

Case No 34/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SHADRACK BANGANI KHUMALO

Appellant

and

THE STATE

Respondent

CORAM: NESTADT, VAN DEN HEEVER, JJA et NICHOLAS, AJA

HEARD: 23 September 1993

DELIVERED: 29 September 1993

J U D G M E N T

NICHOLAS, AJA

The late Wessel Odendaal was a 67 year old farmer. He lived alone on the farm Katdoringfontein in the district of Reitz O.F.S. In the late afternoon of Tuesday 25 February 1992 he was milking his cows in the milking enclosure of his cattle kraal. He was assisted by a 17 year-old youth, Petrus Dladla. His maidservant, Anna Makgwa, was working in the kitchen of the farmhouse. As Odendaal was about to leave the enclosure by its wire gate, he was confronted by two men: Shadrack Khumalo and Samuel Tshabalala. They asked for tobacco and Odendaal told them to wait. He was then heard to cry out, "Los julle my, ek sal vir julle geld gee". Khumalo stabbed him twice in the chest. He fell to the ground and Khumalo stabbed him again, and, taking a key from Odendaal's pocket, left him lying there. Khumalo and Tshabalala each took hold of Petrus by an arm and forced him to accompany them to the farmhouse. They went to the main bedroom where a gunsafe was kept. (Anna managed to escape from the house and

ran off to the neighbouring farm of Petrus Odendaal to seek his assistance.) Khumalo handed to Petrus Dladla the key which he had taken from Wessel Odendaal and told him to open the safe. This Petrus did, and Khumalo took from it an airgun and a purse. He and Tshabalala then took to their heels. When Petrus Odendaal arrived at the scene, he found the dead body of Wessel Odendaal lying on the ground at the entrance to the cattle kraal.

Arising out of this incident, Khumalo and Tshabalala were charged as accused Nos 1 and 2 respectively before a court consisting of Hattingh J and two assessors. Two counts were laid against them: (1) the murder of Wessel Odendaal, and (2) robbery from Odendaal with aggravating circumstances. They each pleaded not guilty on both counts.

Evidence as to the occurrence itself was given by Anna Makgwa and Petrus Dladla. Anna also told the trial court that on Friday 21 February 1992 Khumalo arrived at the house on Katdoringfontein in which she lived with her

brother, saying that he had come to stay with them. He slept there that night and left the following (Saturday) morning, but returned in the evening when Tshabalala also arrived. The two of them stayed there on the Saturday night and again on the Sunday night. On the Monday they left saying that they were going to Qwa Qwa, but returned once more and explained that they had not been able to get transport. They slept at her house on the Monday night. They left again on the Tuesday morning.

Detective Constable Miya said in evidence that on the evening of Tuesday 25 February 1992 he was on duty in a patrol vehicle, when he received a radio message concerning a murder on the farm Katdoringfontein. He was given a description of two suspects. He drove along the Reitz-Qwa Qwa road where he encountered and arrested the two accused.

Dr. J Pellisier gave evidence of his findings on post-mortem examination of the body of the deceased. There were three stabwounds on the chest. One passed between the

3rd and 4th ribs and penetrated into the pulmonary vein just above the heart. Another penetrated the rib-cage between the 5th and 6th ribs and caused a slight wound in the left lung. The third penetrated only to the ribs. The cause of death was found to be the first stabwound and haemorrhage.

The two accused testified in their own defence, but the trial court rejected their evidence as false beyond reasonable doubt.

Both the accused were convicted of robbery with aggravating circumstances on count 2. On count 1 Khumalo was convicted of murder and Tshabalala of culpable homicide. Khumalo was sentenced to death on count 1 and to imprisonment for 12 years on count 2.

Khumalo appeals against the sentence of death. It is now for this court to make findings as to the presence of any mitigating and aggravating circumstances and to consider afresh whether the death sentence is the only proper sentence. Nevertheless the position is so clearly and

correctly set out in Hattingh J's careful and comprehensive judgment that it is convenient to quote from it.

The learned judge referred to the submissions made by counsel for the accused and for the State respectively:

"Mnr. Snyman, namens beskuldigde 1, het betoog dat dit 'n strafversagende faktor is dat u nie voorafbeplan het om die oorledene te dood nie, en dat die optrede aangemerkt behoort te word as impulsief, dat u ten tyde van die pleging van die misdryf 24 jaar oud was, en derhalwe relatief nog jonk was, en dat u ook 'n eerste oortreder is. Daarteenoor het mnr. De Klerk, namens die staat, betoog dat die doodslag plaasgevind het in die uitvoering van 'n rooftog wat gepaardgegaan het met berekende beplanning en dat, soos reeds bevind, die doodslag met direkte opset geskied het."

