IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOHANNES MACHINI KHIBA ..... Appellant

AND

THE STATE..... Respondent

Coram: JOUBERT, ACJ, EKSTEEN et KUMLEBEN, JJA

Heard: 25 February 1993

Delivered: 30 March 1993

J U D G M E N T

EKSTEEN, JA :

The appellant and two others were indicted on three charges viz theft, murder and attempted robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977. The first of these offences related to a .38 Special Taurus revolver together with its holster and five .38 Special cartridges. They were all alleged to have been stolen from one Viljoen during or about 13 March 1991 and 29 April 1991. The latter two offences related to the murder and attempted robbery of one Johannes Josias Els on his farm Fairview in the district of Viljoens-kroon on 28 April 1991. The appellant was con-

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victed on all three counts and was sentenced to death on the murder count. The present appeal is directed solely against that sentence.

The evidence disclosed that the 63 year old Mr Els (the deceased) and his wife lived alone on the farm Fairview. They had lived there for the past 40 years. They kept no farm labourers and conducted all the farming opera-tions themselves. (There was some indication that at times one of their five sons, who farmed in the Vredefort district, would bring some of his farm labourers to assist in certain opera-tions on Fairview.) On the morning of Sunday 28 April at about six o'clock the couple got up

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and went outside to see to the milking of the cows. They were accompanied by their three large dogs - a Rottweiler, a Dobermann Pincer, and a cross between a Rottweiler and an Alsatian. The deceased was armed with a 9mm Manhurin pistol. They first got the milking shed ready and while Mrs Els went to fetch the cows, the deceased went off to open the gate of a little paddock in which the cows were to wait to be milked. The three dogs, as they had been trained to do, went with Mrs Els. While the deceased was wait-ing near the paddock gate he was attacked by the three accused who had been hiding behind a stone-walled shed in the vicinity. One of them,

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armed with a panga, inflicted a gaping wound on his back below the left shoulder blade. This wound penetrated through the ribs into the left lung. Another assailant, armed with a pitch-fork, stabbed him on the right side of his chest. Both prongs of the fork inflicted wounds, one of which penetrated into the thoracic cavity. The appellant was armed with the .38 Special Taurus revolver which had been stolen from Mr Viljoen some six weeks earlier. He fired one, and possi-bly two shots, at the deceased one of which hit him in the left side of his chest between the clavicle and the sternum. The path of the bullet was from left to right passing through

the apex of the left lung, through the arch of the aorta, through the posterior aspect of the right lung, and causing multiple fractures of the sixth and seventh ribs. The spent bullet was found under the skin on the right side of the chest.

When Mrs Els heard the shots being fired she ran to a spot where she could see what was going on. She saw her husband standing with his pistol in his hand and the appellant some five metres away from him pointing his revolver at the deceased. She also saw the other two assailants running away towards a nearby maize field. As Mrs Els moved towards her husband

the three dogs rushed at the appellant causing him, too, to turn and run. The deceased called to his wife to telephone the police, and when she asked him whether he could walk he replied that he could not. Mrs Els thereupon ran back to the farmhouse and tried to telephone the police but was unable to get through, so she abandoned the attempt and ran back to her husband. When she got there he was already dead. The police and the neighbours were then summoned and they came to her assistance.

The appellant was arrested the very next day, and in a statement to a magistrate made shortly after his arrest he said:

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"Ons het daar by 'n stoor op Saterdag begin. Kry ons daar Mnr. Els besig om beeste toe te sluit. Ons het terug na die wonings van die swart mense gegaan. Ons het ge-vind daar is nie kans om horn te kry. Ona het Sondagoggend opgestaan en toe kry ons horn dat hy, Mnr. Els, ook besig is om op te staan. Toe hy kom en hy maak die hek oop het ons skote gevuur. Ons het 'n tweede keer skote gevuur en hy het ook 'n skoot gevuur. Toe sien ons, ons het horn nie raak geskiet nie en toe hardloop ons weg. Ek is toe op Maandag gearresteer. Hulle het my van die plaas af geneem na Viljoenskroon toe. Dis al."

The next day appellant took the police to the farm "Welkom" on which he worked, and which was adjacent to the farm Fairview, and showed them where he had buried the .38 Special Taurus revolver in its holster.

The appellant's defence at the trial

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was an alibi. He denied all knowledge of the incident. This evidence of his was correctly rejected as patently false.

It seems clear from the evidence, and particularly from appellant's confession, that the three accused had planned this attack on the deceased and his wife carefully. The plan seems to have been to waylay the deceased out-side his house while he was about his farming activities and to kill him so that they could plunder his home with comparative ease. To this end they approached the farmhouse on the Satur-day evening. A suitable opportunity for a success-ful attack on the deceased, however, did not pre-

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sent itself. And so it came about that they returned to the scene early on the Sunday morn-ing. While the deceased was waiting alone at the paddock gate one of his assailants must have come up quietly from behind and inflicted the wound on his back with the panga. As he swung round to face his attacker another assailant stabbed him in the chest with the pitchfork. The deceased presumably drew his pistol and fired a shot at them, causing them both to turn tail and run away. Appellant who must have been standing somewhat to the left of the de-ceased, then shot him in the chest. The de-ceased 's pistol jammed and he could not fire

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another shot. When Mrs Els and the dogs appear-ed on the scene the appellant, now deserted by his confederates, decided that discretion may well be the better part of valour, and he too sought refuge in flight.

