Case No 453/91
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

RAVI NAIDOO	First Appellant
BRIAN NAIDOO	Second Appellant
NARAINSAMY MOODLEY	Third Appellant
KRISHNA MOONSAMY	Fourth Appellant

and

THE STATE	Respondent

CORAM: HEFER, VIVIER et F H GROSSKOPF JJA.

HEARD: 5 March 1992.

DELIVERED: 13 March 1992.

J U D G M E N T

VIVIER JA.

VIVIER JA:

The four appellants ("accused No's 1, 2, 3 and 4" respectively), together with one other ("accused No 5") were convicted in the Durban and Coast Local Division by HOWARD JP and two assessors on one count of murder (count 1), one count of robbery with aggravating circumstances (count 2) and two counts of attempted murder (counts 3 and 4). Accused No 1 was further found guilty on one count of rape (count 6) and on one count of indecent assault (count 8). Accused No 3 was found not guilty on one count of rape (count 5) and guilty on one count of indecent assault (count 7). No extenuating circumstances were found in respect of the murder conviction, and under the then prevailing law all five accused were sentenced to death. In respect of the other convictions varying periods of

imprisonment were imposed, leaving accused No 1 with an effective sentence of 24 years' imprisonment, accused No 2 with 17 years' imprisonment, accused No 3 with 24 years' imprisonment and accused No 4 with 17 years' imprisonment. The trial Judge refused applications by all five accused to appeal against the finding that there were no extenuating circumstances and the consequent sentences of death imposed and he further refused an application by accused No 1 to appeal against the prison sentences imposed upon him in respect of the other charges. Petitions by all five 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 in respect of accused No's 1, 2, 3 and 4

were reconsidered by a panel appointed under the Act. (The sentence of death imposed upon accused No 5 had in the meantime been commuted by the State President to imprisonment for 20 years.) The panel made a finding in terms of sec 19(10)(a) of the Act that, in its opinion, the sentence of death would probably have been imposed by the trial Court in respect of each of accused No's 1, 2, 3 and 4 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 accused No's 1, 2, 3 and 4 accordingly comes before this Court on appeal in terms of sec 19(12) of the Act. 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 repeáted. 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. At about 10h30 on 20 October 1987 the five accused went to the house of Mr and Mrs Austin at No 5, Mountain View Road, Morningside, Durban. I shall refer to Mrs Austin as the deceased. Accused No 1 was armed with a handgun and the other accused were all armed with knives. One of them rang the intercom bell on the front gate and informed D.D., one of the domestic servants who answered, that he had come to deliver a parcel and needed a signature for its receipt. He asked her whether her employers were at home and she told him that they were out. She opened the gate and accused No 1, who was carrying the parcel, handed her a small

book to sign. While she was looking at the book he produced the handgun which he pointed at her. Accused No 3 advanced towards her carrying a long knife with which he threatened her. Accused No 1 told her that they wanted money and pearls. (The deceased carried on a business of selling pearls). Accused No's 1 and 3 forced D. to open the front door and they entered the house, followed shortiy afterwards by accused No's 2, 4 and 5, who were all carrying knives. The robbers found another domestic servant, L.S., inside the house. They bound her and D.'s hands behind their backs with electric cords and accused No's i and 3 then took the two girls to the guest toilet at the end of the passage. In the toilet they gagged the two girls with hand towels and head scarves and started swearing at them. After a while accused No 1 took L. into the passage where he indecently assaulted and raped her. Inside the toilet accused No 3

indecently assaulted D. and he then tried to strangle her with an electric cord. While this was going on the other accused were ransacking the house. Accused No 1 brought L. back to the toilet and he and accused No 3 left after locking the two girls inside the toilet. They eventually returned, each carrying a knife and started stabbing the girls repeatedly in the neck, head and other vulnerable parts of their bodies, until both girls lost consciousness. They were left for dead by accused No's 1 and 3.

At some stage before the stabbing of the two girls the deceased arrived back at the house. L., who was at that moment being assaulted by accused No 1 in the passage, testified that accused No's 2, 4 and 5 confronted the deceased with knives and demanded money and pearls. The deceased replied that there was no money in the house and that the pearls were in the bank. They then demanded the engagement ring which

she was wearing. She said that she would rather write out a cheque for them and proceeded to write out a cheque for five hundred Rand which accused No's 2 and 4 later cashed at the bank. The deceased was then forced to hand over the keys of the safe which accused No 2 opened. She was taken to the bedroom where her hands and feet were tied and her mouth gagged. She was thereafter repeatedly stabbed in the neck, chest and abdomen and an attempt was made to strangle her. In confessions made to a magistrate accused No's 1 and 3 admitted that they had stabbed the deceased and accused No 2 admitted that he had tied her legs and hands and that he had held his hand over her mouth to prevent her from screaming while she was being stabbed. The five accused thereafter left the house, taking with them jewellery to the value of more than R41 000-00.

