196/92

Case No 387/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FUNDI SIMON KUNENE APPELLANT

and

THE STATE RESPONDENT

CORAM: HEFER, VAN DEN HEEVER JJA et KRIEGLER AJA

HEARD: 2 NOVEMBER 1992

DELIVERED: 19 NOVEMBER 1992.

J U D G M E N T

HEFER JA:

HEFER JA:

The appellant and two co-accused (who will be referred to collectively as the accused) were convicted in the Natal Provincial Division by HOWARD JP and assessors of murder (count 1) and robbery with aggravating circumstances (count 2). On count 1 the appellant was sentenced to death. The appeal is before us in terms of sec 316A(1) of the Criminal Procedure Act 51 of 1977, as amended. It is directed at the conviction and sentence on count 1 only.

At the relevant time the accused resided on a farm in the Richmond district. On the morning of 3 June 1990 they proceeded on foot to Winshaw Farm about 30 kms away where Mr John Fitzgerald and his wife lived. In the absence of Mr Fitzgerald they persuaded Mrs Fitzgerald to unlock the gate in the security fence surrounding the house by telling her that her husband's car had broken down and that he

wanted her to go and tow it in. Once the gate was open the appellant threatened her with a homemade firearm and demanded money. She had none but surrendered her wristwatch. The appellant then fired a shot at her which missed whereupon, despite her pleas for mercy, he methodically proceeded to murder her by stamping heavily on her chest - shattering her ribcage, contusing one of the lungs and rupturing her liver. Having done so he dragged her body into a flowerbed. Then, after a fruitless search in the house for money and firearms, the accused left the premises and returned home. They were arrested three days later.

There is no need to dwell on the appeal against the conviction. The appellant's evidence mainly followed the lines of a confession which he made to a magistrate on the day of his arrest and which the trial court received without objection.

His involvement in the murder in the manner just described emerges from the confession and from his evidence. At the trial he sought to escape conviction by claiming that he had acted under compulsion but this was plainly a fabrication which was rejected by the court. In this court his counsel did not venture to support his evidence. There is accordingly no reason to doubt the correctness of the verdict. In his written heads of argument appellant's counsel submitted that the appellant had not been accorded a fair trial since the presiding judge had "entered the arena" by subjecting the appellant to intimidating cross-examination seemingly aimed at producing answers favourable to the State, and by generally exhibiting an "attitude of bias or hostility" to the appellant and his co-accused. Since this submission was not pressed at the hearing of the appeal all that need be said is that it is

entirely without substance. The presiding judge did question the appellant and his co-accused but it is far from accurate to describe his questioning as cross-examination and the assertion that he intimidated the appellant and revealed an attitude of bias or hostility is simply not borne out by the record of the proceedings. The way in which he conducted the trial complied in all respects with the standards set in cases such as S v Rall 1982(1) SA 828 (A) and S v Tyebela 1989(2) SA 22 (A).

As far as the sentence is concerned, what we have to decide is whether, having regard to our own assessment of the mitigating and aggravating factors, the death sentence is the only proper one. The trial court's findings in respect of these factors were recorded as follows:

> "1) The motive for the murder was not simply the base motive to facilitate a robbery. It has been established on the evidence that the intention was to

eliminate the robbery victim, and the facts show that she was to be eliminated and was eliminated regardless of any resistance which she offered. Moreover, the motive for the robbery, which encompassed the murder of the deceased, was not related to any dire need on the part of the accused. They were after firearms and money.

2) A firearm was used.

3) There was a considerable degree of premeditation. The intention to kill had already been formulated long before the accused arrived at Winshaw Farm, and the ruse by which he induced the deceased to unlock and open the gates demonstrates that the crimes were meticulously planned.

4) In committing the murder accused No 1 acted in a callous, savage and merciless fashion.

5) The conduct of accused No 1 reveals a contemptuous disregard for human life. He wantonly killed the deceased after she had handed over her watch and pleaded for her life to be spared, and had manifested no intention whatever to resist the robbery.

6) His intention to kill her took the form of dolus directus.

7) The circumstances of the victim constitute a further aggravating feature. She was a woman aged 60, living on a relatively isolated farm. To the knowledge of the accused she was alone, her husband having left the farm that morning. Accused No 1 obviously selected her as being a soft target for his cowardly attack.

Those are the aggravating features.

> The only mitigating factors urged on behalf of accused No 1 are firstly his youth, and the fact that he has no previous convictions. He was 19 years of age at the time of the commission of these crimes. Although not urged as mitigating factors per se, his personal particulars were advanced as being relevant to the question of sentence. He is unmarried with no children and was in steady employment at the relevant time, earning R90 per fortnight. He has a standard five level of education. These facts are relevant as indicating that he could be rehabilitated."

No fault can be found with these findings nor did appellant's counsel challenge any of them. In connection with findings (1), (3) and (6) under the aggravating factors it may be mentioned that the appellant, according to his own evidence, had worked on Winshaw Farm some time before the murder and knew the circumstances there. He enlisted the aid of the other two accused and, as mentioned earlier, they proceeded to the farm on foot. On the way Mr Fitzgerald passed them in his car and they knew that

they would find his wife alone. That the intention to kill was formed long before they arrived at their destination is clear. The appellant was armed with the firearm and his accomplices each had a knife and he freely admitted that they took an actual decision to kill her. In cross-examination by counsel for accused No 3 the appellant stated that accused No 3 went to the farm "with the intention to kill and to rob" - which, of course, applied the more to himself as the leader of the band. Moreover he was well aware of the fact that he was known to Mrs Fitzgerald. Since she would be able to identify him he could obviously not rob her with impunity. She simply had to be eliminated and it is with this knowledge that the accused proceeded on their way. It may be emphasized at this stage that the appellant was the initial conceiver of the scheme for the robbery who persuaded his accomplices to assist him, who played

the leading role in the accomplishment of their purpose and who finally trampled their victim to death.

