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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

EVATON ROBERT SINDANE ..... FIRST APPELLANT

and

PATRICK JABULANE SKOSANA .... SECOND APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : E M GROSSKOPF, M E KUMLEBEN JJA et KRIEGLER AJA

HEARD : 15 MAY 1992

DELIVERED : 29 MAY 1992

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA

Initially three accused stood trial in the East and South Eastern Circuit Local Division, Transvaal, on inter alia charges of murder and robbery with aggravating circumstances. The appellants, accused nos 1 and 3 respectively, were convicted of these two offences. The case arose out of the fatal attack on 10 August 1986 upon Simon Johannes Smit in His home at Vaalbank, district Middelburg, Transvaal, and the theft of certain of his possessions. The appellants pleaded not guilty to these charges. (The second appellant later changed his plea to one of guilty on all counts.) The first appellant refused the services of pro deo counsel and remained unrepresented throughout the proceedings.

After conviction neither appellant gave or adduced evidence in mitigation. The court found no extenuating circumstances and on the murder charge each

was sentenced to death. (For the robbery each received a sentence of 15 years imprisonment.) Applications for leave to appeal against conviction in the court a quo and the petitions to this court in this regard were refused. The panel, which reviewed the death sentences in terms of s 19(8) of the Criminal Law Amendment Act, no 107 of 1990 (the "amending Act"), was of the view that the same sentence would probably have been imposed had s 277 of the Criminal Procedure Act, no 51 of 1977 ("the Act") been in its present form at the time of sentencing. The matter is now before this court in terms of s 19(12) of the amending Act. We are to decide, with due regard to any aggravating or mitigating factors, whether the death penalty in each case was the only proper one.

Whilst the appeal was pending, the first appellant applied on notice of motion to this court:

"for the setting aside of the sentences imposed on him on 5 April 1988 and the remittal of his case to the trial court (Strydom, J. sitting with the same assessors) for decision after:

1. the hearing of an application for the referral of the First Appellant for observation in terms of section 79 of Act 51 of 1977 and such further evidence as may be necessary for the application, and

2. the report of the observation panel set up pursuant to the application for referral."

On the refusal of the petition to the Chief Justice for leave to appeal the first appellant's normal remedies to have his case come before this court by way of an appeal in terms of the Act were exhausted. The present hearing is, as I have said, pursuant to the provisions of s 19(12) of the amending Act, the relevant parts of which read as follows:

"(a) Where the panel finds that the sentence of death would probably have been imposed in the circumstances contemplated in subsection (10)(a), ...[the Appellate Division] shall, irrespective of whether it has previously

given a decision on appeal in the case concerned, consider the case in the same manner as if -

(i) it were considering an appeal by the convicted person against his sentence; and

(ii) section 277 of the principal Act, as substituted by section 4 of this Act, were in operation at the time sentence was passed by the trial court.

(b) The Appellate Division may -

(i) confirm the sentence of death;

(ii) if the Appellate Division is of the opinion that it would not itself have imposed the sentence of death, set aside the sentence and impose such punishment as it considers to be proper; or

(iii) set aside the sentence of death and remit the case to the trial court with instructions to deal with any matter, including the hearing of evidence, in such manner as the Appellate Division may think fit, and thereafter to impose the sentence which in the opinion of the trial court would have been imposed had the said section 277 been so in operation."

It is clear that the jurisdiction conferred on this court by the above provisions is restricted to a

reconsideration (either by this court or, as a result of remittal, the trial court) of the death sentence imposed. Thus it has recently been held by this court in Mabuti Mamkeli v The State (judgment delivered on 20 March 1992: as yet unreported) with reference to ss (12)(a) and (b) that:

> "Although sub-sec (a) requires the court to consider 'the case' ('die saak' according to the Afrikaans text) which would seem to refer to the entire case including the conviction, it is quite clear that sec 19 generally, and sub-sec (12) in particular, concern the sentence only."

And, after stating the reasons for this conclusion, the learned judge commented as follows:

> "There is an obvious reason why the legislature limited the enquiry in terms of sub-sec (12) to the propriety of the sentence. It is the amendment of sec 277 of the Criminal Procedure Act. This is evidenced by the requirement of the panel, as well as of this court and the trial court in the event of a remittal, to consider the sentence as if the amended sec 277 had been in operation at the time sentence was passed. Having

> provided for the adjudication of future and pending cases on the basis of the amended section the legislature saw fit - presumably with a view to the fair and equal administration of justice - to have the sentences of those awaiting execution of the death sentence be reconsidered on the same basis. To my mind this is all that sec 19 seeks to achieve."

