Case Number 409/92

/al

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

MUSI WILLIAM MTOLO	1st Appellant
BONGANI VINCENT MABANGO	2nd Appellant
DUMISANI ZITHA	3rd Appellant
HAMILTON MUZIKAYISE NKABINDE	4th Appellant
THULANI AGRIPPA KHUMALO	5th Appellant

and

THE STATE	Respondent

CORAM : Hefer JA, Howie et Kriegler AJJA

DATE OF HEARING : 4 NOVEMBER 1993

DATE OF JUDGMENT : 25 NOVEMBER 1993

JUDGMENT

KRIEGLER AJA/.....

KRIEGLER AJA :

The five appellants were convicted in the Natal Provincial Division (Hugo J and assessors) of murder and armed robbery. By virtue of the provisions of s 316A of the Criminal Procedure Act No 51 of 1977 ("the Act") appellant no 4 now challenges his conviction on the murder count and a consequential death sentence. The other appellants have appealed, with leave granted by the trial judge, against heavy sentences of imprisonment imposed upon them on both counts. Appellant no 3 was also convicted of the unlicensed possession of a pistol but, for reasons that will become clear in due course, neither that charge nor the sentence thereon need be discussed. Nor need the fourth appellant's conviction and sentence on the robbery charge, no leave in respect thereof having been sought.

Indeed little needs to be said about appellant

no 4's conviction on the murder count. Although he doggedly denied any part in the events culminating in the successful prosecution of himself and his co-accused, his guilt was conclusively established. That is plain from the evidence, to which I now turn.

On Wednesday afternoon, 28 August 1991, five young black men were seen to arrive on foot at Paisley farm in the Winterton district. In full view of the farm workers they set upon the owner, Mr Mervyn Gray, after he had spoken to them. Leaving him mortally wounded, they proceeded to ransack his house and then made off in his bakkie with their spoils. They did not manage to make good their get-away however. A few kilometres down the road they overturned the vehicle and had to make do on foot. They split up, two continuing along a side road, two making off across open country and one hiding in tall grass.

4 In the interim Mr Gray's employees had raised the alarm. The local farming community came out in force and the police hastened to the area with road vehicles and a helicopter. Within a short space of time two couples of young black males were found and arrested. The first couple consisted of appellant no 1 (who was wearing a sweater belonging to Mr Gray and which had been taken from his house that afternoon) and appellant no 4. The other couple, who were run to ground some distance away, were appellants 2 and 3. They were found in possession of two blood-stained daggers, a pistol which had been taken from Mr Gray's cupboard during the ransacking, and a pistol which was later ballistically linked with a cartridge found on the scene where Mr Gray was done to death. Among the debris where the bakkie had capsized the police found a blood-stained clasp-knife.

Withal, then, appellants 1 to 4 faced a

formidable case. So too did appellant no 5, who surrendered to the police the following Monday and confessed to participating in the attack on Mr Gray and the subsequent rifling of his house. Appellant numbers 1, 2, 3 and 5 did not seek to deny their participation in the murder and robbery but contended that they had done so under duress by appellant no 4. According to their evidence at the trial appellant no 4 had told each of them the previous day that he had found possible employment at a saw-mill and had taken them there on the fatal day under false pretences. There, to their profound surprise, he produced a fire-arm and shot Mr Gray after the latter had intimated that there were no vacancies in his saw-mill; each of them was then compelled at gun-point to participate to a greater or lesser extent in the murder, ransacking of the house and subsequent get-away.

I mention their version, not because it bears

on their guilt - it is palpably false and is no longer directly in issue - but because of appellant no 4' s defence. His case, from first to last, was that he barely knew his co-accused, that he had never been to Paisley farm and knew nothing about the crimes charged. He, so he maintained, had been on his way alone to ask for a job at a particular hotel and had coincidentally come across appellant no 1 shortly before their arrest. He could not explain: (a) Why he should be walking some 20 kilometres from the hotel (but near Paisley); (b) how it came to pass that four young men of his acquaintance, who happened to hail from his place of residence many miles away, were in the vicinity; (c) why they should place him on the scene of the crimes and, highly significantly, (d) how he came to be in possession upon his arrest of R600,00 in R50,00-notes while a similar amount in that very denomination had been stolen from Mr Gray's

cupboard by the robbers.

