81/92

CG CASE NUMBER: 522/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATHANIEL MASIANE Appellant

and

THE STATE Respondent

CORAM: HEFER, GOLDSTONE et VAN DEN HEEVER JJA

HEARD ON: 18 MAY 1992

DELIVERED ON: 22 MAY 1992

J U D G M E N T

VAN DEN HEEVER JA

Nathaniel Masiane was originally charged as accused no 2 together with Raymond Ntshangase as accused no 1, on two counts of robbery with aggravating circumstances and one of murder. At the commencement of the trial the prosecutor announced that he withdrew the charges against Ntshangase. He informed the court that Ntshangase had already been executed in consequence of a death penalty imposed in another trial. Masiane was convicted on all three counts and sentenced to eight years' imprisonment on the first robbery count. The death sentence was imposed on the second robbery count, and again in respect of the murder charge after a finding that no extenuating circumstances had been established.

Leave to appeal was refused by the trial court on 13 September 1989. The matter is before us in terms of section 19(12) of Act 107 of 1990. I refer to Masiane in what follows as the appellant.

The facts may be summarized as follows:

On 18 August 1986 Mr and Mrs Knighton left their home at 50 Keats Road, Lombardy East, for their respective places of employment. During the course of the morning the maid, Melita Lepuru, interrupted her domestic tasks to go to the toilet outside. She saw two black men at her room. One was unknown to her. We know that he was Ntshangase. The other was the appellant, whom she knew as Thabo. He had done casual work for the Knightons at the premises on a few occasions. Ntshangase asked her for water. He entered her room, took a glass, drank water, returned the glass and then seized her around the neck. Both men pushed her into her room. Appellant fetched rope and tied her hands and feet. They locked her in her room. After a while they returned. Ntshangase produced and opened an Okapi knife. He threatened her, demanding money. Ntshangase took her money box, her watch and some tapes, and they then left. After some time she succeeded in escaping not only from her bonds but also from the room through a window after

breaking the glass, and reported to a neighbour who called Mrs Knighton and the police. The complainant told the police that Thabo had been one of the pair of robbers. A video recorder, revolver, cassette player, portable tape recorder, money and tools had been removed from the Knightons' home. Mr Knighton estimated the total loss at about R5 000,00.

The pattern of conduct at the Knightons' home on 18 August, was repeated some three weeks later in the same suburb at 37 Sheridan Road, except that this time the victim resisted and was killed.

On 8 September Mrs Hearn went off to work, leaving behind her pensioner husband and the maid Doreen Mbelani who had worked for them for more than ten years. Mr Hearn, somewhat hard of hearing, sat in the family room in the front portion of the house, reading, listening to the radio, dozing. At about 12h45 he called the maid but she did not reply. He got up and on investigation found the main bedroom in complete

disarray, and evidence of an unsuccessful attempt to open the safe. The maid still did not respond to her name. He tried to telephone but the instrument was out of order. He went to a neighbour to telephone from there. His wife summoned the police and she and they arrived simultaneously. Admission was gained to Ms Mbelani's room by means of a spare key. She lay dead on the floor. Her feet were tied together with some sort of cloth, a cloth was tied around her neck, and she had suffered a number of stab wounds. Goods to the value of R2 500,00 were missing from the Hearns' house.

Appellant's and Ntshangase's fingerprints were found in the room. Appellant made a statement to Captain Barnard of the police. This was admitted, after a trial within a trial, as exhibit J, and reads as follows:

> "Ek en Raymond het vanaf Alexandra na Lombardy-Oos gegaan. Dit was gedurende die negende maand 1986. Op Lombardy-Oos het 'n sekere swart vrou ons geroep en vir ons gevra om vir haar koeldrank te gaan koop. Ek het haar naam vergeet. Sy het vir ons R1,00 gegee

