REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

NOT REPORTABLE
Case number: **175/01**

In the matter between:

JAPIE MHLUPHELA DLAMINI 1st Appellant
MUSA ENOSENT MAGAGULA 2nd Appellant

and

THE STATE Respondent

CORAM: **STREICHER, MTHIYANE and HEHER JJA**

HEARD: **18 SEPTEMBER 2006**

DELIVERED: **26 SEPTEMBER 2006**

Summary: **Criminal law – murder – intention to kill – subjective appreciation of consequences of forcing object into victim's mouth;**
- sentence – murder and housebreaking with intent to rob and robbery with aggravating circumstances – duplication of sentence – death of victim to be thought away in relation to the robbery

Neutral citation: **This case may be cited as *Dlamini and another v The State* [2006] SCA 110**

(RSA).

JUDGMENT

HEHER JA:

[1] The two appellants were convicted by Jordaan AJ and assessors of murdering Johannes van Heerden on 26 August 1998 on a farm at Nooitgedacht in the district of Witbank. They were both sentenced to life imprisonment. They were also convicted of housebreaking with intent to rob and robbery with aggravating circumstances arising out of the same incident. For this both appellants received 20 years imprisonment. With leave of the court *a quo* they appeal to this court against their convictions and sentences.

[2] The scope of the appeals is narrow. As to the convictions for murder counsel submitted that the court *a quo* erred in finding that the appellants intended to kill the deceased and should properly have convicted both of culpable homicide. The finding of housebreaking was flawed, so it was argued, because the prosecution had not excluded the reasonable possibility that the appellants gained entry to the deceased's dwelling with his consent or, at least, without any form of housebreaking as that term is understood in law. Counsel also sought to persuade us that, contrary to the conclusion of the trial court, substantial and compelling circumstances were present which justified lesser terms of imprisonment than the otherwise mandatory sentences.

[3] The appellants were respectively 21 and 19 years of age at the time of the crime. The first appellant had been employed by the deceased as a farm labourer from early in July 1998 for a period of three weeks. He deserted one Sunday morning and did not return to the farm until the events described below. The second appellant was a friend of his without any connection with the deceased or the farm.

[4] The deceased, a man of 63 years, lived alone in a cottage some 800 metres from the main farmhouse which was occupied by his son, Johannes Jnr, and the latter's family. At 6h45 on 27 August 1998 the son arrived at the cottage, as he did most mornings. He noticed that a Mazda bakkie was not in its usual parking place. The kitchen door stood open (but undamaged); ordinarily it was still locked. On entering he found his father lying dead on his back across his bed. His body was cocooned in a blanket around which a jersey had been wrapped and knotted in front of the chest. The deceased's feet had been tied tightly with a telephone cord ripped from the wall. The telephone was missing. A thick woolly sock had been crumpled up and thrust into the deceased's mouth. On one of the edges of the top surface of the kitchen stove Johannes Jnr observed what he identified as traces of blood and hair. On the armrest of a chair outside the bedroom door he detected similar traces. Although neither observation was confirmed by expert (or other) evidence, his observations were not placed in issue by defence counsel.

[5] A post-mortem examination was carried out by Dr Joynt the local district surgeon. He determined the cause of death as 'anoxia as a result

of asphyxiation caused by a foreign object in the pharynx'. The sock that had been forced into the deceased's mouth had pressed his tongue and lower dentures against the soft palate and into the back of the throat. This cut off the passage of air through the mouth and possibly also compromised the nasal airway. Dr Joynt was of the opinion that suffocation might well have taken place whether or not the denture had been displaced. The deceased had a blood alcohol content of .25g/100ml which the doctor regarded as a high level. However the deceased was a regular and heavy drinker (he suffered from cirrhosis of the liver) and Dr Joynt said that the injuries to his head and face probably had more effect in rendering him vulnerable to suffocation than did intoxication, especially 'as hy eers goed geslaan was voor die tyd'. Those injuries consisted of extensive bruising on the back of the deceased's head caused by a blunt instrument, or, perhaps, a fall, and bruises of the cheeks under both eyes. In addition there was a long scratch behind the left ear.