According to the medical evidence the

deceased died of penetrating stab wounds of the neck and chest. One of the wounds in the neck penetrated the spinal column. A twelve cm long stab wound of the chest passed through the sternum and proceeded to penetrate the heart and right lung. Another penetrated the left lung and a third, which was eleven cm in length, penetrated the liver and duodenum. There were also six superficial stab wounds of the abdomen. In addition to the knife-wounds there were abrasions and bruises of the neck, one of which, a twelve cm long by two cm wide abrasion, clearly indicated that her assailants had tried to strangle the deceased with a ligature.

In its judgment on the merits the Court a quo said that each accused had entered the house knowing that there were people in it with the intention of using the weapon he was carrying to effect the robbery.

Each one foresaw the possibility of one or more of the knives being used with fatal consequences and was reckless as to such consequences. It did not matter, therefore, which of the accused inflicted the fatal stab wounds. There was no need to kill the deceased in order to effect the robbery and she was killed to eliminate her as a witness. She was able to identify accused No 1, who worked for her husband and was known to her. He knew that she could identify him and the others and so it was decided to destroy her.

In its judgment on the issue of extenuating circumstances the trial Court described accused No 1, who was 23 years old at the time the crimes were committed, as the leader of the gang. The trial Court found, however, that the others all showed an ability to act independently of accused No 1 and that there was no evidence to support the submission that any of the others acted under his influence. With regard to

accused No's 2 and 4, who were respectively 20 years and 21 years old when the crimes were committed, the trial Court said that the fact that they accosted the deceased when she arrived home, threatened her with knives and extorted the cheque from her before taking her to the bedroom, refuted any notion that the roles which they played were minor or insignificant. With regard to accused No 3 who was 19 years old at the time of the commission of the crimes, the trial Court held that he played a leading role in the commission of the crimes and that his conduct showed no sign of youthful immaturity. The trial Court said that it was difficult to imagine anything more wicked than the attempt to murder the two domestic servants in order to eliminate them as. witnesses. The trial Court accordingly found that there were no extenuating circumstances in the case of any of the accused.

Mr Viljoen, who appeared on behalf of accused No's 1, 2, 3 and 4 in this Court, submitted that the murder of the deceased was not part of the plan to commit a robbery, and that her arrival caused her assailants to act in a state of confusion and panic. Mr Viljoen relied on the fact that the plan to gain entry to the house depended on the deceased and her husband not being at home at the time. Although it is correct to say that the robbers would probably not have succeeded in entering the house had the deceased or her husband been at home, the robbers must have realised when they entered the house that the deceased could come back at any moment. It was only when they were inside the house that they were informed by the servants that the deceased and her husband would only come back that afternoon. Nevertheless, the deceased's arrival in the house cannot, in my view,

be regarded as totally unexpected. Furthermore, guite some time elapsed from the deceased's arrival until she was killed. She was killed in a deliberate, cold-blooded manner which refutes any suggestion that her assailants acted in a state of panic or shock. In the circumstances of the present case the fact that the murder of the deceased was without premeditation in the sense that it was not planned before the robbers entered the house cannot, in my view, be regarded as a mitigating factor.

Mr Viljoen next submitted that accused No's 1, 3 and 4 acted under the influence of drugs and/or liquor. This submission flies in the face of an express finding by the trial Court in convicting the accused that none of them had smoked any dagga or mandrax or had consumed any alcohol before they went to the deceased's house. Of the accused only accused

No 3 testified on the question of extenuating circumstances. In its judgment on this issue the trial Court reiterated its previous finding and went on to say that even if any of the accused had consumed liquor or drugs before embarking on the robbery this did not, in the circumstances of this case, serve to extenuate the crime of murder. There is insufficient reason to disturb the trial Court's findings. Apart from any other consideration the record reveals no sign in the conduct of any of the accused that he acted under the influence of either drugs or alcohol.

Mr Viljoen has urged us to take into account certain evidential material which originated after the passing of sentences but before the hearing of the appeal. In the alternative he has applied for an order under sec 19(12)(b)(iii) of the Act setting aside the sentence of death and remitting the matter to the trial

Court for the hearing of further evidence on the aspect of sentence. The evidential material relates to each accused's behaviour and religious conversion since their admission to the Pretoria Central Prison. Mr Oberholzer, on behalf of the State, has objected to the Court taking any cognisance of such subseguent events. The general rule is that this Court must decide the guestion of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards (S v Immelman 1978(3) SA 726(A) at 730 H). Even if there are exceptions to this rule (see Goodrich v Botha and Others 1954(2) SA 540(A) at 546 A-C and the unreported judgment of this Court in S v Nofomela (delivered on 28 November 1991 in case No 161/91) this case does not seem to be such an exception. See the recent unreported judgment of

this Court in S v Quekisi (delivered on 3 March 1992 in case no 514/1991) where this Court refused to take cognisance of similár material.

