Case number 21293 IN THE SUPREME

COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

KHULIKILE ALFRED JIBILIZA Appellant

and

THE STATE Respondent

CORAM : NESTADT, STEYN et

HOWIE JJA DATE

OF HEARING : 9 MARCH 1995 DATE OF JUDGMENT : 17

AUGUST 1995

J U D G M E N T

HOWIE JA/

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HOWIE JA:

Appellant was one of a band of three armed men who travelled from Port Elizabeth to the farm of Colin Ford, near Port Alfred, on 16 November 1991. At about midday they broke into the farmhouse. The deceased and his wife were not present at that stage but returned a short while later. When they entered the homestead they were attacked. In the course of what followed the deceased was fatally stabbed.

Arising out of the killing, appellant, as accused 1, and his companions, as accused 2 and 3, were charged in the Eastern Cape Division (Kannemeyer J and assessors) on the following counts:

1. Housebreaking with intent to rob and to murder,

2. Murder, and

3. Robbery with aggravating circumstances.

In addition, appellant was charged on a fourth count with attempted murder arising out of a subsequent incident on

the same day.

The accused were all convicted on the first three counts. Appellant was also convicted on count 4 of common assault.

Imprisonment was imposed on all the accused on all counts save for appellant in respect of the murder charge. On that count he was sentenced to death.

Leave to appeal was unsuccessfully sought from the trial Court in regard to all the convictions and sentences subject, of course, to appellant's statutory right to appeal under s 316A of the Criminal Procedure Act, 51 of 1977, in respect of his conviction and sentence for murder.

It is in exercise of that right that he appeals now.

Appellant's evidence in his defence was that he was never on the deceased's property at all and was, coincidentally, apprehended by the police for no reason later the same afternoon alongside the main road which runs by the farm. According to the policemen who arrested

appellant, however, they found him hiding in a storm drain under the road wearing two watches, one belonging to the deceased and the other belonging to his wife.

The trial Court rejected appellant's story in its entirety and found that it was he alone who had, with dolus directus, mortally stabbed the deceased.

In argument appellant's counsel accepted, realistically in my view, that it was indeed appellant who stabbed the deceased. On that footing the sole contention advanced in respect of the conviction was that the State had failed to prove any intention to kill on appellant's part.

Before dealing with the evidence on which the crucial finding on intention was founded, I must say this. Although appellant has not appealed against his conviction on count 1 and it could therefore be argued that one of the facts to be taken into consideration in regard to his murder conviction is that the group broke in intending,

inter alia, to kill, I shall approach the present issue by ignoring that conviction and its attendant implications.

Turning to the evidence, an autopsy on the deceased's body revealed the existence of multiple bruises, lacerations and abrasions and also five incised wounds. The incisions included three stab wounds into the chest. One of these penetrated the left lung causing excessive blood loss, ensuing shock and death. The depth of this wound was 30 - 60 mm. The total picture presented by all the wounds suggested to the doctor performing the examination a protracted attack on the deceased with concomitant efforts on his part to defend himself.

The testimony of Mrs Ford was that when she and the deceased entered the kitchen she was set upon by one man and the deceased by the other two. They were dragged to their bedroom. By clear inference the man who attacked her was appellant. He was armed with a knife. As he assaulted her he called to his confederates "Ukubulala, ukubulala"

which means "kill, kill". He demanded her watch and that of the deceased. They relented. He then caught sight of their safe and demanded the keys. She told him the keys were in the possession of one of her sons. She added that the intruders had best leave because visitors were due soon for lunch. This last statement prompted the other accused to leave the house but appellant stayed behind. He persisted in his quest for the safe keys and then switched his attention from Mrs Ford to the deceased. The deceased grabbed appellant and the two men struggled their way into the passage. After that Mrs Ford did not see what more befell the deceased. There is evidence, however, that his last actions involved taking his shotgun, going outside and firing three shots, presumably at one or more of the intruders. He then collapsed and died.

It is not clear precisely when but there is also evidence that to make his getaway appellant jumped through a closed window instead of leaving by the kitchen door. It

would seem, by inference, that his haste must have been engendered by the fact that the deceased had been able to get to the firearm and was imminently about to shoot.

In the submission of appellant's counsel the deceased's spirited resistance, and especially his terminal efforts, supported the inference that appellant not only left the deceased very much alive but that he certainly did not intend to go as far as delivering the coup de grâce. That being so, said counsel, it was not the only reasonable inference that appellant intended to kill. He might very well have intended only such violence as would incapacitate the deceased without his death being either willed or contemplated.

