80/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NOS. 513/91

67/92

In the appeal of:

MXOLISI SKOTI 1st APPELLANT

SIPHIWO MPAMBANI 2nd APPELLANT

and

THE STATE RESPONDENT

Coram: VAN HEERDEN, NESTADT JJA et HARMS AJA.

Dates heard: 18 February 1992 and 4 May 1992

Date delivered: 22 May 1992

J U D G M E N T

HARMS AJA:

The appellants and their co-accused (one Sokoyi) were convicted of, inter alia, two counts of murder, two of attempted murder and one of robbery. No evidence was led in extenuation and the trial court (Kroon J sitting with assessors in the Eastern Cape Division) did not find any extenuating circumstances. The then mandatory sentence of death was imposed in respect of each of the two counts of murder and sentences of imprisonment in respect of the other counts.

An appeal against their conviction on the murder and attempted murder counts as well as against the finding that there were no extenuating circumstances was dismissed by this Court on 7 September 1989 (Case no. 513/91). The panel appointed in terms of s19(1) of the Criminal Law Amendment Act 107 of 1990, after having considered the matter, made a finding that, in its opinion, the sentences of death would probably have been imposed by the trial court on the first appellant, but not on the second appellant or Sokoyi, had the provisions of s 4 of the Act been in operation at the time sentence was passed.

As a result the first appellant's case was heard on 18 February 1992 and judgment reserved. On 24 February the Registrar of this Court was informed that the Minister of Justice had decided to refer, in terms of s19(11)(b), the second appellant's case to this Court. That required a separate hearing. This judgment deals with both appeals.

In both matters application was made in terms of s19(12)(b)(iii) of the Act to set aside the sentences and to remit the case to the trial court for the hearing of evidence relating to mitigating factors. It is, however, convenient first to give a synopsis of the relevant facts of the case before dealing with the merits of these applications.

On 13 March 1986 the first appellant broke into the Haga Haga Hotel in the district of Komga and stole a .22 revolver. On 15 April 1986 the three accused conspired to break into a store belonging to one Freitag to rob or steal money. Freitag was chosen because of his age (66 years). The accused boarded a bus the next day and travelled to the store. The first appellant was armed with the revolver and a clasp knife. They alighted some distance from the store in order to prevent any detection. They waited until the

store had been closed for the day and then, in order to establish who was present at the premises, requested Freitag to open the store to enable them to purchase some food. Thereafter they asked for petrol and permission to use the telephone. They thereby established that Freitag and Mr Promnitz (a frail 57 year old man) presented the only possible opposition to their plan. They left and returned later that evening. In order to lure Freitag and Promnitz from the house, they went to the generator room on the property and stopped the engine. When the lights went out, Freitag and Promnitz went to inspect. Promnitz was attacked by the second appellant and Freitag then hid in the generator room. The first appellant fired a shot through the door to dislodge Freitag. He achieved his aim. The two victims were then marched to the house where Freitag handed over a suitcase with a substantial amount of money. It was cut open by the second appellant and the money removed. The accused were dissatisfied with the loot

and because Freitag could not or did not point out more money, the first appellant shot him at point blank range. The shot was through the heart and was, in itself, fatal. Promnitz, who was also shot at, was wounded, though not fatally. Neighbours, Mr and Mrs Roux, having heard the commotion, came with their vehicle to investigate. After wounding the first appellant in the arm, Roux was disarmed, stabbed and then killed with his own firearm. Freitag received some further shots (one through the eye) and Mrs Roux was assaulted and shot at. The accused thereafter drove off with the Roux's vehicle but the first appellant was apprehended the same night. As far as Roux's death is concerned, the doctrine of common purpose was applied as no finding could be made by the trial court beyond reasonable doubt as to who had shot him. The first appellant was, however, held liable for Freitag's death as principal offender and the other accused by virtue of their common purpose.

The first appellant's application to have the sentences of death set aside and the matter remitted for evidence relating to mitigating factors, flows from counsel's acceptance that the record as it stands does not reveal any such factors. The application consists of a founding affidavit by the appellant to which is annexed two reports by experts, a letter from a prison warder and one from an ex-employer, Mr Pretorius. The expert reports are not on oath. They consist of facts obtained from the appellant during consultation and opinions based thereon. The experts did not attempt to verify any of the facts. The appellant did not confirm the correctness of the facts conveyed to the experts. It follows that the application is fatally defective, first, because it is based upon unsworn allegations and, second, because the opinions are not based on proven facts. These defects are not merely formal but they affect the merits of the application. The

