Case no: 237/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

W J NORTJE Appellant

and

THE STATE Respondent

CORAM: BOTHA, SMALBERGER, et F H GROSSKOPF JJA

Heard: 1 November 1994 Delivered: 18

November 1994

JUDGMENT

BOTHA JA:-

This is an appeal against a death sentence.

The appellant stood trial in the Natal Provincial Division before HOWARD JP and assessors on three charges: (1) murder, (2) robbery with aggravating circumstances, and (3) escaping from custody. On arraignment the appellant pleaded not guilty on count (1) and guilty on counts (2) and (3). He was convicted on all three counts. The death sentence which is in issue in this appeal was imposed on count (1). On counts (2) and (3) he was sentenced to imprisonment for 10 years and 12 months respectively.

The murder charge arose out of the killing of Mary-Anne Crowe, an adult woman ("the deceased"), on 24 August 1991 on a farm road near Camperdown. The body of the deceased was found on 26 August 1991 in the veld at the side of the road. It was covered in grass. It had been decapitated. The missing head was never found.

The appellant was arrested on 30 April 1992. Shortly after his arrest, on the same day, he was taken to a magistrate, to whom he made a statement. It became exhibit C at the trial, and I shall refer to it as "the exhibit C

statement." It reads as follows:

> "In August sometime I was driving along Highway from Pinetown towards Camperdown. I almost had a collision with another vehicle. I lost control of my car. It spun but did not hit anything. I chased the other vehicle. I pulled it off at the Camperdown turnoff. The vehicle took the Eston road and I followed it. I then stopped the vehicle on the Eston road. I went to the passenger door. The door was unlocked. I opened the door. I picked up a rock. I lent into the car and assaulted the driver with the stone. This concussed the driver. I then got out of the car. Went back to my vehicle. I then saw driver move. I then went to the driver side of that vehicle. The door was locked. I broke the window. I then assaulted the driver again with the rock. The driver was bleeding a lot. I then pushed the driver over and drove the car about 500 metres along a dirt road. I then left the car and went back to my own vehicle. I then went to a farm at which I had been staying previous to this incident. I then went to the Van der Merwes hotel where I had 2-3 beers. I then went back to the scene. The driver was still in the car, not having moved. I opened drivers door and pulled the body out. I dragged the body into the bush. I then removed the car from the scene. I then went home. On T.V. that night I saw a description of the driver. I then panicked. The following morning I returned back to the body. It was still there, dead. I then cut the head of the body with a hacksaw. I left the body there. I then buried the head. This has been on my conscience and I have been to psychiatrists. That is all.
> The person I killed was a woman."

On the next day the appellant pointed out various places to a police officer and while doing so made statements which were recorded and later

proved in evidence at the trial. The places pointed out and the accompanying explanations tallied with what the appellant had said in the exhibit C statement.

On 21 August 1992, in the course of proceedings in the magistrate's court in terms of section 119 of Act 51 of 1977, a statement signed by the appellant and his attorney was handed in, in terms of section 115 of the Act. That statement differed radically from the exhibit C statement in two respects, viz as to why and how the appellant had killed the deceased. In brief, it is said in the statement that the appellant had hitched a lift from the deceased and had directed her to drive to a certain spot; he then produced a pistol and said to the deceased that he "wanted her cash card and pin number"; she bent forward to get her handbag; and at that moment "the gun fired and hit the deceased."

The appellant made yet a further statement in amplification of his plea of not guilty on the murder charge in the Court a quo, in terms of section 115 of the Act. The statement was signed by the appellant and his counsel, and after his counsel had read it out, the appellant, in response to a question by the

trial Judge, confirmed its contents. It reads as follows:

1.

On 24 August 1991 the Accused hitch-hiked on the N3 freeway.

2. His intention was to rob the first motorist who gave him a lift.

3. He was in desperate need of money since he wanted to return to London where his girlfriend was due to give birth to their twins.

4. The deceased stopped. The Accused requested her to give him a lift to a nearby farm, since he said his vehicle had broken down.

5.

The deceased gave the Accused a lift to a dirt road near the

Camperdown turn-off.

6. On this dirt road the Accused drew a firearm and informed the deceased of his plight and need for money.

7. The deceased agreed to give the Accused her credit card and pin number as requested. As she bent down to reach for her handbag one or two shots were discharged from the Accused's firearm hitting the deceased in the head and smashing the window in the driver's door.