In my view the cumulative impact of appellant's words and conduct and the nature of the weapon he used, taken together with the site, number and nature of the wounds and appellant's failure to explain his acts and intentions, compels the conclusion, as the only reasonable inference,

that he killed the deceased with direct intent.

It follows that the conviction, and the finding as to dolus directus, were wholly warranted.

As to sentence, the aggravating circumstances are plain. The murder was committed in the course, and as an element, of a planned, armed attack in broad daylight upon a lone farmhouse in order to rob its owners. It was a long-range operation: the gang came from afar. Their attitude clearly proclaimed that they cared not if the house was occupied. Should it be, they would meet resistance with serious violence. The fatal assault was prolonged, determined and merciless. It was accompanied by the desire to kill. Appellant's conduct conforms to the criminal profile presented by his previous convictions. They encompass five crimes of violence, two housebreakings and three thefts. His longest sentences were, respectively, two years' imprisonment in 1981 for housebreaking with intent to steal and theft, and four

years in 1982 for motor car theft. He was unconditionally released from further incarceration under the last sentence in August 1985. It is the Courts' experience that the persistent housebreaker frequently tends eventually to acts of dangerous if not fatal violence.

The mitigating circumstances found by the trial Court - that appellant (who was 31 at the time of trial) was an ill-educated, unemployed man from a deprived socio-economic sector of society - were comprehensively outweighed by the aggravating features.

The killing was one altogether comparable with those in many cases which have come before this Court of late and which have been labelled as falling within the category of the most serious instances of murder.

By reason of all these considerations the trial Judge concluded - justifiably, I think - that the matter was one in which the deterrent and retributive purposes of punishment warranted greater recognition than the others.

When the appeal was heard, the issue of the constitutionality of capital punishment was awaiting decision by the Constitutional Court. To avoid the expense and inconvenience of a further hearing in this matter counsel were invited to advance submissions as regards a fitting alternative sentence in the event of the Constitutional Court's holding that the death sentence was unconstitutional.

Since then the Constitutional Court has ruled that capital punishment is unconstitutional and the sentence of death imposed on appellant must therefore be set aside. As to the appropriate sentence to substitute for that imposed by the trial Court, there are only two alternatives. One is life imprisonment. The other is a very long finite term of imprisonment.

The prison sentences imposed in this case were the following. On counts 1 and 3 taken together, appellant and accused 2 each received 15 years and accused 3, 14 years.

For the murder, accused 2 received 20 years and accused 3 18 years. On count 4 appellant was sentenced to four months. This was ordered to run concurrently with his 15 year sentence.

In the cases of each of accused 2 and 3 a period of 1 0 years of their housebreaking-robbery sentences was ordered to run concurrently with their murder sentences.

In the result the effective sentence of accused 2 is 25 years and that of accused 3, 22 years.

Appellant's counsel accepted that the facts rendered it appropriate that his overall punishment be heavier than theirs.

It is clear that the sentence under consideration must afford society long-term protection from appellant's depredations. It must also have the deterrent and retributive force referred to earlier. For those purposes it could be said, given the fact that appellant is already well into his thirties, that there may not be a substantial

practical distinction between a sentence of say, 25 years

and life imprisonment. However, assuming in his favour that the difference would be one of substance, and taking the enormity of his crime as self-evident, it remains only to focus on his past contraventions. His record reads badly, it is true, but on analysis all the violent crimes were committed between 1976 and 1979 when he was still a minor. In the 12 years before the present events his only offences were housebreaking with intent to steal and theft in 1981 and theft in 1982. Had he been convicted in that 12 year period of a crime of serious violence or had his record in that time showed an undeterred tendency to repetitive violence the argument for life imprisonment would have been more compelling.

The conclusion to which I have come, therefore, is that all the requirements of fair and humane criminal justice would be met, in this case, by the imposition of 25 years' imprisonment on the murder charge. Allowing the

same period of concurrence as in the case of appellant's co-accused, this means that his effective sentence will be 30 years.

The following order is made:

4. The appeal against conviction is dismissed.

5. The appeal against the death sentence is allowed.

6. The death sentence imposed on count 2 is set aside. In its place is substituted a sentence of 25 years' imprisonment.

7. The sentence referred to in para 3 above, and the sentence of 15 years imposed on appellant in respect of counts 1 and 3 taken together, will run concurrently to the extent that the effective sentence on all those counts will be 30 years' imprisonment.

C.T. HOWIE JUDGE

OF APPEAL

NESTADT JA] CONCUR

STEYN JA]

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