62/92

CASE NO 479/91

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

JACOB OUPA TLOOME..... Appellant

and

THE STATE..... Respondent

CORAM: CORBETT CJ, KUMLEBEN JA et NICHOLAS AJA.

DATE OF HEARING: 18 February 1992

DATE OF JUDGMENT : 2 April 1992

J U D G M E N T

CORBETT CJ.....

CORBETT CJ

The appellant stood charged before O'Donovan AJ and assessors in the Witwatersrand Local Division on two counts of murder (counts 1 and 3), two counts of robbery with aggravating circumstances (counts 2 and 4) and one count of housebreaking with intent to steal and theft (count 5). Upon arraignment appellant pleaded guilty to counts 1, 2, 3 and 4 and guilty on count 5 to theft. The last-mentioned plea was accepted by the State.

The State proceeded to lead evidence on counts 1, 2, 3 and 4 as fully as if the accused had pleaded not guilty. The evidence given by the State witnesses was hardly challenged by the defence. The appellant did not give evidence or call any witnesses on the merits, but did testify in regard to extenuating circumstances.

The Court a quo found the appellant guilty as charged on counts 1, 2 3 and 4 and guilty of theft in respect of count 5. The Court held that there were no

extenuating circumstances in respect of the murder counts and the trial Judge imposed the death sentence on each of counts 1, 2, 3 and 4; and a sentence of six years imprisonment in respect of count 5. The appellant was sentenced on 9 February 1989.

The trial Judge refused an application for leave to appeal against the death sentences and a subsequent petition to the Chief Justice also failed. Thereafter the appellant's case was considered by the panel constituted in terms of sec 19 of the Criminal Law Amendment Act 107 of 1990. The panel decided that had sec 277 of the Criminal Procedure Act 51 of 1977, as substituted by sec 4 of Act 107 of 1990, been in operation at the time sentence was passed the sentences of death would probably have been imposed by the trial Court. Appellant's case was accordingly referred, in terms of sec 19(12) of Act 107 of 1990, to this Court on the question of sentence.

Counts 1 and 2 are linked in that they relate to the same occurrence, as are counts 3 and 4. Count 5 relates to a third occurrence.

The facts pertaining to counts 1 and 2, as revealed by the evidence, are shortly as follows. The deceased, Mrs E M A Ferguson, then 67 years of age, lived together with her former husband (they having obtained what was described as "a divorce of convenience") in Rewlatch in the district of Johannesburg. On the day in question, 26 November 1987, Mr Ferguson went to work early in the morning. During the course of the morning, at about 09h30, the deceased came to Mr Ferguson's place of work in order to bring him some sandwiches. She left, intending to return home. When Mr Ferguson himself returned home at about 18h00 that evening he found the deceased lying dead in the lounge. She had been stabbed three times in the upper chest and there was clear evidence of strangulation. The hyoid bone was

fractured. This indicated throttling by hand. The doctor who performed the post-mortem examination was of the view that the deceased was first stabbed and then throttled, while still alive. He attributed death to both the stab-wounds and the throttling. He estimated that if the person who throttled the deceased had maintained a constant pressure death would have occurred within three of four minutes. Sixteen items of property were missing from the home, including the deceased's Toyota Corolla motor car, a television set, a video-recorder and ten video-tapes.

Prior to November 1987 the appellant had worked as a casual labourer for a plumber named Hughes, who stayed in the same street as the Fergusons. On various occasions Hughes had done plumbing work at the Ferguson home. On each occasion the appellant assisted him with the work. On the last occasion some damage was done to a ceiling in the bathroom and Hughes undertook to repair

this. Prior to the murder of the deceased he had not done so, and had not instructed the appellant (who in the meanwhile had left his employ) to do so.

