CG CASE NUMBER: 38/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TENNIS JAMES Appellant

and

THE STATE Respondent

CORAM: BOTHA, EKSTEEN JJA et HOWIE AJA

HEARD ON: 15 FEBRUARY 1993

DELIVERED ON: 26 FEBRUARY 1993

J U D G M E N T

HOWIE AJA

Appellant was convicted in the Cape Provincial Division (Van Deventer J and assessors) of murder and housebreaking with intent to steal and theft. Five years' imprisonment was imposed on the latter count. On the murder charge appellant was sentenced to death. His appeal is directed solely against the death sentence.

The deceased was a 36 year old married woman. On the night of 22 April 1988 she was alone in her home in Durbanville. Her husband, a marine technician, was away at sea. Appellant broke in through the partly open window of the deceased's bedroom. He bound her wrists with a length of flex cut from the telephone and tied two pieces of cloth tightly over her face. He also strangled her. He then ransacked two of the bedrooms. On arrest on 27 April 1988 he was found in possession of a variety of articles belonging to the deceased and her husband.

The forensic pathologist who conducted the autopsy concluded that death was caused by anoxia due to

strangulation and suffocation. Indicative of strangulation was bruising on either side of the neck and a fracture of the hyoid bone. Suffocation was caused by the cloths which had smothered the deceased's nose and mouth. The only other injuries were two bruises on the head. In evidence the doctor stated that for strangulation to cause death there generally had to be obstruction of the airways for three to four minutes. Taking into account the deceased's age he thought that it would have required moderate to severe force to fracture the hyoid bone.

The incriminating evidence which linked appellant to the commission of the offences consisted in his fingerprints and his footprint on the scene together with his possession of the stolen property. Appellant, who declined pro deo representation until a very late stage of the State case, gave evidence denying his guilt and alleging that he had never been to the deceased's house. He claimed to have bought the stolen goods from

a street vendor two days before his arrest.

After conviction the prosecution proved appellant's commission of a number of previous and subsequent offences. Appellant gave no evidence relative to the matter of sentence and it was left to his counsel, Mr Arendse, who also appeared for him on appeal, to outline some of appellant's personal circumstances from the Bar. All this, together with certain aspects of appellant's evidence in his defence, reveal the following personal history. Appellant was born in mid-1961 and grew up in

a rural part of Transkei. He went to school there but due to his family' s impecunious situation he had to leave school in 1977, having reached St. 4. He worked on the mines in the Transvaal from 1978 to 1983. In 1984 he went to Cape Town and has been there ever since. He worked for various employers until 1986. In July of that year he was convicted on three counts of robbery effected by the use of a knife. He was sentenced on

each count to 12 months' imprisonment, 4 months suspended on certain conditions.

He was released unconditionally in November, 1987. Without fixed employment he only obtained casual work. In January, 1988 his criminal career resumed. He committed two robberies. In the one instance the sum stolen was small but in the other he took R15 000 from a supermarket. Somewhat later in the year, but prior to the present incident, he broke into two houses and stole goods to a total value in excess of R15 000. As already mentioned, he was arrested for the murder of the deceased on 27 April 1988. In August 1988 he was sentenced for the housebreakings. In respect of one he received 4 years' imprisonment and in respect of the other, 6 years, of which 2 years were ordered to run concurrently with the 4 years. On 17 October 1988 he was sentenced in respect of each of the two robberies to 7½ years imprisonment. 5 years of the one sentence was ordered to run concurrently with the other. On 31

October 1988 the suspended sentences imposed in 1986 were implemented. Convicted as he then was to a total of 19 years' imprisonment, and awaiting trial in the present case, appellant proceeded to escape from goal. While at liberty he committed two further robberies, In the one he took a firearm and in the other he used a firearm (by inference the same one) to rob a motorist of his vehicle. After his re-arrest in February 1990 he was sentenced to 18 months for the escape and 5 years for the robberies, of which 3½ years was ordered to run concurrently with the 19 years imposed in 1988. By the time appellant was sentenced in the instant matter in December 1991 he was 30 years of age, unmarried and the father of a minor child living with its mother in Transkei.

It was submitted before the trial Court to be a mitigating factor that appellant had grown up in poverty and was minimally educated. The Court rejected that contention, observing that appellant's undoubted

material disadvantages were shared by millions of South Africans who led law-abiding lives.

As to the commission of the murder, the trial Court found that appellant had killed the deceased cold-bloodedly and with dolus directus in order to facilitate the theft of her goods. There was therefore no reasonable possibility that he had been surprised by the deceased or that he had acted impulsively or in response to compelling temptation.

