his partner: she had not felled the deceased but he had; she had not stuffed the dish-cloth into the deceased's mouth but he had; she had not participated in strangling the deceased with the towel, he had done so on his own. With regard to the sexual component of the crime, his evidence was that he and the deceased had had intercourse at her suggestion earlier that morning during his lover's temporary absence from the house.

The trial court found the appellant to be a thoroughly untruthful witness. There is no reason to differ. Not only was the version he advanced in the witness box inherently unworthy of credence and riddled with contradictions and inconsistencies, but it was irreconcilable with

what he had told the magistrate three days after the events.

The question at issue, however, is not the appellant's credibility but whether it has been established that the circumstances of the murder were such that the ultimate penalty is imperative. Counsel for the appellant, wisely, did not contend for the absence of aggravating factors. Indeed they are many and grave. The appellant and his partner in these horrible crimes set upon a middle-aged woman in the privacy of her home. Over a period of several weeks the deceased had come to repose such trust in the appellant and accused number 2 that, notwithstanding an acute concern for personal security, she had admitted them to her home. The trial court found that she was attacked whilst sitting in her lounge, reading a newspaper and enjoying a midmorning snack. Those findings were well founded. A crumpled newspaper

and the deceased's reading spectacles were found near the body while a partially eaten tomato sandwich was grasped in the one hand. Clearly the fatal attack was launched on an unsuspecting victim whiling away the time in repose. There she was attacked, manually throttled, suffocated with a gag and garroted with a twisted towel. Whilst mortally incapacitated she was subjected to the ultimate indignity of rape. Thereupon her assailants rifled her home and made off with their spoils - leaving their victim dead or dying.

Counsel for the appellant submitted, however, that there were a number of mitigating factors to be taken into account. First we were urged to accept as a reasonable possibility that the attack on the deceased had been precipitated by an argument about money. There is no merit in the submission. In his detailed statement to the magistrate three days after the murder, in which he

sought to exculpate himself as best he could, the appellant did not suggest that there had been any argument involving himself and the deceased. On the contrary, he furnished a description of accused number 2 attacking the deceased where she was sitting reading a newspaper.

The next point urged on appellant's behalf was that a direct intention to kill had not been established. The argument fails in its point of departure, its development and its conclusion. The basic hypothesis that the violence was triggered by an altercation is unfounded. There was no sudden outbreak of anger which had to be swiftly quelled. While accused number 2 cunningly kept the neighbours at bay the appellant dispatched his victim with ruthless efficiency. He and his partner performed their respective roles well enough for them to commit the crimes and make good their getaway with their spoils. Furthermore the

duration and violence of the attack described by the appellant (and borne out by the post mortem findings) is barely reconcilable with an intention to incapacitate the deceased temporarily. In his evidence on this aspect the appellant found himself in a dilemma. On the one hand he professed not to know that prolonged throttling or suffocation could be fatal; yet, at the same time, he contended that he intermittently released the pressure on the deceased's throat, to avoid serious injury. In the context that can only mean that he appreciated that sustained pressure was dangerous. In any event, as the trial court found with ineluctable logic, the very fact that three different forms of potentially fatal violence were applied - in succession and over a protracted period of time - leaves no room for doubt as to the direct intention to induce death. Moreover, once it is accepted that there was an unprovoked attack followed by the rape and

the theft, the conclusion is inevitable that the attack was launched in order to rob. Inasmuch as the deceased had come to know her assailants well during the preceding weeks there is grave doubt whether the intention had been merely to incapacitate her as an impediment to the robbery, and not rather to eliminate her as a potential identifying witness. Then, when the appellant proceeded to rape his victim, he must have done so in the knowledge that she would not live to tell the tale. The sang-froid with which the robbers acted once the deceased had been overcome also strongly suggests that they knew they could take their time without fear of any hindrance from that quarter. The appellant proceeded to change from his working into his street clothes and accused number 2, possibly assisted by the appellant, selected and packed their booty; then they left the house separately so as not to evoke suspicion.

As the deceased was not tied up, the sinister inference is that their confidence was founded on knowledge that the deceased was dead or dying.

Counsel for the appellant also suggested that the subsequent theft "appears to have been something of an afterthought, and the items were of relatively small value." Neither contention can be sustained. Robbery was the very motive for the attack. Having overpowered their victim the robbers selected their booty with ostensible discrimination. With only their pockets and two plastic bags at their disposal they managed to take goods to the value of approximately R8 000,00. To the appellant that figure represented some three years' gross income and far exceeded the contract sum of R240,00 he was due to be paid that day. By the time the police caught up with them the following night the robbers had not only spent the cash and secreted the carrier bags but had already

disposed of several items of value.