Thus it follows that the relief sought by the first appellant to have the "sentences" (that is, relating to the murder and robbery convictions) set aside, cannot be granted. At best for the first appellant, in the event of his making out a case for the relief sought, it is the sentence of death only which may ultimately be set aside. Before examining more closely the consequences of remittal, if granted, it is convenient to consider the facts and merits of the application.

The Notice of Motion is accompanied by a short affidavit of a Dr Grové, a psychiatrist and a senior medical superintendent at Weskoppies Hospital. In it he confirms the contents of a letter he wrote in

December 1989. It in turn states that on 4 January 1979 the first appellant was admitted to that hospital in terms of the Mental Health Act. He was aggressive, disorientated and exhibited thought disorder. He experienced auditory hallucinations and behaved irrationally. His mental disorder was diagnosed as schizophrenia for which he was treated. His condition improved and on 3 July 1979 he was discharged subject to receiving medication and further treatment by a district surgeon. The affidavit of Dr Grové continues:

> "3. Schizophrenia is a very serious mental illness and is a clear case of psychosis. The prognosis is poor, and the likelihood of complete recovery is not good. Constant medication is required to prevent the recurrence of its symptoms.
>
> 4. A diagnosis of schizophrenia may have very serious implications for criminal responsibility, and there is a reasonable possibility that a referral of the First Appellant for observation in terms of section 79 of Act 51 of 1977 will reveal that at the time of commission of his crimes he was incapable of appreciating the wrongfulness of

> his acts or of acting in accordance with an appreciation of the wrongfulness of his acts and further that at the time of his trial he was by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence."

In a short founding affidavit the first appellant says that whilst conducting his own defence it never occurred to him that his admission to a mental hospital as long ago as 1979 could be in any way relevant at his trial. It was only in December 1989, some 20 months after his conviction, when interviewed by counsel, Mr Katzew, (who at that time and has since acted for him) that in answer to a question he disclosed this fact. In the circumstances he cannot be faulted for not having brought this application sooner.

It is opposed. The respondent relies on an affidavit of Dr Pretorius, a senior State psychiatrist also practising at Weskoppies Hospital. At the request of Dr Grové, who no doubt conveyed to him the contents

of the letter, Dr Pretorius visited the first appellant in prison monthly during August 1990, September 1990, October 1990, March 1991 and May 1991. On each occasion he conducted a physical and psychiatric examination. In his final report, dated 3 May 1991, Dr Pretorius says that he observed no signs of mental disorder. He, however, qualifies this finding by saying that he was unable to obtain a report from a social worker which could possibly have shed more light on the first appellant's mental condition at the time the offences were committed. He concludes by saying that on the information available to him there was nothing to indicate that the first appellant was suffering from any mental disorder which could have resulted in his not being criminally responsible for his acts.

In a replying affidavit Dr Grové points out that it was never his intention that any report by Dr

Pretorius based on his consultations with the first appellant in prison could be regarded as the equivalent of an inquiry in terms of s 79 of the Act or adequately serve as a substitute. He continues:

> "Insofar as the Respondent may argue that Dr. Pretorius' report eliminates the reasonable possibility adverted to by myself in paragraph 4 of my first affidavit in this matter, it is my firm view that such an argument would necessarily lose sight of Dr. Pretorius' statement in his report to the effect that additional material is required to shed light on the First Appellant's mental state at the time of the commission of the crime. It is likely that this and other material that was also not available to Dr. Pretorius due to the limited nature of his enquiry which took place exclusively at the Maximum Prison would be available to a panel appointed in terms of section 79."

And concludes by saying:

> "There is a reasonable possibility that this additional material will be decisive in determining whether the incapabilities adverted to by myself in paragraph 4 of my first affidavit existed or do exist in the case of the First Appellant."

Dr Grové is quite correct in pointing out

that the investigation in terms of s 79 of the Act is far more comprehensive than those undertaken by his colleague. Where a sentence of death is involved two psychiatrists, and a third appointed by the accused if he so chooses, are afforded an extensive opportunity of examining him, usually in a mental hospital over a suitable period of time (s 79(2)). Thereafter the specialists concerned are required to furnish a joint report, or more than one if their conclusion is not unanimous, in which details of the nature of the enquiry and the diagnosis of the mental condition of the patient are to be set out. In terms of s 79(4)(c) and (d) a report is to conclude with a finding, if the enquiry was ordered in terms of s 77(1) of the Act, "whether the accused is capable of understanding the proceedings in question so as to make a proper defence" ("his capacity to stand trial"): or if the enquiry is under s 78(2) "the extent to which the capacity of the

accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect" ("his criminal responsibility").

