34/92

CASE NO 220/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

GQIBILE PHILMAN MAXAM Appellant

and

THE STATE Respondent

CORAM: EM GROSSKOPF, SMALBERGER JJA et HOWIE AJA

DATE HEARD: 9 MARCH 1992

DATE DELIVERED: 23 MARCH 1992

J U D G M E N T

HOWIE AJA: Appellant was one of a gang of young men that broke into a house on a farm in the Paarl district and stole a quantity of goods and cash. In the course of the raid appellant fatally shot the domestic servant and the gardener who were employed there. As a result he was convicted in the Cape Provincial Division (Munnik JP and assessors) upon two counts of murder and one count of housebreaking with intent to steal and theft.

In respect of the last-mentioned count appellant was sentenced to 10 years' imprisonment. As regards the convictions for murder, the trial Court, in terms of s 277 of the Criminal Procedure Act, 51 of 1977, as amended by Act 107 of 1990, recorded both aggravating and mitigating factors. Having weighed all those factors, the learned Judge President imposed the death sentence on

each count, holding that this was the only proper sentence.

Appellant did not seek leave to appeal and was out of time in his efforts to exercise the right of appeal afforded by s 316 A of the Criminal Procedure Act. However, pursuant to an application for condonation of his late noting of an appeal under that section, condonation was granted at the commencement of the hearing before us. The present appeal is, in terms of that section, directed only at the death sentences.

The killings took place in the early afternoon of 15 April 1986. During the morning appellant met up with a group of younger acquaintances in Mbekweni township at Paarl. According to a confession he made to a magistrate after his arrest in July 1989, which statement was proved as part of the prosecution case, they told him they were on their way to a certain house to obtain money. They asked him to accompany them and he agreed to do so. The

gang, about six in number, then proceeded to the farm. One or more of the group went to the kitchen window and asked the domestic servant for water. She was in the act of handing a container through the window when, with some of the gang holding her, appellant shot her. She slumped to the floor and he shot her again. Other members of the group had in the meantime broken into the house. Appellant went in only as far as the kitchen. When he saw his accomplices carrying articles out of the house he went out with them. He then noticed the gardener who had been tied up with wire and heard someone shout that the gardener should also be shot otherwise he would be able to implicate them. Appellant thereupon shot him and the gang made its getaway.

Appellant gave substantially the same account on the day after the confession when, in the company of a police captain, he pointed out various places at the scene of the crimes.

Medical evidence revealed that the servant, aged about 51, and the gardener, who was approximately 50 years old, had both been shot once through the head. The servant had also been shot in the abdomen.

The house was ransacked and the stolen property included a video recorder, jewellery of considerable value, a large quantity of clothing and R2 200 in cash.

Appellant testified in his defence, and alleged that what the group actually went to the farm for was, in response to a widely disseminated instruction by the president of the then banned African National Congress, to look for firearms for use in confrontation with the police. When the others in the gang asked him to accompany them he fetched a 6,35 mm pistol which he had acquired at some earlier stage and which he kept hidden in a tree near his home. He said that he was the only member of the gang that was armed and that he took the weapon for his defence in the event that they encountered

resistance. Appellant claimed to have fired no more than a single warning shot near each of the deceased and to have done so in order to frighten them. As it happened, no firearms were found and because the sole purpose of the expedition was to obtain firearms, so he said, he took no part in the theft. Save for appellant's account of his possession of the pistol, the trial Court rejected his evidence and held that while the finding of firearms would clearly have been a "bonus", the burglary had obviously been aimed at goods and valuables in general.

After judgment on conviction had been pronounced the case was adjourned. On resumption of the hearing, appellant gave evidence in mitigation of sentence in which he developed the alleged political component of his story still further. However, it is unnecessary to say more about his professed political motive for committing the offences in issue because Mrs Jones, who appeared for

him on appeal and also at the trial, disavowed any intention to submit that the crimes were politically inspired. In view of the absence of any suggestion of such a motive in appellant's statements subsequent to his arrest, when there would have been the opportunity and every incentive to raise this aspect, and in the light of the unconvincing way in which this theme was developed as the various stages of the trial were reached, it seems to me that Mrs Jones exercised a wise discretion.