8. The shot or shots were fired accidently without any intention to kill.

9. The Accused removed the deceased's body and dragged it to a nearby spot in the veld.

10. He drove the deceased's vehicle towards the Hammarsdale turn-off. Along the way the Accused stopped and searched the car for the empty cartridge case or cases. He found one which he threw into a bush. He

drove on and left the vehicle at the Hammarsdale off-ramp.

11. The Accused hitched a ride back to the spot where he had left his own vehicle earlier that day.

12. In his own vehicle he returned to the deceased's vehicle and removed her handbag. He later disposed of the handbag and its contents.

13. The Accused returned to the deceased the following day and decapitated her. This was done in order to remove any possible ballistic link to his firearm.

14. The Accused disposed of the firearm by throwing it into a stream near the Hammarsdale turn-off and buried the head near the spot where he disposed of the handbag the previous day.

15. The Accused denies that he assaulted or intentionally shot the deceased."

Another statement by the appellant, signed, read out and confirmed in the same fashion, was made in terms of Section 112 of the Act in relation to the plea of guilty on the robbery charge. It reads as follows:

1. The Accused admits that on the date and at or near the place referred to in count 2 he unlawfully and intentionally robbed the deceased of her handbag and it contents.

2. The facts and circumstances pertaining to the robbery are those set forth in paragraphs 1 to 12 of the Section 115 Statement Ad Count One, filed

herewith."

The evidence given by the appellant in the trial followed broadly the lines of the last two statements quoted above. In regard to the exhibit C statement the appellant said in his evidence that he had invented the story contained in it in order to protect a friend of his, from whom he had bought the unlicensed firearm by means of which the deceased had been killed. It appears from the judgment of the trial Judge that counsel who then appeared for the appellant had contended in argument that the exhibit C statement should be rejected as a fabrication.

The trial Court found that the appellant's evidence that the deceased had been shot accidentally was manifestly false and that it could not reasonably possibly be true. In general, upon an analysis of the appellant's evidence as a whole, the trial Court also found as follows:

> "Save for admissions directly against interest and statements confirmed by other acceptable evidence, we cannot believe a word that the accused says. There is accordingly no basis for finding that the shooting was either accidental or that the intention to kill took the form of anything but dolus directus."

Counsel for the appellant in this Court rightly did not challenge these findings, nor those in the following passage of the trial Judge's judgment:

> "How then did the accused kill the deceased? Only he knows, and he has spun such a web of lies and deceit that we cannot make a positive finding beyond all reasonable doubt that he did so by shooting her, or bludgeoning her to death with a rock, or by both of these methods. Whether he used a rock or the pistol or both, the killing, for the reasons that I have given, was certainly not accidental. The only reasonable inference to be drawn from the facts which have been proved is that he intended to kill her and when I say he intended to kill her, I mean dolus directus."

With regard to the exhibit C statement the trial Judge pointed out that it contained admissions directly against interest and that in some respects it found support in the physical evidence, but then went on to say that that did not mean that the Court accepted the contents of the exhibit C statement "as being the truth or anything like the truth." In fact, the trial Court disbelieved the appellant's version in the exhibit C statement in a number of important respects, as is evident from various findings of fact recorded in the course of the judgment. Inter alia the Court found that the appellant had got into the deceased's car and had used some pretext to cause her to drive to the isolated

spot where she was later killed; that at some stage of the incident the deceased

had offered resistance (as was shown by certain features of what the learned Judge referred to as "the physical evidence");

and, notably, that it could safely be accepted that the appellant had intended to rob the deceased.

In this Court counsel for the appellant sought to resuscitate the exhibit C statement by arguing that a reasonable possibility could not be excluded that it reflected the true version of why and how the appellant had killed the deceased. The object of the argument was not to show that the appellant had been wrongly convicted of murder; counsel rightly accepted that the appellant's conviction was unassailable even on the basis of the exhibit C statement (hence the absence of an appeal against the conviction). His argument was advanced in the context of the issue whether the death penalty was the only proper sentence for the appellant's crime, and its object was to steer clear of the trial Court's findings as to aggravating factors flowing from the fact that the murder was associated with the robbery of the deceased (to which further reference will be made later). On the footing of a reasonable

possibility that the appellant killed the deceased for the reasons and in the

manner set forth in the exhibit C statement, the argument was that the appellant had been provoked by the bad driving of the deceased; that he acted impulsively, on the spur of the moment, and in a fit of anger and frustration; that he panicked about the fact that he had bludgeoned the deceased to death with a rock; and that this caused him to decapitate the deceased the following morning.

