60/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO: 465/91

In the matter between:

MSHIMANE JOHN NDABENI APPELLANT

v

THE STATE RESPONDENT

Coram: CORBETT CJ, NESTADT JA et VAN COLLER AJA.

Date heard: 3 March 1992

Date delivered: 31 March 1992

J U D G M E N T

VAN COLLER AJA:

Appellant was convicted in the Durban and Coast Local Division by Law J and two assessors on two counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. The court a quo found no extenuating circumstances and appellant was sentenced to death on the two counts of murder. In respect of the conviction for attempted murder, appellant was sentenced to 10 years' imprisonment and in respect of the conviction for robbery, to 5 years' imprisonment. This latter term of imprisonment was ordered to run concurrently with the sentence of 10 years' imprisonment. Appellant was

granted leave to appeal by the Judge a quo in respect of his convictions. This Court, however, dismissed the appeal on 13 November 1989.

On 15 August 1991 the panel for the reconsideration of sentences established in terms of s19(10)(a) of Act 107 of 1990 ("the amending Act"), found that the court a quo would probably have imposed the death sentence if s277 of the Criminal Procedure Act 51 of 1977, as amended by s4 of the amending Act, had been in operation at the time of sentencing. In terms of s19(12)(a) of the amending Act this Court must now consider the death sentence imposed on the appellant. In terms of this section it is the task of this Court to consider these sentences as if s277 of Act 51 of 1977, as substituted by s4 of the amending Act, was in operation at the time sentence was passed by the trial court. The effect of the amendment has been considered in a number of decisions of this Court. See for example, S v Masina and Others 1990 (4) SA 709 (A); S v Senonohi 1990 (4)

SA 727 (A); S v Nkwanyana and Others 1990 (4) SA 735 (A). It is not necessary to repeat what has been stated with regard to the new approach and the task of this Court. After having considered all the relevant principles and circumstances the final question is whether or not the death sentence is the only proper sentence.

The events which gave rise to the charges against appellant took place during the night of 17 June 1987, at the hut of Mukile Modonsela which is situated near the Magwangwa area in the district of Ingwavuma. Her husband was working in Johannesburg at the time and she was living alone at the kraal with her children. There is no direct evidence with regard to what really took place, but inferences can be drawn from the evidence of Mangundwane Madonsela, the father-in-law of Mukile. During the early hours of the morning of 18 June 1987, his grandson came to his kraal, accompanied by Ngodi Madonsela, the 9-year old daughter of Mukile Madonsela. He saw that Ngodi had been seriously

injured. (She was taken to hospital during the day but was found to be dead on arrival.) Mangundwane Madonsela left immediately for the kraal of Mukile. He found Qediswa Madonsela, the six-year old son of Mukile, covered with a blanket, lying in a hut. He was seriously injured. Outside the hut he found the body of Mukile. He noticed that the hut had been ransacked. Two radios were found lying outside the kraal and some distance away from the kraal a kist, which had been forced open, was found. It was empty. According to the medical evidence, both Ngodi and Mukile died as a result of severe head injuries. These injuries could have been caused by a bush-knife which was handed in at the trial as exhibit 1. Exhibit 1 could also have caused the severe head injuries sustained by Qediswa Madonsela. Although Qediswa survived, the right side of his body has been paralysed and he can hardly walk.

Appellant lived at the kraal of his father, which is in the same area as that of the kraal occupied by Mukile and her

children. His defence was an alibi. Although the evidence against him was circumstantial, it was of such a nature and so overwhelming that there can be no doubt that appellant was ideed the perpetrator of the crimes committed at the kraal of Mukile Madonsela during the night of 17 June 1987. I do not intend to deal with the evidence in detail. Suffice it to refer to the following significant facts. A blood-stained overall was found in appellant's hut on 22 June 1987. According to his father's evidence it belonged to appellant. On 18 June 1987, and very shortly after the death of the deceased, appellant was found in possession of three blankets which, according to the evidence, belonged to Mukile Madonsela. Her husband testified that he last saw these blankets in the kist which was removed from the hut. Two weeks after the murder, appellant, in the presence of the police, produced exhibit 1 from among the shrubs at his home.

After his conviction, the trial Judge advised appellant to

reconsider his position and invited him to tell the truth about what had happened. Appellant, however, only confirmed his initial version.