He went on to say:

"Ons aanvaar ... nie dat u impulsief die daad verrig het nie, maar dat u intendeel op 'n listige wyse gepaardgaande met sluwe beplanning en kille berekendheid die rooftog op die oorledene beplan het. U was vir 'n hele aantal dae op die plaas aanwesig gewees en moes u besef het dat die oorledene 'n weerlose slagoffer sou wees in die uitvoering van die rooftog op horn. Hy was ongewapen en het vreedsaam sy gang gegaan, die oorledene is daar en dan uitgewis deur horn dood te steek en terselfdertyd is enige weerstand wat hy sou kon bied teen die rooftog geneutraliseer. Dit opself saamgeneem met beskuldigde 1 se begeerte om homself te verryk wat gebore is uit gierigheid ten

koste van die lewe van 'n bejaarde man, is laakbaar en verfoeilik. Nadat u hom doodgemaak het, net u voortgegaan om u drang na gierigheid en hebsug te bevredig.

'n Verdere faktor wat oorweging verdien is of daar berou by u aanwesig is, berou afkomstig uit 'n boetvaardige hart, wat nog altyd in ons regspraak, indien dit die geval is, as strafversagtend sou figureer. In die onderhawige geval was daar egter algehele afwesigheid van enige berou. Ons is van mening dat die afwesigheid van berou in die lig van die besondere omstandighede wat u wandaad vergesel het, ook as 'n strafverswarende faktor aangemerkt behoort te word.

Wat die persoonlike omstandighede van [beskuldigde 1] betref, is [hy] 'n 24-jarige persoon wat getroud is met een kind, en is 'n hoogste skoolastiese kwalifikasie standerd 6. Voor die voorval het hy by 'n myn gewerk en daarna by 'n meubelfabriek. Daarbenewens is beskuldigde 1 'n eerste oortreder en was hy in hegtenis vir bykans twee maande.

Die belange van die gemeenskap is uiteraard 'n belangrike faktor wat oorweging verdien by die oorweging van wat 'n gepaste vonnis behoort te wees. Daardie belange is veelledig. In sommige gevalle tree die belang na vore wanneer die gemeenskap teen die gedrag van 'n bepaalde individu beskerm moet word. In ander gevalle verdien die belang oorweging wanneer die orde en vrede in die gemeenskap ter sprake kom. Ook tree die belang na vore wanneer lede van die gemeenskap afgeskrik moet word. Dat orde in die gemeenskap gehandhaaf moet word behoef geen betoog nie. Stellig behoef dit ook geen betoog dat daar op vele

terreine in die huidige samelewing hier te lande
 geen orde meer is nie. Een van daardie terreine
 hou verband met die lewe en eiendom van veral
 bejaarde en vredeliewende mense van hierdie land,
 hetsy hulle in stede of dorpe of plase woonagtig
 is. Bejaardes het in die afgelope paar jare die
 skyf van vele booswigte geword en geeneen kan meer
 veilig voel nie, selfs nie eens wanneer die beste
 voorsorgmaatreels getref word nie. Daarom moet
 'n gepaste vonnis uitdrukking verleen aan die
 gevoel van verontwaardiging, weersin en afgryse wat
 u optrede by die ordentlike lede van die gemeenskap
 ontketen het."

Hattingh J went on to refer to a number of
 judgments, reported and unreported, in which this court has
 considered what is the proper sentence in a case where a
 murderous attack has been made on a defenceless person,
 frequently aged, living in comparative isolation in a rural
 area. There has been a disturbing increase in the number of
 such cases. They are giving rise to feelings of insecurity
 in the community and are causing justifiable outrage. The
 judgments reveal a consensus that in these circumstances the
 deterrent and retributive aspects of punishment must weigh
 heavily in the determination of proper sentences.

The learned judge said that in determining the proper sentence he took into account all the circumstances of the case as well as the mitigating and aggravating factors. He considered that the possibility of rehabilitation could not be excluded, but said that this was outweighed by the interests of the community and by the elements of deterrence and retribution:

"Die moontlikheid van rehabilitasie kan sekerlik nie heeltemal in u geval uitgeskakel word nie. Hierteenoor kom egter die belang van die gemeenskap en die elemente van afskrikking en vergelding by straftoemeting sterk na vore, veral wanneer die slagoffer 'n weerlose bejaarde op 'n afgesondere plaas in die loop van 'n rooftog vermoor word. Sodanige optrede soos die waaraan u u skuldig gemaak het, is iets wat vir die gemeenskap inherent verderflik is. Ek het na diepe bepeinsing noukeurige oorweging verleen aan die vraag of 'n lang termyn van gevangenisstraf, selfs lewenslange gevangenisstraf, nie deur die gemeenskap geag sal word voldoende afskrikking vir andere, en as 'n vorm van rehabilitasie vir u gepas sal wees nie. Egter is ek in my gemoed so oortuig dat die boosheid van die moord so skokkend is en so luid om vergelding roep, dat die gemeenskap die vernietiging van u opeis as die enigste aanneemlike en paslike straf vir die pleging van die moord en dat die onvergelyklike uiterste straf u opgele moet word op aanklag 1."

I entirely agree.

The appeal is dismissed.

H C NICHOLAS, AJA

NESTADT, JA

VAN DEN HEEVER, JA Concur