Case No: 120/93
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PATRICK BHEKI NGIDI Appellant

and

THE STATE Respondent

CORAM: SMALBERGER, EKSTEEN, JJA,
et HARMS, AJA

HEARD: 18 NOVEMBER 1993

DELIVERED: 22 NOVEMBER 1993

J U D G M E N T

SMALBERGER, JA :-

The appellant was convicted in the Durban and Coast Local Division by ALEXANDER, J, and assessors of one count each of murder and robbery with aggravating circumstances. He was sentenced to death on the murder

count, and to 10 years' imprisonment in respect of the robbery. He now appeals, in terms of sec 316 A of the Criminal Procedure Act 51 of 1977, against the sentence of death imposed upon him.

The late Mrs Thelma May Shorten ("the deceased") was a 7 6 year old widow who lived alone in her house in Westville, Durban. Her domestic servant, Mrs Grace Mthembu, who had been in her employ for more than 10 years, also resided on the premises. However, Mrs Mthembu used to be off duty over weekends, and it was her invariable practice to go away on a Saturday afternoon and return the following evening. The appellant is Mrs Mthembu's son. While still a youth he had on occasions worked for the deceased in her garden. He regularly visited his mother at the deceased's house. That he was known to the deceased permits of no doubt.

The incident giving rise to the deceased's death occurred on a Sunday morning. It is common cause

that the appellant, knowing that his mother would not be on the premises, went to the deceased's house in order to rob her. He lay in wait for approximately 40 minutes in the vicinity of the kitchen door for the deceased to emerge. When she eventually left the house en route to the outside laundry the appellant confronted her.

What happened thereafter, according to the appellant's evidence, is that he grabbed hold of the deceased by the top of her nightdress or housecoat that she was wearing and pushed her backwards. The deceased stumbled at the laundry door, tripped and fell heavily to the floor of the laundry. He left her there, conscious and trying to lift herself off the floor. He entered the house where he helped himself to money and various articles belonging to the deceased, mainly jewellery. He was so occupied for not less than 10, and possibly as long as 30, minutes. When he left the deceased was still conscious and trying to lift herself

off the laundry floor. (It is common cause that the deceased was found dead on the laundry floor the following morning by Mrs Mthembu.)

The appellant's version of what occurred was rejected by the trial court, largely on the strength of the incontrovertible medical evidence. Apart from that, the appellant proved himself to be an untruthful, unreliable and scheming witness in a number of important respects. The post-mortem findings establish that the appellant strangled the deceased with a view to subduing and permanently silencing her. They revealed the following:

1) A fracture of the hyoid bone caused by the application of moderate direct force to the neck for at least 30 seconds;

2) Abrasions on the neck consistent with manual strangulation;

3) Contusions and abrasions of the deceased's

face consistent with a hand being placed forcibly over her mouth, presumably to prevent her from screaming;

4) Abrasions of the body consistent with the application of physical force to subdue resistance;

5) Contusions of the head in keeping with the notion that the deceased's head had been pounded on the floor;

6) Cyanosis of the face indicative of death through failure of the respiratory system.

The cause of death was found to be strangulation. The medical evidence was further to the effect that death would have occurred within three minutes of the fracture of the hyoid bone, thus effectively giving the lie to the appellant's evidence that the deceased was still alive when he left the premises.

It is common cause that the appellant did not attempt to disguise himself in any way when he went to

the deceased's house. He must have appreciated that the deceased would be able to recognise him. It was not necessary for him to kill the deceased in order to carry out the robbery. The trial court held that the only reasonable inference to be drawn from the facts was that the appellant went to the deceased's house not only to rob her but with the preconceived idea of killing her to prevent later detection. This finding is unassailable.