The court is obliged to order such an enquiry in terms of s 77(1) "if it appears at any stage of the criminal proceedings" that due to mental illness or mental defect an accused lacks the capacity to stand trial or, in terms of s 78(2) "if it is alleged" or "if it appears" that for such reason he might not be criminally responsible. Since both subsections envisage no more than an investigation to enable the court to make a determination on issues vital to a fair trial and the proper administration of justice, the test to be applied for the grant of such an order is, as one would expect, a low one: "a reasonable possibility suffices to oblige the court to direct the

inquiry" - S v Mogorosi 1979(2) S.A. 938(A) 942 B. When such an application is made the court will in each case consider whether there are grounds for such a conclusion. (S v Makoka 1979(2) S.A. 933(A) 937 G - H.) However, as appears from the notice of motion, the first appellant does not seek an order pursuant to ss 77 and 78 but merely one for remittal to enable the trial court to consider an application for such an order and envisages that further evidence in this regard may be adduced. It follows that in considering the application before us certainly no more than a reasonable possibility of such an order being ultimately granted need be shown.

To my mind such a possibility exists. The significant averments of Dr Grové, though general, are not answered or in any way dealt with by Dr Pretorius: they stand uncontradicted. And the latter's opinion is a qualified one: he acknowledges that further

information would be helpful and implicitly might cause him to alter his views. There are countervailing considerations. To judge from the record the first appellant during the course of a reasonably lengthy trial conducted his case with as much proficiency as could be expected from a layman of his standard of education. And the evidence relating to the commission of the offences does not indicate that his behaviour, though criminal, was irrational. Nevertheless, all things considered, I am of the opinion that the order sought should be granted.

As already pointed out, s 19 of the amending act is only concerned with a reconsideration of the death sentence. Should the trial court, as a result of the proposed order of this court, direct that the first appellant be examined in terms of s 79, the report may reveal mitigating facts acceptable to the court, though falling short of a conclusion that first appellant is

either unable to stand trial or was not criminally responsible. This is envisaged by s 78(7) which reads as follows:

> "If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused."

In such a case an appropriate sentence, having regard to the provisions of the amended s 277 of the Act, would follow. However, if the court should find that the first appellant is incapable of standing trial or not criminally responsible, the peremptory provisions of s 77(6)(b) and s 78(6)(b) respectively would apply. In that eventuality, one should perhaps add, the fact that in the result the conviction on the murder charge

would have to be set aside and therefore no sentence could be substituted would be due to the provisions of the said two subsections, and not as a result of s 19(12)(b)(iii) of the amending Act functioning beyond its prescribed limits.

Turning to the appeal of the second appellant, though the complicity of both in the murder was clearly established, details of the involvement of each were not satisfactorily proved. First appellant, notwithstanding the fact that his confession was admitted as evidence (in which he simply acknowledged that he with others had murdered the deceased) to the bitter end pursued his alibi defence. A statement made by the second appellant was handed in by consent. It gives a detailed account of the incident. It is exculpatory to the extent that it alleges that he acted under a measure of compulsion. When giving evidence, which differed in certain respects from his statement,

he finally said that his statement (with one immaterial qualification) was the truth. However, the court - with ample justification - had this to say about his credibility: "Hoe minder daar van beskuldigde 3 [the second appellant] as getuie gesê word, hoe beter. Van meet af was hy 'n onbetroubare en ongeloofwaardige getuie." The court also, quite correctly, rejected his exculpatory assertions. In the absence of any eye-witnesses the court was unable to determine the precise part each played in the actual assault and who was directly responsible for his death. It did, however, conclude that they went to the small-holding where the deceased lived with the common intention of robbing him and that his murder was a preconceived part of their plan. The evidence led by the State, read with such evidence of the second appellant as can be confidently accepted as accurate, is briefly to the following effect.