Furthermore the police managed to lift a partial palm print in Mr Gray's house which was subsequently identified as that of appellant no 4. No serious attempt was made at the trial to challenge this ostensibly damning piece of evidence, nor was it controverted. In the court below Mr Cooke, who appeared for appellant no 4 both there and on appeal, argued that an essential link in the identificatory chain had not been established and adumbrated the contention in his heads of argument. At the hearing, however, he wisely did not press the point. It is quite plain that (a) the original print was properly lifted; (b) a duly identified print was later taken from appellant no 4; (c) those two prints were properly compared by the police fingerprint expert; and (d) the expert in his evidence explained and demonstrated by means of enlargements why the trial

court could accept beyond doubt that the palm-print found in Mr Gray's house had been left by appellant no 4.

There was other cogent evidence indentifying appellant no 4 as the fifth member of the gang that killed Mr Gray and made off with his bakkie and their loot. Mrs Rosemary Mchunu, the late Mr Gray's housemaid, witnessed the original conversation between her employer and the robbers, albeit from a distance but in broad daylight and with an open field of vision. Her evidence that four of the gang were of a height and one materially taller, ties in with the observation by the trial court, appellant no 4 being the odd man out. She testified that the tall man, wearing a brown overall, fired two shots and that three others then attacked Mr Gray with knives. (Three bloodied knives were found and appellants 1, 2, 3 and 5 were ad idem that appellant no 4 was dressed

in a brown overall, that he fired shots and that no 1 had not participated in the stabbing.) After Mr Gray had been stabbed the man wearing the brown overall, still brandishing the firearm, approached the homestead, found her where she was hiding and ordered her at gun-point to produce money and firearms. She gathered the impression that that person was the leader of the group. He was the one who started the attack on Mr Gray; he took the lead in ransacking the house; he took possession of a wad of R50,00-notes and a pistol found in the bedroom cupboard; and he gave instructions for keys to be found in the bakkie and to be tried on a desk-drawer.

Mrs Mchunu's identification of appellant no 4 as the gang-leader wearing a brown overall and wielding a firearm is fully borne out by the evidence of the other four appellants. Although they were untruthful regarding the duress to which

they were allegedly subjected, it is of importance that they not only ascribed the leading role to him but confirmed that he was indeed the man in the brown overall who had initially had a firearm and took possession of another found in the house. They also testified that, after they had overturned the bakkie and had to make good their escape on foot, appellant no 4 instructed appellant no 3 to put on the overall to enable him to secrete no 4's pistol and the two daggers. Upon his arrest shortly afterwards appellant no 3 was indeed wearing the overall and was in possession of those three weapons. Mrs Mchunu later identified the brown overall appellant no 3 was wearing when he was arrested as the garment worn by appellant no 4 on Paisley farm. In the circumstances it is of little consequence that she was unable to identify appellant no 4 at an identification parade the next day: his identity as one of the robbers was proved

conclusively dehors her evidence. But what is of great moment is the role she ascribed to him, namely that of the gun-wielding leader and authoritative commander of the gang.

On that ominous note one turns to consider the appeal of appellant no 4 against the death sentence Imposed upon him for the murder of Mr Gray. By now it has become trite that this court is obliged to consider afresh whether, having regard to the aggravating factors proved beyond reasonable doubt and any reasonably possible mitigating factors for which there is a basis in the evidence, the death sentence - and it alone - is appropriate. It is equally trite that such evaluation must take into account the fourfold objective of sentence, to whit deterrence, rehabilitation, prevention and retribution.