reports contain a number of materially conflicting allegations of fact (all allegedly emanating from the appellant) as well as a number of allegations which are in conflict with the appellant's evidence at the trial. The letter from Pretorius is, apart from the fact that it is unsworn, of no value. He knew the appellant some nine years before the commission of these crimes and his belief that the appellant could not have planned to kill someone unless that person had harmed him "in a very bad way" was shown by the appellant's case history to be false. The prison warder's letter, also unsworn, deals with the appellant's good behaviour in prison since his conviction. This material originated after passing of sentence and, since exceptional circumstances are not present, cannot be taken into account. See S v Nofomela 1992 (1) SA 740 (A) 748 E. It was also there held at 748 H - J that an appellant, in order to succeed with an application such as the present, must satisfy this Court:

"(a) that the proposed evidence is relevant to the issues of mitigating or aggravating factors and the exercise by the trial Court of its discretion in the light of the new test;
(b) that, save for exceptional circumstances, there is a reasonable possibility that such evidence would have been presented to the trial Court by the appellant if the test had been what it now is;
(c) that the proposed evidence would presumably be accepted as true by the trial Court;
(d) that, if accepted, such evidence could reasonably lead to a different sentence; and
(e) that, save for exceptional circumstances, there is a reasonably acceptable explanation why such evidence was not led at the trial. Situations falling under (b) above would comply with this requirement."

I now proceed to consider whether the expert reports (assuming them to be properly before this Court) comply with the requirements. The factual matter contained in the reports and which was obtained from the first appellant is relevant to enable the court to assess the appellant as a person and to determine whether, in the light thereof, the sentence of death is the only appropriate sentence. These

facts relate to the appellant's deprived childhood, lack of education, poverty and the unstable nature of the society around him. They can be summarized as follows: the appellant grew up in a rural area; he was a herdboy; his brother ill-treated him; he had no father and that his mother was often away from home; he left home at a very early age and obtained stable employment; his employer left the area and he thereafter struggled to keep body and soul together; he realised later in life that he might be illegitimate and was not accepted as a member of his putative father's tribe; he was not prepared to accept the employment opportunities open to him; he was an active member of a sport club; whilst he was in prison, having committed attempted murder, there was general violence and unrest in the Eastern Cape; although he has a lack of formal education he is intelligent, articulate and literate in English and has natural leadership skills.

The psychologist whose evidence is proposed to be led expressed the opinion that the violence and general unrest in the country during 1985-6 may provide some moral justification for the murders because, and I paraphrase, there was no opportunity to consider moral questions and the individual's capacity to make responsible choices was diminished. I am satisfied that this opinion is speculative and is not based upon any factual foundation. The present crimes were not politically motivated; the appellants had ample time to make a responsible choice; it was not a case of mob violence; and lastly, Freitag was killed not out of need, but of greed.

There is also an anthropologist's report. He expresses the view that "(t)here is simply no way, anthropologically speaking, in which his [the first appellant's] involvement in the killings can be explained simply in terms of criminal intent." Counsel informed us that what this means

is that the first appellant did not act out of inner vice. What counsel could not explain is how that question is an anthropological question; in other words, how an anthropologist is qualified to express that view. Nor has the anthropologist established, even prima facie, a causal link between the first appellant's background and the murders. The first appellant has had ample opportunity to have raised his alleged dire financial circumstances as the motive for the killings but has not done so.

The last report is that of a so-called social work manager. There is no indication that this person is qualified to express any expert opinions, but in any event, he says really no more than that he gained the impression that the first appellant "is" (the present tense was used) a man alone in the world with no support systems. That impression conflicts with the impression one gains reading the appellant's evidence and the other reports. He had

many friends, had a mother of whom he was very fond, belonged to a sport club and was able to assume a leadership role in the present case.

To summarize, I am of the view that the opinion evidence proposed to be placed before the trial court does not satisfy requirements (a) and (c).

The second appellant's application was filed on the court day preceding the hearing of the appeal. The application is similar to that of the first appellant's in that reliance was placed on reports by the same psychologist and anthropologist. In this instance these experts did file affidavits in which they allege that the facts stated in their reports were obtained from the second appellant. What is lacking, is an allegation under oath confirming their opinions. There is also no allegation by the second appellant that what he told the experts was true. That is

understandable since the experts did not always believe the second appellant, especially his (new) claim that the crimes were politically motivated. Even counsel eschewed reliance thereon. In any event, the report of the psychologist does not assist. Her basic premiss is, as far as both appellants are concerned, the same and has been dealt with above. She further points out that the second appellant has an average intelligence, he recounts a happy childhood, he is in touch with reality (which rules out delusions and therefore a psychosis) and he is a "fabricator and confabulator". The report of the anthroplogist, although it purports to express an opinion, does in fact not express any. He does not even opine, as in the case of the first appellant, that the second appellant did not act out of inner vice. The applications to remit, cannot, therefore, succeed.