The two appellants, who had come to know each other when they were in prison together in September 1986, met again before the day of the murder. On the morning of that day they went to a secluded spot and smoked some dagga. The two appellants proceeded to the deceased's home. Near some ash heaps the first appellant picked up a piece of iron and on being questioned said that "he intended working with it". When they arrived at the deceased's home, which is only a short distance away from where the object had been picked up, they sat under a tree and smoked another dagga "zol". They then made contact with the deceased and in due course found themselves in the house. At a stage when the deceased was in his bedroom, one of them struck him a number of times with a heavy sharp object. At some stage he was apparently also stabbed. According to the report of the post-mortem examination,

a heavy sharp instrument accounted for three skull fractures which were the cause of death and a number of further major injuries to the chest. Abrasions on the neck indicated that a ligature had been applied and abrasions to the wrists, forearms and chest lead one to infer that he was tied up. Extensive injuries to the face and numerous superficial incised wounds to the neck and chest corroborate a suggestion in the second appellant's statement to the effect that the deceased was tortured in order to obtain his keys. His body was discovered lying under the bed in the main bedroom. A bunch of keys and money had been taken off him. The intruders stole various items from his home and these were placed in his motor car. They drove off in it. At a certain stage they stopped and changed their clothes by putting on garments belonging to the deceased. They also secreted a shotgun stolen from him. They proceeded on their way until, as a result of

being chased by a police vehicle, they collided with a large lorry. Lieutenant du Toit searched the motor car and found a blade of a spear with what appeared to be blood stains on it. On 25 December 1986 Detective Constable Steyn arrested the second appellant and under a pillow in his home found a firearm, which had been stolen from the deceased.

From the above account the aggravating features are self-evident and important. The inference is inescapable that it was a planned and brutal attack on a defenceless 70 year old man in his home with a view to robbing him after he had been killed. These facts establish that both acted with dolus directus. Particularly as regard the second appellant, the fact that he may not have inflicted the fatal or other injuries, is in the circumstances immaterial. He was well-known to the deceased and he would have been identified had the life of the deceased been spared.

Second appellant, who was about 25 years of age at the time of the offences, has a lengthy record of previous convictions. They commence in 1974, when he must have been about twelve years of age, with a conviction for housebreaking with intent to steal and theft. This was followed during the period from 1974 to 1977 by two further convictions for the same offence and one for theft. From 1979 to 1981 he was convicted twice of assault with intent to cause grievous bodily harm. For the second of these offences, involving a knife, a sentence of two years imprisonment was imposed. Two further convictions are recorded, one of which involved a theft of a motor car. He was released on parole on 1 May 1986 and within three months committed the offence giving rise to this appeal. This chronicle of crimes shows a progression - to call it that - in the gravity of his crimes; an increase in the severity of the sentences imposed which failed to prove a deterrent;

and a consistent disregard for the law even shortly after his release from custody on parole.

By contrast the mitigating factors put forward in argument are unsubstantiated. There are no facts (other than his allegations in his statement which were correctly rejected) from which one might as a reasonable possibility infer that he was influenced or compelled by first appellant to participate. If one accepts, despite the absence of acceptable evidence in this regard, that it was first appellant's idea to kill and rob the deceased, there is nothing to indicate that second appellant did not willingly fall in with this plan. There is similarly no evidence to support the submission that the second appellant played a minor or subordinate rôle, as the trial court correctly concluded in its judgment on extenuating circumstances:

> "Mev Meintjies namens die staat betoog onses insiens korrek dat daar in iedere geval geen

> getuienis voor die hof is dat beskuldigde 1 die leiersfiguur was òf dat beskuldigde 3 onder die invloed van beskuldigde 1 gehandel het nie. Die blote feit dat beskuldigde 1 die bestuurder van die voertuig gedurende die loop van daardie aand was help beskuldigde 3 ook nie. Mev Meintjies wys in hierdie verband ook daarop dat die twee beskuldigdes van min of meer dieselfde ouderdom is en dat selfs sou beskuldigde 1 die leiersfiguur gewees het en beskuldigde 3 'n meer onderdanige rol gespeel het dit op sigself nie 'n versagtende omstandigheid is nie in die afwesigheid van veral getuienis tot die mate waarin hy sodanige ondergeskikte rol gespeel het."

The reference to dagga smoking cannot be relied upon. The second appellant in his statement did not claim that this eroded his self-control or influenced him to commit the crimes. Everything points to a prior decision to do so, at least before they smoked on the second occasion.

After giving the matter careful consideration I am of the view that the proved aggravating circumstances and the absence of factors wich can fairly be regarded as mitigatory make the sentence

imposed the only proper one.

The application of the first appellant is granted and the following order made:

> The sentence of death is set aside and the matter is remitted to the trial court for the hearing of an application for the referral of the first appellant for observation in terms of s 79 of Act 51 of 1977, and such further evidence as may be necessary for the application and the report of the observation panel set up pursuant to the application for referral.
>
> The appeal of the second appellant is dismissed and the death sentence confirmed.

M E KUMLEBEN
JUDGE OF APPEAL

E M GROSSKOPF JA)
J KRIEGLER AJA) - **Concur**