The aggravating factors in the present case are obvious. Firstly, the murder was committed in the course of a coolly planned, cunningly executed robbery. Secondly, the accused were all armed when they entered the house, ready to do all that would be required to subdue their victims. Thirdly, the deceased was murdered in a cold-blooded, merciless manner for no reason other than to eliminate her as a witness. When they killed her the robbers had already achieved their purpose in robbing her. She had been tied hands and feet and was at their mercy. Fourthly, it.was a savage attack as is evident from the nature of the numerous wounds inflicted upon her. In the case of

accused No 1 there is the additional aggravating factor that the deceased and her husband had shown great kindness and generosity towards him. The former, as his employer, had made interest free loans amounting to R16 000 to him and had invited him and his wife to their home at No 5, Mountain View Road in order to show them how they might improve their own home. Accused No 1 thus knew the layout of the house. A further aggravating factor in the case of accused No's 1 and 3 is that their behaviour throughout the attack on the house displayed a complete disregard for the personal integrity and lives of others. This is illustrated by their attempt to kill the two servants in order to eliminate them as witnesses. In its jugment on extenuating circumstances the trial Court held that accused No's 1 and 3 acted from inner vice, and this finding was not challenged before us.

The mitigating factors are, in the case of accused No 1, his relative youthfulness and the lack of relevant previous convictions. Accused No 1 was 23 years old at the time the offence was committed. He had passed std 9 at school, he was married and was in permanent employment. It was submitted that he had shown remorse by telling the magistrate that he was sorry for what he had done and by breaking down and crying when he went with the police to the scene to point out certain places. In his evidence before his conviction, however, accused No 1 put the blame on someone else. He did not testify on the issue of extenuating circumstances but instead made, what the trial Court described as a "defiant little speech". In these circumstances I am not satisfied that accused No 1 showed genuine remorse for what he had done.

The mitigating factors in the case of accused

No 2 are his youthfulness and the fact that he has no relevant previous convictions. Accused No 2 had passed standard 6 at school and was in fixed employment at the time.

Accused No 3 was only 19 years old at the time the murder was committed and his age must obviously be regarded as a strong mitigating factor in his favour. He had obtained a matriculation certificate and was unemployed at the time. He had one previous conviction i.e. for assault with intent to do grievous bodily harm with a knife, committed during 1987.

Unlike accused No's 1, 2 and 3 who, on their own admission, actively participated in the actual killing of the deceased, there is no evidence that accused No 4 took any active part in the actual killing or that he was even present when she was killed. 1

have already referred to L.'s evidence to the effect that accused No's 2, 4 and 5 accosted the deceased in the passage and that they marched her off to the bedroom. In his confession, which is the only evidence against him as to what happened inside the room, accused No 4 said that after the safe had been opened he left the rocm and did not return. It must therefore be accepted in his favour that accused No 4 did not participate in the actual killing of the deceased. This is a strong mitigating factor in his favour. Another mitigating factor is his relative youthfulness. Accused No 4 has two previous convictions for assault with intent to do grievous bodily harm and four for common assault.

The final question which has to be answered is whether, having regard to the aggravating and mitigating factors, the death sentence is the only

proper sentence in the case of each of the accused.

In the case of accused No's 1,2 and 3 the nature of the murder was so gross, their deeds so wicked, that one is driven to the conclusion that this is one of those exceptionally serious cases where the deterrent and retributive aspects of punishment outweigh all other considerations and the death sentence is imperatively called for. In S v Majosi and Others 1991(2) SACR 532 at 541 e the following was said with reference to an accused's prospects of rehabilitation as a consideration against the imposition of the death sentence:

> "....that factor, weighty as it undoubtedly is, must yield to considerations of retribution and deterrence when the horror of the crime, the callousness of the criminal, and the frequency of its recurrence generally, are such that the perceptions, sensibilities and interests of the community demand nothing less than the extreme

penalty."

This, in my view, applies to the case of accused No's 1, 2 and 3. The position of accused No 4, however, is different. As I have said he played no active part in the actual killing of the deceased and, dëspite the fact that his prospects of rehabilitation must be regarded as poor, it cannot be said that the death sentence is the only proper sentence in his case. In my view a sentence of 20 years' imprisonment should be substituted for the death sentence on the murder charge in his case.

In the result the following order is made:

1. The appeal of accused No's 1, 2 and 3 against the death sentences oncount one is dismissed, and the death sentences are confirmed.

2. The appeal of accused No 4 against the death sentence on count one is allowed. There is substituted for the sentence on this count the following:

"On count one accused No 4 is sentenced to 20 years' imprisonment. It is ordered that the sentences on counts two, three and four are to run concurrently with the sentence on count one."

W. VIVIER JA.