In support of the argument counsel pointed to the trial Court's inability to come to a positive finding beyond reasonable doubt as to the means used by the appellant to kill the deceased, whether it was a rock, or the pistol, or both, and to the further consideration that the possibility of a rock having been the murder weapon was supported by certain aspects of the objective evidence. Of these the most important is that, when the deceased's car was retrieved at the place where the appellant had left it next to the highway, the police found a large blood-stained rock on the floor in front of the passenger's seat next to the driver's seat. Counsel pointed further to the trial Court's rejection of the

appellant's proferred explanation for having told a false story in the exhibit C statement (the protection of his friend) as patently absurd and false, and argued that it was unlikely that the appellant would have invented such a story in the short space of time between his arrest and the making of the statement. It was more likely, or at least reasonably possible, counsel argued, that the appellant had subsequently concocted the story of an accidental shooting in the course of a robbery, and that to accommodate such a defence the appellant was prepared to plead guilty to the robbery charge.

The argument cannot be accepted, for a number of reasons, of which only a few need be mentioned. Its fundamental fallacy is that it does not differentiate between the "why" and the "how" of the killing, between the motive and the manner of it. If it is postulated that the possibility of a rock having been used in the killing cannot be excluded because of the presence of the bloodstained rock in the car, that only means that in that particular respect the exhibit C statement cannot be rejected out of hand as being false beyond reasonable doubt. But it does not follow, either in logic or in law, that the

remaining parts of the statement merit the same treatment. In particular,

whether the reason given by the appellant for the killing (anger at the deceased's bad driving) operates as a reasonable possibility to the exclusion of a finding that the appellant had intended to rob and did rob the deceased, must be assessed by considering the totality of the evidence. The trial Court was fully entitled to accept one part of the statement as being reasonably possibly true and to reject other parts as being false beyond reasonable doubt. And that is what it did when, while not being able to determine with sufficient certainty the means by which the appellant had killed the deceased, it nevertheless found as a fact, established with the requisite degree of proof, that the appellant had been intent on robbing the deceased, with the plainly implicit corrollary that robbery was the motivation for the killing, to the exclusion of the reason for it which was put up in the exhibit C statement.

Consequently the real question raised by the argument is whether there is any ground for differing from the trial Court's finding of fact in this regard. In my opinion, there is none. The finding is amply supported by the evidence

which was before the trial Court. A brief reference to two pieces of the

evidence will suffice. Both relate to informal extra-cunal statements made by the appellant. The first occasion was in November 1991, some three months after the murder and some five months before the appellant's arrest. He was having drinks with his half-sister, Pat Pienaar. Her parents had adopted him when he was a baby and they grew up as brother and sister. They were chatting about Pat Pienaaf's husband, whom they had just visited in hospital; he had had a nervous break-down as a result of being suspected of having stolen a quantity of money. Pat Pienaar was upset about the plight of her husband. The appellant told her not to worry about it, because he (the appellant) had done "a lot more for a lot less." He explained that he had shot somebody after stealing an amount of R34 from that person. A little later he told her that he had shot this person at close range and had cut off "his" head. In response to a shocked query from Pat Pienaar, he admitted that it was "the woman from Hillcrest" (which was a reference to the deceased).

In cross-examination it was suggested to Pat Pienaar that the appellant had told her that

he did not mean to kill the deceased, to which she replied: "No. He said he had shot and killed the person for a miserable R34." In the judgment of HOWARD JP it is said that the trial Court had no doubt whatever that Pat Pienaar had told the Court "the unvarnished truth."

The appellant's other communication was contained in a letter written in contemplation of suicide while he was in prison awaiting trial. It was addressed to his girlfriend and given to a fellow prisoner. Part of it reads as follows:

> "My babe what I'm about to write will change your life forever, Im sorry, but I know what effect the death sentence will have on you, or even if I got life imprisionment, Love you musent believe any stories you hear about Mrs Crow, I know you know the truth. I didn't know her at all, I never knew she had alot of money, all I wanted was to rob someone to get the air fair to get to you, cause I wanted to be with you and the babies when they were born, I didn't mean to shoot her, you must believe me this is important to me please."