After his arrest appellant made a confession before a justice of the peace in relation to counts 1 and 2, which was admitted in evidence at his trial. In it he stated that on 26 November 1987 he was busy repairing a ceiling in what must obviously have been the Ferguson home. The deceased left the house to go to the shops. While she was away he drank rum and gin which was in the house. After the deceased's return she prepared food for him, which he ate. The deceased came to the bathroom with a plastic bag in which to put pieces of the ceiling. The appellant seized her. She broke loose and ran to the dining-room. He followed her, grabbed her, stabbed her with a knife and throttled her until she was dead. He took the goods which were later found missing, loaded them into the deceased's motor car

and drove off. He sold the television set and the video-recorder. The motor car was stripped by a friend of his. He was arrested before the parts of the motor car could be sold.

Counts 3 and 4 concern a similar episode which occurred on 11 December 1987. The victim this time was 66-year old Mr N J van der Riet, who lived with his wife in a house not far from the Ferguson home. He was a pensioner, but his wife worked. On the day in question she left for work at about 07h15. Her husband was then in good health. She returned that afternoon at about 16h30 to find her husband lying dead in the kitchen. According to the post-mortem evidence he too had been either throttled manually or strangled with a ligature or killed by a combination of both. A number of items of property were missing from the home, including a portable radio, radio-tape player and about R180 in cash. In this case as well the appellant made a confession to a

justice of the peace, which was admitted in evidence. It appears that appellant used to do gardening work at the Van der Riet home on Saturdays. The 11th of December 1987 was a Friday, but he went there to cut the grass and explained to the deceased that he had come on the Friday because he wished to go off early the following day. The deceased gave instructions in regard to the work he was to do. While he was working the deceased came outside to find out at what time the appellant wished to leave on the Saturday. The appellant told him. As the deceased was about to re-enter the house the appellant seized him from behind and asked: "Waar die geld?" The deceased screamed. The appellant grabbed him round the throat and forced him into the kitchen, where he throttled him to death. He then helped himself to the missing goods, packed them in a container and departed. He thereafter sold various items.

No evidence was led in respect of count 5, but the indictment charges him with having on 3 June 1987 broken into a home in the Johannesburg district with intent to steal and having stolen 22 items of property, including a television set, a camera, and a portable radio.

The evidence given by appellant during the inquiry as to extenuating circumstances was terse in the extreme. In chief he merely stated that he was 29 years old, that his only dependant was his sister, that he gave the police "every co-operation", that he had admitted everything on the first four counts and that he was sorry for what he had done. Under cross-examination he conceded that, having been caught in possession of many of the items of stolen property he did not have much choice other than to admit everything. He further stated that he started feeling sorry "after this thing had happened".

After the finding of no extenuating circumstances the State produced his list of previous convictions and led evidence by Col Mostert of the South African Police.

The appellant's previous record is a bad one. It shows that his career in crime started in 1972, when he must have been about 12 years of age. In that year he was twice convicted of housebreaking and theft and on each occasion received cuts. In 1976 he again received cuts on being convicted on two counts of theft. In the following year (1977) he was convicted of malicious damage to property. Sentence was postponed for five years. In 1977 he was again convicted of theft and sent to a reform school. In 1978 a conviction for theft resulted in a sentence of 6 months imprisonment. About 18 months later (in 1980) he was again convicted of theft and received a sentence of 12 months imprisonment. Within 6 months of being released on parol he was

convicted of assault with intent, involving the use of a knife. On this occasion he was fined, but readmitted to serve portion of his previous sentence because he had breached his parol. And then finally on 19 August 1983 he was sentenced to six years imprisonment for housebreaking and theft (evidently stealing a television set from a private home). One does not know how much of this sentence he served, but in view of his record it seems unlikely that he received much remission. Consequently the present crimes must have been committed soon after his release from gaol.

Mostert's evidence related to the high incidence of attacks (rapes, robberies, murders and serious assaults) upon elderly people in their own homes, countrywide and in the Johannesburg area. This evidence, supported as it was by statistics, shows a significant increase over the period 1 January 1987 to 31 December 1988.

I shall deal first with the death sentences imposed in respect of the counts of murder. Attached to the heads of argument of appellant's counsel are two reports. These were not placed before the Court a quo but, according to counsel, were put before the panel. The first, headed "Voorlopige verslag", which is undated, purports to be from a psychiatrist, who studied the record of the trial and evaluated the appellant. The report refers to the appellant's history of anti-social conduct from an early age, but states that there is insufficient information to determine whether psychopathy can be diagnosed. A full background report by a social worker for this purpose is accordingly requested. No other mental disorder whereby he could possibly be held to be not responsible or his responsibility diminished, is suspected. The report concludes by saying that a final report will be given when fuller background information is available.

