CASE NO : 541/91 and
616/91

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

ROBERT MATLOMOLA TSHABALALA	First Appellant
KENNY SEGOE	Second Appellant
STEPHEN SHINE MOLEFE	Third Appellant

and

THE STATE	Respondent

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CORAM: SMALBERGER, FH GROSSKOPF, JJA,
et HOWIE, AJA

HEARD: 23 February 1993

DELIVERED: 5 Maart 1993

J U D G M E N T

SMALBERGER, JA :-

On the night of 13 December 1989 the three appellants broke into the house of Mrs Nola Harriet Levy

("the deceased") at 145 Corlett Drive, Johannesburg. Access was gained through the kitchen window. The deceased was absent from the premises at the time. The appellants' motive was theft. While they were going about ransacking the house the deceased returned. When they heard the sound of her car they sought shelter behind a bedroom door. After entering the house the deceased retired to her bedroom, unaware of the events that had taken place during her absence. The appellants decided amongst themselves that it would be necessary to render the deceased helpless in order best to achieve their felonious purpose. They waited until the deceased was asleep before making their move. They then entered her room where they subdued, bound and gagged her. In the process they overcame her resistance by force. In the course of the struggle the deceased sustained numerous head and facial injuries including a broken nose. Most of the injuries were of a relatively

minor nature. She was left lying on her back on the floor of her room. The appellants then proceeded to partake of food and liquor in the house before leaving, some hours later, in the deceased's motor vehicle. They took a considerable quantity of goods with them. The following morning the deceased was found dead in her bedroom by her domestic servant. The above facts are either common cause or not in dispute for the purposes of the present appeal.

Following on these events the appellants were convicted in the Witwatersrand Local Division by M J STRYDOM, J and two assessors of (1) murder and (2) housebreaking with intent to steal and robbery with aggravating circumstances. On the latter count they were each sentenced to eight years' imprisonment. On the murder count the learned trial judge, after a thorough review of the relevant mitigating and aggravating factors, came to the conclusion that, in the

case of all three appellants, the death sentence was the only proper sentence, and sentenced them accordingly. They now appeal against both their convictions and sentences of death on the murder count. The essential issues raised on appeal on behalf of the appellants were (1) causation, (2) intent and (3) sentence. I shall deal with each of these in turn.

Causation

It was contended under this head that the State had failed to prove that the appellants' conduct was directly and causally responsible for the deceased's death.

According to Captain van Wyk, the investigating officer, he arrived at the deceased's house shortly after 06:15 on the morning after her death. He found the deceased lying on her back on the floor of her bedroom. She had her head on a pillow and

her body was covered by a duvet. Her hands were tied behind her back and her ankles were bound together. There was a skirt tied around her throat and mouth. There was some blood around her nose and on the back of her head. The bedclothing was bloodstained and there were traces of blood on the wall adjacent to the bed. After loosening the skirt he observed two socks in the deceased's mouth. A third sock came away from her mouth when the skirt was untied. It is common cause that a further sock was found lodged in the back of her throat at the post-mortem examination conducted by the pathologist, Dr Steenekamp. He saw the deceased's body for the first time at her house at approximately 08:30 on the morning in question. He only recalled seeing one sock in her mouth at that stage (and not two, as stated by van Wyk). I shall revert to this difference in their evidence later.

Dr Steenekamp concluded at the post-mortem

examination that the cause of the deceased's death was suffocation. (That this was in fact the cause of the deceased's death was admitted by the appellants at the commencement of the trial - an admission never subsequently retracted.) The immediate cause of the suffocation was the sock found in the back of the deceased's throat which overlay the epiglottis and obstructed the airflow into her lungs. This would have led to anoxia, shock, heart failure and consequently death. On the medical evidence there were only two possible explanations for the presence of the sock: (1) it was manually thrust into the back of the deceased's throat or (2) the deceased suffered some form of seizure which led to her involuntarily swallowing, causing the sock to be drawn into the position in which it was found. There were clinical findings to support the first explanation. Dr Steenekamp found small submucosal haemorrhages in the back of the deceased's throat which

were consistent with the sock having been forcibly thrust there. On the other hand he could find no clinical signs normally evident in the case of a seizure (such as a bitten tongue). On a proper conspectus of the medical evidence it would seem that a seizure was a remote rather than a reasonable possiblility. It follows that the only reasonable inference to be drawn is that the sock was forced into the back of the deceased's throat. In any event, whatever the precise mechanism of death, it was the presence of the sock in the deceased's mouth that ultimately caused her death by suffocation; at the very least it was a major contributing factor. On the assumption that the appellants were responsible for the sock in the deceased's mouth the causative link between their acts and the deceased's death has been established.