[6] Fingerprints of the appellants were lifted by a crime scene investigator from, respectively, a tin in the deceased's bedroom and an empty gin bottle on the kitchen table. A hi-fidelity system, the telephone and some R3000 in cash were found to be missing from the cottage after the event. The sound system, the telephone and the bakkie were recovered in circumstances which it is unnecessary to detail, save to note that strong connections between the stolen goods and the appellants were established by the evidence led by the State.

[7] The appellants were arrested and brought before a magistrate at

Witbank on 17 September 1998 for the purposes of pleading to the charges in terms of s 119 of the Criminal Procedure Act 51 of 1977. The record of the proceedings was produced by the State at the trial in terms of s 120 read with s 76(3)(b) and s 235 of the Act. Both appellants pleaded not guilty to murder but guilty to robbery. Each made a statement of his defence to the charge of murder (in terms of s 115) and answered questions posed by the magistrate concerning the allegations of robbery (in terms of s 112). The record reads as follows:

'BESKULDIGDE 1 : AANKLAG 1

EK'T OORLEDENE OP SY BED GEKRY – HY'T OPGESPRING EN GEVAL – ONS HET SY VOETE MET 'N TELEFOONDRAAD VASGEBIND. EK HET GELD GESOEK WANT HY HET MY GELD GESKULD – EK EN BESKULDIGDE 2 HET TOE DIE HI-FI GENEEM OP DIE BAKKIE GELAAI EN WEGGERY. ONS HET NIKS VERDER AAN DIE OORLEDENE GEDOEN NIE.

AANKLAG 2

HOF

V. ERKEN U DAT U OP 27/8/1998 TE WITBANK DISTRIK VIR MNR. VAN HEERDEN AANGERAND HET?

A. JA.

V. HET U DIE VOERTUIG, TELEFOON EN HI-FI STEL GENEEM?

A. JA.

V. WEET EN BESEF U DAT U VERKEERD OPGETREE HET DEUR DIE GOEDERE MET GEWELD TE NEEM?

A. JA.

V. HET U ENIGE REG, REDE, TOESTEMMING GEHAD?

A. HY'T MY KOM HAAL VIR WERK TE BRONKHORSTSPRUIT. HY HET MY GELD GESKULD.

V. U HET GEWEET DAT DIE GOEDERE WAT U GENEEM HET AAN MNR. VAN HEERDEN BEHOORT?

A. JA.

V. PLEIT U VRYWILLIG SKULDIG OF IS U VOORGESê OF GEDREIG OF BEïNVLOED OM SKULDIG TE PLEIT?

V. WIL U NOG IETS BYVOEG?

A. NEE.

BESKULDIGDE 2 – KLAGTE 1

ONS KRY OORLEDENE OP BED – ONS LAAT HOM SKRIK EN HY VAL MET SY KOP OP BED – ONS

VANG HOM – BESKULDIGDE 1 HET TOE SY HANDE EN VOETE VASGEBIND. ONS HET TOE DIE GOEDERE GEVAT EN IS WEG. ONS HET OORLEDENE DAAR GELOS – HY HET NOG GELEWE. ONS HET 'N KOUS IN DIE OORLEDENE SE MOND GEDRUK SODAT HY NIE KON SKREEU NIE.

BESKULDIGDE 2 – KLAGTE 2

V. HET U OP 27/8/1998 DIE GOEDERE SOOS GENOEM, DIE EIENDOM VAN MNR VAN HEERDEN GENEEM SONDER SY TOESTEMMING.

A. JA.

V. HOE?

A. ONS HET OORLEDENE IN KAMER AGTERGELAAT EN IS TOE MET DIE GOEDERE WEG.

V. HET U GEWEET EN BESEF DAT U OPTREDE VERKEERD WAS?

A. JA.

V. PLEIT U VRYWILLIG SKULDIG OF IS U VOORGESê OF GEDREIG?

A. EK PLEIT SO VRYWILLIG.

V. ERKEN U DAT U MNR. VAN HEERDEN AANGERAND HET EN TOE DIE GOEDERE GENEEM HET?

A. JA.

V. WIL U NOG IETS BYVOEG?

A. NEE.'

[8] At the trial both appellants testified in their own defence. It is unnecessary to analyse their evidence. Both departed from the substance of their s 115 statements. In essence, the first appellant partially shouldered the blame while the second appellant distanced himself from the assault. The substance of the first appellant's case was that the deceased invited him into his cottage to fetch wages that he was owed; the deceased then attacked him with a bottle; he defended himself and subdued the deceased after which he tied him up and gagged him to prevent the deceased raising the alarm; he took R100 and the sound system, both of which the deceased had freely offered to him before the fracas in order to compensate him for his arrear wages and drove off in the bakkie (which he intended to return when opportunity arose).