The record evidences many factors that are gravely aggravating. This is manifestly a very

serious case indeed. An armed gang deliberately set out to commit a daring daylight robbery; the inference is irresistible that it was integral to the plot that the farmer would be overcome in such a manner as to render him powerless and to cow his employees into submission. And the means decided upon to those ends was to strike down their prime target with such ruthless ferocity as to intimidate the onlookers. That is clear from the accoutrements they took with them in a carry-bag, as also from the manner in which they put them to use. There is no suggestion that they gave a thought to subduing Mr Gray by any means other than immediate and deadly violence. As he turned to leave two shots were fired at him at close range by appellant no 4, neither - miraculously - finding the target. Then, while their victim was vainly trying to escape, three of them set about stabbing him to death in clear view of his horrified

workers. There were no less than 28 stab-wounds to his head, throat, arms and torso, both from the front and behind. Once he had been felled, so appellants 2 and 3 testified, the stabbing continued until they were satisfied that he was done for.

They then turned to their ultimate purpose, namely to make free with his possessions. And also with regard thereto a number of sinister inferences are ineluctable: they were in a remote area, far from their home, and must have planned to make their get-away with their booty in Mr Gray's vehicle. They must therefore have planned their attack so as to find him at home. It was no coincidence that they sat waiting for him near the saw-mill until he approached them during the lunch-break. It must also be inferred that they knew the lay of the land. If one then looks at the evidence of appellant no 4's colleagues it becomes clear

that he was the one who had reconnoitred the scene. Admittedly they were untruthful in their attempts to cast a veil of duress over their proven participation in the crimes, but there is no reason to doubt their evidence that appellant no 4 had mustered them the day before and had told them he had found "work" for them at a saw-mill. He knew where the farm was and led them there; he knew there was a saw-mill; he knew there would be transport for their get-away and especially recruited appellant no 1 as the driver; and he took a carry-bag with a pistol and three other murderous weapons for use by the gang.

The conduct of the gang after Mr Gray had been cut down evidences more planning. Without further ado four of them went to the house and appellant no 1 to the bakkie parked under a tree nearby. The housemaid was found and forced to point out valuables; the telephone wire was cut and the desk

forced open; the stolen goods were bundled in some blankets, loaded on the bakkie and they drove off. The fact that appellant no 1 proved incapable of getting them safely out of the area does not detract from the impression of purposeful efficiency one gathers from the exercise as a whole. When things turned sour and they had to try to escape on foot, appellant no 4 was crafty and cunning. He foisted the potentially incriminating overall and weapons on appellant no 3 and told him and appellant no 2 to head for open country while he and number 1 kept to the road. And, ultimately, when the two of them were caught, he put up a fight and had to be subdued. All in all, therefore, appellant no 4 comes across as a very resourceful and dangerous man who led a band of younger men in a planned and daringly executed robbery/murder.

There is very little to counter-weigh those aggravating factors. Appellant no 4 was at the

time some 21 years old and with a clean record. He is the product of a deprived tribal back-ground, poorly educated and was out of employment for approximately three months. In the light of these features Mr Cooke urged upon us that the prospects of rehabilitation by lengthy imprisonment are so good that it cannot be said that only the ultimate penalty would be fitting. In similar vein he submitted that a severe beating inflicted upon his client by local residents at the time of his arrest and the possibility that he had not shot at Mr Gray to wound but merely to frighten him, should be taken into account.

Some of those factors certainly carry some weight: the circumstance that appellant no 4 grew up in an environment of poverty and deprivation, and particularly the circumstance that his age and record hold out hope for reformation, must be taken into account. But he was no unsophisticated tribal

youngster; he had worked on the Witwatersrand for some years and had then held down a job with the Kwazulu Government for several months. Nor did he seek to suggest he had been forced into crime by dire need. The suggestion that he had not shot at Mr Gray is fanciful - the plan was to kill and the absence of bulletwounds must be ascribed to some other reason, be it ineptitude or luck. And on his own showing the injuries he sustained upon his arrest, assuming them to be relevant, were minor.

Be that as it may, this court has emphasized repeatedly that the personal circumstances of the wrong-doer and prospects of his rehabilitation pale into relative insignificance when juxtaposed with the demands of deterrence and retribution in cases of this nature. In my view this is indeed a case where the death sentence is the only appropriate sanction.

