B/O.

124/92

CASE NO: 349/9

NCEBA ARCHIE MBENGU ..... Appellant

and

THE STATE ..... Respondent

VAN COLLER, AJA :-

CASE NO: 349/91
J VD M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NCEBA ARCHIE MBENGU Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, KUMLEBEN, JJA et
VAN COLLER, AJA

HEARD: 21 AUGUST 1992

DELIVERED: 1 SEPTEMBER 1992

J U D G M E N T

VAN COLLER, AJA:

On 6 December 1990 appellant was convicted of murder in the Cape Provincial Division. After the

court had considered the mitigating and aggravating factors, the trial judge, MUNNIK JP, came to the conclusion that the death sentence was the only proper sentence and consequently imposed that sentence. Appellant was also convicted on three other charges, namely theft, housebreaking with the intention to commit a crime to the prosecutor unknown, and rape. On a further count, namely one of robbery, appellant was convicted of theft. Appellant was sentenced to 15 years' imprisonment on the rape charge. On the other charges periods of imprisonment varying from 3 to 5 years were imposed, these sentences to run concurrently with the 15 years' imprisonment imposed on the rape charge.

This appeal is only against the conviction and sentence on count 4, i e the murder charge. Although appellant's defence at the trial was an alibi, Mr Roux, who appeared on behalf of appellant, did not contend

that the trial court erred in finding that appellant had killed the deceased. He attacked the conviction solely on the ground that it was not proved beyond a reasonable doubt that appellant had the intention of killing the deceased.

The relevant facts are briefly as follows. The deceased, a 60 year old widow, lived alone in her house at 43 Strathmore Road, Camps Bay, Cape Town. Her husband died in 1986 and her two children, a married daughter and a son, Mr Morrison Jameson, also lived in Cape Town at the time of her death on 2 January 1990. The deceased worked at a library. Appellant was employed by the deceased from about the end of September 1989 as a part-time gardener. The deceased preferred appellant to come to work on Tuesdays, that being her day off. During the morning of 2 January 1990 the deceased drew R100 at the First National Bank's branch at Sea Point. She also visited her daughter and son-

in-law during the course of the morning and left their home in Buitenkant Street at 12.20 pm. At 6 pm Mr Morrison Jameson went to the deceased's house. Her car was parked in the street but the house was locked. He returned to his house where he received a telephone call call from his sister who enquired about the deceased's whereabouts. He immediately went back to the deceased's house. He found the car still outside and the front door locked as before. He could find no signs of a forced entry into the house. He had to break a small window in order to get into the house. He found his mother's body on the landing of the staircase leading from the ground floor to the first floor. She was partly covered with 2 Persian runners. The bedrooms of this double-storey house are on the ground floor with the kitchen, dining-room and sitting-room on the first floor. The kitchen door, which is on the first floor, was locked, but the key was in the door

and Mr Jameson was able to open the door from the inside. The keys of the front door, which is on the ground floor, and the keys of the motor-car were found at a later stage in one of the small store-rooms situated under the house.

The following facts emerged from the evidence of Captain Lister of the S A P who was in charge of the investigations. When the rugs were removed, it appeared that the deceased's lower body was naked. Next to the body was a clock weight taken from a clock in the dining room and which, like its counterpart found in the passage leading from the front door to the foot of the stairs, was bloodstained. Both deceased's arms and hands were smeared with blood. Blood was found on the walls of the passage on the ground floor. There was a large pool of blood where the staircase commenced and there was blood on practically every stair of the carpet-covered staircase to the landing. In the

bedroom overlooking the front entrance steps half a bottle of beer was found on the armrest of a chair next to the bedroom door. Partly under the bed was a plate with a cooked chicken from which portions had either been cut or torn off. Next to the plate were some chicken bones, the top of a beer bottle, a small kitchen knife and a small container of meat tenderiser. According to the evidence of Captain Lister a person sitting on the floor in the vicinity of where the plate was found, would have a good view of anyone coming up the steps to the front door. A person on the inside would not be visible from the outside because of the lace curtains in front of the window. At first it was not clear how the intruder had gained entry into the house but it was subsequently found that two roof tiles, which had been half hidden under an overhanging shrub, had been removed. A person could gain access to the inside of the house through the opening left by the

removal of the tiles, and a trap-door in the ceiling adjacent to the inside kitchen door. On the trap-door a palmprint, identified as that of the appellant, was found. When appellant was arrested he had in his possession the deceased's wrist-watch, which she had been wearing on the day of her death. He was also in possession of a bloodstained belt which had belonged to the deceased. This evidence (and evidence of other items found in appellant's possession), leaves no doubt that appellant's alibi was rightly rejected as false and that he was the person who had killed the deceased.