[9] The trial court did not believe either appellant. It found in effect that no weight could be attached to anything either said in the absence of independent corroboration. Counsel made no serious attempt during the appeal to persuade us that the credibility findings should be re-assessed and rightly so since the evidence of both appellants was a mass of serious improbabilities and internal contradictions.

[10] For the purposes of the limited investigation to which the appeal against the first conviction is directed, viz whether either appellant formed an intention to kill the deceased, the court *a quo* was required to determine the subjective intention of each appellant. As has often been emphasised, in the absence of direct admissions, the state of mind of a perpetrator at the time of a crime is a question of inference drawn from all the material proven facts both for and against the conclusion of guilt. The facts must be considered holistically to determine whether they permit an inference to be drawn beyond a reasonable doubt that the accused actually foresaw the reasonable possibility that his victim could die from the assault but, nevertheless proceeded with it reckless of that outcome. See, for example, *S v Van Wyk* 1992 (1) SACR 147 (Nm) at 161 f-g per Ackermann AJA. In the present instance the trial court purported to apply these principles and emphasised its awareness of the dangers of adopting an armchair approach in so doing. Counsel's submission before us was that the court erred in its application of the principles to the facts more particularly in that foresight of the reasonable possibility of death was not the *only* reasonable inference to be drawn from the facts in relation to either appellant.

[11] After subduing the deceased by violence the appellants trussed him like a chicken and gagged him. One cannot wholly discount the evidence of the first appellant that he was scared that the deceased would raise the alarm and alert the security guards on an adjoining property unless effective steps were taken to prevent him. There is certainly some inconsistency between a direct intention to kill one's victim and the considerable lengths to which the appellants went to ensure that the deceased neither shouted nor moved. However, the common experience of mankind is that shutting off the power to breathe leads within a short time to death. Just as it does not avail an assailant who points a loaded firearm at his victim's heart and pulls the trigger to deny an intention to kill without offering an acceptable explanation for such denial, so credibility is stretched beyond breaking point by one who forces a gag into his victim's throat and denies that he foresaw the reasonable possibility of death but does not explain why such blindness possessed him. The first appellant was both worldly wise and beyond the age where the callowness of youth might of itself explain a lack of insight. Cf *R v Lewis* 1958 (3) SA 197 (A) at 109 and *S v P* 1972 (2) SA 412 (A) at 416H-417A. The first appellant attempted to provide an explanation by means of an obviously contrived and somewhat desperate description of how he had folded the sock and carefully placed it 'just behind the deceased's teeth' in such a manner as to allow him to dislodge it without much effort. This was not only transparently false since it was clear that the sock in its crumpled state had been pressed in to the limit without any thought for the interest of the deceased but the first appellant also equivocated in his evidence as to whether the deceased

was even conscious at the time. Under cross-examination he expressly disavowed an intention to press the gag deep into the mouth of the deceased because, as he conceded, if he did so the deceased would choke and die from an inability to breathe. So there was evidence of a foresight of the consequences and factual proof that despite such foresight he had done what was required to bring the expectation to reality. To this may be added his admitted awareness that as soon as the deceased was released he would cause the first appellant to be arrested – it was common cause that not only was the first appellant known to the deceased but the deceased was also aware of the place of residence of first appellant and his parents. This last consideration does not of course justify the inference of a direct intention to kill but it increases the likelihood that the first appellant, aware of the reasonable possibility of fatal consequences, proceeded recklessly to disable the deceased in an inherently dangerous fashion untroubled by the potential permanence of the solution. In short, he was prepared to take risk of the deceased dying before he could be rescued. That was to act with *dolus eventualis*. The first appellant was therefore rightly convicted of murder.

