Case No 214/92 /wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DALIOUS NKOSI SHANDU Appellant

and

THE STATE Respondent

CORAM: MILNE, EKSTEEN JJA et Van Coller AJA

DATE OF HEARING: 5 March 1993 DATE OF

JUDGMENT: 15 March 1993

J U D G M E N T

/MILNE JA.....

MILNE JA:

The appellant and three others were convicted of murder and robbery with aggravating circumstances. The appellant was also convicted of the unlawful possession of a firearm and ammunition. He was sentenced to death on the murder charge, to 12 years' imprisonment on the robbery charge and 4 years' imprisonment on the other charges. He appeals only against the sentence of death.

The deceased was a retired man. He lived on his own in a semi-detached flat in a retirement village in Eshowe. The trial court found as facts the following:

"1. ... that the deceased returned to his flat on the afternoon of the 21st September 1990 at about 3.30 pm and that he remained there thereafter.

2. After dark on that Friday evening persons who had arrived in the vicinity earlier that afternoon in a blue motor-vehicle gained access to the deceased's flat.

3. The deceased's resistance was overcome by force. We

think that he was probably threatened with a fire-arm.

4. His assailants thereupon ransacked the flat, removing the goods Exhs 1 to 41 and placing these in the deceased's motor-vehicle parked in the adjoining garage.

5. The deceased's motor-vehicle was used because the removal of the goods would be effected as unobtrus-ively as possible.

6. The deceased was forcibly put into his own car and his assailants drove off to the secluded spot in the State forest some 59 kilometres from his home. (This distance should actually be 70 km)

7. The spot itself is isolated and clearly not frequented by people.

8. The deceased was removed from the vehicle and he was shot in the head.

9. In order to remove all traces of him his body was set alight with an inflammable substance, such as petrol. The burning resulted in the body being extensively charred.

10. We find that the killing of the deceased in these circumstances was intentional in the sense of dolus directus.

11. We find further that the persons who removed the deceased from his home did so with the intention that he be permanently removed. To that extent every member of this gang acted in common purpose or in concert to achieve that objective."

The Court found that the appellant was one of the gang referred to and, indeed, that he had played a leading role in the commission of the crime.

4 It was urged upon us by Mr Ludick for the appellant, to whom we are indebted for his assistance, that the trial court had erred in finding that the appellant had played a leading role and that there were a number of mitigating factors present. The elder brother of the appellant, one Musa (who was shot dead when the police were attempting to arrest him) was, so it was submitted, the person who had planned and "orchestrated" the commission of the offence. The court a quo found that it was reasonably possible that Musa had "earmarked and targeted" the deceased's house in Eshowe but that nevertheless the appellant had played a major role. There is no basis for interfering with this finding. The appellant is the one who took the deceased's car and drove it to Durban where he was found driving it six days after the commission of the murder. He was the one who took virtually all the spoils of the robbery and concealed them. It was his version that he had become involved only after Musa had already committed the murder

 and the robbery but the court rejected that version as false.

The mitigating factors relied upon were that:

12. the appellant's moral blameworthiness was diminished because he had consumed liquor in the course of committing the robbery;

13. he had had little formal education and had been raised in disadvantaged circumstances and influenced by his brothers who were "no strangers to criminal activity"; and

14. the possibility of the appellant's reform could not be excluded.

For reasons which follow I find that there is no sub-stance in these submissions, but even if there had been, their effect would have been far outweighed by a number of serious aggravating features.

There is no direct evidence that any of the accused drank liquor that night. The evidence suggests

 that someone drank beer and some spirituous liquor in the deceased's home that night but (save with regard to Accused No 2 whose fingerprints were found on a beer glass) there is no evidence as to the identity of those persons. On the appellant's version he did not even enter the deceased's home let alone have anything to drink in it. Assuming however in appellant's favour, that it was reasonably possible that he had something to drink in the course of committing the robbery, there is not a shadow of evidence to suggest that it influenced him in any way which would mitigate his offence.

He had had some schooling - he had passed Standard 6 and he had taught himself to be a motor mechanic. He was earning sufficient from this trade to support himself, his children and his sister's children at the time this offence was committed. True his parents died when he was a very young child and no doubt his brothers were a bad influence, but the appellant had

overcome his deprived background sufficiently to be able to earn a reasonable living. The appellant was 28 years old at the time when the murder was committed and was in fact the eldest of the four accused.

The prospect of the appellant's reform is remote. He has a number of previous convictions involving violence. His last was a conviction for robbery in respect of which he was sentenced to 8 years' imprisonment. He did not serve the full term because he escaped from custody and in fact committed this very offence whilst at liberty. In my judgment there are no mitigating factors of any real significance.

The aggravating factors I referred to are the following: (a) The crime was planned in advance. The deceased,

aged 69, lived in a retirement village in Eshowe.

The accused came from Empangeni, 59 km away.

(b) The manner in which the crime was committed. I cannot improve upon the following description by the learned trial judge (Levinsohn J):

> "... this elderly and defenceless man, who was entitled to live out the rest of his days in peace, was overpowered in his own home and forcibly removed to a lonely spot in the forest where he was done to death. He was obviously assaulted (so seriously that three ribs were broken) prior to being killed and the manner in which he was finally killed was nothing short of being a cold-blooded execution." (My parenthesis)

15. The motive for the murder was to avoid detection and punishment for the robbery which could easily have been carried out without killing or seriously injuring the deceased. The value of the articles stolen was R7 335.00.

16. The fact that a number of attacks of this nature on elderly and defenceless persons in the area has on the evidence increased in the last few years.

To sum up. This is a particular shocking murder committed by a heartless criminal who did it for

the worst possible motives.

The question still remains whether the death sentence is the only proper sentence. In S v Tloome 1992(2) SACR 30 (A) at 39h the Chief Justice said:

> "This Court has on a number of occasions indicated that in determining whether or not the death penalty should be imposed the main objects of punishment, retribution, prevention, deterrence and reformation should be weighed. At the same time, in cases of murder of elderly victims in their own homes with robbery as the motive, inevitably the factors of retribution and deterrence tend to come to the fore."

These remarks apply in this case. The appeal is dismissed.

A J MILNE
Judge of Appeal

EKSTEEN JA]
] CONCUR VAN
COLLER AJA]