

ELIJAH SKENJANA

AND

THE STATE

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ELIJAH SKENJANA

Appellant

AND

THE STATE

Respondent

CORAM: Trengove, Nicholas, JJA et Eloff, AJA

HEARD: 21 March 1985

DELIVERED: 28 March 1985

J U D G M E N T

NICHOLAS, JA

In his lifetime JOHANNES DE JONGH was a butcher.

He owned DE WET SLAGHUIS in WORCESTER, and his wife, Mrs.

MARIA

MARIA DE JONGH, worked with him there. They lived in a house nearby.

Shortly after 7 p.m. on Friday 19 June 1981, DE JONGH closed his shop, and drove to his home in his bakkie.

His wife, who was sitting next to him, had with her a bag containing the day's takings. Arrived at the house,

DE JONGH parked the bakkie outside the kitchen. Tel-

ling his wife to remain in the vehicle, he got out and

unlocked the kitchen door. Shortly afterwards all the

lights in the house went on, presumably when DE JONGH threw

the main switch in the kitchen. He screamed as he was

set upon by two men who were lying in wait for him

inside the house. A struggle

ensued

ensued. Mrs. DE JONGH gave a prolonged blast on the hooter of the bakkie, hoping to attract the attention of a neighbour. Two men, who were also inside the house, came through the kitchen door to the bakkie. They broke the window of the vehicle, flung open the door, and pulled out Mrs. DE JONGH and the bag she had with her. They dragged her into the house, seriously assaulted her, and tied her up with a blanket and pillows over her head. The intruders opened a safe in a bedroom and removed the contents. They ransacked the house, and then left in the bakkie with their booty.

The police arrived on the scene shortly afterwards.

DE JONGH was lying on his back on the kitchen floor. He

was

was dead. Mrs. DE JONGH was in a severely shocked condition.

Arising out of this incident, four men were tried in the Supreme Court in Cape Town on charges of (1) murder and (2) housebreaking with the intent to rob and robbery with aggravating circumstances. ELIJAH SKENJANA, the present appellant, was accused No. 3.

All four of the accused were found guilty on the second count. The State did not seek convictions in respect of the first count, on which they were accordingly acquitted.

The findings of the trial Court may be summarised as follows:

1.

1. The accused broke into the house in pursuance of a plan to wait there for the deceased, to overcome any resistance he might offer, and to rob him and his wife.

2. The deceased was alive and well when he entered the house, but when the accused left he had been brutally assaulted, and was dead. There was bruising of both lips, over both maxillae and on the neck. The most probable cause of death was smothering, although death possibly resulted from strangulation or more remotely from shock in consequence of the attack on deceased.

3. The deceased died as a result of an attack or attacks

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on him by one or more of the accused. On the evidence, however, it was not possible to say which of the accused was responsible for his death.

4. The accused stole cash totalling R2 280,80 and numerous articles from inside the house, and the deceased's bakkie.
5. When Mrs. DE JONGH was medically examined on the night of 19 June 1981, she was shocked and anxious. She had sustained a number of bruises.
6. The Court found aggravating circumstances based on the murder of the deceased and the assault on Mrs. DE JONGH.

In passing sentence, the trial judge (SCHOCK J) said that the offences committed by the accused were of

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a very serious nature - so serious that sentence of death was competent. Mr. and Mrs. DE JONGH were elderly people.

(They were 63 years old at the time). They were both assaulted, DE JONGH fatally and Mrs. DE JONGH seriously:

although she did not suffer grievous bodily harm, the learned judge said, "for a woman of her age and appearance to have gone through what she did at the hands of the accused, was a most terrible and frightening experience."

SCHOCK J said that the case was a border line one, and it was only after the most anxious consideration that he had decided that the death sentence was not justified, taking into account the circumstances that there was no proof

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which of the accused caused the death of the deceased, that no weapons were used, and that the previous records of the accused did not show any appreciable propensity for violence. The case did, however, call for a very lengthy prison sentence, because "this type of dangerous crime is far too rife, both in the town and country, and calls for stern penalties". The learned judge did not think that the circumstances called for any discrimination between the accused, and he sentenced each of them to 20 years imprisonment.

