Case Number 643/93 IN THE SUPREME COURT OF SOUTH AFRICA (APPELATE DIVISION) In the matter between:

MKANGELI RASMENI Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, VIVIER, VAN DEN HEEVER, JJA

DATE OF HEARING: 6 MARCH 1995 DATE

OF DELIVERY: 27 MARCH 1995

J U D G M E N T

E M GROSSKOPF, JA

The appellant was convicted of murder in the Eastern Cape Division (Leach J and assessors) and was sentenced to death. He now appeals against this conviction and sentence. At his trial he was also convicted on a number of additional counts which are not subject to appeal. For the purposes of this appeal it is necessary to have regard to the full ambit of the criminal conduct proved against him at his trial.

On 11 January 1993 the appellant entered, through the bathroom window, the farmhouse of Mr S P Holtzhausen in the district of Alexandria. The appellant stole a .357 revolver and three rounds of ammunition.

About a week later, on 17 January 1993, the appellant returned to the farm of Mr. Holtzhausen, broke in through a window, and stole food, drink, jewellery, cash and other items to a value of at least R3 500.

The next number of offences were committed on 29

January 1993 at Vengrove Farm in Alexandria, the home of Mrs. M J Scott. On the evening in question Mrs Scott, who was a woman in her early 70's, was alone at home. The house was locked. At approximately a quarter to seven she was busy cleaning her teeth at a wash stand. On turning around from the wash stand she was confronted by a man (who, it was established at the trial, was the appellant) holding a pistol in his left hand pointing at her. His face was smeared with paint and partly covered by a handkerchief. He screamed at her demanding money, which she said she did not have. He then demanded the keys of the safe. She said she did not have them. Thereupon he produced a large knife with a blade of approximately 30 cm in length. Mrs Scott maintained that she had no money. However, she found some small change on a table which she gave to the appellant. He then took her to her son's bedroom where there was a wall-safe. The appellant made various attempts to open the safe but without success. He then

directed Mrs Scott to go to the dining room, and from there to the bathroom. She tried to slam the bathroom door and lock it. However, the appellant forced open the door, removed the key from the inside, and locked her in. While he was doing this Mrs Scott escaped through the bathroom window. She made her way to a neighbour who lived about four kilometres from her. When she returned home she found that some articles of no great value had been stolen.

This then brings me to the final series of offences. These were committed on the night of 16 to 17 February 1993 at Forest Hill Farm in the district of Alexandria. This was the home of Mr and Mrs Purdon. The trial court accepted the State evidence in regard to these charges and this finding was rightly not challenged before us. The facts as found were as follows.

On the night in question Mr and Mrs Purdon, who were both in their 50's, were at home together with

their 30 year old daughter Katherine and her nine year old son Tyrone. Mr Purdon's pick-up truck was parked outside the house. In the truck were some bottles of liquor, cool drinks, a glass, cigarettes and a butcher's knife. The knife was exhibit 1 at the trial. The appellant came to the farm and removed these articles from the pick-up truck. Save for the knife, he placed the articles on a nearby lawn, apparently with the intention of retrieving them later. The knife, which had a fixed blade, some 20 cm in length, he took with him. He was also armed with another knife and a 9 mm pistol. The pistol was loaded with a single round (this is the appellant's version and it is supported to some extent by police evidence).

Some time after midnight the appellant took a ladder which was in the vicinity of the house and used it to enter the Purdons' bedroom. Their bedroom window was ajar, and the appellant had to open it further to gain access. All the inhabitants of the house were

asleep. The appellant walked through the bedroom, a passage and some further rooms to the kitchen.