Appellant is a married man with three children, aged between 8 and 12 years. He was employed by construction companies during the 10 years immediately preceding his arrest. Appellant testified that he never went to school but that his fellow employees taught him to read and write. He also said that he owned a motor car. His wife used to drive the car and although he did not possess a driver's license, he said that he could also drive. On 9 September 1987 appellant was convicted of theft and sentenced to a fine of R300.00 or six months' imprisonment. This is his only other conviction, but it is not clear when this offence was committed. Appellant also testified that he was suspended from work on 19 May 1987, but that he had not been dismissed. Although the trial court found that appellant was a totally untruthful and unreliable witness, it also

found that appellant was an intelligent and quick-witted person. Appellant appears to have been a law-abiding citizen until 1987. He was gainfully employed until May 1987. He acquired a wife and family, household commodities and even a motor vehicle. There is no evidence with regard to appellant's age, but the age of 33 years reflected on the indictment is probably correct.

That appellant acted in the way he did does appear somewhat strange and uncharacteristic. Another strange feature is that appellant is related to Mukile Madonsela's husband. There appears to be no satisfactory answer to the question why appellant would rob his relatives. The motive for appellant's conduct appears to have been robbery, but he abandoned the two radios. It was contended on behalf of appellant that it was probable that some emotional dispute occurred immediately before appellant launched his attack on the occupants of the hut. It was also contended that appellant's violent conduct was in all probability brought

about by extreme provocation. These contentions are speculative and have no factual basis. Although it is difficult to get a clear answer as to why appellant committed these murders, he had every opportunity to disclose what had happened. He preferred not to do so. Although the removal of only three blankets could be proved, one cannot, and it is indeed at this stage of the proceedings not possible to do so, infer a motive other than robbery and one more favourable to appellant. In my judgment, the trial court's finding that appellant went to the home of the deceased, armed with a bush-knife and obviously intent upon robbery cannot be faulted. The only inference that can be drawn from all the evidence is that the deceased were killed to overcome resistance during the course of the robbery, or to prevent identification.

In my judgment the only mitigating factor in appellant's favour is the fact that he has no previous convictions involving violence. The aggravating factors in this case

are obvious and are indeed very serious. A young married woman, 29 years of age, and her 9-year old daughter were brutally murdered. They were defenceless and they were killed at their home during the night. There can be no doubt that appellant acted with the direct intention to kill. He acted against his victims in a brutal and cruel manner.

I now turn to the question whether, in all the circumstances of this case, the death sentences are the only proper sentences. If one has regard to appellants' personal circumstances and background and the absence of previous convictions involving violence, the possibility of rehabilitation cannot be ruled out. On the other hand, the nature of appellant's deed was so heinous that it is difficult to escape the conclusion that the deterrent and retributive purposes of punishment should play a decisive role in this case. This is a case where the interests of society come strongly to the fore. In S v Sesing 1991 (2)

SACR 361 (A), Vivier JA, referring to cases where defenceless elderly people were attacked in their own homes, robbed and killed, said the following at 365g:

> "In sake soos die huidige, waar weerlose bejaardes in die veiligheid van hul huise aangeval, beroof en om die lewe gebring word, tree die gemeenskapsbelang sterk na vore. Sulke optrede is uiteraard iets wat vir die gemeenskap verderflik is."

See also S v Makie 1991 (2) SACR 139 (A) and S v Khundulu and Another 1991 (1) SACR 470 (A). These remarks are also apposite in this case. The deceased and her young children were defenceless. They were attacked in their home during the night. In my judgment this is one of those cases where the death sentence is imperatively called for.

The appeal is dismissed and the death sentences imposed on counts 1 and 2 are confirmed.

A.P. van Coller

NESTADT JA Concurs. VAN COLLER AJA

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DATE OF HEARING: 3 March 1992

DATE OF JUDGMENT: 31 March 1992

J U D G M E N T

/ CORBETT CJ .....

