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Case No 467/91
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WELLINGTON DHLAMINI — Appellant

and

THE STATE — Respondent

CORAM: HOEXTER, MILNE et GOLDSTONE JJA

DATE OF HEARING: 24 February 1992

DATE OF JUDGMENT: 5 March 1992

J U D G M E N T

/MILNE JA.....

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J U D G M E N T

GOLDSTONE JA:

I have had the privilege of reading the judgment of my brother Milne JA. For the reasons which follow I am unable to agree that in this case the death sentence is the only proper sentence.

At the outset I would like to express my own moral outrage and indignation at the cruel manner in which the appellant murdered the deceased. However one must take care not to allow that outrage and indignation to cloud one's judgment in deciding, as we are bound by law to do,

whether this is one of those "exceptionally serious cases" where the imposition of the death sentence "is imperatively called for": S v Nkwanyana and Others 1990(4) SA 735(a) at 754 F.

As mentioned by Milne JA, the judgment in S v Cele and Another 1991(2) SACR 246 (A) was relied on by counsel for the appellant. There the two appellants had committed a series of armed robberies. They waylaid passing motorists on a public road. During each of two of the robberies they stabbed and killed one of their victims. Both appellants were found guilty in respect of each of the murders. It was proved that in respect of the first murder the second appellant inflicted the fatal wounds. In respect of the second murder both appellants joined in the fatal attack. It was held by this Court that the death sentences which had been imposed by the trial court were not the only proper sentences and long periods of imprisonment

were substituted. In his judgment Smalberger JA said the following at 248 e-i:

> "All murders are serious. The two of which the appellants were convicted are particularly so. The manner and circumstances in which the offences were committed constitute an aggravating factor. Innocent, unsuspecting persons were set upon by the appellants whose motive was to rob them. Their conduct was not impulsive. It was planned in the sense that they preyed on any unfortunate victim they came across or were able to waylay in the area in question. They were prepared to meet any resistance with violence, and were indifferent to the fate of their victims. But it cannot be said that the intention to kill was foremost in their minds. This is evidenced by the fact that a number of their robbery victims were left unharmed. It was only to overcome encountered resistance, or in order to forestall resistance, that they resorted to degrees of violence sufficient for such purpose. Morally this does not make their conduct any less opprobrious, but it does indicate that it was not a passion for

violence per se not an a priori decision to murder, which governed their conduct.

The two appellants are both in their early thirties. Both have previous convictions, but none for crimes of violence. The second appellant has never been to gaol. Apart from the the offences they committed (and I do not seek to minimise their seriousness) there is nothing in their past history to suggest that the two appellants are such dangers to society that it is imperative that they be removed permanently therefrom. Nor can it be said that imprisonment is unlikely to have a rehabilitating effect upon them. Although this is very much a borderline case, it seems to me that society will be sufficiently protected, and the objects of sentence satisfactorily achieved, if the appellants are imprisoned for a substantial period of time. Accordingly it cannot be said that the death sentence is the only proper sentence. In my view a sentence of 20 years' imprisonment should be substituted for the death sentence on each of counts 1 and 4 in respect of both appellant."

I concurred in that judgment and I have found no

reasons for departing now from any of the principles enunciated therein. In particular it was there held that:

1. the absence of a "passion for violence";
2. the absence of a history suggesting that the appellant is a danger to society and that it is imperative to remove him from society; and
3. the likelihood that imprisonment will rehabilitate the accused,

are all relevant mitigating factors in deciding whether the death sentence is the only proper sentence.

In all cases of this kind the court is enjoined to have due regard to the presence or absence of any mitigating or aggravating factors. Having done that the court, having regard to the objects of sentencing, must decide whether the death sentence is the only proper sentence. It is not particularly helpful to compare the facts of other cases. As pointed out by Milne JA each case must be decided on its own facts. Having said that, however, it is equally

important that this Court, as the court of last instance, should attempt to be consistent in the principles it applies in its approach to the exercise of its discretion. This is especially so in capital cases. If there is a public perception that questions of life and death are dependent on the subjective inclination of one judge or another the respect for the criminal justice system may well be eroded.

In the present case all three mitigating factors referred to in Cele's case are present, or in any event, have not been excluded by the State upon whom rests the onus of proof.

As assumed by Milne JA, and as I hold, the State did not establish that the appellant broke into the Meyerowitz home having made "an a priori decision to murder". There was no evidence to establish that he expected anyone to be at home, let alone the deceased whom he had probably not seen for some years. There was no

evidence to suggest that the accused had a murder weapon in his possession - the fact that he manually strangled the deceased strengthens the probability that he did not plan to resort to violence. In passing, I would mention that in the Cele case (supra) the two appellants were armed with and used knives in fatally stabbing their two victims.

The criminal record of the appellant, the detail of which appears from the judgment of Milne JA, is not such that, in my view, it can be said that the appellant is such a danger to society that it is imperative that he be permanently removed therefrom. Again in passing, I would point out that in Cele's case the appellants had each been convicted of two murders in the course of a planned series of robberies over a comparatively lengthy period of time.