Concerning appellant as an individual, the Court a quo considered that his various convictions conformed entirely to the profile of the unrepentant, hardened criminal whose offences became progressively more serious and more violent.

It was found to be consistent with that behaviour pattern that appellant had persisted in a false denial of his guilt and had displayed no sign of remorse. The Court concluded, on the evidence, that there were aggravating factors but no mitigating

factors.

In his judgment on sentence the learned Judge found that in view of appellant's obvious contempt for the law, and by reason of the disturbing frequency with which housebreakings involving murderous violence were committed, the instant case warranted the imposition of a sentence in which the elements of prevention and retribution were paramount in the interests of the community. He said:

> "Ek sou my plig teenoor die gemeenskap versuim as ek nie poog om die moontlikheid uit te sluit dat die beskuldigde weer in die gemeenskap vrygelaat mag word nie."

Accordingly, so he concluded, the death sentence was the only appropriate sentence.

In presenting appellant's case on appeal, Mr Arendse advanced two main submissions. The first was that the meagre information before the trial Judge was inadequate material upon which to find that the death sentence was the only fitting punishment in this matter.

A pre-sentence report by, say, a social worker, psychologist or criminologist should have been called for. In the circumstances, said counsel, this Court should remit the case to the trial Court for the receipt in evidence of such a report and for the re-imposition of sentence thereafter. In the second place, counsel submitted that there were factors in the case, some overlooked by the trial Judge, which rendered life imprisonment also an appropriate sentence.

In support of the first submission counsel relied on the dicta of this Court in S v DLAMINI 1992 (1) SA 18 (A) at 31 C-F (1991 (2) SACR 655 (A) at 667e-h) and S v TLOOME 1992 (2) SACR 30 (A) at 38e-39a. In DLAMINI'S case it was pointed out that in considering sentence a trial Judge was not confined to the material placed before him. He had the power under s 274(1) of the Criminal Procedure Act (51 of 1977) to call for such evidence as he thought necessary to inform himself as to the proper sentence. Just as pre-sentencing reports

were often requested in cases involving juveniles, so, in appropriate cases involving older accused, particularly in cases where the death sentence was being considered, could such reports be called for from the sort of qualified person mentioned above, who might be able "to garner information from the accused which the Court itself could not do".

In seeking to argue that the trial Court should have exercised that power, Mr Arendse was driven to concede that he could himself have requested the Judge to call for such a report and, further, that there was no reason to think that had that request been made a report would not have been received and considered. In my view counsel's concession was properly made. Nothing in the record suggests that the trial judge was, or might have been, averse to the request for and receipt of a pre-sentencing report.

In so far as counsel's submission amounted to the contention that the trial Judge had erred in not, of

his own accord, ordering such a report to be furnished, I cannot agree. The Court was adequately apprised of appellant's background and current personal circumstances. The only other relevant topic on which information could have been sought was appellant's explanation for his criminal conduct on this occasion and the occasions to which his proved convictions related. In that respect, however, appellant had steadfastly denied having committed the offences laid to his charge in the present matter. Moreover, his counsel consulted with him subsequent to conviction and after that informed the Court that no evidence would be called in relation to sentence. That being so, the trial Judge was, in my view, entitled to make certain assumptions. The basic one was that counsel had fully canvassed with appellant the need and desirability of evidence being given by him or concerning him. The consequent assumptions were, firstly, that appellant had, whether on advice or on his own decision, declined to testify

2 and, secondly, that in counsel's assessment there was no reason either to ask the Court to call for a pre-sentencing report or for the Court to request one mero motu.

Apart from those assumptions, it must be observed that DLAMINI' S case laid down no general rule. It was merely pointed out that it would be advisable to consider calling for a pre-sentence report on an adult accused "in appropriate cases".

That there is no hard and fast rule even in the case of a juvenile accused is apparent from this Court's judgment in S v HLONGWANA 1975 (4) 5A 567 (A). Two points made in that judgment are presently important. The first is the approval of the stance taken in the earlier case of S v JANSEN AND ANOTHER 1975 (1) SA 425 (A) at 428 B-C. In the JANSEN case this Court stated that although the evidence on the merits had thrown considerable light on the personality and circumstances of each of the two appellants (the one 16

years old at the time of the offence, the other just younger) it was reasonably possible (my emphasis) that a probation officer's report might disclose further facts in relation to them which might be of great assistance in the determination of a proper sentence. The second point is that, in approving of that approach, Rumpff CJ said in HLONGWANA'S case at 571 A-B the following:

> "Ek stem volmondig saam met wat daar gesê is maar wil beklemtoon dat die feit dat 'n Verhoorhof nie 'n verslag van 'n proefbeampte ingewin het nie, nie in elke geval en outomaties ' n geldige rede skep om ' n opgelegde vonnis tersyde te stel nie. Ek dink nie dit was die bedoeling om so 'n reël in die lewe te roep nie omdat dit in elke besondere geval sal afhang van die ouderdom van die beskuldigde en van ander relevante feite wat reeds deur getuienis geopenbaar is, of 'n hof 'n verdere verslag behoort te vra of nie."