Returning to the merits of the appeal, aggravating factors abound. The first appellant was the leader of the gang; he was armed with a deadly weapon; the others knew that; the attack was planned well in advance; the victims were known to the appellants and carefully chosen; the victims were an easy target, especially in the light of their ages and the fact that the store was located in a remote rural area; the first appellant fired the first two shots, the second being through the heart of Freitag - clear proof of dolus directus; two people were murdered and two left for dead. Finally reference must be made to the first appellant's previous convictions, four of which are for housebreaking and theft and one for an attempted murder committed less than four years prior to the commission of the present crimes during a housebreaking.

It has already been pointed out that, as far as the first appellant is concerned, no mitigating factors are present.

The presence or absence of mitigating or aggravating factors is not conclusive as to what the proper sentence in a case such as the present is to be. A value judgment must be made. In making this judgment the court must have regard not only to those factors, but also to the accused, the crime and the community as well as the objects of sentencing, namely rehabilitation, prevention, deterrence, and retribution. I am of the view, that in the circumstances of the present case, the interests of society, deterrence and retribution play a decisive role and the personal circumstances of the first appellant (which are not different from those of a substantial number of the inhabitants of the world) a subordinate one. The murders were heinous and vicious; elderly and defenceless victims were carefully chosen. Any alleged link between the personal circumstances of the first appellant and his crimes is tenuous and too remote to be of any consequence.

It follows that in his case the sentences of death are the only proper sentences.

The position of the second appellant differs from that of the 1st appellant in two respects: he is a first offender and, second, the trial court made no finding beyond reasonable doubt that he had contributed to the death of any of the deceased and by implication found that his intent was one of dolus eventualis. The first point is an important mitigating factor. As far as the second point is concerned, the trial court gave anxious consideration to the question whether dolus eventualis in this case was an extenuating circumstance. It came to the conclusion that it was not one because the foreseeability of death in the contemplation of the second appellant was real and strong and not a mere possibility. It therefore becomes necessary to consider more closely the second appellant's role in or association with the two murders.

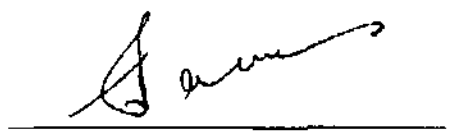
When they went to the scene, he was not armed with any deadly weapon. However, he was the first of the accused to have used force when he assaulted Promnitz at the generator room. He witnessed the wanton shooting of Freitag, but, instead of dissociating himself from the events, he actively partook in the further acts. At that stage he was in possession of a knife. When Roux entered the house, he was keeping a watch behind the door and was, therefore, behind Roux. Roux shot the first appellant, wounding him seriously. Roux was then stabbed and shot with his own weapon, Freitag was shot in the eye with it and, shortly thereafter, Mrs Roux was shot at, again with that weapon. The second appellant attempted to pin the blame for these acts on the first appellant. It has already been found by the trial court and confirmed by this Court during the previous appeal that it was the second appellant who shot at Mrs Roux. He also admitted that he had left the scene

with both firearms is his possession. In the light of his false evidence, especially in relation to the shooting at Mrs Roux, the improbability that the first appellant in his wounded condition would have committed these acts of aggression and his admitted possession of the Roux's firearm I do not share the doubt tentatively expressed by the trial court (an issue not considered by this Court during the appeal on the merits), but am firmly of the view that the second appellant, who insisted that the shooting of Roux, the shot through the eye of Freitag and the shooting at Mrs Roux were committed by the same person, was in fact that person. No reason was proferred why Freitag was shot again; it was no accident but a deliberate association with the murderous intent of the first appellant.

It follows that, as far as the second appellant is concerned, there is one mitigating factor only and that is

the absence of previous convictions. Most of the aggravating factors referred to when dealing with the first appellant also apply to him. If regard is had to the nature of the crime and its execution, the lack of previous convictions and his personal circumstances pale into insignificance and it therefore follows that for the reasons already given, I am of the view that the sentences of death are the only fit sentences.

The applications to remit and the appeals are dismissed and the sentences of death confirmed.



HARMS AJA

VAN HEERDEN JA)

NESTADT JA) concur