Case No 323/91
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

BOY NKOSI ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : JOUBERT, KUMLEBEN JJA et HOWIE AJA

HEARD : 17 SEPTEMBER 1993

DELIVERED : 27 SEPTEMBER 1993

JUDGMENT

KUMLEBEN JA/....

2 The appellant (accused no 3) was one of three accused charged with murder; housebreaking with intent to steal and robbery; and two counts of arson. He was found guilty in the Transvaal Provincial Division of the Supreme Court (Curlewis J sitting with assessors) on all four counts as charged. For the murder conviction the death penalty was imposed. This conviction and sentence are before us as of right in terms of s 316A of the Criminal Procedure Act 51 of 1977.

The circumstances giving rise to these charges and convictions appear from the State case and are -undisputed. Mr Essa, the complainant, was the owner of a farm store. On 20 January 1990, a Saturday, he locked it at about 1.30 pm and left. Mr Moses Mchunu, the deceased, lived in a room about 20 metres from the shop. He was engaged by Essa as a night-watchman. During the night intruders forcibly

entered the shop, stole goods from within and set it alight. The building and its contents, valued in all at about R45 000, were burned and irreparably damaged. Some of the stolen goods were recovered later in a hut on a neighbouring farm where the appellant lived or visited from time to time. The appellant and the two other accused were customers of that shop and had last visited it some two or three weeks before it was destroyed. That same night Mchunu was assaulted, strangled with a piece of binding wire and his room set alight. The charred remains of his body were found the following morning in his partially destroyed room. The cause of death was asphyxiation caused by strangulation before the body was burnt.

At the preliminary proceedings before a magistrate in terms of s 119 of the Criminal Procedure Act, the appellant made a statement in

answer to certain questions put to him. He admitted that he and two others broke into the shop. The deceased was seen running towards the home of Essa. One of the other two persons caught him. He was taken to the shop and assaulted with fists. The deceased produced a knife which the appellant wrested from him. The deceased fled to his room whilst the three of them returned to the shop, stole goods and set it alight. When the appellant emerged from the shop he realised that the deceased's room was on fire. Accused no 2, the appellant said, must have torched it since he and accused no 1 were in the shop at that time. On the strength of this statement a plea of not guilty was entered. One notes that according to this statement the appellant admits his presence there; alleges that the deceased produced a knife; and denies all complicity in the fatal attack upon the deceased in his room or that he had any part

in setting it on fire. The correctness of what he had said as recorded during these proceedings before the magistrate was expressly and formally admitted at the start of the trial.

The appellant tesstified after the close of the State case. His evidence turned out to be a complete about-face. He denied that he had been present at the scene of the crime and raised for the first time an alibi defence. His difficulties under cross-examination were inevitable. He first admitted that what he had told the magistrate in the section 119 proceedings was the truth, but concluded by saying that he had never made any statement before a magistrate.

This was not the end of his vacillation and contradictory evidence. After judgment, the appellant again entered the witness box to give evidence in mitigation. According to this version,

he and accused no 1 entered the shop. The deceased came into the shop. They grabbed him. He produced a knife from his pocket. This the appellant took from him and stabbed him with it. Under cross-examination he admitted that it was planned that they would break into the shop that night; that he stabbed the deceased because the deceased wished to prevent their breaking into the shop and stealing from it; that after the deceased had been stabbed, they left him and went on to steal; and that the deceased was later carried back to his room. He, however, denied that he had strangled him with the wire. It will be noted that this evidence conforms in some, but not all, respects to his statement in the s 119 proceedings.

Accused no 1, who testified in his own defence before judgment, gave a different account of this nefarious excursion. The two of them, he and

the appellant, went to the shop. The appellant told him that he wanted to see the deceased about money allegedly owed to him by the deceased: the appellant was a witch-doctor and said that he had provided the deceased with medicine for which payment was due. On arrival the two of them went to the deceased's room and the appellant asked to be paid. The deceased explained that he did not have any money as it was not yet the end of the month. With that the appellant felled him to the ground with a fist blow, struck him with an iron object, trampled him under foot, stabbed him with a knife and strangled him with a piece of wire. (The enquiry about money was obviously no more than a pretext for the assault.) The appellant then instructed the witness to go to the shop with him where they broke in and stole from it. It was at this stage that accused no 1's brother, accused no 2, joined them. The three of

them rifled the the shop and took the loot to the appellant's house. This evidence was not really challenged in cross-examination on behalf of the appellant although, as emerges from it, his defence at that stage had not yet changed to a denial that he was present.

To explain his participation in the housebreaking and theft, the accused no 1 said that as the appellant was a witch-doctor and was armed, he was scared of him, had to obey him and could not dissociate himself by running away. (The evidence of accused no 2 need not be referred to since it takes the complicity and the conduct of the appellant no further. It should be mentioned though, that he too, explained his lesser involvement by saying that for the same reasons he was obliged to carry out the appellant's instructions.)

The trial court held, no doubt on account

of their explanation for their participation, that they were "not perfect witnesses, not even good witnesses on every aspect" but, that one could safely infer from their evidence "that [the appellant] was the ringleader in the whole expedition." There are strong grounds for accepting the evidence of accused no 1 - as the trial court apparently did - in preference to that of the appellant. The latter was patently an untruthful witness. Apart from shifting his ground and contradicting himself, he gives no explanation for the strangulation and burning of the room which acts on all the probabilities he must at the very least have instructed or witnessed: being the ringleader, one would not have expected him to entrust this task to others in his absence. He knew that the deceased lived in that room, was employed as a night watchman and that they had to forcibly and noisily wrench open the security door of the shop

with a crowbar. It is therefore in the highest degree likely that the appellant realised the need first to despatch the deceased. Merely to immobilise him would have been insufficient since he knew all three of them and would have been able to identify them as the culprits. The appellants' account of wresting the knife from the deceased without difficulty or injury does not have the ring of truth. As I have said, the evidence of no 1 accused implicating the appellant was substantially unchallenged. For these reasons, in my view, the evidence of accused no 1 is to be preferred.

On this basis the aggravating-features of the appellant's conduct in the murder of the deceased must be viewed in the gravest light. He deliberately eliminated a night watchman of the shop in a brutal manner to effect a burglary for personal gain and thereafter callously burnt the body and the

deceased's dwelling place.

Even if one puts aside the evidence of accused no 1, the conduct of the appellant on his own evidence, is hardly less serious. After the deceased had entered the shop - which as I have indicated the appellant must have expected or foreseen - he was stabbed by the appellant, severely enough for him not to interfere with their burglary or be able to leave to report it. Thus on the appellant's version, he was callously left in that condition while they continued with the theft. When it suited them, as it were, he was strangled to death to ensure that he would not later be able to identify them. Thus the motive for the murder, whether the killing took place before or after the shop was broken into, remains a most reprehensible one.

There is a further important aggravating feature common to both versions. It was accepted

that the appellant was about 30 years old and the accused were approximately 18 years old. The appellant was, as the court found, the ringleader. It is clear that the malevolent venture was his idea and that he recruited or influenced accused no 1, if not accused no 2 as well, to take part in it. But for this there is no reason to suppose that they would today be convicted criminals.

On the facts of this case the only mitigating one is that the appellant is to be regarded as a first offender. It is an important consideration to which due weight must be attached. However, it is so far outweighed by the aggravating circumstances that the retributive and deterrent elements of punishment are paramount and make the death sentence the only proper one.

3 The appeal is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

JOUBERT JA
Concur
HOWIE AJA