In this matter what the present question really comes down to is whether, to judge from the evidence already on record, this was an appropriate case for a pre-sentence report. To put it another way: was there, on that evidence, a reasonable possibility that

4 such a report might disclose further facts which might assist in determining the appropriate sentence?

What the evidence before the trial Judge revealed about appellant, apart from his criminal record, was that he was in his mid-twenties at the time of the murder. He had been earning his own living since the age of about seventeen. Although originally from a rural area, he had learnt to fend for himself in an urban environment. His conduct in Court prior to his representation by counsel indicated to the trial Judge* and this much is apparent to a reader of the record, too, an assertive spirit of independence, an acuity of thought, a ready decision-making ability and not a little disingenuousness. Until a late stage of the case appellant persistently refused the assistance of pro deo counsel despite the careful explanations repeatedly offered by the trial Judge as to the advantages of legal representation. That this attitude on appellant's part was not due to an informed choice or a lack of

5 understanding but to a pre-determined ploy is evidenced by a number of features. The first was his, obviously intentional, protracted and irrelevant questioning, particularly of the investigating officer. Then there were two occasions when he professed to be too ill to continue attending the trial but was on each occasion proclaimed fit after expeditious examination by a district surgeon. The third feature was his request, late in the proceedings, to be represented by "an advocate of the ARC". Appellant could not explain the reason for or relevance of this request and the trial Judge understandably refused it but nonetheless allowed a number of adjournments so that arrangements for representation could be made through the Cape Bar Council. These steps culminated, as it happened, in appellant's eventual representation by Mr Arendse. It is appropriate, before leaving the subject of appellant's attitude in Court, to commend the considerable patience, and concern for the proprieties,

6 displayed by the trial Judge in the face of conduct by appellant that must at times have been oppressively trying.

To sum up thus far, the trial Court was substantially informed as to the nature of appellant's crime, his criminal record, his personal circumstances and the sort of person he was, including his attitude to society and authority. Moreover, whatever appellant might have been prepared to discuss about his other offences, all the indications were that he was not willing to admit guilt in the present instance. There was, accordingly, no reason for the trial Judge to have considered it reasonably possible that appellant might communicate sufficiently frankly with a suitably qualified person of the type referred to, who might then, as a result, have revealed further factors of importance in determining the proper sentence.

Nor was there anything inherent in the nature of the murder or appellant's conduct at any relevant

time before and even at the trial which suggested, as a reasonable possibility, that a psychological, psychiatric or criminological examination might unearth relevant evidence. The possibilities as to what a pre-sentence report might have served to establish were therefore entirely speculative.

In all the circumstances this was not an appropriate case in which to call for such a report and the trial Judge cannot be faulted for not requesting one mero motu. The alternative basis for counsel's first submission was that this Court should mero motu remit the case for a pre-sentence report on the strength of certain dicta in TLOOME'S case. For the reasons just stated, that suggestion cannot be accepted. The relevant material is no different now from what it was at the trial. In addition, TLOOME'S case dealt with legislation specifically catering for those cases in which sentence of death was passed before the operation

of the Criminal Law Amendment Act 107 of 1990 but which were subsequently dealt with by this Court, as on appeal, in terms of that Act. In such cases there was the self-evident possibility that evidence considered irrelevant to, or insufficient to prove, extenuating circumstances under the previous law might have become relevant to the wider question whether there was a reasonable possibility of mitigating factors. Accordingly s 19(12)(b)(iii) of the Act empowered this Court to remit the case inter alia for further evidence in suitable instances. In TLOOME'S case (at 38 e-i) the learned Chief Justice stated that the proper procedure to follow when seeking remittal under that sub-section was for the appellant formally to apply for it on notice of motion. He went on to say that this Court would not normally exercise the power concerned mero motu unless the availability of relevant evidence (relevant in the sense explained in S v NOFOMELA 1992 (1) SA 740 (A)) was a reasonable possibility. Mr Arendse relied

particularly on the next paragraph in TLOOME'S case (at 38j-39a) which reads thus:

> "In an exceptional case this Court may invite such an application in terms of s 19(12)(b)(iii) even where the basis for the possible existence of such evidence ... is lacking. In such a case this Court will spell out to appellant's counsel the lines of investigation to be undertaken in order to sustain a proper application for remittal. Such a case may arise where there is a dearth of personal information about the applicant (cf S v DLAMINI (supra)). In such a case the principles of NOFOMELA'S case will have to be borne in mind."