The injuries sustained by the deceased are highly relevant to the question whether or not the intention to kill was proved. MUNNIK JP summarised the medical evidence as follows:-

> "From the post-mortem report and the evidence given by Dr Fowler the following emerges. Deceased was 60 years and weighed 52kg. There were no bruises indicative of strangling or throttling nor in fact any bruises at all. This appears to us to preclude any question of a hand-to-hand struggle.

The wounds found by Dr Fowler were the following:

Lacerations to the front of the face, including (a) 4cm laceration above the left eye slightly to the middle of the forehead; (b) 3cm laceration above the right eyebrow and a similar laceration on the right eyebrow; (c) 1cm abrasion on the bridge of the nose; (d) a peri-orbital (that is around the eye) bruise of the left eye which was probably, in the doctor's opinion caused by the seepage of blood from the injury to the nose; (e) a 3cm abrasion on the left cheek near the nose and 1.5cm abrasion at the junction of the cheek and the jawbone; (f) 2cm abrasion just above the left ear, and finally (g) 4cm x 5cm lacerated area of the left occipital area of the head, that is at the left back of the head. The infliction of this wound caused extensive fracturing of the underlying skull. In this fracture were two loose fragments. Apart from these fractures, the blow also had the effect of causing a fracture line extending down to the pharynx, i e the back of the throat, and this caused tearing of the mucosa, that is the lining in that area, with subsequent haemorrhage into the airways. There was also extensive subarachnoid haemorrhage covering the greater part of the whole brain, and there was swelling of the brain as well as a small left to right shift. The doctor's view was that although the subarachnoid and direct haemorrhage was consistent with any of the blows, because of the fractures underlying the blow to the back of the head and no underlying fractures to any of the other blows, i e those which caused the various lacerations, the damage was done by the blow to the back of the head. In his view this blow would have caused immediate unconsciousness,

but he would have expected the deceased to have lived for 15 minutes to an hour. Dr Fowler, who is in the service of the State as a Registrar of Forensic Pathology at UCT, and who impressed the Court with the quality and restraint of his evidence, i e the manner in which he weighed the import of questions before expressing a view, told the Court that considerable force would be required to cause all the damage resulting from the blow to the back of the head, i e the long fracture across the middle line to the other side of the skull. He said he examined Exhibits 2 and 3, which are the weights of the wall clock, and said the injuries he found were consistent with having been inflicted with these exhibits. I may add that the forensic tests proved by the State and admitted by consent, showed that both these exhibits bore traces of human blood. ...

In cross-examination he also expressed the view that all the injuries, except the large one at the back of the head were inflicted by blows from the front, and that the injury at the back of the head was highly suggestive of a blow from behind. He also stated that working on the theory that it is unlikely that someone would hit somebody who was already unconscious, it is probable that the blow at the back of the head was the last blow.

He conceded that some of the blows on the front could have caused subdural haemorrhage and may have caused a degree of loss of consciousness, but it was obvious from the way that he answered this proposition put to him that he had considerable doubt about the probability of this having

occurred.

One further fact remains to be mentioned, and that is that when asked about the relative sizes of the accused and the deceased, he gauged the weight of the accused to be slightly less than that of the deceased.

In this connection I may mention at this stage that although the accused is slightly built, we accept Morrison's evidence based on his observation of the accused moving cupboards and a half drum at his house, that the accused despite his build is very strong. Exhibits 2 and 3 were examined by the members of the Court. They are heavy metal objects, rectangular in shape, slightly honed down at one end, where there is a hole from which they hang on the chain. They are about 9 to 10 inches long and about one inch square. So much then for the medical and physical evidence relating to the deceased. We have no hesitation in accepting Dr Fowler's evidence and opinions as accurate and correct, not only because of his professional status but because they accord with the visual evidence recorded in the various photographs of the body, and with the probabilities and the other evidence such as the bloodstains already referred to."