CORBETT CJ:

The facts of this matter are set forth in the judgment of my Brother Van Coller, which I have read. I am, I am afraid, unable to subscribe to the view that the death sentences imposed in this case should be confirmed. My reasons for reaching this conclusion are briefly as follows: I take as my starting point the exposition of how this Court should approach the question of the imposition of the death sentence which is to be found in the judgment of this Court in the case of S v Nkwanyana and Others 1990 (4) SA 735 (A) at 745 A-G. The relevant passage in the judgment reads as follows:

> "In considering whether the death sentence is 'the proper sentence' (an expression which the Legislature has understandably not defined), the findings as to mitigating and aggravating factors are not necessarily decisive. What the section provides is that 'due regard' be had to them. This means 'consideration in a degree appropriate to (the) demands of the particular case' (Black's Law Dictionary

5th ed sv 'due regard'). Inherent in the expression therefore is a recognition that other matters may be relevant. The absence of mitigating factors (or, as before, extenuating circumstances) will not mean that the death sentence should be passed. Conversely the presence of mitigating factors will not mean that the death sentence should not be passed. And when both mitigating and aggravating factors are present, their respective force or significance will have to be weighed in order to determine whether the death sentence is the proper one. In doing this I agree with the view of E M Grosskopf JA in S v Senonohi (supra) at pp 18-19) that regard will be had to the main purposes of punishment, namely deterrent, preventive, reformative and retributive. This means that in deciding whether the death sentence is the proper one, consideration will be given to whether these objects cannot properly be achieved by a sentence other than the death sentence (generally a lengthy period of imprisonment). If they can, then the death sentence will not be passed. This is because 'the proper sentence' (unlike 'a proper sentence') must be interpreted to mean 'the only proper sentence'. It follows that the imposition of the death sentence will be confined to exceptionally serious cases; where (in the words of Nicholas AJA in S v J 1989 (1) SA 669 (A) at 682D, albeit in a different context) 'it is imperatively called for'. I do

> not think that any further attempt at defining when the imposition of the death sentence will be justified can or should at this stage be made."

I agree that on the face of it, the murders committed by the appellant were cruel and brutal and were apparently committed in the course of a robbery. There are, however, certain strange features concerning the commission of these crimes. These are:

(a) The fact that the appellant chose the home of a relative of his, where he was known, as the target of his crimes. This in itself is strange. One would imagine that someone bent on robbery would normally choose as his victims strangers who could not so readily identify him. It appears that he must have walked several kilometers to get there. Again one wonders why a target, or victims, closer at hand were not chosen.

(b) There was no evidence of enmity between the appellant and Mukile Madonsela, one of the victims (and the mother of the other victims) whom he attacked with the bush-knife. Such evidence as there is, is to the contrary. Family ties and loyalties would normally inhibit violence within the family.

(c) The only articles taken by the appellant were three blankets, obviously not articles of great value. On the other hand, two radios, though taken out of the kraal, were abandoned at the scene of the crimes. This anomalous feature, which was unexplained and for which there seems to be no ready explanation, does not fit in with the inferred motive of robbery.

(d) At the time of the commission of these crimes the appellant had no previous criminal record whatever. He was (probably) 33 years of age,

was married with two young children and had for the previous 10 years been employed in the construction industry. At the time he was doing "a shuttering carpenter's job". He had learned from fellow employees the rudiments of reading and writing. He owned a motor car. It is true that on 19 May 1987 (approximately a month before the crimes were committed) he had been suspended from work because, so he said, on that date "an engine went missing at my place of employment". He was not, however, dismissed and went home to his kraal. He was paid for the days that he had worked during the fortnightly cycle (he was paid every 14 days), an amount of about R300. Thus his financial circumstances do not appear to have driven him to commit these crimes. And one asks oneself why a person like the appellant, who had no

previous history of criminality, had for years been gainfully employed and was apparently a useful member of society, should suddenly commit these heinous crimes.

These strange features remain unexplained. This admittedly is largely due to the fact that the appellant at all times vainly persisted in the Court a quo with his story that he was not there: that he did not commit the crimes. They nevertheless leave me with a sense of unease. I do not know exactly what happened or what motivated these crimes.

As to the appellant's personal circumstances, I have already referred to most of these. With regard to the conviction for theft on 9 September 1987, this is not a previous conviction; and it is not even clear that the theft was committed prior to the date of the murders. It should be left out of account. I would think that having regard to appellant's previous life history, he

would be good material for rehabilitation and reform. I fully recognise that in some instances the heinous nature of the crime may be such that the interests of the community become paramount and outweigh the personal factors relating to an accused; and that typical of such instances are cases where defenceless persons are attacked and robbed in their own homes. Nevertheless, even in that type of situation regard must be had to the particular facts of the case.

Having given the matter much anxious thought, in the light of the various factors I have mentioned above, I have come to the conclusion that the death penalty is not the only proper sentence for these murders. I would in each case substitute sentences of life imprisonment.

M M CORBETT