It remains to consider the appeals against

sentence by the other four appellants. With regard thereto Hugo J was at pains to garner such information as was available. One point in particular was thoroughly thrashed out, namely the ages of the four young men, who were all in their late teens. That was a necessary enquiry inasmuch as s 277(3)(a) of the Act (as amended by s 4 of Act 107 of 1990) prohibits the imposition of the death sentence on a person who was under the age of 18 years at the time of the commission of the act constituting the particular crime. In any event the information was valuable in assessing sentence. The State adduced the evidence of a specialist who had radiologically examined all the appellants to ascertain their ages. In addition the court called for probation officer reports regarding their personal circumstances, while appellant no 3's mother gave evidence as to his age and home environment. In each instance the appellants were

given the benefit of any doubt, which is what par (b) of s 277(3) demands. As regards appellants 1 and 5 the finding was that they may have been 17 years old in August 1991, appellant no 2 was found to have been 19 and appellant no 3 somewhat younger.

The probation officer's report makes depressing but, unfortunately, all too familiar reading. The appellants grew up in a poor and primitive environment, characterised by large families, material and cultural impoverishment, rudimentary education and chronic unemployment. Unlike appellant no 4, the other appellants were callow tribal youths, ill-equipped to make their way in adult life. The trial judge nevertheless felt obliged to impose heavy sentences of imprisonment on both counts. I respectfully endorse that approach. It was indeed a particularly heinous murder and the subsequent

robbery was sufficiently removed in time and space, and serious enough in itself, to warrant a robust sentence. I also concur with the judge's decision to distinguish between the two younger appellants (numbers 1 and 5), not only because of their lesser maturity, but also because they may have played less active, and hence less blameworthy, roles.

Hugo J used the proviso to s 280(2) of the Act to obviate excessive severity and sentenced the four appellants to the following years of imprisonment:

APPELLANT	MURDER	ROBBERY	CONCURRENT	EFFECTIVE
1	15 10	5		20
2	20 15 10			25
3	20 15 10			25 5 15 10 5
	20			

Those are very robust effective sentences indeed for young men on the threshold of life, in each case substantially in excess of his total life-span

up to the day he was a party to these crimes. Nevertheless, if that had been the only consideration I may have inclined to the view that even teenagers who commit horrible crimes should expect such severe retribution.

But it is not the only factor. The learned trial judge, when granting leave to appeal, expressed a reservation whether he had made sufficient allowance for the degree to which these four appellants had been under the sway of appellant no 4. With regard to him the finding was unequivocally that he had been the authoritative leader from the genesis of the plot to its denouement. That finding was amply supported by the evidence and the probabilities, as appears from the discussion of his sentence above. There was moreover evidence by a policeman that the other four were visibly afraid of appellant no 4 even after they had been detained in police-cells.

Indeed appellant no 4 confirmed that he had been segregated from the other four because of friction between them.

Upon analysis of the trial court's judgment regarding mitigating and aggravating factors it does appear that insufficient weight was ascribed to this particular circumstance vis-a-vis the four rank-and-file members of the gang. The cumulative effect of their sentences is indeed excessively severe and requires re-assessment. I consider that justice would be served by reducing the effective sentence in each instance by five years. Tinkering with the sentences on the separate counts would not only be artificial but could possibly be misconstrued as some indication that this court is less implacable towards such crimes than the judge a quo. It is consequently preferable to allow the individual sentences to stand but to achieve the desired reduction by ordering that they run wholly

concurrently.

In the result the following order issues:

1. The appeal by appellant no 4 against his conviction on the charge of murder as also his appeal against the death sentence imposed thereon are dismissed.

2. The appeal by each of appellants no 1, 2, 3 and 5 against the sentences imposed on him is upheld to the extent that it is ordered that his sentence on the charge of robbery is to be served concurrently with his sentence on the charge of murder.

J.C. KRIEGLER

ACTING JUDGE OF APPEAL

HEFER JA]

] AGREED

HOWIE AJA]