What happened thereafter was recounted by Mr and Mrs Purdon. At about 1 a m, Mr Purdon said, he awoke and decided to go to the kitchen to get a glass of water. On reaching the door leading from the lounge into an entrance hall and from there to the kitchen, he turned on outside lights which shone into the kitchen. He saw the appellant standing in the kitchen with his hands over the kitchen table. The appellant says he was eating and this is not disputed. The distance between the appellant and Mr Purdon at that stage was approximately 9 metres. Mr Purdon asked the appellant what he was doing, to which the appellant replied that he was hungry. The next moment the appellant launched a violent attack on Mr Purdon with the knife, exhibit 1. The first blow which the appellant struck missed Mr Purdon and caused an indentation in the steel doorframe, which is an indication of the force with

which it was delivered. The appellant then directed a hail of blows with the knife at Mr Purdon. Mr Purdon put up his left arm in an attempt to ward these off. He sustained stab wounds on his arm, his chest and his hand, his thumb being almost severed. On turning away from the appellant, he was stabbed in the back. Eventually he fell to the ground with air escaping out of a wound in his chest which he tried to stop with his fingers. In the course of the attack he heard his daughter Katherine shouting "leave him, leave him." On looking around he saw the appellant grab hold of his daughter. He also heard his wife, who had awoken, asking what was wrong and he shouted, "fetch my gun". After that, while he was lying immobile on the ground, he heard several shots being fired. When the shooting had ended he heard movement in the house and shouted at his wife to give the appellant money. He knew that he had R960 in a wallet in a trouser pocket. What happened after that appears from the evidence of Mrs Purdon, to

which I now turn.

Mrs Purdon was awakened by shouts. She got out of bed and went into the passage. She saw her husband being attacked in the doorway with her daughter, Katherine, attempting to pull the appellant off him. Katherine was shouting to the appellant to leave her father alone. Mrs Purdon returned to the bedroom to fetch her husband's pistol and then went back to the passage. As she went down the passage the appellant left her husband who collapsed on the floor. The appellant came at her. He had a firearm in one hand and a knife in the other. She fired the eight rounds which were in the pistol at the appellant. Although she struck the appellant four times, twice in one leg, once in the other, and one shot in the abdomen, he gave no indication of having been hit. He went up to her, stabbing furiously. She tried to protect herself by raising her hand in front of her. At the same time Katherine approached the appellant from the rear and

tried to pull him away from Mrs Purdon. The appellant then stabbed vigorously at both of them and Katharine collapsed to the floor. During the course of this attack on her, Mrs Purdon sustained a stab wound extending from her left shoulder penetrating for nine and a half inches under her left breast. There were also stab wounds on the dorsum of the left hand, on the palm of the left hand, on the left forearm, the left elbow, and on both the left and the right sides of her back.

After Katherine had collapsed, the appellant went to the main bedroom. Mrs Purdon followed him. As she entered the room, the appellant was in the vicinity of the window through which he had entered. He picked up a plastic chair with steel legs, and attacked her with it, striking her over the head. While she was still recovering from the blow, he attacked her again with the knife, laying open her left ear and the left side of her neck. Had this wound been a few millimetres

deeper it would have been fatal. This wound bled profusely and she sat down on her bed. She then heard her husband shouting, telling her to offer the appellant money. She asked him whether he wanted money and he said yes. She took the money from her husband's trouser pocket and added about R40 of her own. She gave this money to the appellant. He then picked up something from the floor and made his escape through the window. It later appeared that he had taken Mr Purdon's firearm, which had fallen to the ground.

It is not necessary to set out how Mrs Purdon ultimately obtained help.

As a result of her injuries Katherine bled to death. Mrs Purdon spent a short while in hospital while her husband was in hospital for several months and suffered permanent disability and weakness in the left leg.

Arising from the above events the appellant was convicted as follows. He was convicted of theft of the

firearm and three rounds of ammunition from Mr. Holtzhausen on 11 January 1993 (count 1). In respect of the second incident at Mr. Holtzhausen's home, i e, that of 17 January 1993, he was found guilty of housebreaking with intent to steal and theft (count 2). The events at Mrs Scott's home gave rise to convictions of housebreaking with the intent to rob (count 3) and robbery with aggravating circumstances (count 4).

