/CCC CASE NO 643/92

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between:

MESHACK THEOANE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: NESTADT, GOLDSTONE et VAN DEN HEEVER JJA

DATE HEARD: 11 NOVEMBER 1993

DATE DELIVERED: 19 NOVEMBER 1993

J U D G M E N T

NESTADT, JA:

This is an appeal against the death sentence imposed on the appellant consequent upon his conviction for murder.

The facts appear from the comprehensive judgment of the trial judge, LICHTENBERG JP, sitting in the Orange Free State Provincial Division. In summary they are the following. The crime took place at about 8.30 pm on the night of 1 February 1991 in the district of Koppies. The appellant, together with two others, identified as Mojalefa and Sugar, arrived at the farm where the deceased lived. Their intention was to rob him. The deceased was a retired farmer aged 76. They entered that part of the house in which he lived alone. The deceased was stabbed by Mojalefa. Having taken possession of a certain amount of money (about R400), some keys and a firearm, the three of them left the scene. This they did in the deceased's car. It had been parked outside the farmhouse. They forced the deceased to accompany them. They proceeded a

distance of about four kilometres into a maize land. There, by means of petrol which was siphoned out of the petrol tank, the car was set alight. The deceased had at that stage been placed in the boot of the car. He was still alive. Being unable to escape, he died (according to the post-mortem examination report) as a result of "blootstelling aan brandwonde met vermoedelike terminals inaseming van rook en gasse". Based on this and on the doctor's evidence the trial court's finding was that "die oorledene het dus versmoor en verbrand".

These then were the circumstances which, together with certain others to which I shall refer, impelled the trial court to impose the death sentence on the appellant for the murder of the deceased. I should add that the appellant was also charged with and convicted of robbery (involving the theft of the items

referred to as well as the deceased's car) and kidnapping. These convictions respectively attracted sentences of eleven years and four years imprisonment (to be served consecutively). They are not, however, in issue in this appeal.

LICHTENBERG JP found a number of mitigating factors. In broad outline they were (i) that at the time of the crime the appellant was relatively young; a few months under 24 years; (ii) that he was an uneducated and unsophiscated farm worker; (iii) that the murder "(was) nie lank vooruit beplan nie"; (iv) that the appellant played a lesser role and in particular that it was Mojalefa who actually set the car alight; moreover just before this was done the appellant asked him whether he did not realise that "ons fout maak as ons die voertuig aan die brand steek"; (v)

that in reply to this question Mojalefa (who had a firearm) threatened to kill the appellant; he said "hy gaan my ook sommer nou doodmaak".

Taken at face value these factors may be said to be quite strongly mitigating. On closer examination, however, I do not think they are. Nor, so it seems to me, did the trial judge so regard them. The appellant's age ((i) above) is not mitigating to any extent. He was certainly not an immature youth. Besides, he has recent previous convictions; one for assault with intent to do grievous bodily harm and one for housebreaking (committed less than two months before the murder). The fact that the appellant is uneducated and unsophisticated ((ii) above) is also not a cogent factor (S v Majosi and Others 1991(2) SACR 532 (A) at 541 f-g).

The others factors referred to ((iii), (iv) and (v) above) emerge from two extra-curial statements which the appellant made and which were handed in at the trial as exhibits K and L. (The appellant had contested their admissibility but his evidence that they were not voluntarily made was rejected.) In the statements the appellant confesses to his participation in the crime. However, they also contain certain exculpatory allegations and it was on the basis of these that the court a quo, applying the principle of R v Valachia and Another 1945 AD 826, found the mitigating factors in question. Such factors require closer analysis. I begin with (iii) above (absence of planning). The two statements give conflicting accounts of when the deceased was placed in the boot of the car. According to K this took place in the maize lands just before the

car was set alight. But in L the appellant says that the deceased was put into the boot at the house just before they drove away in the deceased's car. This contradiction matters not. The point is that it is clear that the deceased was abducted from his house with the intent that he be killed. The trial court's finding to this effect was rightly not challenged. And the reason was (as LICHTENBERG JP put it) "om latere identifisering van die beskuldigde en sy twee mededaders deur die oorledene te voorkom". (As will be seen, the deceased knew the appellant. ) So, from the time they left the deceased's house, the murder was planned. We do not know how long it took to reach the spot where the murder took place. But the evidence does show, as I have said, that the distance that would have had to be travelled was about four kilometres. And at the actual

scene there was a degree of preparation by the appellant and his co-perpetrators for what they had in mind. A hosepipe had to be fetched from Mojalefa's vehicle where it had been parked some distance away; it was then used to siphon petrol out of the tank of the deceased's car; and the petrol was then sprinkled over the car. This then was a calculated, deliberate murder involving a sustained intention on the part of the appellant (and the others) that the deceased be killed. It was plainly not a case of the victim of a robbery (possibly impulsively or out of panic) being killed during its course.