[12] The position of the second appellant was not identical. He may not have physically taken part in the gagging of the deceased. If he did not it is unlikely that he knew how forcefully or how deeply the sock had been pressed in. He also did not face the same threat of immediate identification and arrest if the deceased should be released. Nevertheless the inescapable inference is that he actively participated in the violent and callous subduing of the deceased. He saw and apparently approved of the

first appellant's action in silencing the victim – the photograph of the deceased shows that almost all of the sock was inside his mouth – and he was satisfied to leave the deceased in a helpless and hopeless state without any attempt to mitigate the possible consequences by ensuring that the deceased did not choke. He was educated to standard 7 and appears to have possessed a reasonable level of intelligence. His unconvincing profession of ignorance of the consequences of stuffing a gag into the mouth of his victim was not buttressed by any explanation which might have sustained such a profession. In the circumstances, it seems to me, the comparison between his position and that of the first appellant results in distinctions without a difference in their states of mind. The only reasonable inference to be drawn is that he too appreciated the consequences of interrupting the deceased's breathing and was similarly prepared to take the chance that their victim would expire before he could be rescued. He also was correctly convicted of murder on the basis of *dolus eventualis*.

[13] The attack on the conviction on the charge of housebreaking can be shortly disposed of. The evidence of Johan Jnr was that the deceased kept his kitchen door locked by means of a sliding bolt and opened it only with reluctance, even to him. Often he was obliged to rouse the deceased by knocking on his bedroom window. There is in my view no reasonable possibility that the deceased would have voluntarily admitted the appellants to the cottage. They offered no acceptable reason for him doing so. On the contrary, the first appellant had abandoned his employment and the second appellant was a stranger to the deceased who had no excuse for

entering his home. Their evidence that they went to the cottage so that the first appellant could collect wages that the deceased owed him is at odds with his own admission that he made no attempt to obtain payment when he left employment, nor subsequently, but only did so when the deceased, out of the blue, offered to pay him. His evidence first fixed the arrears at R150; later it became R750. In the event the appellants left the deceased's cottage with a great deal more, and the evidence that the first appellant intended to return the bakkie was patently false. The front door was not forced but the bathroom window had apparently been prised open – the evidence of Johan Jnr was that this could easily be achieved – and it hung loose. All that was needed to gain entry was to hold the window open. The only reasonable inference is that the two appellants obtained access by that route and in that manner. The element of 'breaking' was satisfied by such an entry. The appellants were accordingly rightly convicted on the second charge.

[14] In support of the appeal against sentence counsel for the appellants has drawn our attention to a range of factors: the ages of the appellants, the absence of previous convictions, their family circumstances and responsibilities, their employment and income, their education and their socio-economic backgrounds. In addition both appellants had been detained in custody for some two and a half years awaiting trial. The conviction on the first count depended on a finding of *dolus eventualis*, not direct intention to kill. But all of these considerations were mentioned by the learned judge in his careful appraisal of the factors favourable to the appellants against others which called for a severe sentence. He did not

consider that individually or cumulatively they amounted to substantial or compelling circumstances and I am not persuaded that he was wrong. (In relation to the conviction on the second count he concluded that the minimum sentence of 15 years was, in any event, inadequate in the circumstances of the case. An enquiry into the existence of substantial and compelling circumstances, was, therefore, unnecessary.)

[15] However, the manner in which the learned judge approached the question of sentence on the second count gives rise to some difficulty. He said,

'Ek het hierbo gehandel met die aard van die misdaad wat gepleeg is. Ek het gehandel met die feit dat plaasmoorde aan die orde van die dag is. Ek het gehandel met die feit dat 'n mens in sy eie huis veilig behoort te voel en veilig behoort te wees. Die aanranding op die oorledene was onmenslik en hy het 'n wrede dood gesterf. Uit die gesag wat ek aangehaal het, het ons hoogste hof van appèl dit duidelik gestel dat faktore soos 'n bevinding van *dolus eventualis* en die relatiewe jeugdigheid en rehabiliteerbaarheid nie noodwendig 'n ligter vonnis regverdig as die maksimum wat opgelê kan word nie. Ek is voorts van oordeel dat die erns van die roofklagte sodanig is dat 15 jaar gevangenisstraf soos voorgeskryf as minimum vonnis te min is in die huidige saak.'

