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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

BHUTIFANA MASEKO APPELLANT

and

THE STATE RESPONDENT

CORAM : BOTHA, KUMLEBEN et NIENABER JJA

HEARD : 3 MARCH 1994

DELIVERED : 15 MARCH 1994

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

This appeal is restricted to the death sentence passed on the appellant after his conviction for the murder of the deceased, the late Thomas Mkhwanazi. The appellant was also found guilty of the attempted murder of the deceased's wife and sentenced to 12 years imprisonment. The third count, also proved, was one of robbery for which a sentence of 15 years imprisonment was imposed. (Two other counts on which he was convicted are relatively unimportant and need not be mentioned.)

The deceased's wife, the complainant on count 2, was the only eyewitness to testify to the occurrence which gave rise to the indictment. She was an outstanding witness and her evidence was unchallenged on appeal. Her account, briefly stated,

was to the following effect. She lived with her husband at their home in the Tembisa township. On the evening of 3 December 1991 at about 8 pm, whilst the two of them were seated in their dining-room watching a television programme, the outer door of the kitchen, which was locked, was kicked open. The deceased went to investigate. A person, referred to as Mbata, was standing in the kitchen doorway. He promptly shot the deceased. As he fell to the floor, Mbata and three other men, one of whom was the appellant, entered the kitchen from outside. All four men were armed. Mbata fired a further shot at the deceased as he lay on the floor. The appellant immediately entered the dining-room where the complainant had remained, grabbed her and dragged her through the doorway, in which the deceased lay, via the kitchen to the bedroom. There he demanded money from her. She handed him R450,00 which he pocketed.

He proceeded to kick her and strike her with his fists until she was able to persuade him that that was all the money to be found in the house. He thereupon stood guard over her with his firearm pointed at her. He also at some stage ripped the complainant's watch from her wrist and took that of the deceased where he lay on the floor. The other three men removed the television set from the house and returned to the bedroom. They also took garments from the wardrobe and in her presence put on certain items of the deceased's clothing. The appellant apparently fancied one of his leather jackets which he tried on and continued to wear. In due course clothing was removed by the other three whilst the appellant continued to guard her. Mbata returned and ordered the appellant to shoot her because she was in a position to identify them. The appellant did not protest or show any reluctance to carry out this

instruction. On the contrary, he made ready to do so. The complainant pleaded with him to spare her life, pointing out that they had already killed her husband and that she was the mother of young children. As he was about to shoot her, she managed to grab the barrel of the firearm and the shot was deflected. As she grappled with the appellant, one of the other intruders attacked her with a bush-knife, injuring two fingers of her right hand. This caused her to release her grip on the firearm whereupon the appellant fired three shots at her. Two of them found their mark on the left upper part of her body and her left arm. She fell to the floor and lost consciousness. When she regained her senses, she crawled to where her husband lay only to confirm that he had been fatally shot. Though in a seriously injured condition, she went on hands and knees in search of help and was eventually taken to

hospital. She was severely disabled as a result of the assault: her left arm had to be amputated at the shoulder and the use of the two injured fingers has been permanently impaired.

The appellant alone gave evidence in his defence. In essence it was a denial that he had any knowledge of the unlawful purpose for which they had gone to the house of the deceased, and that Mbata had forced him to shoot the complainant. He was a hopeless witness and his evidence was correctly rejected. Even the most modest devotee of the truth would find his story repugnant.

In convicting the appellant of murder the trial court decided in his favour that his degree of intent was dolus eventualis. This finding is open to considerable doubt. The intruders knew that the house was occupied. Mbata shot the deceased the moment he entered without surprise or demur from any

of the others. Everything strongly suggests that the plan to shoot and kill him was preconceived and was an integral part of the robbery which was thereafter methodically carried out. Be that as it may, Mr Johnstone, who appeared for the appellant on appeal, correctly conceded that even on an acceptance of the finding of the court a quo in this regard, it cannot in the circumstances of this case be relied upon as a mitigating factor.

Those properly drawn to our attention were that the appellant was a first offender; that he was a comparatively young man (23 years of age at the time of the trial); that he had held down a job; and that in general he had hitherto been a worthwhile member of the community. These facts do indeed serve as mitigation: they ordinarily indicate that such a person is not an inherently vicious character and perhaps capable of rehabilitation. In the instant

case, however, countervailing evidence precludes any such conclusion. The facts in this regard have already been related. According to the complainant, he and Mbata were the two most aggressive participants in this attack upon a defenceless couple in their home with robbery as the ultimate objective. The callous manner in which the appellant dealt with the possessions of the deceased (the watch and the jacket), and the brutal way in which he assaulted the complainant, more than offset these mitigatory factors and rule out any favourable inference they might otherwise have justified.

Moreover, the appellant's inhuman conduct (too self-evident to bear repetition) and the motive for the murder - or perhaps the foreseeable consequence of the robbery - render the retributive and deterrent requirements of punishment of particular, if not paramount, importance.

Taking all relevant considerations into account I am obliged to conclude that the death penalty is the only proper sentence to be imposed on the murder charge.

The appeal is dismissed and the sentence on count 1 is confirmed.

M E KUMLEBEN
JUDGE OF APPEAL

BOTHA JA)
NIENABER JA) - Concur