Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Case No: 525/92

N v H

IN THE SUPREME COURT OF SOUTH

AFRICA

(APPELLATE DIVISION)

In the matter between:

LAWRENCE FRANCIS Appellant

and

THE STATE Respondent

SMALBERGER, JA :-

NOT REPORTABLE

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In the matter between:

LAWRENCE FRANCIS Appellant

and

THE STATE Respondent

CORAM : SMALBERGER, EKSTEEN, JJA,
et KRIEGLER, AJA

HEARD : 13 MAY 1998

DELIVERED: 18 MAY 1993

J U D G M E N T

SMALBERGER, JA:-

The appellant was convicted in the Natal Provincial Division by Thirion J and two assessors of murder and various other counts (including attempted murder and robbery with aggravating circumstances). He was sentenced to death on the murder count and to a

total of 16 years' and 3 months' imprisonment on the other counts. His appeal, in terms of s 316A of the Criminal Procedure Act 51 of 1977, is directed only against the sentence of death imposed upon him.

The events giving rise to the appellant's convictions took place on the evening of 8 May 1991 on the farm of J.I. ("the deceased") and his wife A.I. ("the complainant"). The deceased was 82 and the complainant 79 years of age. They lived alone in their house on the farm. There were staff quarters nearby. On the evening in question they were together in their study. At a certain stage the deceased left to fetch a newspaper from his motor car. The garage where the car was parked is attached to the house. Access to it from the house is through a door in a passage leading off the kitchen. The deceased was carrying his revolver. The complainant also had a revolver which she had placed on a coffee table in the

study.

The deceased was accosted in the garage by the appellant and one Khanyile and dispossessed of his revolver. On hearing the deceased talking the complainant got up to go and investigate. She opened the study door. On entering the adjoining passage she observed the appellant in it. She turned back to fetch her revolver. Her attempt to do so was frustrated by the appellant who got to the revolver before she could.

The appellant propelled the complainant at gun point to the garage where the deceased and Khanyile were. The deceased was being held up there by Khanyile with his (the deceased's) own revolver. Khanyile had a largish knife in his other hand. The appellant and Khanyile then herded the deceased and complainant back to the study. On the way the appellant told the complainant to keep quiet. He added that they would have to kill the deceased and the complainant as they

had seen their (the two assailants') faces.

In the study the appellant and Khanyile demanded firearms and money. The deceased pleaded with them not to hurt either the complainant or himself. He offered to give them whatever they wanted, and handed over his wallet. The appellant and Khanyile proceeded to search the study for firearms and money - they were apparently not interested in anything else. They found nothing. They then took the deceased and the complainant at gun point to the main bedroom where the search continued. There was a safe in the bedroom which the deceased opened. It contained some jewellery but no firearms or money. At one stage in the bedroom Khanyile told the deceased to keep quiet or else he would be killed.

In response to questioning the deceased told the appellant and Khanyile that the only other safe was at the dairy about 1 km away. The deceased and the

complainant were taken to the dairy (still at gun point) in one of their motor cars which was driven by Khanyile. On the way the complainant tried to escape from the car but her attempt was thwarted by the appellant who again threatened to kill her. On arrival at the dairy the safe was opened. It contained very little money and no firearms.

The deceased and the complainant were then taken back to the house. At the garage the appellant and Khanyile started assaulting the deceased, presumably with a view to forcing him to disclose the whereabouts of money or firearms. The complainant seized the opportunity to run away. She went to a nearby servant's cottage in search of assistance. The appellant followed her and dragged her back by her hair, threatening to kill her.

When one of the farm employees (Maseda Phiri) appeared at the entrance to the garage Khanyile fired at

him but missed. Some minutes later another employee (Remus Phiri, Maseda's father) arrived on the scene. Khanyile fired several shots at him, four of which struck him (one in the head) causing him to collapse in a nearby flower bed. Khanyile then turned to the deceased and without further ado shot and killed him. This all happened in the presence of the appellant. According to the post-mortem report the deceased died from a single gunshot wound fired from close range that penetrated his chest and dissected the arch of the aorta.