The trial court found that the fatal shot fired by the appellant was fired with dolus eventualis and not with dolus directus. This finding seems to me not to be warranted on all the evidence. When one has regard to the preconceived plan to attack the deceased, and the attack already launched by his other two associates with the panga and the pitch-fork, the inference that appellant fired at

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the upper part of deceased's body at a range of a mere 5 metres with the direct intention of killing him, is irresistible. The trial court therefor erred in considering dolus eventualis to be a mitigating factor. The fact that the appellant had no previous convictions was correct-ly taken into account.

Miss French, who appeared on behalf of the appellant before us, and in the court a quo, submitted that the trial court ought to have regarded the fact that the appellant was 23 years old at the time; that he was an illiterate farm hand; and that he had grown up in rural surround-

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ings as mitigating factors. The trial court did consider these features and came to the con-clusion that, although in certain circumstances they may constitute mitigating factors, they could not be so regarded in the present case. The rural surroundings in which appellant lived, it found, were not so remote as to preclude the appellant from visiting the neighbouring towns from time to time. Moreover the singleness of purpose with which the preconceived plan was laid and carried out, and the persistence of the appellant in an attempt to see the matter through even after his associates had fled, militated against the suggestion of bucolic

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unsophistication. Moreover in S v Majosi and Others 1991 (2) SACR 532 (A)

Nienaber JA remark-ed at p 541 f-g that :

> " ... one does not have to be learned and sophisticated to appreciate that a murder which is committed during and as part of an armed robbery is particularly reprehen-sible."

and went on to hold that in that case the imposition of the death

sentence was impera tively called for.

I therefore endorse the conclusion to which the trial

court came in this re-spect.

Miss French also submitted that the whole scheme was an

amateurish attempt at robbery

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and that the fatal shot had been fired in panic and without premeditation. I cannot agree. On the contrary, the robbery, on all the evi-dence, was both premeditated and planned. In fact the first attempt on the Saturday evening was aborted when the circumstances did not appear to be sufficiently propitious for a successful conclusion. The second attempt on the Sunday morning was launched with deliberate intent. The fact that the deceased would be armed had apparently not been foreseen, and this feature tended to upset the carefully laid plans. Two of the assailants fled, but the appellant, armed himself, stood his ground. The shot he

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fired was not, on the face of it, fired in panic, but in direct execution of their preconceived plan. It was only the advent of the three large dogs that eventually made him waver and run.

It was also submitted to us that the learned trial judge had over-emphasized the deter-rent and retributive aspects of punishment and had failed to accord sufficient weight to the reformative aspect. 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 Shaba-lala and Others 1991 (2) SACR 478 (A) - Goldstone JA, in confiriming a sentence of death, remarked

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at p 483 c-e that :

> "While giving consideration to the ob
> jects 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 came to the fore.
> All members of our society are entitled to
> security in their own homes. It is un-
> fortunately 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 both
> 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 per-

sons regarded as shocking." (See also S v Khundulu and Another 1991 (1) SACR 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 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 in-tention 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

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decisions seem to reflect the gravity with which this Court regards murderous attacks on victims in their own homes and more particularly on iso-lated farms. Sentences of death have been con-firmed 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 event-ualis, and where the appellants have been compa-ratively 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. The present case is but one more in this sad category. The deceased and his wife

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lived alone on their farm and had done so for 40 years. This must have been common knowledge in the area, and was certainly known to the appellant and his two associates who lived on neighbouring farms. Their plan of attack was premedita-ted and carefully laid, as was evidenced by their abortive foray on the Saturday evening. It was carried out with violent determination and persistence, and resulted in the death of the hapless deceased in his own farmyard while he was about his farming activities. The appellant and his associates were unknown strangers to Mrs Els and presumably also to the deceased, so there could be no suggestion - nor

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was there any - of provocative behaviour by the deceased or of a grudge which one or more of them may have harboured against him. Appellant's alibi, to which he resorted at the trial, pre-cluded him from expressing any remorse for his deed, nor did he at any stage indicate any.

On consideration of all these mitiga-ting and aggravating factors the latter seem to me far to outweigh the former. Seen in the con-text of the recognized objects of punishment, the interests of society seem to me to demand that deterrence and retribution must outweigh considerations of reformation. I therefore share the view of the trial judge that this is

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one of those exceptionally serious cases where the death sentence is imperatively called for and where it is the only proper sentence.

The appeal is accordingly dismissed.

J.P.G. EKSTEEN, JA

JOUBERT, ACJ .....)
KUMLEBEN, JA .....) concur