The other report, dated 8 August 1990, is a social background report by a probation officer. It gives the usual information about the appellant's family background, school attendance, work record, criminal record, social and cultural situation and so on. It includes a statement to the effect that at an early age appellant "showed signs of being mentally disturbed" and was taken to witch doctors.

Clearly these reports are not properly before the Court and cannot be taken into account in adjudicating the appeal. During argument, however, the question arose as to whether the case should not be remitted to the trial Court (the sentence having been set aside) for the hearing of further evidence incorporating the information contained in the reports and generally dealing with the appellant's personality. In this connection reference was made to the judgment of this

Court in the case of S v Dlamini 1992 (1) SA 18 (A), at 30 C - 31 F.

A case referred to this Court under sec 19(12) of Act 107 of 1990 is required to be considered in the same manner as if it were an appeal by the "convicted person" against his sentence. The powers of this Court in such a case are set forth in sec 19(12)(b), which provides that the Court may -

> "(i) confirm the sentence of death;
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> (ii) if the Appellate Division is of the opinion that it would not itself have imposed the sentence of death, set aside the sentence and impose such punishment as it considers to be proper; or
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> (iii) set aside the sentence of death and remit the case to the trial court with instructions to deal with any matter, including the hearing of evidence, in such manner as the Appellate Division may think fit, and thereafter to impose the sentence which in the opinion of the trial court would have been imposed had the

> said section 277 been so in operation".

In the recent case of S v Nofomela 1992 (1) SA 740 (A) this Court considered fully the power of remittal to the trial court for the hearing of further evidence. In the course of his judgment (concurred in by Hefer JA and Preiss AJA) Nienaber JA pointed out (at 747 B-E) that it was the clear intention of the Legislature (in enacting Act 107 of 1990) that, inter alia, the case of every person under sentence of death should be reconsidered in terms of the new legislation. Where his trial was completed under the old regime he may be prejudiced if he is denied the opportunity of re-opening his case and leading new evidence for -

> "The manner in which he conducted the trial, his decision to lead, or to refrain from leading or controverting specific evidence, for instance, may well have been dictated by either the incidence of the onus as it then was or the narrower connotation ascribed to the old concept of extenuating circumstances in contrast to

> the new concept of mitigating factors (cf S v Masina and Others 1990 (4) SA 709 (A) at 714 B) or both."

Because the rules have been retrospectively changed it is only right that a person sentenced to death should be permitted to reconsider his strategy.

Nienaber JA cautioned, however, as follows (at 747 F-G and 748 A-E):

> "Implicit in that approach is, however, a limitation. Since the purpose is to give an accused the benefit, ex post facto, of the new test, the proposed evidence must have a bearing on how the accused would have conducted his case on sentence if the new test had been in place at the time sentence was passed by the trial Court.
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> .....
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> As a first step this Court must therefore be satisfied, in considering whether to accede to the request to have the matter remitted to the trial Court for new evidence to be led, that the proposed evidence is of such a nature that it is

reasonable to suppose that the appellant would have presented such evidence if the new test had been in operation at the time sentence was passed. That would encompass material of which he was aware and which was available to him at the time but which he may have withheld because the onus was against him or because it was irrelevant; as well as evidence of which he was unaware but which may well have led had he been aware of it and had the new test been in operation. This formulation would exclude as irrelevant any material, whether or not the appellant was aware of it at the time of sentence, which is of such a nature that it would not have been presented to the trial Court even if the test had then been what it now is. By the same token, material should as a rule be excluded which was not in existence at the time of sentence. Section 19(12)(a) enjoins this Court, when a matter reaches it via the panel, to consider it 'in the same manner as if it were considering an appeal by the convicted person against his sentence'. Material which originated after the passing of sentence but before

> the hearing of an appeal would, save perhaps in exceptional circumstances, not be taken into account."