After shooting the deceased Khanyile grabbed the complainant and dragged her into the house. In the passage he started cutting the complainant's clothes from her body. While he was doing so the appellant moved down the passage past him. Khanyile threw the complainant onto the floor and attempted to rape her. He then got off her and went in search of the appellant,

dragging the complainant with him. She, displaying great fortitude and presence of mind, eventually managed

to escape from him, fled the house and hid outside. She remained hidden and undetected for the next two hours or so while the appellant and Khanyile ransacked the house before leaving in the vehicle in which they had come.

The facts outlined above are either common cause or based on findings made by the trial Court which are not in issue for the purposes of the appeal. In passing it may be mentioned that the appellant admitted having accompanied Khanyile on the evening in question. He claimed that he did so at the request of Khanyile who had said that he was going to his former employer to collect certain wages due to him. He admitted that he was present during the events that occurred but alleged that, to the extent that he participated in them, he did so under duress by Khanyile. The trial Court rightly

rejected his evidence and came to the following conclusion:

> "In our view the State has proved that the accused [the appellant] took part in the robbery realising that Khanyile in pursuance of the robbery might shoot the deceased or might shoot anybody who might turn up there to see what was going on. Despite that realisation the accused continued to participate in the robbery reckless as to whether anybody would be killed in pursuance of the common purpose to rob."

This finding is not challenged on appeal.

We are called upon to decide, on a consideration of all relevant mitigating and aggravating factors, whether the death sentence on the murder count is the only proper one.

There are numerous aggravating factors present. The robbery was carefully planned and executed. The motive for it was greed and personal gain. Khanyile had previously been employed by the deceased and the complainant on their farm. He would

have known their circumstances and would probably have informed the appellant accordingly. Their attack was therefore deliberately directed against an elderly couple living alone in a remote area. The deceased and the complainant had their privacy and the sanctity of their home violated, they were treated with callous indifference and subjected to prolonged humiliation. Ultimately the defenceless deceased was fatally shot in an act of mindless killing.

The only reasonable inference to be drawn from the evidence as a whole is that the appellant foresaw the death of one or both of the victims as a strong probability - one almost bordering on a certainty. He and Khanyile went to rob them armed with a knife. At an early stage each one had obtained possession of a revolver. The appellant told the complainant they would be obliged to kill her and the deceased as they could identify their assailants. The appellant

registered neither shock nor surprise when Khanyile fired at Maseda Phiri and then shot Remus Phiri before cold-bloodedly shooting the deceased at nearly point-blank range. Nor did he remonstrate with Khanyile for doing so. His subsequent behaviour demonstrates his full acceptance of, and association with, Khanyile's conduct. Because of the appellant's high degree of foresight the absence of dolus directus cannot constitute a mitigating factor.

Although Khanyile appears to have taken the lead throughout, the appellant was at all times a willing and enthusiastic participant. I agree with the submision by counsel for the State that the appellant's overall role in the events, while different from that of Khanyile, wat not a significantly lesser one.

The appellant has twelve previous convictions for various offences of which the most serious are three for housebreaking and theft. He only has one

conviction for assault, which was of a minor nature. His longest sentence to date was one of three years of which he served less than two years. The present offences were committed one month after his provisional release. If not one yet, he is fast on the way to becoming a hardened recidivist.

The appellant is 40 years of age. He is not married but has three children. He passed standard 6 at school. He was unemployed when the offences were committed. These are neutral rather than mitigating factors. Although the appellant expressed remorse for his deeds through his counsel there is no evidence of genuine remorse on his part.

In the present matter the aggravating factors are many and serious. There are no mitigating factors, or none of any substance. The appellant's prospects of rehabilitation are slim. While regard must be had to all the main objects of punishment when determining an

appropriate sentence, it has repeatedly been emphasised by this Court that in cases of murder of elderly victims

in their own homes with robbery as the motive, the factors of retribution and deterrence inevitably tend to come to the fore (S v Tloome 1992 (2) SACR 30(A) at 39 H). This is particularly so having regard to the prevalence of this type of offence. On a conspectus of all the evidence this is in my view a case of extreme seriousness where the only proper sentence is the death sentence.

The appeal is dismissed.

J W
SMALBERGER
JUDGE OF
APPEAL

EKSTEEN, JA )
KRIEGLER, AJA ) concur