Intent

As previously mentioned, it is common cause that after the return of the deceased the appellants agreed amongst themselves to overpower her and render her helpless. In the execution of their common purpose they duly subdued, bound and gagged her. In statements made by them shortly after their arrest, which were admitted in evidence against them, they described how, while two of them held the deceased's arms and legs, the third forced what eventually turned out to be socks into her mouth to prevent her from screaming. It is apparent from their statements that each appellant associated himself with the acts of the others, thereby making himself legally responsible for both his own and their acts. When giving evidence the appellants denied that anything had been forced into the deceased's mouth, but their denials were rightly rejected by the trial court. Quite clearly their statements reflected the true state

of affairs in this regard, and were accepted as such.

Because the statement of any one appellant could not be used as evidence against the others the trial court was unable to make a conclusive finding as to which appellant had actually thrust the socks into the deceased's mouth. Only the appellant who did so would appreciate how deeply he had forced the socks into the deceased's mouth and throat, a factor relevant to his actual foresight of the possibility of her death. Given the circumstances pertaining at the time - a relatively poorly illuminated room, an ongoing struggle to subdue the deceased and the latter's probable resistance to anything being forced into her mouth - the other two appellants are unlikely to have appreciated just how deep the inward thrust into the deceased's oral cavity was. As it cannot be established which appellant was responsible for forcing the socks into the deceased's mouth the guilt of each must be assessed on

the lesser basis that each had knowledge only that socks (or something similar, they may not have known precisely what) were thrust into the deceased's mouth to prevent her from screaming and that thereafter a skirt was tied over her mouth, acts with which each appellant associated himself.

As previously mentioned Captain van Wyk and Dr Steenekamp appear to have contradicted each other with regard to the number of socks found in the deceased's mouth and throat. It seems to me to be unnecessary to resolve the conflict. Whether there were three or four would probably not have had a significant bearing upon the choking effect of what was essentially a wad of material thrust into the deceased's mouth. And in any event one must proceed on the premise that none of the appellants would have been aware of the precise number of socks thrust into the deceased's mouth. All each one must be taken to have known was that enough material

of some kind had been used to effectively prevent her from screaming.

> As appears from the medical evidence, the mere presence of socks in the deceased's mouth would not per se have prevented her from breathing. But in her case she had suffered, in the course of the assault upon her to subdue her, visible head and facial injuries. According to their evidence both the second and third appellants were aware, when they assisted in gagging and binding her, that her nose was bleeding. The first appellant's evidence is silent on this point, but if the other two appellants were aware of this (what must have been fairly obvious) fact, the only reasonable inference is that he must have been equally aware thereof. A person with the meanest intelligence would appreciate that a bleeding nose interferes with normal breathing. The socks in the deceased's mouth would have interfered further, and no doubt significantly, with her breathing

process. To this must be added the fact that the appellants tied a skirt around the deceased's throat and neck thereby effectively preventing her from expelling the socks from her mouth.

Having regard to the circumstances outlined above, a reasonable person in the position of any one of the appellants ought to have forseen that the socks thrust into the deceased's mouth would gravely impair her breathing process and could cause her to die from suffocation. The question is whether each appellant subjectively foresaw the possibility of her death, for proof of such subjective foresight is a necessary prerequisite for a finding of intent in the case of murder. In this respect one must guard against leaping to the conclusion that because the appellants ought to have foreseen her death they did in fact foresee it.

Proof of the appellants' subjective foresight of the possibility of the deceased's death is to be

found mainly in certain statements made by each under cross-examination. Each in effect admitted knowing that if socks were bundled up and placed in a person' s mouth they would interfere with such person's breathing and could possibly lead to suffocation and death. It was argued on the appellants' behalf that this evidence was ex post facto and may have been based on what they had heard in evidence during the trial. It did not therefore necessarily reflect their subjective belief at the time the socks were thrust into the deceased's mouth. However, the appellants never sought to qualify their answers and there is no basis for holding that they did not at all material times hold the belief they professed to in their evidence. Even if the factual situation put to the appellants under cross-examination, which elicited the responses I have mentioned, went somewhat further than the evidence justified I do not think that it detracts from the fact

that their replies clearly showed a subjective awareness of the dangers inherent in stuffing socks into the mouth of a person in the deceased's position. That subjective awareness would have been heightened by the fact that they were dealing with a person who was injured, whose nose was bleeding and whose mouth was covered by a skirt tied around it. The false denials by the appellants in evidence that socks were thrust into the deceased's mouth further strengthens the inference that they subjectively appreciated the dangers inherent in their conduct.

In all the circumstances the only reasonable inference to be drawn is that the appellants foresaw the death of the deceased as a possibility and reconciled themselves with that event occurring - such reconciliation being reflected in their reckless disregard of whether the deceased died or not. This was evidenced by their complete lack of interest in or

real concern for the fate of the deceased after leaving her injured and trussed up in her room. Thus dolus eventualis on the part of all three appellants was proved and they were correctly convicted of murder.

