CG CASE NUMBER: 416/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MANDLA BRIDGEMAN ZAMISA Appellant

and

THE STATE Respondent

CORAM: CORBETT CJ, HOWIE et HARMS AJJA

HEARD ON: 21 MAY 1993

DELIVERED ON: 2 JUNE 1993

J U D G M

E N T HOWIE AJA

2 On the morning of 15 January 1992 appellant entered the house in Montclair, Durban, where Coral Petzer, aged 64, lived with her husband and daughter. His motive was theft. He was in the process of rifling her daughter's bedroom when Mrs Petzer, who had been outside, confronted him. She was alone at home at the time. A struggle ensued in the course of which appellant struck and kicked her. He escaped with R60,00 in cash and some jewellery. Thirteen days later Mrs Petzer died in hospital as a result of the injuries which appellant had inflicted.

On the morning of 25 February 1992, in an almost identical incident, appellant entered the Montclair home of Margaret Kayser, aged 73. She, too, was alone at the time and outside when appellant went into the house. He was busy searching the premises when she re-entered. In the resulting confrontation he fatally assaulted her. She died within minutes. He came away with sundry articles of clothing.

Arising out of these events appellant was convicted in the Durban and Coast Local Division on two counts of murder and two of theft. For the Petzer murder and the related theft (counts 1 and 2) he was sentenced to 20 years' and 2 years' imprisonment respectively. For the Kayser murder (count 3) he was sentenced to death. For the associated theft (count 4) he received 2 years' imprisonment. His appeal is directed solely against the death sentence. Counsel for appellant contended, in the main, that the later killing was not materially more serious than the first, that it did not warrant the inference, drawn by the trial Court, that the second victim was murdered with direct intention, and that if the ultimate sentence was not warranted on count 1 it was equally not the only appropriate punishment on count 3. In the alternative it was argued that the death sentence was in any event not justified in all the circumstances of the case.

These submissions necessitate brief reference to the first incident. A neighbour of the Petzers testified that he saw a man (who could only have been appellant) standing in the street opposite their house. After a while this man entered the Petzer's driveway. Some time later the neighbour saw Mrs Petzer in the driveway, badly injured and screaming for help. On her admission to hospital shortly afterwards she exhibited multiple neck contusions consistent with throttling, a flail chest due to multiple rib fractures, a fracture of the right lower arm and numerous contusions and abrasions.

Autopsy confirmed the existence of multiple fractures. The chest injuries in fact comprised thirteen rib fractures and a fracture of the upper part of

the sternum. The pathologist, Professor J B C Botha, described the deceased as having been well built and well nourished. Her chest had been injured either by having been jumped upon or having been repeatedly

kicked. He assessed the assault as severe not only in respect of its consequences but also in terms of the force used.

Appellant pleaded guilty to the theft charges but not guilty on the murder counts. Through counsel he tendered a written plea explanation. In it he said that having taken the cash, a pair of gold earrings and a gold chain, he was confronted by the deceased when he about to leave the house. They became involved in a scuffle in the course of which he punched and kicked her in order to get away. After she had fallen he made good his escape.

Appellant gave evidence in regard to both incidents in which he sought persistently to evade the most incriminating inferences arising from the incontestable facts. His evidence was justifiably found by the trial Court to be vague and unsatisfactory. His counsel did not seek to contend otherwise. In particular, although appellant strove to say that he

kicked Mrs Petzer before she fell and not after that, it is plainly the only reasonable inference that he did so when she was on the floor. Moreover, despite his violent assault she was evidently not entirely succumbing. She had continually shouted for help and was still crying and shouting when he left her. The further compelling inference, therefore, not disturbed by his unacceptable evidence, is that he desisted only because her shouts, which he admitted occurred and which would have been audible in the neighbouring properties, were in his view likely to attract someone who could endanger his escape.

Undeterred by this experience appellant sought out another lone and defenceless victim. Margaret Kayser lived with her nephew but during the day he

was at work. On the morning concerned she was busy in the garden with her back turned when appellant entered the kitchen door.

In his plea statement appellant offered the

following account of this incident. He said he saw the second deceased before he went inside. He had taken various items of clothing and was about to depart when he realised that she had entered the house and locked the security gate situated at the back door. She confronted him and sprayed some substance into his eyes. They started to struggle as he attempted to get out. He punched and kicked her and left her seated against a wall, still conscious. He said he did not realise she might die from the injuries which he inflicted. In her nephew's evidence for the State he disclosed having equipped her with a can of repellent self-defence spray for her protection.

During the course of the police investigation after appellant's arrest he pointed out relevant features at the respective houses involved. His last remark at the Kayser property was "I am sorry that I strangled her".

In his evidence appellant initially denied

having made this last remark. Subsequently he withdrew the denial, saying that he was not sure he had mentioned strangulation to the police. However he could not deny having injured the second deceased's neck and said that the spray had blinded him. As in the case of the earlier incident, he alleged that the force he used on the deceased was aimed at effecting his escape. He said he kicked her not very hard, and not many times, just to get her out of his way and that she was alive when he left her.

From the evidence of Professor Botha it is apparent that this deceased was slightly built - a mere 1,55 cm in height and weighing only 52 kg. The chief post-mortem findings were a fractured hyoid bone, a lacerated pulmonary artery, multiple cardiac lacerations and multiple superficial capsular lacerations of the liver. There were also numerous facial and bodily abrasions, contusions and lacerations.

