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12-7/92

Case nr 631/91
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

Between:

RICHARD PIKOLI First Appellant

THEMBISILE MOSES SKAAP Second Appellant

and

THE STATE Respondent

CORAM: VIVIER, VAN DEN HEEVER JJA
et KRIEGLER AJA.

HEARD: 20 August 1992

DELIVERED: 1 September 1992

J U D G M E N T

VIVIER JA./

VIVIER JA:

The two appellants, to whom I shall refer as accused No's 1 and 2 respectively, were convicted in the Eastern Cape Division by JENNETT J and two assessors on one count of murder (count 1); one count of housebreaking with the intent to rob and robbery with aggravating circumstances (count 2) and one count of the unlawful possession of ammunition (count 5). Accused No 2 was also found guilty of contravening sec 107 of Act 44 of 1958 by cutting a telephone wire (the alternative to count 6). No extenuating circumstances were found in respect of the murder convictions, and under the then prevailing law the two accused were each sentenced to death. On count 2 the two accused were each sentenced to twelve years' imprisonment and on count 5 they were each sentenced to 6 months'

imprisonment which was ordered to run concurrently with the sentence on count 2. On count 6 accused No 2 was sentenced to 2 months' imprisonment which was also ordered to run concurrently with the sentence on count 2. The trial Judge refused an application by accused no 1 for leave to appeal against his convictions and sentences on counts 1, 2 and 5 and by accused No 2 for leave to appeal against his conviction and sentence on count 1. Petitions by the two accused to the Chief Justice for leave to appeal were unsuccessful.

Since the trial the Criminal Law Amendment Act 107 of 1990 ("the Act") has come into operation, and in terms of sec 19(8) of the Act the sentences of death imposed upon the two accused in respect of their convictions of murder were reconsidered by a panel appointed under the Act. In terms of sec 19(10)(a) of the Act the panel found that the death sentence

would probably have been imposed by the trial Court in respect of each accused had sec 277 of the Criminal Procedure Act 51 of 1977, as substituted by sec 4 of the Act, been in operation at the time sentence was passed.

The case of the two accused accordingly comes before this Court in terms of sec 19(12) of the Act as if it were an appeal by them against the sentences of death. The principles to be applied and the approach to be adopted in an appeal against a sentence of death under the new legislation have repeatedly been stated in recent decisions of this Court and need not be repeated. It is only necessary to apply them to the facts of the instant case. For present purposes these may be summarised as follows.

The murder was committed during the course of a carefully planned armed robbery. The deceased was a

53 year old retired farmer who lived alone in a house on the farm Clifton near Seven Fountains in the Albany District. His body was discovered under the bed in his bedroom early on Sunday morning 7 August 1988. There was a stab wound behind the right ear. His hands and feet had been tied but he had managed to free his feet before he died. A belt was tied tightly across his mouth and fastened behind his head. Forced entry to the house had been gained through a window, the house had been ransacked and goods, including the deceased's bakkie, to the value of over R19 000 had been stolen. Two knives were found on the floor in the deceased's bedroom. The telephone wires to the house had been cut as well as the power supply wires to the deceased's citizen band radio. The battery serving as a back up for the radio in the event of a power failure had been removed. On the stoep of the

house the police found three pieces of women's stocking. The police succeeded in lifting two fingerprints, one from the frame of the window through which the accused had gained entry to the house and one from the window of the left door of the deceased's bakkie, which had in the meantime been recovered. These prints were established to have been made by accused No's 1 and 2 respectively.

The post-mortem examination of the body of the deceased showed that, in addition to the stab wound behind the right ear, he had also sustained a fractured skull and multiple bruises and abrasions of the face and body. The stab wound had severed the carotid artery with resultant severe bleeding which obstructed the deceased's airway passage and caused him to die of asphyxia within minutes. According to the medical evidence the absence of any signs of blood on the

outside of the deceased's mouth indicated that he had first been gagged and then stabbed.

The trial Court found that the two accused left accused No 2's house at Grahamstown at about 5 o'clock in the afternoon of Saturday 6 August 1988 on their way to the deceased's farm, some 30 km away, with the common purpose of committing a robbery. They were armed with at least a homemade firearm, known as a Zipgun. In his coat pocket accused No 1 carried a punch and two cartridges. The punch was needed to fire the gun. Accused No 1 had previously lived on the deceased's farm and knew the area. They managed to get a lift to the Seven Fountains turn off and from there proceeded on foot across the veld to the deceased's farm. When they got to the deceased's house he was not there and they waited for him to return. The deceased arrived at about 8 o'clock, parked his

bakkie in the garage and went into the house. The two accused waited until he had put out the lights and they were certain that the deceased was asleep before they broke a window and entered the house. They went to the deceased's bedroom and attacked him while he slept. A violent struggle ensued during which the deceased sustained the fatal stab wound and his other injuries and accused No 2 received scratches on his cheek and nose. It was not possible to identify the actual instrument with which the deceased was stabbed. The trial Court found that it was obviously a sharp instrument such as a knife and that one of the knives found in the bedroom or the knife which accused No 2 said accused No 1 had had with him could have been used. The trial Court was unable to find which of the accused had inflicted the fatal stab wound or caused the fractured skull. Accused No 1 admitted in a

statement to Major Jonker, which was ruled admissible by the trial Court, that he had tied the deceased's hands while accused No 2 admitted in his evidence before the trial Court that he had gagged the deceased with the belt.