Counsel for the appellant also contended that his actions after the commission of the crimes manifested mitigatory features. I cannot agree. First and foremost there is no merit in the suggestion that the appellant, by his co-operation with the police, manifested contrition. It is true that, once the police had run him to ground, he assisted them in the recovery of some of the stolen goods. It can also be accepted that, at the time, he made further disclosures to the investigating officer. It can even be assumed in the appellant's favour that in doing so he was not merely bowing to the inevitable. Nevertheless an inference of remorse on his part is not reasonably possible. The morning after the pointings out he made a statement to a magistrate evidencing no such sentiment but, on the contrary, a studied attempt to exculpate himself at the expense of his lover.

His evidence at the trial reveals not a scintilla of remorse. While the merits were still in contention he adhered to his palpably false attempts at exculpation by suggesting that the deceased had rutted with him and had subsequently threatened to shoot him. Once he had been convicted he declined to testify with regard to extenuating circumstances. Protestations of remorse at that stage would have rung singularly untrue in the light of the callous unconcern for his victim manifested throughout.

Counsel submitted on his behalf, however, that such conduct should be viewed in the context of the appellant's socio-cultural background of gross deprivation and his history of chronic alcohol dependency. While it is true that the appellant came from humble origins and was eking out a precarious existence, there is no evidence to suggest any environmental conditions which could

have predisposed him to the reprehensible actions in issue in this case. There is no history of any mental aberration or socio-pathology. His record of previous convictions reflects two minor thefts in the mid 1970's and a clean record thereafter. For some six years prior to the commission of the instant offences he had fended for himself reasonably adequately as a freelance contractor in and around the urban area of East London. He was therefore neither an unsophisticated tribesman nor a helpless alcoholic. Counsel's further suggestion that the appellant's adherence to traditional beliefs could possibly have played a part, finds no support in the evidence.

But the case is not wholly devoid of mitigatory features. The trial court found as a fact that the murder had not been premeditated. Indeed it is reasonably possible that even the

decision to rob the deceased was taken shortly before when the appellant and/or accused number 2 realised that their presence in the house in the proximity of a soft target presented an opportunity for easy spoils. What is more, to persons of their station in life the deceased's jewellery and personal effects must have seemed unattainable riches. Although the description by counsel for the appellant of the robbers' actions as "inept" cannot be supported, there is substance in the submission that there are indications of a lack of forethought. Thus they did not wait till the deceased had drawn their wages, which would have made sense from their point of view. Also the absence of any weapon suggests that they fell upon the deceased without any predetermined plan. The progression from manual strangulation to gagging and ultimately to the use of the towel as a ligature, albeit not a "frenzy of confusion" as

counsel characterised it, does tend to indicate the absence of planning.

What is more important, though, is that it leaves room for doubt as to whether the intention to kill was not formed in the heat of the moment as the attack gathered momentum. In that context regard should be had to the personal circumstances of the appellant. He was in his mid-thirties at the time and had never been involved in any crime of violence. His two previous brushes with the law had been petty thefts more than a decade before. Not only can he be regarded as a first offender, but, what is more important here, the instant crimes seem out of character. That lends support to the possibility that (a) the robbery was launched without reflection, and (b) that the subsequent crimes were committed in the unstructured escalation of violence. Clearly such lack of premeditation is a cogent factor in

determining whether the death sentence is the only appropriate penalty. So, too, due weight should be given to the appellant's clean record for more than a decade after he had served five months in prison in 1976/77. Not only does it tend to suggest that he is amenable to rehabilitation, but it also indicates that he was a law abiding and useful member of society.

That having been said, the question remains whether the retributive and deterrent demands of the law do not render the death penalty unavoidable. In this regard it is important to note that the trial court expressly mentioned the prevalence of murderous attacks on elderly or defenceless robbery victims in its area of jurisdiction. Counsel for the State stressed this factor and drew attention to a number of recent judgments in this court dealing with such cases emanating from the Eastern Cape. Sad to say,

that area is by no means unique; nor is robbery the only motive for the alarming increase in both the incidence and the savagery of crimes of violence currently besetting the country. The causative factors are complex, manifold and pervasive. Yet the legislature, within whose field of competence such factors pre-eminently lie, and with knowledge of their dire consequences, turned over a new leaf with Act 107 of 1990. Although maintaining the death sentence, it reserved it for cases where no other penalty, even imprisonment for life, could do justice.

Despite the heinousness of the murder, the mitigating factors discussed above take this case out of that category. The ultimate penalty is not imperative. The interests of society and the retributive and deterrent objectives of sentence, would be adequately served if the appellant were to spend the rest of his life in

prison.

The appeal against the death sentence is upheld and in its stead the appellant is sentenced to life imprisonment.

KRIEGLER AJA

E.M. GROSSKOPF JA]

] CONCUR

GOLDSTONE JA]