Sentence

This Court is free, upon a consideration of all relevant mitigating and aggravating factors, to make its own assessment whether the death sentence in casu is the only appropriate sentence in respect of each of the appellants. Its discretion is not in any way fettered by the findings and conclusions of the trial court (save that it should allow itself to be guided on issues of credibility).

There are substantial mitigating factors present. The appellants' motive in breaking into the deceased's house was one of theft. They did not go there with the preconceived idea of robbing or killing

the deceased. They broke into her house in her absence. For practical purposes they were unarmed. One of the appellants had a knife in his possession but it was used solely for the purpose of effecting entry into the house. It was never used to inflict injury on the deceased even though the opportunity to do so presented itself later. It must be accepted in the appellants' favour that they were disturbed by the early return of the deceased - it was not established that they had deliberately waited for her to return. Their form of intent was no more than dolus eventualis. Their primary intention was to subdue her and render her helpless so that they could proceed to ransack the house undisturbed. There is no justification for finding that they foresaw the deceased' s death as a strong possibility. I disagree with the trial court's finding that their conduct bordered on dolus directus; if anything the scale tilted the other way.

All the appellants come from a low socio-economic background. The first appellant was 19 years and 4 months old when the offence was committed, prima facie he would not yet have reached emotional and intellectual maturity. This inference is not sufficiently disturbed by the fact that he was the prime mover behind the housebreaking venture and that he outwardly leads an adult existence. Even though he may have been hardened to life's vicissitudes, immaturity is still likely to have been a part of his make-up. It will require exceptional circumstances before it can confidently be said that the death sentence is the only proper sentence for a 19 year old. Such circumstances were found to be present in S v Mofokeng 1992(2) SACR 710(A) (but see contra S v Cotton 1992(1) SACR 531(A)). A further consideration is that while the first appellant has four previous convictions for housebreaking or attempted housebreaking he has no

previous convictions involving physical violence. It cannot therefore be said that he is incapable of rehabilitation as far as any violent tendencies he may have are concerned.

The second and third appellants are in a less favourable position. They were 25 and 24 years old respectively at the relevant time. Youthful immaturity is therefore not a consideration as far as they are concerned. In their favour is the fact that they did not set in motion the events of that fateful night. They were lesser players in a venture initiated by the first appellant. The second appellant has two previous convictions of which one was for assault with intent to do grievous bodily harm. Judging from the sentence imposed it was not a particularly serious offence. In his case too rehabilitation cannot be ruled out. The third appellant has previous convictions for assault with intent to do grievous bodily harm, robbery and

attempted robbery. The first two were committed when he was a juvenile and were taken together for the purposes of sentence. The sentence imposed was one of 7 cuts with a light cane. The third offence was committed in 1984 and resulted in a gaol sentence. While his prospects of rehabilitation seem somewhat remote they are probably not entirely lacking.

There are a number of seriously aggravating factors present. The appellants could have made good their escape after the return of the deceased had they chosen to do so. Instead they turned to robbery. Their revised plan of action was a considered one and they bided their time before putting it into effect. Theirs was therefore not a spur-of-the-moment decision. In the end result their actions were dictated by self-interest and greed. Their attack upon the deceased, a defenceless middle-aged woman, in the sanctity of her own bedroom constituted an unwarranted and grave

invasion of her privacy. Their conduct is made all the more serious because of the prevalence of this type of offence. The retributive and deterrent objectives of punishment come strongly to the fore when considering an appropriate sentence in cases such as the present. On the other hand it must be borne in mind that the appellants did not make themselves guilty of mindless violence or undue savagery or brutality as is so frequently the case. Initially they appeared to show some concern for the deceased by throwing a duvet over her, although they later displayed a somewhat callous indifference to her fate. Their callousness, however, was not of the magnitude found by the trial court, the court having misinterpreted certain aspects of the evidence in arriving at its conclusion in this regard (the details of which need not be gone into).

While the mitigating factors in favour of the first appellant are somewhat greater than those in

favour of the other two appellants, I do not think that the relevant circumstances warrant a distinction being drawn between the appellants in regard to sentence. Without in any way detracting from the heinous nature of the offence, this is not a matter of such exceptional seriousness that it can be said that the death sentence is the only proper sentence. A long term of imprisonment would be equally appropriate.

In my view all the objectives of punishment would be achieved by a sentence of 20 years' imprisonment for each appellant. It follows that the appeal against sentence must succeed.

The following order is made:

(1) The appeals against the convictions are dismissed but those against the sentences are allowed.

(2) The sentences of death imposed upon the three appellants are set aside and are replaced, in respect of each appellant, by a sentence of 20 years' imprisonment. It is ordered that the sentence of 8 years' imprisonment on the housebreaking

count is to run concurrently with this sentence.

(3) The Registrar is directed to transmit a copy of this judgment to the Department of Correctional Services.

J W SMALBERGER
JUDGE OF APPEAL

F H GROSSKOPF, JA)
HOWIE, AJA) concur