Counsel's reliance on TLOOME'S case is misplaced. As already mentioned, that matter concerned legislation dealing with a special class of cases. Ordinarily the admission of new evidence is only permitted if an applicant complies with certain long-recognised requirements laid down in the cases. These requirements have been codified, in so far as Supreme Court criminal cases are concerned, in s 316(3) of the Criminal Procedure Act 51 of 1977. In the NOFOMELA matter those requirements were included among

0 the steps required of an applicant for remittal under s 19(12)(b)(ill) of the 1990 Act. The additional requirements laid down in NOFOMELA'S case, which were necessitated by the situation with which the latter Act was intended to deal, were that the proposed evidence had to be relevant to the issue whether there were mitigating factors and that, save for exceptional cases, there was a reasonable possibility that the evidence in question would have been led at the trial had the amended (1990) law been in force at the time of the trial.

Manifestly, TLOOME'S case does not apply here. Appellant's trial (from October 1991 to December 1991) was conducted under the amended law and the reasons for the enactment of s 19(12)(b)(iii) in no way pertain to his case. He was at liberty to lead evidence, or have evidence led, in relation to the matter of mitigating factors. He failed to do so. Further evidence could only be admitted thereafter consequent upon appellant's

compliance with the requirements for re-opening as prescribed in the Criminal Procedure Act (see secs 316A (3) read with s 316) . No such compliance has he ever attempted.

It follows that Mr Arendse's first main submission cannot succeed.

As to his second submission, counsel urged that the trial Court overlooked, or at least under-emphasised, the fact that appellant came from humble and disadvantaged beginnings and the fact that the killing was not planned. It cannot be found that the Court erred in either respect. Appellant's personal circumstances, as conveyed from the Bar, were recounted in the judgment dealing with aggravating and mitigating factors. It is not feasible, either, that those circumstances could begin to match, much less outweigh, the other relevant elements of sentence imposition in this particular case. As to the suggested absence of planning, appellant did not live in the area of the

deceased's home and must have made his way there with burglary in mind and the accompanying intention to seek out the easiest target. The evidence shows that the deceased had not long before her death eaten a substantial meal and taken a bath. In the absence of any evidence creating a reasonable contrary possibility, the inference is that her presence in the house was proclaimed by lights in a number of rooms and that this would have been obvious to anyone watching the house from outside. Appellant must have contemplated what steps to

take to overcome any attempt to foil his plan. Such contemplation would inevitably have led him to intend the use of violence upon the occupant of the house. Having entered, he did overcome the deceased with violence. It is uncertain whether he tied her hands and bound her face before strangling her but if the killing was not wholly gratuitous, it was aimed either at preventing his incrimination (if she had already seen

his face) or facilitating the theft. The only reasonable further inference is that appellant must have foreseen this very likely sequence of events beforehand. Even if he only did so a short while before entry (which is very unlikely) he went ahead prepared to kill if it suited his purpose. Nothing in the evidence supports counsel's implied submission that the murder was committed on the spur of the moment, in panic or on impulse.

The further basis for counsel's second submission was that life imprisonment without parole would be sufficient to remove appellant from society permanently, thereby fulfilling in sufficient measure the need for a sentence which not only exacted retribution but served to protect the public. This contention overlooks one crucial feature of appellant's criminal career. Having been sentenced in 1988 to what was in effect very long term imprisonment, and having, no doubt, been confined in conditions designated for

long term prisoners, appellant nevertheless escaped. Not only that. He soon committed two robberies, the one involving a threat with a firearm. I consider that in these circumstances there is good reason to think that appellant will use all his endeavours to escape again. If he does, there is equally good reason to contemplate that he will once more resort to criminal conduct involving very serious, if not fatal, violence. The trial Judge was therefore justified in holding that the death sentence was the only proper sentence in this matter. That is also my conclusion.

The appeal is accordingly dismissed.

C T HOWIE ACTING JUDGE
OF APPEAL

BOTHA JA)
EKSTEEN JA) CONCUR