> en ons het vir haar koeldrank gekoop. Op pad terug het Raymond vir my gesê dat ons hierdie swart vrou moet beroof. Ons het na die vrou se kamer gegaan met twee liters koeldrank. Ek het dit gedra en dit op die tafel neergesit. Raymond het die vrou gegryp en haar gewurg. Die vrou het 'n mes uit haar oorpak getrek. Raymond het gesê ek moet die mes by haar gryp. Ek het die mes vanaf die vrou gegryp en haar met die mes op die linkerkant van haar bors gesteek. Sy het op die vloer geval. Ek en Raymond het uit haar kamer geloop na die huis van haar werkgewer. Ons het by die kombuisdeur ingegaan. Raymond het 'n hangkas in een van die slaapkamers oopgemaak. Ons het vier geldblikkies gekry. Ons het die geld gevat en geloop. Dit is al."

When testifying, appellant admitted that he had been casually employed at the Knightons' house but denied having anything to do with the robbery there. Ms Lepuru's accusation against him was false and motivated by jealousy, he surmised, because he was paid by the Knightons at a far higher scale of remuneration than she received.

As regards the later episode he testified that he and the deceased knew one another by sight. When Ntshangane seized her and she resisted,

> "(was) die oorledene ... sterker gewees as (Ntshangase), en dit het gelyk asof sy loskom van hom af. En toe sê die gewese beskuldigde 1 ek moet haar mes vat, en toe vat ek dit, en toe neem gewese no 1 dit van my af en steek oorledene daarmee. Ek is toe onmiddellik uit, gevolg deur gewese beskuldigde no 1."

In short, he contradicted his earlier confession by denying that he himself had stabbed deceased at all; though under cross-examination he said that Ntshangase had instructed him to do so.

The trial court not surprisingly found him to be a lying witness. His tale that he did not flee from the scene despite disapproving of Ntshangase's conduct because he was afraid of and had been threatened by the latter, does not merit serious consideration any more than that about Ms Lepuru's alleged jealousy does. His evidence also leaves one in the dark as to what exactly happened when Ms Mbelani resisted, and particularly when and why her legs were tied together.

The court a quo correctly found that dolus directus had under the circumstances not been proved.

No medical evidence was led at the trial, the medico-legal post mortem report having gone in by consent as exhibit B, which is perhaps unfortunate; although the doctor may not have been able three years later to remember, and give, more detail than contained in that document. The cause of death is stated to be "multiple penetrating incised wounds of the body with ligature application to the neck". Eight wounds are listed and described in somewhat contradictory fashion: although five "penetrating incised wounds" in the chest are tabulated the comment is made that "wounds 2 and 3 are non-penetrating". The fifth is described as penetrating superficially into the left breast. We do not know the depth of any of these wounds. The fourth appears to be the only one which could have perhaps caused or contributed to the death of the deceased, namely one to the side of the left nipple, the track of which passed

> "backwards and slightly laterally to enter the left chest cavity through the 5th intercostal

> space and it causes the injuries to the pericardium".

This in turn was described:

> "There is haemorrhage into the wall of the pericardium anteriorly. The heart is slightly pale."

The three remaining stab wounds were on the left upper and right lower arm and caused no vascular damage. Here too we do not know how deep those wounds penetrated.

Encircling her neck was a friction abrasion about 5 mm wide with extensive haemorrhage into the muscles of the neck. The walls of both common carotid arteries were contused, but the hyoid bone and thyroid cartilage intact. There were "numerous areas of abrasion" over the face and forehead. Without more detail one does not know what should be inferred from those.

Appellant was 22 years of age and a first offender when the offences in question were committed,

and probably illiterate since he signed his confession, exhibit J, with a thumb-print. He seems to have been neither inherently violent nor criminally inclined until Ntshangase whom he had met about two months earlier misled him onto that slippery path. Ntshangase was a good deal older than appellant, his age having been estimated at 37 years. And according to Ms Lepuru's evidence it was Ntshangase who took the lead when she herself was robbed and he was the only one who was armed. Appellant had had ample opportunity to rob her before, had he been so minded, while working there and alone with her on the premises. And although they knew one another, he made no attempt to silence her permanently to prevent her from identifying him.

