91/92

CASE NO. 550/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

KOKO SINDILE	FIRST APPELLANT
THAMSANQA VENA	SECOND APPELLANT
NZALISEKO PIENKIE SHUMI	THIRD APPELLANT

and

THE STATE	RESPONDENT

CORAM: SMALBERGER, GOLDSTONE JJA et HOWIE AJA

DATE HEARD: 19 MAY, 1992

DATE DELIVERED: 27 MAY, 1992

HOWIE AJA: Arising out of the killing of an elderly widow and the ransacking of her home, the three appellants were convicted in the South-East Cape Local Division (Van Reenen AJ and assessors) of murder and robbery with aggravating circumstances. No extenuating circumstances having been found in respect of the murder, appellants were sentenced to death. For the robbery they were sentenced to imprisonment. An appeal to this Court against their convictions and sentences was dismissed.

The panel appointed in terms of the Criminal Law Amendment Act, 107 of 1990, ("the Act") reviewed appellants' death sentences and concluded that the same sentences would probably have been imposed had the changes brought about by the Act been in operation at the time of the trial. The matter of their death sentences is now before this Court in terms of sec 19(12)(a) of the Act. According to established principle and procedure it is for this Court, exercising an independent discretion, to undertake a comparative evaluation of the mitigating and aggravating factors relative to the murder charge and

then to decide whether the death sentences are the only appropriate sentences in respect of that offence.

The relevant facts are these. The deceased lived in a house in Walmer, Port Elizabeth. Third appellant had been employed by the deceased as a gardener for some four years. He came to work on 5 January 1988. He had the use of an outside servant's room and lavatory, in both of which various gardening tools were kept. He also had access to the key to the locked gate which led into the walled garden. At about 9 am on the morning in question, while the deceased was temporarily absent, first and second appellants arrived at the premises. This was by previous arrangement with third appellant that they would all participate in entering the deceased's house to rob her. Third appellant let them in and told them to wait in the outside room as the deceased was out and he would let them know when to enter the house. The house was equipped with burglar-proofing and an alarm system including "panic buttons". The inescapable inferences are that, to evade these measures, appellants planned to make their entry while the deceased was at home, and that, to

prevent her resisting their invasion, they intended to overcome her with physical violence. Their plan succeeded. Not long after noon appellants entered the kitchen and encountered the deceased. First and second appellants were each armed with a spade from the outbuilding and third appellant had a knife. It is not clear who commenced the assault but all three participated in inflicting multiple injuries upon the deceased with their respective weapons. There were three stab wounds of the chest. One was into the heart and this was the cause of death. There was one into each lung, both potentially fatal. Several wounds were caused by blows with the edge of a spade. One such blow, to the front of the neck, was inflicted with considerable force, sufficient to fracture the body of the fifth cervical vertebra. The deceased would have died from the stabbing within four or five minutes. The attack past, appellants proceeded to loot the house and removed goods to a value of about R5000.

The trial Court held that third appellant was criminally liable for the deceased's death but expressed no opinion on the form of his means rea. It

was also found that in making common cause with third appellant to assault the deceased, first and second appellants must have foreseen that she might be fatally injured. This was plainly a finding that first and second appellants acted with **dolus eventualis.**

The aggravating factors are not in dispute. The robbery was obviously planned before the fatal day. The culprits had ample time to reflect and to think better of their nefarious ideas. They were together on the property from about 9 am and the attack occurred after midday. Instead of using that time to reconsider, appellants waited for the moment to strike. They worked out how to evade the burglar-proofing and the alarm system. The assault was cowardly and brutal. The deceased was alone and without help in the supposed safety of her own home. The manner of the attack obviously left her no time to activate the alarm system. The raid was motivated by the quest for material gain. These features apply to all three appellants. As regards third appellant in particular, he breached the deceased's trust by abusing his position as her employee. He was clearly at least the

inside contact. Whether he was the so-called mastermind was not, in my view, proved beyond reasonable doubt. His role would have been as extensive even if the initiative and the driving force had emanated from one of the other appellants.

As far as intention to kill is concerned, there can be no other inference than that third appellant acted with **dolus directus.** The other two appellants were essentially no less blameworthy even if they did not have direct intention. At the latest when the attack upon the deceased was at long last imminent they must have foreseen that her death was a very strong possibility. The more the assault progressed the nearer to a certainty that eventuality must have appeared. Yet they persisted. This is no case in which to find that **dolus eventualis** served to mitigate the crime and its attendant circumstances.

Turning to the matter of mitigating factors, counsel for the State conceded the reasonable possibility that first and third appellants were between twenty and twenty-one years of age at the time of this incident. This is in keeping with medical

evidence called by the trial Court, in terms of which the age of each was assessed - as at June 1989 - as already at least twenty-two. It was also conceded on behalf of the State that it could not be said that appellants were beyond rehabilitation. Relevant to this last aspect is the further fact that none has previous convictions for crimes of violence. However, that, so it seems to me, is the sum total of the mitigating factors in this case and even then some qualification is necessary. Although first and third appellants were not yet adults at the time of the murder they were but a few months from majority and, practically speaking, led adult lives. (Second appellant is, on the evidence, manifestly several years older than they are.) Furthermore, first appellant, despite having no previous convictions involving violence, had nonetheless a disturbing record. In 1984 he received cuts for housebreaking with intent to steal and theft as well as a further count of theft. In 1985 he was sentenced to 4 years imprisonment, of which sentence half was conditionally suspended. That sentence was imposed in respect of two counts of

housebreaking with intent to steal and theft, one count of possessing a firearm and ammunition, three counts of theft from motor cars and one count of stealing a motor car. He was released after some 15 months in gaol. The impact of that experience obviously did not deter him from a further invasion of privacy and property.

That history pertaining to first appellant, taken together with the proficiency and resolve with which third appellant played his part in this case, strengthen the conclusion that they have no claim to be regarded as having been less than adults as at the time of the murder.

Counsel for first and second appellants submitted that their role was materially less than that of third appellant. I have already remarked on the impossibility of finding beyond reasonable doubt that it was third appellant who initiated and planned the robbery and its accompanying violence. The position is that one simply cannot determine who the mastermind was. The furthest one can take this aspect in favour of first and second appellants is that the raid could not have been achieved without third appellant's inside

help. True, he breached his trusted position as the deceased's employee. But they, on the other hand, readily and illicitly entered her premises with as much evil intent. From then on they were all on the same footing. And but for differences in the form of their intention to kill and the fact that it was third appellant who brandished the fatal weapon, their contributions to the entire criminal enterprise were also to all intents and purposes equal. I am not satisfied that in the overall picture the distinguishing features to which I have referred really serve to saddle any appellant with greater blameworthiness in respect of the murder than the others.

In the light of the aforegoing the aggravating factors outweigh the mitigating factors very considerably.

This type of murder, involving a cold-blooded, merciless attack upon an elderly person in the sanctity of her home, has, unhappily, been prevalent for some years. Understandably, it evokes feelings of alarm and outrage among all reasonable members of the national

community. They are entitled to protection and, rightly, they look to the courts to impose sentences that have the appropriate deterrent, preventative and retributive force. Having considered all the facts and circumstances relevant to sentence here, it seems to me that those elements of punishment must prevail above all other considerations. The death sentence was the only appropriate sentence in respect of all the appellants. Their appeals are dismissed and the death sentence imposed on each of them is confirmed.

HOWIE AJA

SMALBERGER JA)
CONCUR
GOLDSTONE JA)