CASE NO. 358/92
J VD M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MADODA ALFRED MCHUNU Appellant

and

THE STATE Respondent

CORAM: BOTHA, JA et NICHOLAS, VAN COLLER, AJJA

DATE HEARD: 10 MAY 1993

DATE DELIVERED: 2 JUNE 1993

J U D G M E N T

VAN COLLER, AJA:

The appellant was convicted in the Durban and Coast Local Division of murder (count 1) and

of housebreaking with intent to commit robbery and robbery (count 2) . On 8 June 1992 the trial judge, Broome J, sentenced the appellant to death on the murder charge. On count 2 he was sentenced to 15 years' imprisonment. The appellant's co-accused, his girlfriend, was also convicted on counts 1 and 2 . She was sentenced to 20 years' imprisonment on the murder charge and to 10 years' imprisonment on count 2. The sentences were ordered to run concurrently. The appellant's appeal is only against the death sentence.

The events which gave rise to the charges as revealed by the evidence are the following. The deceased was a 56 year old widow, who lived alone in her house in Pinetown after her husband's death in November 1991. She was a frail woman, weighing approximately 39 kilograms. At about midnight on the night of 27-28 March 1992 the appellant and his co-accused left the latter's room and

walked to the deceased's house, a

distance of approximately 10 kilometers. The appellant, who knew that the deceased was living alone, was armed with an Okapi knife. At the deceased' s home the appellant climbed onto the roof and removed a few tiles. Gaining access in this manner he broke through the ceiling and got into the living room. The appellant said in his evidence that he went through the roof in order not to alert the deceased. The appellant's co-accused stood guard outside the house. The appellant encountered the deceased in the passage and immediately proceeded to stab her. She fell and died in the passage. The appellant's co-accused then entered the house and they gathered and removed the items detailed in the indictment. They loaded the stolen items into the car of the deceased and the appellant reversed out of the garage. It appears that the appellant experienced difficulty in reversing the car which went off the driveway. The appellant and his

co-accused then left the car and took what they could carry and walked away. The trial court found that the appellant selected the house, that he intended to eliminate the one and only occupant and that he immediately made short work of the deceased the moment they encountered each other in the passage. Therefore, according to the trial court, it was the clearest possible case of dolus directus.

Professor Botha, a forensic pathologist who conducted the post mortem examination, said in his evidence that the deceased died as a result of multiple penetrating stab wounds. About 39 stab wounds had been inflicted of which 12 could probably be categorised as defensive injuries, these being on the hands, wrists and the arms.

There was uncertainty at the trial with regard to the appellant's age. The evidence of the appellant's mother that she thought that he was born in

1971 was described by Broome J as quite unreliable. A radiologist put his age at 19 to 22 years. The trial court, also taking into account the appellant's appearance and the fact that he was the father of two children, was satisfied on all the evidence that he was at least 21 years old at the time of the trial. The appellant has no relevant previous convictions.

There are few mitigating factors in this case. The fact that the appellant was only 21 years old at the time when the murder was committed and that he has no previous convictions can be taken into account in his favour. The aggravating factors, however, far outweigh the mitigating factors. A frail elderly woman was attacked in the middle of the night in her own house. Entry was obtained through the roof and once the intruder was in the house there was no possibility of escape for her. She suffered a savage and brutal attack in which no less than 39 stab wounds were

inflicted on her. The appellant was not known to the deceased and there was no reason to kill her in order to deprive her of her possessions. The appellant could easily have overpowered the deceased without killing her. I agree with the finding of the trial court that this was a premeditated killing. The appellant admitted in his evidence that he took the knife along in order to injure the deceased and that this was agreed upon with his co-accused even before they went to the house. Although the appellant was unemployed he received financial assistance from his mother and brothers. He admitted under cross-examination that he went to the house of the deceased because "I like good things . . . and like money . . .". The crimes were therefore not committed because the appellant was destitute, but out of greed.

It remains to consider, with regard also to the main objects of punishment, whether or not the death

sentence is the only proper sentence. In view of the appellant's youth one considers the death sentence with reluctance. The calculated and determined way in which the crimes were committed, however, rules out any argument for immaturity in his case. Although the possibility of rehabilitation cannot be excluded this is another of the increasingly frequent fatal attacks on the elderly within their own homes. In these circumstances the deterrent and retributive aspects of punishment play a decisive role and the interests of society come strongly to the fore. See State v Tloome 1992(3) SA 568 (A) at 577H-I and S v Sesinq 1991(2) SACR 361 (A) at 365g. Mr Markram, who appeared on behalf of the appellant, submitted that in view of the suspension of the execution of the death sentence by the executive authority, it can no longer be in the public interest to impose that sentence. According to this argument the death sentence has lost

its deterrent and retributive effect and can therefore not be regarded as the only proper sentence to impose. This Court had occasion to deal with an argument in similar vein in the unreported judgment in the case of Dennis Williams v The State, case no 311/92 dated 24 May 1993. I concurred in the judgment of Eksteen JA who said the following at pages 10-14:

> "Mr Daubermann limited his argument before us to the appeal against the sentence. His main argument was that owing to a so-called 'moratorium' which the executive authority seems at present to be applying to the execution of death sentences imposed by the courts, that sentence has lost all its deterrent and retributive effect, and that consequently courts of law should no longer impose such sentences as they served no good purpose.
>
> However cogent this argument may be from a political platform or in an academic debate, it is not one which can be entertained by this Court. In the first place this 'moratorium' is not contained in any law or proclamation, and so its

nature and ambit - whether it contains any provision for exceptional circumstances, or how long it is to be applied - cannot be ascertained. In any event, and even if we were to assume that some general 'moratorium' existed as a matter of government policy in respect of all death sentences imposed by the courts, it could still not serve to deter this Court from carrying out its duty in terms of the law. Sec 277(2) of the Act [Act 51 of 1977] provides that:

> '(2) The sentence of death shall be imposed -
>
> (a)
>
> (b) if the presiding judge ... is satisfied that the sentence of death is the proper sentence.'

In S v Nkwanyana and Others 1990 (4) SA 735 (A) at 745 F this Court, in considering the abovementioned section, held that

> 'the imposition of the death sentence will be confined to exceptionally serious cases; where ... 'it is imperatively called for'.'

Where the presiding judge, after considering all the mitigating and aggravating factors, is satisfied that it is so imperatively called for, then he is enjoined to give effect to the law and impose the death sentence. (S v Nkambule 1993 (1)

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SACR 136 (A) at 146 f.)

That this whole argument was one very much ad hoc became apparent by Mr Daubermann's ready concession that should the 'moratorium' be terminated forthwith, his whole argument would fall away. Nothing more need therefore be said on this score."

I have not been persuaded that those views are wrong.

Having considered all the circumstances I am of the view that this is an extreme case where the death penalty is imperatively called for.

The appeal is dismissed.

A P VAN COLLER
ACTING JUDGE OF APPEAL

BOTHA, JA )
) CONCUR
NICHOLAS, AJA )