In conclusion the learned Judge of Appeal summed up the position as follows (at 748 G - 749 A):

> "In summary, and superimposing the above observations on the requirements of s 316(3) of the Criminal Procedure Act 1977, an appellant, in order to succeed with an application in terms of s 19(12)(b)(iii), will have to satisfy the Court:
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> (a) that the proposed evidence is relevant to the issues of mitigating or aggravating factors and the exercise by the trial Court of its discretion in the light of the new test;
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> (b) that, save for exceptional circumstances, there is a reasonable possibility that such evidence would have been presented to the trial Court by the appellant if the test had then been what it now is;

(c) that the proposed evidence would presumably be accepted as true by the trial Court;

(d) that, if accepted, such evidence could reasonably lead to a different sentence; and

(e) that, save for exceptional circumstances, there is a reasonably acceptable explanation why such evidence was not led at the trial. Situations falling under (b) above would comply with this requirement."

In Nofomela's case, supra, there was before the Court an application on notice of motion, with supporting documents, asking the Court to exercise its power of remittal under sec 19(12)(b)(iii). In the present case there is no such application. All that happened is that appellant's counsel, reacting to certain observations from the Bench, asked that the case be remitted for the hearing of further evidence.

It is, accordingly, appropriate in this case to give a general indication of the procedure to be followed when the Court is to be asked to exercise its powers under sec 19(12)(b)(iii). As a general rule an applicant for such relief should make application to this Court on notice of motion, supported by affidavits indicating the evidence which the applicant proposes to lead before the trial Court. It is an essential requirement that any witness whom the applicant intends to call, if and when further evidence is heard, should depose to an affidavit (to be annexed to the application) setting out the gist of his evidence or, where the witness has compiled a report which would constitute the basis of his evidence, that such report be verified by affidavit. The Court will not entertain or have regard to unsworn statements or reports. The application must be served upon the State in accordance

with usual procedures; and the State may, if it so wishes, file answering affidavits.

Normally this Court will not exercise its powers under sec 19(12)(b)(iii) mero motu. In the event of it appearing to the Court, from the record of appeal or other information properly before the Court or from information tendered by counsel from the bar, that there is a reasonable possibility that additional evidence, relevant in the sense defined in Nofomela's case, exists and can be led, then the Court may, in its discretion, invite appellant's counsel to submit an application along the lines described above (in the previous paragraph) and postpone the hearing of the appeal to enable this to be done.

In an exceptional case this Court may invite such an application for remittal in terms of sec 19(12)(b)(iii) even where the basis for the possible existence of such evidence (as defined in the previous

paragraph) is lacking. In such a case this Court will spell out to appellant's counsel the lines of investigation to be undertaken in order to sustain a proper application for remittal. Such a case may arise where there is a dearth of personal information about the applicant (cf S v Dlamini, supra). In such a case the principles laid down in Nofomela's case will have to be borne in mind.

I am of the opinion, upon a review of all the facts of this case, that this is not an appropriate case for the Court to invite an application for an order for remittal in terms of sec 19(12)(b)(iii). The appellant was charged in the Court a quo not only with murder but also with robbery where aggravating circumstances are present and housebreaking. Even if the kind of mitigating evidence vaguely suggested by the psychiatrist's report and the probation officer's report might not have been relevant as to extenuating

circumstances on the murder charges (I make no finding in this regard), it would certainly have been relevant on the other charges. There is no explanation as to why it was not presented to the trial Court. I cannot, therefore, conclude that there is a reasonable possibility that such evidence would have been led before the Court a quo if the law as to the death sentence had then been what it now is. Nor am I persuaded that there is a reasonable chance that such evidence, flimsy as it appears to be, could lead to different sentences on the murder charges. My reasons for so concluding will appear from my treatment of the appeal against these sentences. The appeal must, therefore, be considered on the basis of the appeal record as it stands and this Court must pass its own judgment as to the propriety of the death sentences imposed (see sec 19(12)(b)(ii)).