In this court his counsel made great play of the fact that the appellant was 19 years old at the time of the commission of the murder and had no previous convictions. He urged upon us that the appellant may still be rehabilitated and that he should be sentenced to a long term of imprisonment rather than death. In regard to these matters the trial judge said the following in his judgment on sentence:

> "In this case accused No 1 has no previous convictions and therefore no long history of wickedness. Granted, as a youth of 19 years he was not as mature and did not have the experience of an adult. But there is no acceptable evidence that any outside influence operated to induce him, because of his youthfulness, to commit these crimes. On the contrary, he was the leader of the gang. It was He who hatched the plot and he who influenced the other younger accused to participate with him in

the commission of these crimes. Nor did accused No 1 commit these crimes under circumstances which, by reason of his youth and inexperience, were either provocative or emotive. The last thing that the deceased offered or seemed capable of offering was provocation. And it was not emotion which took accused No 1 to Winshaw Farm to rob and kill; it was greed. On all the evidence, particularly the brutal, cold-blooded and savage manner in which he went about destroying the deceased, accused No 1 acted not because of any immaturity or inexperience stemming from youth, but from inner vice or wickedness.

It cannot be said that accused No 1 is beyond redemption. If a very lengthy prison sentence can serve to reform anyone, which I doubt, it may well be that such a sentence would serve to rehabilitate accused No 1. However, I have to balance his interests against the interests of society and consider whether this is a case in which the deterrent and retributive purposes of punishment should prevail...

....In a recent case, S v Mlotshwa and Mkhize, which I decided in this court in April this year, and in which one of the accused was sentenced to death, I had the following to say:

> 'The incidence of violent crimes of this nature has reached alarming proportions in the area of jurisdiction of this Division, and the victims are all too frequently persons living on isolated farms or

> smallholdings. People no longer feel safe in their own homes. Under these circumstances society is entitled to and demands the protection of the courts, and I think that I reflect the view of the overwhelming majority of right-thinking people when I say that crimes of this nature are exceptionally serious ones in which the death penalty is imperatively called for.'
>
> What I said in that case applies equally to this one.
>
> Having given the matter due consideration, I am of the opinion that notwithstanding his youth and lack of previous convictions the sentence of death is the only proper sentence for accused No 1 on count 1."

I do not think that there could have been any question about the propriety of the death sentence had it not been for the appellant's age and clean record. This court has repeatedly held that the interests of society coupled with the deterrent and retributive objects of punishment come to the fore in cases where elderly or otherwise defenceless persons are killed in the course of a robbery.

Reference may in this regard be made to S v Sesing 1991(2) SACR 361(A) at 365 g-h and S v Shabalala and Others 1991(2) SACR 478 (A) at 483 c-e. Moreover, in view of the appellant's behaviour in the planning and execution of the murder, it should be borne in mind -

> "(i)n determining whether, on a conviction of murder, an accused's conduct is so serious that the death sentence 'is imperatively called for ' one must have regard primarily to the circumstances of the offence, the extent of actual participation therein and the form of intent present. Where a person by his own act, and with direct intent to kill (dolus directus), causes the death of another, then the greater the premeditation that preceded his conduct, the more base his motive, the more brutal, heinous or callous the crime, the greater will society's resultant indignation and revulsion be, and the more readily can the conclusion be reached that such a person's deed 'is so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing'....." (per SMALBERGER JA in S v Mthembu 1991(2) SACR 144 (A) at 147 d-e.)

All this notwithstanding, where the crime was committed by a person who was only 19 years old at the time, there is a natural reluctance to impose the death sentence. But since youthfulness as such cannot be decisive, one has to look beyond his age. The real question is whether, having regard to all the circumstances of the case, society would demand his destruction despite his youthfulness. What must be taken into account, apart from his motive for committing the murder and his personality and mentality, is the nature of his offence and the manner in which it was committed. And we must enquire into the possibility of any outer influences which, because of his youth and inexperience, were provocative or emotive. (Cf MILLER JA's remarks in S v Ceaser 1977 (2) SA 348 (A) at 353.)

The trial judge indicated in the passage from the judgment on sentence quoted above that there

is no evidence of any outside influence operating on the appellant (apart from his own untruthful claim of compulsion) and that he did not commit the murder under circumstances which, by reason of his youth and inexperience, were either provocative or emotive. This is undoubtedly so. As indicated earlier, the appellant was the leader of the gang. He suborned two other youngsters (accused No 3 was only 15 years old) not only to assist in his nefarious deed but later to support his fabricated claim of compulsion at the proceedings in terms of sec 119 of the Criminal Procedure Act. Whatever influence was exerted in this case emanated from the appellant himself. And I agree with the trial judge that there is no indication whatsoever of immaturity playing any part in the planning of the deed and the coldly calculated manner in which it was performed. In all the circumstances of the case I have no doubt that it

is indeed one clamant for extreme retribution.

In the result the appeal is dismissed.

J J F HEFER JA.

VAN DEN HEEVER JA)

CONCUR.

KRIEGLER AJA)