On the facts relative to the crimes, therefore, one may conclude by saying that the motive of the gang members was to steal whatever valuables they could find and, clearly, valuables included firearms. Appellant said he armed himself to deal with anticipated opposition but on his own showing the servant and the gardener offered no resistance whatever. The only reasonable inference on all the evidence is that he killed them either to facilitate commission of the theft or to

prevent their subsequently giving information which would lead to his arrest, or that of his accomplices. Moreover, the trial Court was justified in finding that appellant was the leader of the gang. Not only was he about five years older than his accomplices but evidence given in mitigation depicted him as a prominent figure in the Mbekweni community.

The aggravating factors found by the trial Court were, firstly, that the raid was planned earlier in the day and was not a spur of the moment decision by a group happening to pass by the farm. Secondly, it was held that the murders were committed in pursuit of an unlawful object. Thirdly, it was found that the killings consisted in the cold-blooded "execution" of innocent victims who were about their lawful business and who could have been immobilised and silenced by non-fatal means. Fourthly, the Court pointed to appellant's leading involvement and, finally, to his failure to show,

or unequivocally to express, any genuine remorse. These findings are unassailable and were not contested on appellant's behalf before us.

The recorded mitigating factors were matters either beyond dispute or not disproved by the prosecution. Firstly, appellant is a first offender. Secondly, he had a consistent employment record from the time he left school in 1980 until resigning from his most recent post a short while before this incident. In that brief interval he was awaiting word of his application for employment with the South African Transport Services. Thirdly, on the strength of evidence given in mitigation by witnesses who knew appellant well, the trial Court accepted that he had achieved commendably at school and participated worthily in church activities. Fourthly, the trial Court found, on the evidence of a clinical psychologist, Mr L Loebenstein, one of the witnesses called in mitigation, that appellant was a person of

innately anxious make-up, which disposition had been so aggravated by serious ongoing political upheaval in Mbekweni at the relevant time that when he committed the offences he was suffering from what is known as a general anxiety disorder, and that this disorder constituted a mitigating factor. However the Court went on to state, in relation to this ailment, that "its existence was not related to the commission of the crime involved" and that had appellant acted criminally "in a situation arising out of the ongoing township violence then his generalised anxiety disorder would have constituted a very relevant mitigating factor".

I may say that it was common cause that appellant was a leading political activist in Mbekweni and that for quite some months before the present incident the township had been racked by very serious political unrest involving a majority faction, to which appellant belonged, and a minority faction which, he alleged,

received frequent police support. In this situation public disturbances and acts of violence were the order of the day.

In his judgment on sentence the learned Judge President took the view that in the absence of a nexus between appellant's anxiety disorder and the offences, such disorder had failed, in effect, to reduce the overall seriousness of the case. He held that its level of seriousness was "exceptional", and considered that even life imprisonment would not be regarded by society as adequate expiation or deterrence to others.

In support of the appeal Mrs Jones contended that the element of retribution had been accorded excessive weight at the expense of the mitigating factors and that the case was one in which all the objectives of punishment would be satisfactorily and responsibly achieved by the imposition of appropriately lengthy imprisonment.

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Essentially on the strength of the aggravating factors, Mr Downer, for the State, argued that the present matter was fairly comparable with other cases involving the killing of defenceless people on outlying farms and in which sentences of death had been upheld by this Court. He accordingly submitted, with justification, that those factors made the death sentence eminently appropriate.