As far as the murder charges are concerned, there are a number of aggravating factors. In each case

the murder was committed with robbery as the obvious motive in the home of the victim. The victims were elderly people, less able because of their years to offer resistance. In each case the appellant was known in the home concerned and it may be inferred that the deceased was killed to prevent future identification. This inference was conceded by appellant's counsel. In each case the appellant gained access to the victim's home on what appears to have been an untrue pretext. In each case the appellant attacked his victim ferociously and unexpectedly and without the slightest suggestion of provocation. Each victim died a relatively slow and cruel death. In each case **dolus directus** is the only reasonable inference.

Another agravating factor is the appellant's criminal record, which reveals him as a hardened recidivist. It is true that in the past his offences have for the most part not involved violence. But they

have involved theft and housebreaking and theft. And housebreaking with theft as the motive often leads to confrontation with the house-owner and violence. That is what happened here. The appellant eventually embarked upon a campaign of housebreaking and, in the last two instances, of murder.

This Court has on a number of occasions indicated that in determining whether or not the death penalty should be imposed the main objects of punishment, retribution, prevention, deterrence and reformation, should be weighed. At the same time in cases of murder of elderly victims in their own homes with robbery as the motive, inevitably the factors of retribution and deterrence tend to come to the fore.

In appellant's case the prospects of rehabilitation and reform appear to me to be very poor. The aggravating factors are many and serious. No mitigating factor of any substance has been suggested.

This is a case of extreme seriousness. In my view the death penalty is the only proper sentence in respect of counts 1 and 3.

I turn now to the sentences of death imposed in respect of the convictions for robbery with aggravating circumstances (counts 2 and 4). In his reasons for sentence the trial Judge, while directing himself to ignore the facts of the death of the two deceased, emphasized the features of the case to which I have called attention in dealing with the question of aggravating factors in respect of the murder convictions. The problems concerning the possible duplication of sentence in a case such as the present one have on a number of occasions engaged the attention, and concern, of this Court. The most recent decision on this point is S v S 1991 (2) SA 93 (A) - see particularly at 103 I - 105 D. As is pointed out in a passage from the judgment referred to, the danger of duplication is typically

present where a murder is committed in the course of a robbery and the accused is charged with and convicted of murder as well as robbery with aggravating circumstances (at 104 D). In such cases the approach has been to "think away" or ignore the death of the deceased when dealing with the question of sentence on the robbery charge. With reference to this approach, the Court stated the following (at 105 A-C):

> "Hierdie benadering is, sover my bekend, vir die eerste keer deur Trollip AR in S v Mathebula and Another 1978 (2) SA 607 (A) te 613 H geformuleer (waaroor aanstons meer) en is daarna herhaaldelik toegepas. 'n Selfstandige regsbeginsel is dit egter nie. Die eintlike beginsel is dat dieselfde feit of feitestel wat aan meerdere misdade gemeenskaplik is - in die een geval bes moontlik as 'n bestanddeel van die misdaadomskrywing, en in die ander geval as 'n verswarende omstandigheid by vonnis - nie meermale teen 'n beskuldigde in ag geneem moet word wanneer dit by die oplegging van vonnis op elk van die

> klagtes kom nie. Die 'wegdink' van die een misdaad sodra 'n vonnis vir die ander oorweeg word, is dus hoogstens 'n riglyn."

This passage may require further elucidation, but this is not the appropriate occasion for this. At least it is necessary in the present case to think away the fatal consequences of the appellant's attacks upon the two deceased in this case.

Having given the matter careful consideration, I am of the view that, despite the seriousness of the robberies and their attendant circumstances, this Court would not have imposed the death sentence in respect of counts 2 and 4 (see sec 19(12)(b)(ii). The violence resorted to by the appellant clearly constituted an aggravating factor, but it and the appellant's criminal record do not, in my opinion, call imperatively for the ultimate penalty. A sentence of 10 years imprisonment would be a fitting punishment on each count.

Accordingly it is ordered that:

(1) The death sentences imposed in respect of counts 1 and 3 are confirmed.

(2) The death sentences imposed in respect of counts 2 and 4 are set aside and in each case there is substituted a sentence of 10 years imprisonment.

M M CORBETT

KUMLEBEN JA)
NICHOLAS AJA) CONCUR