In respect of the Purdons, the appellant was convicted of theft of the articles removed from the pick-up truck (count 5); housebreaking with intent to rob (count 6); robbery with aggravating circumstances of Mr Purdon's pistol and of the money which Mrs Purdon handed to the appellant (count 7); the attempted murder of Mr Purdon (count 8); the attempted murder of Mrs Purdon (count 9); and the murder of Katherine Purdon (count 10). Finally the appellant was also convicted of the illegal possession of two firearms (count 11).

As I have stated above, the only count which is

before us on appeal is count 10 relating to the murder of Katherine Purdon. On this count the appellant was sentenced to death. On the other counts various terms of imprisonment were imposed, some of which were ordered to run concurrently, resulting in an effective term of imprisonment of 25 years.

Although the present appeal was said to be against

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conviction and sentence, the only point taken in respect of the conviction was that the trial court had erred in holding that the appellant had killed the deceased with dolus directus proved. This was consistent with the appellant's attitude in the court a quo. There he had pleaded guilty to murder on the basis of dolus eventualis, but this plea was not accepted and the court found dolus directus. The appellant's counsel in this appeal asked therefore that the conviction for murder be maintained but that the finding in regard to the nature of the appellant's

intent be changed to one of dolus eventualis. It is

clear, therefore, that there is not, in truth, an appeal against the conviction. It is common cause that the conviction must stand. The nature of the intent with which the appellant killed the deceased can be relevant only to sentence.

The crux of the argument presented to us was that the appellant was surprised in the kitchen by Mr Purdon, that a scuffle started between the two of them, and that the appellant wanted to escape by the same way as he had come, i e, through the bedroom window. However, first Mr Purdon, and later Katherine and Mrs Purdon, were between him and the window. This caused him to stab wildly in an attempt to escape. He was also shot by Mrs Purdon before he stabbed the deceased, and before he could get away. These circumstances, it was suggested, cast doubt on whether the appellant ever entertained the direct intent to kill any of the Purdons.

In my view this argument is refuted by the facts.

When Mr Purdon first saw the appellant they were about 9 metres apart. The appellant immediately launched a violent attack on Mr Purdon, using such force that an indentation was made in the steel door frame. If the appellant had merely wanted to get away, he could easily have done so, Mr Purdon had just got out of bed. The appellant was armed to the teeth. If the appellant had threatened Mr Purdon with his firearm (or, for that matter, one of his knives) Mr Purdon would hardly have

tried to prevent his escape, and would, no doubt, have opened the front door if asked to do so.

A further important pointer to the appellant's intent may be found in his conduct after he had returned to the bedroom. At that stage he was at the window, all the inhabitants of the house had been subdued, and nothing prevented his escape. However, he turned around and launched a fresh attack on Mrs Purdon. He did not desist until she had given him money.

It seems clear, therefore, that the appellant's motive in attacking the Purdon's was not solely to escape. He wanted to get them out of the way in order to plunder the home. To that end he entered the house armed, and even took with him the highly effective knife, exhibit 1, which he had stolen from the pick-up truck. No doubt he would not have used these weapons if none of the Purdons had woken up. But once they did, he immediately went over to the attack. And when one looks

at the wounds which he inflicted, the inference is irresistible that he had the direct intent to kill them, as was found by the trial court. As regards the deceased, Katherine Purdon, the trial court said the following:

> "Again the issue here is whether the accused had the actual intention to kill Katherine Purdon when he attacked and stabbed her or whether he only realised that she might die and persisted with his attack upon her notwithstanding his appreciation of that risk. Again on this count there are two wounds of great significance. The first was a 5 cm laceration above the left ear, deeper towards the rear, indicative of a stab at the head. The

> second was the fatal wound. It penetrated from a point 15 cm from the mid sternum on the upper part of her body near the shoulder through the pectoralis major muscle between the first and second ribs in the mid clavicular line to reach the second thoracic vertebra of the spine. To put that more simply, the knife was buried in her body from near her shoulder until it touched her spine. In its passage the knife severed the subclavicular veins and arteries which in turn resulted in massive bleeding and ultimately death. The medical evidence was that this wound could only have been caused by a blow delivered with considerable force. The accused, who according to what he demonstrated in court is right handed and used the knife with that hand, must have been facing the deceased when he delivered the blow that caused this wound. He was undoubtedly also facing her when he directed a blow towards the head. In the light of this, the force which was required to deliver the fatal wound in particular, the nature of the weapon used and the parts of the body at which the accused directed his blows, we feel that the only reasonable inference which can be drawn is that he must have had the actual intention to kill her when he stabbed her."

