Case Nos 202/92 - 312/92

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

JOHN MSHAYINA NTULI Appellant No 1

PETROS LUTHULI Appellant No 2

and

THE STATE Respondent

CORAM: E M GROSSKOPF, KUMLEBEN, JJA et HOWIE, AJA

HEARD: 8 March 1993 DELIVERED: 11 March 1993

J U D G M E N T

E M GROSSKOPF, JA

During the months of November and December 1990 the two appellants committed three sets of offences for which they were subsequently charged in the Durban and Coast Local Division. First, on 1 November, they broke into the house of a 79 year old man, John Leonard Hornsey, who was living on his own. They overpowered, bound and gagged him. He died as a result of the assault on him. According to the evidence of the pathologist who performed the autopsy, the gag consisted of numerous strips of material which had been tightly applied over the mouth, the upper part of the nose and the forehead, resulting in total obstruction of the oral cavity and partial obstruction of the nostrils. As to the cause and time of death, the pathologist said the following:

> "The deceased in this particular instance died of asphyxiation. There were ample signs to indicate this at autopsy. What I cannot indicate is whether death occurred while the ligatures and straps were placed over the face, or whether the person died shortly afterwards. But should the deceased have died shortly after application of the ligatures death would have ensued, I think, within a couple of minutes."

After putting Mr. Hornsey out of action, the two appellants stole a number of articles from the house and left.

Then, on 12 December, the appellants broke into the home of Ethel Jean Main, an 82 year old woman who was alone at home at the time. Again they bound and gagged her, but they were disturbed before they could steal anything. The gag consisted of a scarf, a dish cloth and a portion of a shirt or a blouse which were tightly bound around her head. The effect of this gag was stated as follows by the pathologist:

> "M'Lord, again I think this is a similar situation to the previous case. The deceased could have died during the application of the strips of material over the face, or could have died shortly thereafter due to an accumulation of saliva in the back of the throat and an inability to breathe normally. Again the features seen are consistent with asphyxia."

Finally, on 23/24 December, the appellants broke into the house of another old man who was living on his own, one George Frederick Thomas Hambly, who was 84 years old. The

state in which his body was found was described as follows by the pathologist:

> "M'Lord, again the body was tightly bound. The hands and feet were tied together, and again rags had been applied over the face, and the chief post-mortem findings made by me at the time of autopsy were extensive bruising to the soft tissues of the neck, with associated fracture of the hyoid bone, pulmonary oedema and congestion, and again there were petechias present over the conjunctival membranes of the eyes and over the lungs.
>
> And what was your conclusion as to what was the cause of death?- - -In this particular case my conclusion was that death was due to manual strangulation."

The fracture of the hyoid bone, the pathologist said, had occurred while the deceased was still alive, and indicated that he had been manually strangled. The deceased would have died almost immediately following the fracture of the hyoid bone. The intruders stole a number of articles before leaving.

Arising out of these incidents, the appellants were charged with three counts of murder and three counts of

housebreaking with intent to rob and robbery or attempted robbery. They were convicted as charged. For the murder of Mr. Hambly, the two appellants were sentenced to death. In respect of the other charges periods of imprisonment were imposed totalling, in respect of the first appellant, 60 years, and, in respect of the second appellant, 47 years.

The present appeal is directed only against the death sentence.

The reason given by the learned trial judge for imposing the death sentence in respect of the murder on Mr. Hambly (count 6) was that in that case, as distinct from the others, dolus directus was proved to have been present. This was motivated as follows:

> "Count 6 involved a moderate degree of force and it seems that the application of manual force to an area which is notoriously potentially fatal justifies beyond reasonable doubt the conclusion that the death of the deceased was intended. Mr Ramsden, for accused No 2, suggested that the fact that the deceased was bound as well indicates otherwise, for if the accused was strangled first there was no need to bind him, unless the attackers believed that he was still alive, and if he were bound first there would be no need to

> strangle him. In this matter, however, we have the positive feature of a proved manual strangulation. To conjecture on the sequence of events is unprofitable."