There is no doubt that the killings in this case were crimes of exceptional seriousness and that they call for a sentence in respect of which the retributive and deterrent elements of punishment weigh extremely heavily. One could well tend towards the conclusion that anyone who murdered the domestic servant as appellant did and then, undeterred, proceeded ruthlessly to dispatch the gardener, must have been moved by little else than essentially evil propensities. Whether that potential conclusion is really justified in the end, however,

depends upon the weight to be given to the acceptable aspects of the evidence given by what I might term the "character" witnesses, and to the evidence of Mr Loebenstein.

It is unnecessary to recount the character evidence in any great detail. The gist of it was not really in dispute and amounts to the following. Appellant comes from what was described as a disciplined, conservative and religious home. He was an obedient, reliable, loyal and hard-working scholar whose school-days culminated in his holding office as a prefect. In adult life he obtained steady employment and went on to occupy leading and responsible positions in township politics. His various community commitments demonstrated an active social conscience. Various witnesses described the crimes in question as completely out of character.

Mr Loebenstein's evidence was that the anarchic situation in Mbekweni during the months leading up to the

present offences must have created living conditions of considerable, persistent and widespread tension. The effect upon appellant was that, as a result of his inherently anxious disposition he developed the identifiable psychiatric disorder referred to earlier. According to Mr Loebenstein, this disorder

> "would have impaired his functioning to the extent of reducing his ability to apply due circumspection to the stressful environment confronting him at the time of this offence."

He went on to say that had appellant not been of an anxious disposition and had he not been subject to ongoing daily stress, he would have behaved in his innately compliant, conforming manner instead of the way he did. His considered opinion was that the commission of the offences was "totally at variance" with appellant's normal functioning. He concluded by emphasizing that he did not mean that appellant's disorder caused him to commit the offences; what it did do was to disrupt his general behavioural functioning.

In certain respects Mr Loebenstein relied on information (either from appellant or various of his witnesses) which was rightly ignored by the trial Court as being unreliable for one reason or another. However, I do not find that the Court queried or expressed any real reservations regarding the essentials of Mr Loebenstein's evidence as summarised above. That evidence, in my assessment, established not merely the existence of a mitigating factor. It established a mitigating factor no less related to the commission of the crimes than would have been the case, for example, had appellant's intellectual and behavioural function on the day been affected by intoxication. Clearly, where inebriation was held to be an extenuating circumstance under the criminal law as it was before the amendments brought about by Act 107 of 1990, and therefore found to be a circumstance related to the commission of the offence (eg **S v McBride** 1988 (4) SA 10 (A) at 19-20), it

was not because drunkenness had caused the offender to commit the crime, but simply because he committed it in a state in which alcohol had impaired his functioning by reducing his ability to exercise his usual sense of morality and self-discipline (cf **S v Saaiman** 1967 (4) SA 440 (A) at 443D-F) and, therefore, his ability to behave as he would normally have done. In my opinion, that is essentially what Mr Loebenstein said was the effect upon appellant of his general anxiety disorder. It follows, I think, that that disorder did after all constitute what was referred to by the Court below as "a very relevant mitigating factor".

I conclude, therefore, that although the crimes themselves were of exceptional seriousness, the seriousness of the case as a whole, assessed by way of the comparative evaluation of the aggravating and mitigating factors, was reduced to a material extent by appellant's anxiety disorder.

When one takes that conclusion into account together with those aspects of the character evidence which I have outlined above, then it seems to me that it cannot be said that the death sentence is the only appropriate sentence in this matter.

As to an alternative appropriate sentence, appellant's clean record, stable employment history and sound personal qualities point to there being favourable prospects of his reformation and that consideration, in turn, makes it inappropriate, in my opinion, to impose life imprisonment. I consider that all the purposes of sentence would be achieved by the imposition of very long term imprisonment on each count.

The appeal is allowed. The sentences of death are set aside. Each is replaced by a sentence of 25 years imprisonment, which sentences are ordered to run concurrently with one another and concurrently with the sentence on the housebreaking charge.

HOWIE AJA

CONCUR

EM GROSSKOPF JA
SMALBERGER JA