What the appellant told Pat Pienaar and wrote to his girlfriend clearly amounted to a confession that he had intended to rob the deceased and that he had killed the deceased in the process of robbing her. As far as that is concerned, no acceptable reason can be imagined why the appellant would have

wished to lie to either of the persons he was addressing. He obviously spoke

to Pat Pienaar in confidence, believing that he could trust her. It is inconceivable that he was laying the groundwork for a false defence of accidental shooting. And in his letter to his girlfriend he was obviously trying to minimize the enormity of the crimes he had committed. In both instances the circumstances of the communication provide compelling reasons for accepting the truth of the appellant's assertion of what had given rise to the killing, which are lacking in relation to the exhibit C statement.

That being so, there is no reason why the appellant's plea of guilty to the robbery charge should not be accorded full weight. It was argued on behalf of the State that the appellant, having freely and voluntarily and without being influenced pleaded guilty to robbery, was precluded as a matter of law from contending on appeal that his plea is not effective and binding. It is not necessary, however, to pursue this line of enquiry. On the facts of this case there is no basis for doubting the genuineness or correctness of the plea. Counsel for the appellant's postulate that the plea had been tendered only to

accommodate the false defence of an accidental shooting is simply a theory,

and no more. It is wholly unsubstantiated by any evidence. It must be rejected.

It follows, then, that the appellant cannot avert a consideration of the aggravating features of the murder which flow from the fact that it was committed as part and parcel of the robbery of the deceased. The trial Court rightly rejected the argument that the crimes had not been premeditated or well-planned. The trial Judge expressed the trial Court's findings on the aggravating circumstances as follows:

> "The deceased, a defenceless woman aged about 50, travelling alone on the highway in broad daylight, was tricked into becoming the victim of a robber and murderer. Having gone out of her way to assist the accused she was brutally done to death. The killing was not the sudden and quick procedure described by the accused in his evidence. The deceased offered resistance and she must have experienced real terror before she died. The intention to kill took the form of dolus directus. She was killed to facilitate robbery, which is among the basest of motives, or to enable the robber to avoid detection which is equally heinous. Not content with having killed this innocent woman "for a miserable R34", the accused returned to the murder scene the next day, sawed off her head with a hacksaw, placed it in a garbage bag and disposed of it in such a way that it has never been recovered. He left the torso to rot in the veld next to the farm road. The mutilation of the

corpse demonstrates an extraordinary degree of callousness and depravity and is a further aggravating factor. See State v Malgas & Andere 1991 (1) SACK 284 (A) at 296 c. Finally, there is a complete lack of remorse. "The social worker, Mrs Myers, thought that she detected some element of remorse but this was based on what the accused told her, he being a pathological liar with manipulative tendencies. She conceded that it was very difficult to distinguish between genuine remorse and self-pity, and acknowledged that the accused's actions subsequent to the murder are hardly consistent with remorse. The mutilation of the body was only one of a series of elaborate steps which he took to cover his tracks and avoid detection, and the false defence of accidental killing was advanced in this court without the slightest hint that he felt sorry for what he had done to the deceased."

I agree entirely with these findings.

Turning to the appellant's personal circumstances, he was 26 years old when he murdered the deceased. He has previous convictions, of which it is relevant only to note those that occurred in the first part of 1986. He was then convicted on four counts of motor cycle theft and sentenced on each count to 12 months' imprisonment, 6 months of which was suspended on appropriate conditions.

The social worker, Mrs Myers, to whom reference is made in the above-quoted extract from the judgment of the trial Judge, in her evidence confirmed

the contents of a psycho-social report which she had compiled on the appellant.

It is a comprehensive report containing a very thorough analysis of the appellant's background and personality. It appears inter alia that the appellant was about 16 years old when he discovered that his adoptive parents were not his natural parents. The circumstances surrounding the discovery and the events which followed upon it had a traumatic effect on the appellant. In general, Mrs Myers noted that he grew up in an environment without warm relationships, adequate communication or proper stimulation, and she found that he had a highly strung personality, with limited coping mechanisms for handling stress, a poor self-image, low frustration tolerance, impulsiveness and a violent temper. The trial Court accepted that the appellant's background and personality might bave predisposed him to the commission of the crimes and took that into account as a mitigating factor. I agree with this approach. The trial Court could find nothing else which served to mitigate the murder.