The trial court could not come to any definite finding with regard to where the deceased was when she first became aware of the presence of appellant inside

the house. The trial court did find, however, that the deceased was struck down in the passage and then dragged up the stairs to the landing. This finding was not questioned by Mr Roux. Another relevant fact that must be referred to relates to the R100 drawn by the deceased during the morning of 2 January 1990. This money could not be found in the house and the trial court inferred from the evidence that appellant had taken it. It was found to be highly improbable that the deceased would have spent the money because she intended taking friends to a restaurant that evening.

The trial court's conclusion that appellant had the intention to kill was based on the following grounds. It found, firstly, that appellant had waited for the deceased to come home because he wanted money. He was therefore not surprised in the house and the fact that he was known to the deceased could have made it

necessary for him to kill her. Secondly the trial court found that, on this evidence, viewed in conjuction with the intensity of the attack and the force of the blows, there can be no doubt that appellant attacked the deceased intending to kill her. The trial court advanced cogent reasons for its finding that appellant was waiting for the deceased. The facts and the inferences that can be drawn lend support to this finding. Appellant took his time in the house, he helped himself to refreshments and at some stage he placed himself in the downstairs bedroom from where he could observe the front entrance. Appellant could have left with the chicken and the beer and with anything else he wanted to take. Instead of doing so, he remained in the house and it is probable that he did so because he wanted money. Appellant could have left the house undetected even after the deceased's return, had he wished to do so. The fact that he did not do so

is a further indication that he wished to confront the deceased. Mr Roux contended that the inference that appellant waited for the deceased is not the only reasonable inference that can be drawn from all the proved facts. There is merit in this argument but in view of the conclusion to which I have come I do not deem it necessary to deal with his submissions. I shall assume in appellant's favour that he did not wait for the deceased to return. In my judgment the intention to kill has in any event been proved. Appellant was well known to the deceased and, if he had no waited for her, the reason for the attack could only relate to the fact that she found him in the house. Even then he could have left the house without difficulty, and without assaulting her. Thus the lethal attack could only have been to prevent her from laying charges against him. This motive, which strengthens the inference that appellant intended

killing the deceased, remains even if, as Mr Roux contended, appellant had been surprised in the house. There can be no doubt that at least one of the clock weights had been used in the attack on the deceased. They are heavy metal objects, about 9 to 10 inches long. The deceased was struck more than once on the head. It is clear from the evidence that this instrument was used with so much force that not only would immediate unconsciousness have followed, but extensive fracturing and brain injury was in fact caused. The only reasonable inference that can be drawn from all the evidence is that appellant intended killing the deceased. In my judgment dolus directus was proved. The appeal against the conviction can therefore not succeed.

Appellant was convicted after Act 107 of 1990 came into operation and it is our task to consider the sentence afresh. We must give due consideration to the

mitigating and aggravating factors, bearing in mind also the well known objects of punishment. The personal circumstances of appellant are the following. At the time of the trial he was approximately 23 years old. He can read and write and he was educated to the level of standard seven. He has one previous conviction. He was convicted in 1986 of assault with the intention to cause grievous bodily harm. A knife was involved and he was sentenced to seven cuts with a light cane. It is difficult to find mitigating factors in this case. I shall assume that it was not proved that appellant contemplated killing the deceased before she returned to the house. Even if this can be regarded as a mitigating factor, it cannot carry much weight.

Serious aggravating circumstances are present. As I have said at the best for appellant the motive was to avoid detention. A brutal attack was perpetrated on an elderly woman in the safety of her own home.

Subsequent to the cowardly attack on the deceased, appellant raped her while she was unconscious. This conduct reveals an absolute lack of feeling and a total disregard for human dignity.

It remains to consider whether, in all the circumstances of this case, the death sentence is the only proper sentence. The possibility of rehabilitation cannot, despite the previous conviction, be ruled out. On the other hand, this is once again a case where an elderly person was killed in her own home. This is a case where the deterrent and retributive aspects of punishment play a decisive role, and where the interests of society come strongly to the fore. See State v Sesing 1991 (2) SACR 361 (A) at 365 G and State v Makie 1991 (2) SACR 139 (A). In my judgment the circumstances of this case are of such a nature that the death sentence is imperatively called for.

The appeal is dismissed.

A.P. VAN COLLER
ACTING JUDGE OF APPEAL

VAN HEERDEN, JA)
KUMLEBEN, JA) CONCUR