While there may be some doubt as to precisely what the learned judge had in mind, it seems probable that he regarded the fact that the assault upon the deceased resulted in his death as a factor to be taken into account in assessing the appropriate sentence for the robbery with aggravating circumstances. The overlap between offences such as murder and robbery in a sentencing context has frequently led to discussion about the proper way of avoiding duplication of punishment. See eg *S v S* 1991 (2) SA 93 (A) at 103H-106C and the authorities there cited and cf *S v Maraisana*

1992 (2) SACR 507 (A) per Nestadt JA. In the first-mentioned case Nienaber JA said,

'Die geweld wat tot die dood gelei het, kwalifiseer vanselfsprekend as 'n verswarende omstandigheid vir doeleindes van die roof. Dan gaan dit om die skuldigbevinding as sodanig aan die misdaad "roof met verswarende omstandighede". (Vgl *R v Cain* 1959 (3) SA 376 (A) te 383D-F; *R v Constance en 'n Ander* (*supra* te 634A-D; 636A-G).) Maar wanneer dit by die vonnis vir die roof kom, moet die moord, soos meermale gesê is, weggedink word want anders word die dood van die oorledene twee keer teen die beskuldigde in ag geneem – een keer onder die rubriek "moord" en 'n tweede keer onder die rubriek "roof met verswarende omstandighede".

Hierdie benadering is, sover my bekend, vir die eerste keer deur Trollip AR in *S v Mathebula and Another* 1978 (2) SA 607 (A) te 613H geformuleer (waaroor aanstons meer) en is daarna herhaaldelik toegepas. 'n Selfstandige regsbeginsel is dit egter nie. Die eintlike beginsel is dat dieselfde feit of feitestel wat aan meerdere misdade gemeenskaplik is – in die een geval bes moontlik as 'n bestanddeel van die misdaadsomskrywing, en in die ander geval as 'n verswarende omstandigheid by vonnis – nie meermale teen 'n beskuldigde in ag geneem moet word wanneer dit by die oplegging van vonnis op elk van die klagtes kom nie. Die "wegdink" van die een misdaad sodra 'n vonnis vir die ander oorweeg word, is dus hoogstens 'n riglyn.)'

Jordaan AJ was clearly entitled to have regard to the degree and circumstances of the attack on the deceased, even to the point of recognising that it was life-threatening, but in so far as he emphasised the fatal consequences of the attack and the effect of a finding of *dolus eventualis* it seems to me that he misdirected himself. Instead of thinking away the death of the deceased he allowed it to aggravate the seriousness of the lesser offence. The question of sentence on the second count is thereby opened for reconsideration. The attack on the deceased was undoubtedly brutal and cowardly and in every way to be discouraged with all means at our disposal. But it must also be remembered that the

appellants went unarmed to the deceased's home and that the initial, disabling, assault was probably not caused by a weapon but by the banging of his head on the furniture to hand (consistent with the observations of his son) and the effect was bruising and not a fracture (neither of which factors was mentioned in the judgment of the court *a quo*). I do not leave out of the equation the additional means adopted by the appellants to silence their victim. Nor do I discount the other aggravating features such as the prevalence of attacks on farmers and the invasion of the deceased's home. I do not agree with counsel for the appellants that their ages and clean records were, of themselves, such as could properly be regarded as substantial and compelling circumstances in the circumstances of this case. Indeed I cannot find any such circumstances present which warrant the imposition of a sentence less than the mandatory minimum in respect of either appellant. On the other hand after weighing the aggravating features of the case I conclude that those too are not such as to require the imposition of sentences exceeding the statutory minimum.

[16] In the result –

1. The appeals of both appellants against their convictions are dismissed.
2. The appeals of both appellants against their sentences of life imprisonment on the charge of murder are dismissed.
3. The appeals of both appellants against the sentences of 20 years on the count of housebreaking with intent to commit robbery and robbery with aggravating circumstances are upheld. There is substituted for

those sentences a sentence of 15 years imprisonment in respect of each appellant.

J A HEHER
JUDGE OF APPEAL

CONCUR:

STREICHER JA)
MTHIYANE JA)