HOWARD JP said that in his judgment the aggravating factors far outweighed the mitigating factors, and, in seeking to balance the interests of the appellant

against the interests of society and considering whether the deterrent and retributive purposes of punishment should in this case prevail over other considerations, came to the conclusion that this was a case in which the only proper sentence was death.

In this Court counsel for the appellant, in arguing to the contrary, relied on two matters emerging form the report and evidence of Mrs Myers: first, the appellant's defective personality, and second, his prospects of being rehabilitated.

As to the first matter, the phrase "defective personality", by itself, has an ostensibly sympathy-evoking air about it, which was highlighted by counsel's attempt to apply to the appellant in this case the words used with reference to a murderer in another case: "the wellspring of his misconduct was his inadequacy as a human being rather than inner vice or calculated cruelty" (per KUMLEBENJA in S v Oosthuizen 1991 (2) A C R 298(A) at 302 b). But these words cannot be made to fit the appellant in this case, as becomes evident when one considers what the appellant's defective personality comprises. Mrs

Myers found that the appellant revealed various traits of an anti-social personality disorder, and said that he in fact presented the classic profile of such a disorder. The salient feature of his personality for present purposes is his propensity to commit acts of violence. Mrs Myers described him as "dangerous." Her assessment is borne out by the evidence of Pat Pienaar. She said that the appellant could at times be loving and caring, but that he had a violent nature, and she related to the Court how she had witnessed an assault by the appellant on his girlfriend. It was a vicious and prolonged manifestation of brutal violence. Moreover, the appellant's killing of the deceased was not an impulsive act; it was not the "typical example of a sudden outburst of irrational anger and aggression" Oosthuizen's case supra at 301 f/g). It was quite the opposite. And so, of course, was the gruesome decapitation of the deceased's body. The appellant's defective personality manifests itself as wicked, vicious, cruel and depraved. Such was the wellspring of this appellant's misconduct. It does not constitute a mitigating factor. It brings sharply into focus the interests of society as one of the determinants of a proper

sentence, as well as the need to give due effect to the deterrent and retributive purposes of punishment.

As to the prospects of the appellant's rehabilitation, the trial Judge expressed the view that they appeared to be remote. I agree with this assessment. Counsel pointed to the fact that the appellant seems to have lived a fairly stable life for a period of about two years after he had served the sentences of imprisonment imposed upon him in 1986, and to the fact that he had of his own accord consulted a psychologist shortly before his arrest. I am, however, unable to regard these facts as significant, when they are considered as part of the total picture presented by the evidence. Mrs Myers, in her written report, said that there "remained some potential and hope" that the appellant might "develop insight in his destructive behaviour", and that he might "become prepared to accept responsibility to make certain necessary changes in his life and behaviour." The guarded terms of her statement are understandable when one has regard to the nature and degree of the appellant's personality disorder. In her evidence Mrs Myers stressed that the prospects of

change depended vitally on the appellant's willingness and readiness to accept

responsibility for making the necessary changes. If one were to assume that the appellant is capable of accepting such responsibility and of putting it into effect, the stark reality is that he has shown no inclination of any willingness to do so. It is clear from Mrs Myers's report and evidence that the appellant was not amenable to utilize the professional help that she could offer him - "he has not really opened up properly", she said. And, of course, the appellant's lack of remorse (which was dealt with by the trial Judge in the extract from his judgment quoted earlier) militates rather strongly against any real prospect of rehabilitation. On being questioned by the trial Judge about the possibility of rehabilitation, Mrs Myers responded: "as long as the person is alive I don't think you can really write him off." In sum, although the possibility cannot be ruled out, it remains remote. On this footing I do not consider that the appellant's prospects of being rehabilitated can serve to discount the cogent factors calling for the extreme penalty in this case.

In the final result I conclude, as did HOWARD JP, that the death

sentence is the only proper sentence in this case.

Since the Constitutional Court has not yet pronounced on the validity of the death penalty, this appeal (in which the death sentence imposed on the appellant is the sole issue) cannot now be finally disposed of. It must await the decision of the Constitutional Court

The appeal is postponed to a date to be determined by the Registrar in consultation with the Chief Justice.

AS BOTHA JUDGE
OF APPEAL

SMALBERGER JA } CONCUR FH
GROSSKOPF JA }