The cause of the arterial and cardiac injuries

was a stove-in chest. The thoracic cage was the focal point of appellant's attack. It resulted in a fracture of the sternum and multiple bilateral rib fractures. Broken ribs had torn into the heart so extensively that Professor Botha said that he had never seen an instance in which chest trauma had ruptured the heart in this measure. He concluded that severe force was responsible, possibly by way of a single application. Asked to elaborate, he said that the chest injury appeared to be a compression injury most probably caused by the downward momentum of the assailant's foot while the rear of the chest was against a hard surface. He added that the second deceased's nutritional status was not as good as that of Mrs Petzer and that consequently the former was more vulnerable in that her bones would have fractured with "somewhat less force" than in the case of Mrs Petzer. As regards the neck, soft tissue injuries were present apart from the hyoid fracture and all this was consistent with a moderate degree of manual

force. Unlike the chest and hyoid fractures which caused internal bleeding, the liver lacerations resulted in none. Professor Botha consequently concluded that the latter injuries were inflicted shortly before death or after death. One must therefore infer, I think, that there was a further application of force after the injury to the chest. Professor Botha also stated that any one of the injuries to the hyoid, the heart, the pulmonary artery and the liver could individually have been fatal.

From the medical evidence the conclusion is unavoidable that the deceased must have been on the floor when the chest injuries and the blow to the liver area were inflicted. The other injuries must therefore have been caused in appellant's efforts to overpower her which resulted in her landing on the floor. Assuming in appellant's favour (however unlikely this may be) that he did not intend to kill prior to her lying on the floor, the situation after that was essentially

different. Once she was on the floor it would, given her already injured state and her frail physique, have been easy for appellant, a young man of 23, to make his escape without causing her further harm. Instead, he delivered the cruel and devastating blow which crushed her chest. As if that was not enough he inflicted a blow to the abdomen. In the light of what had occurred at the Petzer home it is open to inference that he intended this time to eradicate any chance that his victim might cry out. Or possibly he intended to eliminate not only any chance of discovery or pursuit but also any prospect of subsequent identification. At all events the inference is inescapable that he intended the disabling consequences to the deceased to be final and complete. Counsel for appellant suggested that the effect of the spray might have angered or frightened him. He testified to neither effect. Even the temporary impairment of vision he referred to was limited in its relevance to his awareness as to the

extent of the neck injury. He at no stage suggested that he was at all incapacitated as regards the subsequent stages of the assault. Finally, if he did not intend either to forestall arrest or identification the only other conclusion is that the further violence he inflicted was simply wanton. In all the circumstances, therefore, the trial Court's inference that appellant killed Margaret Kayser with direct intent was wholly justified.

That form of intent is an aggravating factor. So is the fact that this assault was an almost exact repetition of the attack which appellant inflicted on Mrs Petzer. Also aggravating are the victim's age and defencelessness, appellant's theftuous motive, and the merciless force he employed. In the absence of reasonably possibly truthful evidence by him cm this last aspect the inference seems to me to be justified, as the only reasonable one, that the violence used on the deceased when she was down was purely gratuitous.

In addition, the evidence warrants the conclusion that appellant reconnoitred with the purpose of identifying solitary victims whose physical resistance he could easily overcome. He must necessarily have seen that the deceased was old and frail before he entered her house. For that reason the fact that appellant neither carried nor used a dangerous weapon is of no moment. Upon such victims his capacity for unarmed offence was lethal enough. This is, moreover, yet another case of an attack upon an elderly person in the supposed fastness of her own home.

It also tells against appellant that the last of his three previous convictions (the first two were petty thefts) was for housebreaking with intent to steal and the consequent theft of money from the dwelling concerned. Here again is the recurrence of a pattern of often encountered criminal behaviour - the persistent intruder's eventually resorting to fatal violence. Finally, apart from telling the police that he was sorry

he had strangled the deceased, which statement appellant variously denied or could not recall, there was neither evidence from any source nor protestation by appellant at the trial that he displayed or felt genuine remorse for what he had done.

On the mitigating side appellant, who earned his living by doing casual labouring and gardening jobs, testified that had failed to find work on the two days in issue in this case and had therefore decided to steal because he needed money. Secondly, it is in his favour that his previous convictions include no crimes of violence. The trial Court found, in addition, that appellant had co-operated in the police investigation and had not wasted the time of the Court with a false or baseless defence. Against this last finding, however, must be weighed appellant's attempts in evidence to minimise the criminality of his conduct and to downplay the extent of the violence he used.

Giving due and anxious attention to all the

facts of this matter, it is clear that the aggravating factors strongly outweigh such mitigating factors as are present. Furthermore, although it cannot be said that appellant is beyond reform it seems to me that that feature must yield to the cumulative and decisive effect of three other considerations. In the first place, society's abhorrence of attacks upon the elderly in their homes was repeatedly expressed in many trial and appellate judgments pre-dating these events as a major reason warranting the most extreme deterrent and retributive sentence. Such attacks have nevertheless persisted. Secondly, callous and gratuitous violence, beyond such force as would sufficiently subdue the victim for the offender's nefarious purpose, is a feature of many of the murders which the reported cases have labelled as among the most serious. Thirdly, having assaulted Mrs Petzer with the foresight of her possible death and having, I infer, narrowly escaped, appellant proceeded, unswayed by what he had done or by

his first victim's anguish, to repeat his conduct, almost to the last detail, six weeks later. Neither the earlier experience nor adequate opportunity for contemplation dissuaded him from doing so. In the result I take the view that the death sentence is the only appropriate sentence on count 3.

The appeal is accordingly dismissed.

C T HOWIE ACTING JUDGE OF APPEAL

CORBETT CJ)

CONCUR

HARMS AJA)