Against that background it is a fair inference that although the second robbery was planned, the murder was not but came about when the deceased, probably contrary to expectation, offered armed resistance. There is nothing to contradict appellant's version that

it was she who produced the knife with which she was stabbed, and that he himself stabbed her once at most, and did so on Ntshangase's instructions, after which Ntshangase took the knife from him. On that version he had little time for reflection and there may well have been little that he could do in a situation that got out of hand. On the only evidence we have (and in accordance with the previous pattern) it was Ntshangase who strangled the deceased without any assistance from appellant. If the pattern was carried through it would probably have been appellant who tied the deceased's legs together – hardly the conduct of one confident that he and/or his socius had rendered her harmless through death.

Aggravating factors that weigh in the scale, are that the motive for the murder was robbery, and particularly that the offences were committed brashly in broad daylight in a residential area. Despite these, I do not regard the death sentence as the only one

appropriate in respect of the murder count, in view of the mitigating factors which outweigh them.

A complicating factor, and a factor which tipped the scale for the court a quo in regard to sentence on the second robbery charge, is an earlier conviction but in respect of offences committed after the ones presently in issue. Those offences were committed on 26 July 1987, and again in the company of Ntshangase. Where the pair started with robbery and graduated to robbery and murder, their activities escalated further. From the judgment of the court a quo (the SAP 69 form is not included in the record) we learn that after having been convicted of housebreaking, robbery with aggravating circumstances, murder and arson, Ntshangase was sentenced to death. Appellant received sentences totalling an effective 25 years' imprisonment. The trial judge held that those offences confirmed his impression that appellant is by now a hardened criminal. He expressed himself somewhat

unfortunately:

> "It was a heinous offence committed by two cowardly murderers - or shall I rather say, two cowardly robbers because I must take it that she was not murdered"

for purposes of determining what sentence would be appropriate on the robbery count as a separate charge.

From the discrepancy between the extreme penalty imposed on Ntshangase and that meted out to appellant, the inference is that the former pattern continued: with Ntshangase taking the lead and appellant performing a lesser role.

Were one to ignore that conviction and also that Ms Mbelani died, the death sentence would not be imperatively called for, in respect of the second robbery committed by a 22-year-old first offender with a much older man setting the pace. Because of the violence inflicted upon a woman exercising her right to defend herself, this is however clearly more serious than the offence which formed the subject of the first

count.

The weight that should be attached to an earlier conviction for offences committed after those for which an appropriate sentence is sought, must depend on all the circumstances. The trial court regarded the earlier conviction for offences committed some 9 months after those with which it was dealing as proof not only that appellant is a hardened criminal, but that

> "there is no hope of reformation for him - that is clear. If ever he were let out of goal again, I am sure he would immediately lapse into his old habits of housebreaking with concomitant results" (my underlining).

Appellant was unfortunate that the police were unable to make anything of the information given them by Ms Lepuru, that Thabo who had worked on occasion for Mr Knighton had been one of the pair who had robbed her. Instead of learning that crime does not pay, he learned that he could literally get away with murder. There has been no attempt at rehabilitating him so far, and it must carry weight in his favour that he came through the

turbulent years of youth without any clashes with the law. Ntshangase has been removed as a source of influence. But although the inference, that should he ever be free he will again break into houses and kill whoever may attempt to thwart him, is not an inescapable one, it would be unfair to the law-abiding community to subject it to the risk that a third innocent may fall victim to one who holds life as cheap as appellant does.

The appeal succeeds. The sentence of death imposed on appellant on the second count, in respect of the murder of Doreen Mbelani, is set aside and replaced by one of life imprisonment. The sentence of death imposed on appellant on the third count in respect of the robbery which led to the death of Doreen Mbelani, is set aside and replaced by one of twelve years' imprisonment.

L VAN DEN HEEVER JA

HEFER JA)
GOLDSTONE JA) CONCUR