Case No 117/92.

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between:

MKHOMBISENI MOSES MYAKA Appellant

and

THE STATE Respondent

CORAM; VAN HEERDEN, NESTADT, JJA et NICHOLAS, AJA

HEARD: 6 SEPTEMBER 1993

DELIVERED: 14 SEPTEMBER 1993

J U D G M E N T

NICHOLAS, AJA

The appellant, Moses Myaka, was arraigned before the Witwatersrand Local Division on three counts, namely,

(1) murder, (2) attempted robbery with aggravating circumstances, and (3) robbery with aggravating circumstances. He was convicted on all three counts and sentenced on count (1) to imprisonment for 15 years, on count

(2) to imprisonment for 8 years, and on count (3) to imprisonment for 5 years. It was directed that 5 years of the sentence of 8 years on count (2), and the whole of the sentence of 5 years on count (3) should run concurrently with the sentence on count (1), so that the effective sentence on the three counts was imprisonment for 18 years. The learned judge granted leave to appeal against sentence.

After hearing argument this court dismissed the appeal, stating that reasons would be furnished later. These are the reasons.

The facts follow a pattern which has become distressingly familiar.

On the evening of 10 March 1991, Myaka went together with two other men to the premises of a garage named Western Motors and Auto Electrical in the district of Krugersdorp. This was managed by Sydney Thomas Gibson. Myaka (who had a knife) and one of his associates (who had a firearm) entered the office, while the third man kept watch outside. Myaka threatened Gibson with his knife, and when the latter refused to co-operate, the second man fired two shots at him, one of which was fatal. Myaka and the second man emerged from the office, and went up to a Volkswagen Golf which was standing at the petrol pumps waiting for service. Myaka's associate grabbed the keys from the ignition lock and snatched from the driver's hand R50 which he was holding in readiness to pay for petrol. The three men then ran off. They were pursued by the occupants of the car, who brought down Myaka and effected his arrest.

The killing of Gibson formed the subject of the first count; the attempt to commit robbery in Gibson's office formed the subject of the second count, and the robbery of the keys and R50 from the driver of the Volkswagen formed the subject of the third count.

The principles to be applied in an appeal against sentence are well settled. See S v Rabie 1975(4) SA 855 (A) per Holmes JA at 857 D-F:

> "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -
> (3) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
> (4) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

It was not contended by Myaka's counsel that any irregularity was committed or that the learned trial judge had misdirected himself in any respect. It is clear from his judgment on

sentence that the judge took into account every factor of which he should have taken account, and that he did not take into account any factor which he should not have considered. Counsel's argument related to the relative weight which should have been given to the various relevant factors. That, however, is part of the adjudicative process, which is the function and prerogative of the trial judge. The broad basis of the argument on appeal was that the cumulative effect of the sentences as well as the individual sentences were shockingly inappropriate. Here too the words of Mr - Justice Holmes, when sitting in R v Lindsay 1957(2) SA (NPD) 235 at 235 F-H are appropriate mutatis mutandis:

> "Judging by the appeals against sentences which come before us, it would not appear to be sufficiently appreciated that the Supreme Court does not have an overriding benevolent discretion to ameliorate magistrates' sentences. The matter is governed by principle, not by ad hoc discretion. And the principle is this: If a magistrate has passed a sentence within his jurisdiction, and has not misdirected himself on the law, and has duly considered the relevant facts, the Supreme Court will not interfere unless the sentence is so severe as to be unjust. And the accepted test for determining this (at any rate in Natal) is for the

> appeal Court to enquire whether the sentence is so severe as to give it a sense of shock. Now 'shock' is a strong word and its requirements are not satisfied merely by a desire to interfere on sympathetic or discretionary grounds. All this is well settled, but I think it merits emphasis, for the guidance of the profession, and so that Judges may be on their guard against any tendency to substitute their discretion for that of the magistrate and to vary the sentence to one which they would have imposed if they had been sitting as a court of first instance."

In our view the sentences imposed, regarded both individually and in their cumulative effect, could not be said to be in any way excessive or unjust, and we accordingly dismissed the appeal.

There is one matter to which we draw attention. It does not appear from the record, or from what we were told by counsel both of whom appeared at the trial, that the trial judge considered whether leave to appeal should be granted to the full court. In terms of s. 315(2)(a) of the Criminal Procedure Act (as amended), if an application (excluding an application of a person who has been sentenced to death) for leave to appeal in a criminal case heard by a single judge is

granted under s. 316, the trial judge shall, if he is satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Appellate Division, direct that the appeal be heard by a full court. The present was pre-eminently a case in which the trial judge should have been so satisfied. There were no questions of law or fact involved; the case raised no question of principle; and there were no considerations which called for the attention of the Appellate Division. In order to avoid unnecessary clogging of the roll of this court with matters which do not require its attention, it is important that trial judges should not overlook the provisions of s. 315(2)(a).

H C Nicholas, AJA VAN

HEERDEN, JA NESTADT, JA

Concur