This brings me to the part played by the appellant in the murder ((iv) above). Whilst according to the appellant' s statements it was Mojalefa who by means of a match set the car alight, it is nevertheless

clear that the appellant played an active role in killing the deceased. He helped place the deceased in the boot of the car; it was he who fetched the hose; and it was he who siphoned the petrol out of the petrol

tank.

This leaves for consideration the finding that Mojalefa had threatened to kill the appellant ((v) above). I would not have thought that the appellant's allegations in this regard were worthy of much weight. Indeed in convicting the appellant, the judge a quo firmly found that the appellant did not act under duress. The appellant repudiated both confessions. He did not give evidence on the merits. Accordingly, his allegations of coercion could not be tested under cross-examination. These are factors which detract from their cogency (R v Yelani 1989(2) SA 43(A)). Besides, the

statements contain bald, contradictory assertions. It is only in the second one that there is mention of the appellant having in effect taken exception to the deceased being killed. Accordingly, the allegation in K that Mojalefa threatened to shoot the appellant is unmotivated. No details are given in the statement of how "hy...my...met 'n vuurwapen gedreig (het)". And in L this allegation does not appear. It is improbable that the appellant would question what Mojalefa had in mind doing to the deceased. The appellant had previously worked for the deceased. He must therefore have realised that he could be identified by the deceased. If this be so and consistent with the finding (already referred to) that the deceased was removed from the house with the intention that he be killed, it is more likely that the appellant would not

have objected to that purpose being carried through. More especially is this so seeing it was the appellant's idea to rob the deceased. But most important, there is an admission in the appellant's second statement which is largely destructive of his reliance on duress as a mitigating factor. Exhibit L is a statement made in terms of sec 119 of the Criminal Procedure Act in explanation of his plea of guilty. Towards the end of it and following on his averment that Mojalefa "net gese hy gaan my ook sommer nou doodmaak", the appellant said (in answer to certain questions put to him by the magistrate):

> "Het u vrywillig deelgeneem aan die dag se gebeure?
> Ja ons was nie gedwing nie. Ek het dit net sommer gedoen omdat Mojalefa vir my gese het hy sal nie weer saam met my loop as ek nie deelneem nie.
> Het u dit dus slegs gedoen om Mojalefa se vriendskap te behou?
> Ja."

The "dag se gebeure" obviously include the murder. It was with this in mind that LICHTENBERG JP framed his finding on the issue of duress as a mitigating factor in the following terms:

> "Nietemin bevind ons dat (die)... dreigement vir die beskuldigde tot 'n mate beinvloed net, en in daardie sin neem ons dit as 'n strafversagtende faktor in ag ten aansien van die beskuldigde se morale blaamwaardigheid en/of verwytbaarheid."

Clearly therefore the learned judge did not regard the factor under consideration as a weighty one. Nor do I.

The conclusion of LICHTENBERG JP was that the aggravating factors heavily outweighed the mitigating ones. I fully agree. It will be apparent from the discussion what the aggravating factors are. They may be summarised as follows: (i) the deceased, a defenceless, innocent old man, was abducted from the privacy of his home in order that he be killed; (ii)

the (base) motive for this was to prevent the appellant and his co-perpetrators being identified by the deceased as the robbers; (iii) the degree of preparation that was involved in carrying out the murder; (iv) the fact of the deceased being murdered in a particularly barbarous manner; the judge a quo's description of it as "'n genadelose, gevoellose, koelbloedige, meedoenlose, afskuwelike, wrede, gruwelike en weersinswekkende wyse gepleeg. Dit was 'n barbaarse, afgryslike en bose daad" is no exaggeration; (v) the prevalence of this type of crime. These factors make this an exceptionally serious, indeed extreme, case. It is one where the deterrent and retributive objects of punishment come to the fore. It is a case which brings to mind the remarks of GOLDSTONE JA in S v Shabalala and Others 1991(2) SACR 478(A) at 483 d, namely:

> "Our farming community too frequently falls victim

to the violent criminal. The justifiable outrage understandably caused thereby must be a relevant factor in the imposition of a proper sentence in this kind of case".

In my opinion the only proper sentence is the death

sentence.

The appeal is dismissed.

NESTADT, JA

GOLDSTONE JA )
) CONCUR
VAN DEN HEEVER JA)