Case No

394/92 /MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MULATEDZI MOSES NEMASETONI

Appellant

- and -

THE STATE

Respondent

CORAM: VIVIER, F H GROSSKOPF et NIENABER JJA.

HEARD: 5 March 1993.

DELIVERED: 5 March 1993.

TRANSCRIPT OF REASONS ORALLY DELIVERED IN OPEN COURT ON FRIDAY 5 MARCH 1993, BY VIVIER JA AND CONCURRED IN BY F H GROSSKOPF AND NIENABER JJA.

VIVIER JA:

The appellant was convicted by VAN DER WALT J and assessors in the Venda Supreme Court on one count each of murder, attempted rape and assault with intent to do grievous bodily harm. On the murder count no extenuating circumstances were found and under the then prevailing law the appellant was sentenced to death. On the attempted rape and assault charges he was sentenced to three years' and two months' imprisonment respectively which sentences were ordered to run concurrently. Since the trial the provisions of the Criminal Law Amendment Act 107 of 1990 have been adopted in Venda by the Venda

Criminal Procedure Amendment Proclamation 16 of 1991. In terms of sec 316A of the Criminal Procedure Act 51 of 1977, as amended, the appellant appeals to this Court against the sentence of death imposed in respect of the murder count. Under the new Legislation this Court has a

discretion to determine, with due regard to the presence or absence of any mitigating or aggravating factors, whether the sentence of death was the only proper sentence.

The deceased, who was the appellant's grandmother, was killed at Madombidzha in the district of Tshilwavhusiku on 18 November 1989. At about six o'clock that afternoon the complainant on the attempted rape charge, E.S., was accosted on her way home by the appellant who stabbed her with a knife on the forehead and on the top of the head and ordered her to accompany him to his house where, he said, he would sleep with her for a whole month. On the way she managed to break lose and attempted to seek refuge at the house of one Ratshilavhi, who turned her away after the appellant had threatened him. The appellant grabbed hold of her again and, still wielding a knife, dragged her to a tree next to the road where he cut

open the front of her skirt and blouse with the knife, and said that he would rape her there. She pleaded with him to take her to his house where she would submit to him and he eventually agreed. Upon their arrival at the premises where he lived with his father, his sister Lucy and the deceased, E. again managed to get away from the appellant. She ran into a room where she found the appellant's father Samuel, the deceased and some other people. She told them what had happened. Samuel went to the door and saw the appellant outside with a piece of burning firewood in his hand. When Samuel told him to go away the appellant hit him on the hand with the piece of wood. A scuffle ensued between the two men and Samuel managed to take the piece of wood from the appellant and throw it away. They started hitting each other with their fists. The deceased then came between them and pushed Samuel away. The appellant took out his knife and

tried to stab Samuel but by mistake stabbed the deceased instead. The appellant thereafter inflicted three more stab wounds upon the deceased who collapsed and died shortly afterwards. Samuel, who had gone to search for a weapon, came back and the appellant said to him that he would kill him like he had killed the deceased and that he would burn down his house and outbuildings. The police were summoned and the appellant was arrested later the same evening.

The post-mortem examination of the deceased's body revealed that she had sustained four stab wounds to the front and back of the chest of which two were to the mid upper back. One of the wounds to her back penetrated the heart and left lung and caused her death. None of the other wounds penetrated into the chest cavity.

The trial Court found that it had not been established that the appellant had acted with dolus

directus in causing the death of the deceased. It held that the first blow, aimed at Samuel, may have been the fatal one. The appellant was nevertheless guilty of murder as he must have foreseen that he could hit the deceased who was in front of him and between him and Samuel. He nevertheless took the risk and used the knife and thus had the required intention to kill in the form of dolus eyentualis. The appellant's version, which was rejected as false by the trial Court, amounted to a denial that he had assaulted either the deceased or E..

In his evidence on the issue of extenuating circumstances the appellant persisted in this denial. He testified that his mother had left his father when he was still a young child and that he had been brought up by the deceased, whom he loved very much. He was taken out of school at an early age as he had to look after Lucy. The appellant was 24 years

old at the time of the commission of the offences. He admitted no fewer than nine previous convictions of which four were for assault with intent to do grievous bodily harm. He is clearly a man given to violence and his prospects of reform must be regarded as poor. The fact that he killed an innocent, defenceless old lady who had done him no harm and posed no threat to him is an aggravating factor.

An important mitigating factor in the present case is that the appellant did not have the direct intention to kill when he delivered the blow which, it must be assumed in his favour, caused the deceased's death. The State evidence as to the exact positions of the appellant, the deceased and Samuel in relation to one another when the fatal blow was struck, is not altogether clear. In my view the State cannot be said to have established that the risk involved was objectively high. Nor has it been established that

the appellant subjectively appreciated that there was a high risk of the deceased being killed when he stabbed at Samuel. It is true that the appellant continued to stab the deceased three more times, but the exact position and nature of these three stab wounds are not clear. Dr Roubos, who conducted the post-mortem examination of the deceased's body, was not available to give evidence at the trial, and his report which was placed before the trial Court by agreement between the parties, merely described these wounds as three nonpenetrating cut wounds of the chest, of which two were at the right armpit. Another mitigating factor is that the murder was neither planned nor premeditated but was committed on the spur of the moment while the appellant was provoked and angered by the fight with Samuel.

In all the circumstances I am of the view that, while this remains a most serious case, it cannot

be placed in the category of the exceptionally serious cases where the death sentence is imperatively called for. Although the death sentence may be a proper sentence, it has not been shown to be the only proper sentence. In my view a sentence of 20 years' imprisonment would adequately serve the main purposes of punishment.

In the result the appeal is upheld. The death sentence is set aside and for it is substituted a sentence of 20 years' imprisonment.

W. VIVIER JA.

F H GROSSKOPF JA)
NIENABER JA) Concurred.