This reasoning was strongly attacked on appeal. In particular counsel stressed before us, as they had in the trial court, that if the appellants had been actuated by the direct intention to cause the death of the deceased, they would probably not have taken the trouble to bind and gag him. The fact that they did so showed, it was contended, that they thought that he was still alive at that stage, and there would have been no reason for them to strangle him afterwards. This submission leaves out of account that the first appellant did painting work at the deceased's house some years previously, and it is quite possible that he might have wanted to kill the deceased so as to eliminate a possible witness to his identity. However, be that as it may, I do not think much turns on the question of dolus directus. If one assumes that this was a case only of dolus eventualis

it would not detract substantially from the blameworthiness of the appellants' conduct. The deceased was manually strangled, gagged and tied up in a manner which was, objectively speaking, certain to cause the rapid death of this frail old man. It is impossible to believe that the appellants did not realise that there was at least a very strong chance that he would die. If they had taken the trouble to ascertain how their first victim, Mr. Hornsey, was before they left his house after the robbery, they would have known that he had died as a result of their actions. Nevertheless they treated Mr. Hambly in the same way, and went still further by strangling him. Of course, it is possible that they did not return to Mr. Hornsey. If this were the case, they might have had a lesser awareness of the likelihood of death supervening when they overpowered, bound and gagged Mr. Hambly, but, on the other hand, their failure to find out what Mr. Hornsey's condition was would serve to emphasize the callousness of their behaviour towards their

victims.

It was not contended that the trial court misdirected itself except in regard to the question whether the murder was committed with dolus directus, which I have discussed above. In now proceeding to consider what aggravating or mitigating factors are present I shall accordingly do so on the basis of the trial court's undisputed findings.

The first and main aggravating feature is the nature of the offence. Our courts have consistently held that attacks on frail and defenceless old people in their homes should be regarded with the utmost seriousness. In the present appeal, although the appellants are of course to be sentenced only for Mr. Hambly's murder, it is relevant that this was their third fatal attack on an old person in his or her home within less that two months. Clearly the two appellants had an established modus operandi whereby they sought out opportunities to overpower and rob old persons who were alone at home. The robbery in the present case was accordingly

pre-planned, and the appellants had a fixed way of dealing with their victims, which inevitably led to their deaths. And, as I have stated above, the fact that the appellants may not have realized the full risk of death ensuing does not in my view materially mitigate the seriousness of their offence.

I turn now to other possible mitigating factors. The first appellant was 43 years old at the time of the offence, and has a fairly long list of previous convictions. These were mainly for theft and housebreaking. The best that can be said for him is that he does not have a record of violence and has never served a long period of imprisonment. However, given his age and record, his prospects of reformation would not appear to be good, even if no regard were to be had to the series of events giving rise to the charges in the present case. If one further bears in mind the light thrown on his character by the present offences, his chances of rehabilitation must be regarded as extremely slight. Counsel

pointed out that this appellant had regular work as a painter. In the circumstances of the present case this seems to me to underline the depravity of his conduct. This is not a case of a man driven to crime by hunger.

The second appellant's personal circumstances are somewhat more favourable. According to his evidence he was 32 years old at the time of the offence. He worked as a painter with the first appellant. He testified that he had two children by a woman for whom he had paid lobola but whom he had not yet married. He has no previous convictions. It was argued on his behalf that he may have been under the first appellant's influence. There is, however, no evidence to support this. The second appellant never suggested anything of the sort. His version was a complete alibi. It is true that he is younger than the first appellant, but he is not a child any more. And the mere fact that the first appellant has previous convictions whereas the second appellant has none does not in my view suggest that the second appellant

may have been under the influence of the first. This seems to me to be purely speculative.

The final question now is whether, regard being had to the aggravating and mitigating factors, the death penalty is imperatively called for. The murder of Mr. Hambly, even if taken in isolation, is of such seriousness that many courts would consider the death sentence appropriate. If one takes into account further that it was not committed as a single offence, but was the third in what appears to have been a planned campaign to rob old people alone at home, the wickedness of the appellants' conduct would seem to demand the ultimate penalty allowed by law. This is so particularly in the case of the first appellant, where there would not seem to be any significant prospect of rehabilitation. The second appellant is in a somewhat different position. He is younger, and has no criminal record. In his case it might be argued that a possibility of rehabilitation exists. Personally I doubt whether such an argument would be sound. I

suspect that a person who commits a series of offences of the sort we have here is beyond redemption. But even if I am wrong in this, I consider that any prospect of rehabilitation must in the circumstances of this case, yield to the needs of deterrence and retribution.

In the result the appeals are dismissed and the death sentences on both appellants confirmed.

E M GROSSKOPF, JA

KUMLEBEN, JA

HOWIE, AJA concur