We are called upon to consider, in the exercise of our discretion, and with due regard to the presence or absence of mitigating and aggravating factors, whether the death sentence is the only proper sentence. The appellant was unemployed when he committed the offences but by no means destitute as his mother apparently used to assist him financially. He was 22 years old at the time. The only significant mitigating factor present is the fact that he is a first

offender. His youth is also a consideration, although there is nothing to suggest that he is in any sense immature. In his favour it must be said that he is probably capable of rehabilitation. As against this there are significant aggravating factors present. The deceased, a defenceless, elderly woman, was brutally attacked in the privacy of her own home. The robbery and the murder were well-planned and premeditated. The appellant had ample time to reflect upon what he was about. His motive was the base one of greed. A further relevant consideration is that, according to the evidence, the deceased had been kindly disposed towards the appellant in the past. Finally, there is a total absence of genuine remorse on the appellant's part for his evil deed.

This is another example in the all too long catalogue of tragic cases involving fatal attacks on elderly people in the sanctity of their homes.

According to evidence led at the trial this disturbing tendency is on the increase. In determining whether or not the death sentence is the only appropriate sentence in this and similar matters the following passage from the judgment of EKSTEEN, JA, in the recent case of S v Khiba 1993(2) SACR 1(A) at 4c-i is apposite:

> "This Court has in diverse cases had occasion to express itself on such unprovoked attacks on defenceless victims in their own homes. In one such case - S v Shabalala and Others 1991(2) SACR 478(A) - GOLDSTONE JA, in confirming a sentence of death, remarked at 483c-e that:
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> > 'While giving consideration to the objects of punishment (deterrent, preventive and retributive) it may be said that the three appellants are capable of reform. However, in this type of case the deterrent and retributive objects come to the fore. All members of our society are entitled to security in their own homes. It is unfortunately a fact of modern living that precautions, and sometimes elaborate and costly precautions, are taken to safeguard life and property. In the isolated rural areas of this vast country those precautions are more difficult to effect than in urban areas. Our farming

> community too frequently falls victim to the violent criminal. The justifiable outrage understandably caused thereby must be a relevant factor in the imposition of a proper sentence in this kind of case. Such a sentence should act as a deterrent to others who may be tempted to murder or rob defenceless and innocent people. It should also, in a suitable case, reflect the retribution which society demands in respect of crimes which reasonable persons regarded as shocking.'

(See also S v Khundulu and Another 1991(1) SACK 470(A); S v Makie 1991(2) SACR 139(A); S v Sesing 1991(2) SACR 361(A); S v Ngcobo 1992(1) SACR 544(A); S v Jordaan 1992(2) SACR 498(A) and S v Mofokeng 1992(2) SACR 710(A).) In all these cases the death sentences imposed on the appellants were confirmed. In Khundulu's case one of the victims, though aged 62, was described by the trial Court as a 'strong man', and the intention of one of the appellants was found to have been dolus eventualis. In Mofokeng's case the appellant was 19 years old, and in Jordaan's case he was 20 years old and a first offender. These decisions seem to reflect the gravity with which this Court regards murderous attacks on victims in their own homes and more particularly on isolated farms. Sentences of death have been confirmed not only when the victims were old and frail but also where they were ablebodied and strong. So, too, even where the intention was dolus eventualis

> and where the appellants have been comparatively young, and even first offenders. The reasoning in these cases, as exemplified in the dictum from Shabalala's case quoted above, is compelling and commends itself to any reasonable mind."

Counsel for the appellant put foward the argument that because of the so-called "moratorium" which the executive authority is at present applying to the execution of death sentences, that sentence has lost its deterrent and retributive effect and that such considerations are no longer valid in determining whether, in a given case, the death sentence is the only appropriate sentence. That argument has already been rejected by this Court for cogent reasons, and is without merit (see S v Williams, an unreported judgment of this Court delivered on 24 May 1993).

I agree with the views expressed in S v Khiba quoted above. Applied to the facts of the present matter they lead to only one conclusion - that the death

sentence is the only appropriate one.

The appeal is dismissed.

J W SMALBERGER

EKSTEEN, JA )
HARMS, AJA ) CONCUR