And thirdly, it cannot be said that a lengthy period of imprisonment is unlikely to have a rehabilitating effect on the appellant.

I am in full and respectful agreement with Milne JA with regard to the serious aggravating factors. I need not repeat them. I would add, however, that the most serious, in my opinion, is the probability that the motive for the murder was the appellant's desire to avoid being identified by the deceased.

Having due regard to the mitigating and aggravating factors, I have come to the conclusion that this is another of those borderline cases where it cannot be said that, (paying due regard to the objects of sentencing), the death sentence is the only proper sentence. Taking into account all the circumstances, and, in particular, the mitigating factors referred to above, I am not convinced that in this case the death sentence is imperatively called for. I would set aside the sentence of death and substitute therefor a lengthy period of imprisonment. In my opinion, imprisonment for 20 years would be an

appropriate period. Such imprisonment should run concurrently with the sentence of 10 years' imprisonment imposed by the trial court in respect of the robbery charge.

R J GOLDSTONE

JUDGE OF APPEAL

MILNE JA:

On 7 September 1988 the appellant was convicted of murder and robbery with aggravating circumstances. On the murder charge he was sentenced to death, no extenuating circumstances having been found, and on the robbery charge he was sentenced to 10 years' imprisonment. Leave to appeal against the convictions and sentences was refused by the trial court and by this court. Thereafter, in terms of the amendments effected by the Criminal Law Amendment Act 107 of 1990 the matter was considered by the panel in terms of section 19(8) of that Act. The panel found that the trial court would probably have imposed the death sentence if section 277 of the Criminal Procedure Act as amended had been in operation at the time the sentence was imposed. The matter now comes before us in terms of section 19(12).

The appellant's convictions arise out of the events which occurred on 27 October 1986. The factual picture which emerges from the evidence is as follows. At about 7.15 a m on that day Mr and Mrs Meyerowitz left their house in Parktown, Johannesburg. At that time, the deceased, who had been employed by them as a housemaid for about 11 years, was present. At some time between then and 2.45 p m on the same day, the appellant entered the premises and encountered the deceased. The deceased had clothes pegs in one hand and a bunch of keys in the other. These keys included the keys to the back gate and security gate of the premises. The appellant strangled the deceased manually. Either before or after strangling her he forced open the doors of two wardrobes, seven built-in cupboards and a steel cupboard behind one of the wardrobes. He stole clothing, money, a gold bracelet and various other items belonging to the Meyerowitz's, the total value of which was between R4 000 and R5 000. In addition to the injuries caused by the strangulation the

deceased, who was 64 years of age, had abrasions on the top of her right shoulder and bruising on her upper and interior chest, the right lower forearm and the left forearm. The appellant had, during the period 1978 - 1981, been employed as a part-time gardener during the absence on leave of the regular gardener. On the evidence of Mr Meyerowitz (which was accepted by the trial court) the appellant and the deceased were known to each other "because he worked with her on the Sundays or Saturdays."

The appellant denied that he had had anything to do with the death of the deceased and in fact alleged that he was in a different suburb of Johannesburg on the day in question. In a statement to the police, however, he said that on a day in October 1986 he had done painting at 47 Loch Avenue, Parktown (the address of the Meyerowitz's) and that he was hired by one George Ncobo to do such work. The trial court rejected his evidence.

The question to be decided is whether, in the particular circumstances of this case, the death sentence is the only proper one, giving due consideration to any mitigating and aggravating factors and the well-known objects of sentencing. In considering the question of mitigating factors it is necessary to have regard to the personal circumstances of the appellant. The appellant's counsel submitted in her heads of argument that insufficient evidence had been led as to the personal circumstances of the appellant and that "further evidence should be led in this regard". She was requested to file an affidavit indicating the general nature of the evidence sought to be led. Such an affidavit has now been filed which deals fully with the personal circumstances of the appellant. It is apparent that the appellant's counsel experienced considerable difficulties in obtaining and placing in proper form this information; she is to be commended for her refusal to be deterred by

these difficulties, and for the clear and precise manner in which the appellant's case was presented. Counsel for the State consented to the court receiving the affidavit as evidence, but he submitted that such evidence could not reasonably lead to a different sentence. I agree with this submission and I did not understand the appellant's counsel to suggest that the affidavit really takes the matter materially further. There is accordingly no basis for remitting the matter to the trial court and strictly speaking this court should not receive the affidavit. In the light of the pragmatic attitude of counsel for the State, however, we shall receive it for what it is worth.

It was submitted that the youth of the appellant was a mitigating factor. At the time he committed these offences he was 24 years old, he was married and had a child aged about 4. For several years he had been earning his own living and supporting his

wife and child. There is no factual basis for suggesting that immaturity played any part in the commission of these offences. Cf S v Lengane 1990(1) SACR 214 (A) at 220c-d.