Afterwards the two accused made off with the stolen goods in the deceased's bakkie which was driven by accused No 2. In Grahamstown the bakkie broke down and they managed to stop a passing minibus taxi in which the stolen goods were then conveyed to accused No 2's house. Accused No 1 slept there that night and before leaving the next morning he hid the home-made firearm under the roof of the house. Later that day accused No 2's wife left on a visit to Bathurst and accused No 2 gave her some of the stolen articles which she took with her. The bulk of the stolen goods were recovered in accused No 2's house a few days later.

There are a number of aggravating factors in the present case. The murder was committed during the course of a well planned and executed armed robbery on a lonely farm house. The accused had enough time for reflection as they lay in wait for the deceased to return to his house and to go to bed before they entered the house. The deceased was viciously attacked while he was sleeping. The accused both have criminal records. In the case of accused No 1 he has one previous conviction for housebreaking with the intention to steal and theft and one for arson. He was 17 years old at the time of both convictions and has never been to goal. Accused No 2 has no fewer than eleven previous convictions: six for housebreaking, three for assault, one for stock theft and one for the possession of a dangerous weapon.

There are also mitigating factors. In the case of both accused the trial Court found that

the direct intention to kill had not been proved. The firearm which the accused had with them when they entered the deceased's house was not used and the trial Court found that the fatal stab wound inflicted during the struggle to subdue the deceased was not inflicted in a part of the body where one would expect an assailant with the direct intention of killing to stab his victim. In my view it has not been shown that either accused subjectively appreciated the risk of death as a strong possibility and in all the circumstances of this case the absence of a direct intention to kill should be regarded as a mitigating factor.

On behalf of accused No 1 it was further submitted that his youthfulness should be regarded as a mitigating factor. Accused No 1 was 20 years old when the murder was committed. The trial Court said in

its judgment on the issue of extenuating circumstances that from what it had seen of accused No 1 he did not appear to be a particularly mature person, but that his immaturity in no way contributed to his actions. In **S v Dlamini** 1991(2) SACR 655(A) at 667 i-j it was held that although the youthfulness of the appellant in that case could not be regarded as a mitigating factor, it was nevertheless relevant to the propriety of the death sentence, in that the reluctance to sentence teenagers to death expressed in **S v Lehnberg en h Ander** 1975(4) SA 553(A) at 561 B would extend to cases where the accused, though no longer a teenager, was standing on the threshold of manhood. In **Dlamini's** case the appellant was 19 years and 7 months old when the crime was committed and he was described by this Court as "not an immature youth, but a man seasoned in crime" (at 666 f-g). The same, I think, can be said

of accused No 1 if regard is had to his previous convictions and the nature of the present crimes committed by him. As in **Dlamini's** case his youthfulness, although it cannot be regarded as a mitigating factor, is nevertheless relevant to the propriety of the death sentence.

In the case of accused No 2 it was submitted that he had given the police his full co-operation and that he has shown genuine remorse for the death of the deceased. As regards co-operating with the police, there is little else accused No 2 could initially have done as he was found in possession of most of the stolen goods. He went on, however, both in his statement to the magistrate and in his evidence at the trial to minimise his own role and to put most of the blame on accused No 1. His account of the events of the fateful evening was rejected by the trial Court as

completely unreliable. He did not say in his evidence that he was sorry for what he had done. In the circumstances it cannot be said that accused No 2 has shown genuine remorse.

It has been stressed in decisions of this Court that in cases of murder of elderly victims in their own homes with robbery as the motive, the factors of retribution and deterrence inevitably come to the fore (**S v Tloome**, 1992(2) SACR 30 at 39 h). The final question, however, which has to be answered is whether, having regard to the mitigating and aggravating factors and other circumstances such as accused No 1's youthfulness, the death sentence is the only proper sentence in the case of each accused.

After mature reflection I am not convinced that in the present case the death penalty is the only

suitable punishment. In my view a sentence of 25 years' imprisonment in the case of accused No 1 and one of life imprisonment in the case of accused No 2, would, in the circumstances of this case, be sufficient to satisfy the deterrent, preventative, punitive and reformative aspects of sentence.

In the result the appeals of both accused against their sentences are allowed. The death sentence in each case is set aside. There is substituted, in the case of accused No 1, a sentence of 25 years' imprisonment and, in the case of accused No 2, a sentence of imprisonment for life. It is ordered that the sentences imposed by the trial Court on counts 2 and 5 in the case of accused No 1, are to run concurrently with his sentence of 25 years' imprisonment, and that those imposed by the trial Court

on counts 2, 5 and 6 in the case of accused No 2 are to run concurrently with his sentence of life imprisonment.

W. VIVIER JA.

VAN DEN HEEVER JA)
KRIEGLER AJA) Concur.