I agree with this finding.

It was also argued before us that, if the appellant had intended to kill the Purdons, he would have used his firearm rather than the knife. At best this seems a very speculative contention. The knife was

a deadly and efficient weapon. There may be many reasons why a murderer would prefer it to a firearm. But, be that as it may, in the present case we know that the appellant had only a single round of ammunition. This would hardly have sufficed to put all the Purdons out of action.

For the reasons given I accordingly agree with the trial court that it was proved beyond reasonable doubt that the appellant had the direct intent to kill the deceased.

I turn now to the appeal against the death sentence. It is trite law that this court has an independent discretion to decide, after considering all mitigating and aggravating factors and any other relevant circumstances, whether the death sentence is the only proper sentence in this case.

There are substantial aggravating factors. The appellant entered the isolated farmhouse of the Purdons in the middle of the night when everybody was asleep.

The raid was pre-planned. The appellant foresaw the possibility of resistance, and was armed to deal with it. When the occupiers of the house woke up, he attacked them with the direct intention of killing them. More particularly, he had the direct intention of killing the deceased.

The appellant was not a first offender. Apart from an irrelevant previous conviction for theft while still a youth, he was found guilty of assault with the intent to do grievous bodily harm in 1990. This does not appear to have been a serious matter. He was sentenced only to a suspended fine. Then he was convicted (again in 1990) of dealing in dagga. He was sentenced to a partially suspended term of imprisonment. These previous convictions are not of any great importance for present purposes. What is more important is the course of conduct revealed by the evidence in the present matter. In little more than a month the appellant unlawfully entered three farmhouses for the

purposes of theft or robbery. In all these cases there was a potential of injury or death to the occupiers. At least on the last two occasions (those involving Mrs Scott and the Purdons) the appellant was armed with a firearm and a knife. This background is seriously aggravating. I turn now to mitigating factors. The appellant was 23 years old when he was sentenced (12 November 1993). There is nothing to suggest that he was immature for his years. Nor can it be said that the offence flowed from youthful impetuosity or any other attribute of immaturity. The appellant's mother gave evidence in mitigation in which she described his youth and upbringing. He clearly came from a deprived background and had received an inadequate education. Prior to the appellant's arrest, his mother said, he had been doing piece work on a chicory farm. The appellant, on the other hand, testified that he had been out of work for some years. Whatever the true position may be, I think we must accept that his

employment was, at best, sporadic. Although his age and personal background may be regarded as mitigating to some degree it cannot in my view be accorded any substantial weight.

If one weighs up the aggravating factors against the mitigating ones, the balance comes down heavily on the side of the aggravating ones. Looking at the purposes of punishment I consider that this is a case where deterrence should receive the greatest emphasis. I do not have to expand on the need to protect farmers and their families against murderous assaults like that in the present case. At the same time the natural anger of the public at such deeds also deserves some recognition. I agree with the learned trial judge that it is impossible to say that the appellant is entirely incapable of rehabilitation, but that the prospects thereof are clearly extremely slim in view of the nature of the offences and his previous history of crime. Taking everything into account I consider that

this is a case calling for the most severe punishment for which the law makes provision.

My above conclusion would, as the law now stands, lead to a confirmation of the sentence. However, the constitutionality of the death sentence is at present being considered by the Constitutional Court. In these circumstances it is appropriate to postpone the final decision of this appeal until after the Constitutional Court has given its ruling.

The following order is made:

1. The appeal against the conviction is dismissed.

2. Further consideration of the appeal against the sentence is postponed to a date to be fixed by the Registrar of this Court in consultation with the Chief Justice.

E M GROSSKOPF, JA

VIVIER, JA
VAN DEN HEEVER, JA
Concur