It was further submitted that although it was established that some degree of premeditation and planning was involved in the robbery, it was at least a possible factor in the case that at the time he entered the premises the appellant had not formed the intention to kill anyone. In this regard it is relevant that the appellant had last worked at the premises in question some five years previously and then only during Saturdays and Sundays. The incident took place on a weekday during the morning or possibly the early afternoon and it was submitted that it is accordingly reasonably possible that the appellant did not know that the deceased would be there. (One cannot derive any assistance from the appellant's evidence in this regard since he raised an

alibi which was rejected by the trial court.) The appellant certainly knew that the deceased had been employed as a domestic servant when he last worked for the Meyerowitz's and had the incident occurred soon after that, it would be highly probable that he would have believed that the deceased would be on duty during the day. Circumstances might however have changed in the intervening five years and I shall assume that it is reasonably possible that when the appellant entered the premises his primary intention was to break in and steal; and that it was not proved that he had considered what he would do if he encountered the occupiers or their servant on the premises. This is, to some extent, a mitigating factor.

There are serious aggravating factors. The first is the manner in which the crime was committed. The deceased was an elderly domestic servant who was obviously going about her lawful occasions on the

premises of her employer when she and the deceased encountered one another. The uncontested medical evidence was that there must have been some sort of a struggle. It would have been necessary for the appellant to have applied considerable pressure to the neck of the deceased for four to five minutes. In the circumstances of this case it is inevitable that the appellant must have seen her dying under his hands. In R v Lewis 1958(3) SA 107 (A) at 109E-F MALAN JA said

> "The inherent danger of the application of pressure to the throat and neck for even a very brief period must be present to the mind of even the most dull-witted individual and, apart from explanation, in performing such an act the assailant either realises, or recklessly disregards, its probable consequences. The application and pressure manually, as in the case before us, is an aggravating circumstance because the assailant is throughout not only fully alive to the degree of force exerted by him but he is, by reason of his manual contact of the throat, warned of the victim's reaction to the pressure applied."

There is nothing to indicate anything to the contrary in the appellant's evidence since he (falsely) denied that he was in any way involved in the death of the deceased.

It follows that **dolus directus** was proved. Moreover, the murder was committed either in order to enable the appellant to complete his plan to break in and steal or, what is worse, because he knew the deceased could identify him as the culprit.

The appellant had a number of previous convictions. In 1980 he was sentenced to receive a whipping of 5 cuts for housebreaking with intent to steal and theft of jewellery. In May 1983 he was convicted of theft and the passing of sentence was suspended. On 19 December 1984 he was sentenced to 6 months imprisonment, all of which was suspended, for assault with intent to commit grievous bodily harm. On 4 February 1986 he was sentenced to 9 months imprisonment for fraud involving a cheque - this 9 months had not expired by the time the murder and robbery were committed and he must accordingly have been released on parole before committing these offences. He also has a subsequent conviction on 8

September 1987 for housebreaking with intent to steal and theft for which he was sentenced to imprisonment for 4 years. It does not appear from the record whether this housebreaking was committed before or after the murder and robbery in the instant case. If it was committed before then this was his third offence involving theft from premises. If it was committed after the murder then it indicates that despite the fact that the appellant knew that he had killed in order to commit the robbery from the Meyerowitz's or to avoid detection, he callously continued on his career of housebreaking. There is no evidence as to the exact stage when the deceased and the appellant encountered one another. Bearing in mind that he must obviously have opened the steel cupboard with some instrument like a crowbar it is more than probable that he did this after killing the deceased. In any event, the inference is inevitable that before he left the premises he did encounter the deceased and having murdered her he left with his booty. He was therefore

not deterred by a realization of the enormity of his crime from carrying out his original purpose.

It is apparent therefore that the aggravating circumstances overshadow the rather slight mitigating factor already referred to. It does not necessarily follow of course that the death sentence is the only proper sentence. One must have regard to the objects of sentencing. This kind of cowardly attack on elderly persons for the purpose of committing robbery has become so frequent that it can rightly be described as epidemic. In these circumstances the deterrent and retributive aspects of punishment play a decisive role. See **S v Khundulu & Ano** 1991 SACR 470 (A) at 479i, **S v Sesing** 1991(2) SACR 361 (A) at 365g and **S v Makie** 1991(2) SACR 139 (A). We were pressed with the decision in **S v Cele & Ano** 1991(2) SACR 246 (A) in which the court substituted sentences of 20 years' imprisonment for the death sentences. It was submitted that the aggravating factors

present in that case were at least as serious as those present in the instant case. Compare, however, **Ndepa v The State** (unreported decision of the Appellate Division in Case No 160/91 delivered on 26/11/91) where the court accepted that the 25 year old accused had no serious previous convictions and that his original intent had not been to murder but merely to break in and steal, but nevertheless considered the death sentence the only proper sentence.

Be that as it may, each case must be decided on its own facts and it must be noted that in **Cele's** case neither of the appellants had any previous conviction for crimes of violence and one of them had never been to gaol.

In my judgement the death sentence is the only proper sentence in the circumstances of this case. The

appeal accordingly fails and the sentence of death is confirmed.

A J MILNE
Judge of Appeal

HOEXTER JA] CONCURS