SCHOCK J granted leave to the appellant to appeal to this Court against the sentence. The grounds of appeal were (a) that the trial judge did

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not give due weight to the personal circumstances of the accused; (b) that a sentence of 20 years imprisonment was disturbingly inappropriate, unduly severe and induced a sense of shock, and in imposing it the trial judge over-emphasized the interests of the community and the gravity of the offence and overlooked the element of mercy; and (c) the trial judge erred in not directing that a sentence of 4 years imprisonment for rape imposed on the accused in 1981, should run concurrently with the said sentence of 20 years imprisonment.

The accused's personal circumstances as disclosed in his evidence in mitigation were these.

He was 24 years of age. He left school when

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he was in Std. IX, upon the death of his father. He was then aged 16. He had a daughter aged 7 whom he supported. He was employed by Rainbow Chickens. In 1976 he had been convicted on two relatively minor charges. On 4 September 1981 he had been sentenced to 4 years imprisonment on a charge of rape.

In giving leave to appeal, SCHOCK J said that in deciding on the sentence he "had regard to the accused's personal circumstances, but felt that this was a case where consideration of the nature of the crime which had been committed and the public's interest must predominate".

In my view, these personal circumstances, when viewed against the enormity of his crime, did not have a

great

great deal of weight:

A sentence of 20 years imprisonment is undoubtedly very severe, and it is not a sentence which I would have imposed had I been sitting as the trial judge. My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent

effect

effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.

Similarly in regard to the aspect of retribution. This has tended to yield ground to the aspects of deterrence and reformation, but it is not wrong that, in determining a proper sentence, the Courts should give some recognition to the natural indignation and the fears and apprehensions of interested persons and the community at large. (See R v Karg 1961(1) SA 231(A) at 236A-B). In a case such as the present the Court must give heed to the demand of the ordinary citizen for the condign punishment of robbers who invade the sanctity of the home to commit rapine and violent as-

sault

sault and worse. But that demand may well be satisfied by the imposition of less than the most severe sentence.

Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in S v Khumalo and Another 1984(3) SA 327(A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers "must not be visited with punishments to the point of being broken." (per HOLMES JA in S v Sparks and Another 1972(3) SA 396(A) at 410G).

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The present appellant is a young man, apparently of above average intelligence and he still has the potential of becoming a useful citizen.

But as I have said, these are personal views; and sentence is pre-eminently a matter for the discretion of the trial judge. It cannot be said that, in imposing the sentence that he did, SCHOCK J did not reasonably exercise that discretion. There is, therefore, no basis for interfering with the sentence.

With regard to the third ground of appeal, the trial judge was asked by defence counsel for the appellant to direct in the exercise of his power under s. 289(2) of the Criminal Procedure Act, 1977, that the sentence of 4

* years

years which the accused was serving for rape should run concurrently with the sentence of 20 years. In his judgment on sentence, however, he said that he did not think this appropriate and he was not prepared to do so.

The effective sentence to be served by the appellant is one of nearly 24 years. This is only one year short of a sentence of 25 years, which is "exceptionally long according to our practice" (R v Mzwakala 1957 (4) SA 273(A) at 278 D), and "will only be appropriate in very exceptional circumstances" (S v Whitehead 1970 (4) SA 424(A) at 438 H). Serious as were both the crimes of which the appellant was convicted, the case is not of

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the exceptional kind which calls for such a long period of imprisonment.

Counsel for the State submitted that if the sentences were to run concurrently, there would result a disparity between the appellant and the other accused, since they would all be serving an effective sentence of 20 years, whereas the appellant had been convicted not of one but of two serious offences. That is so, but I do not think that this consideration should lead one to ignore the cumulative effect of the sentence imposed on the appellant, particularly when regard is had to the fact that the appellant was only 24 years of age, whereas accused No 1 was 39 and accused No 2 31 years old.

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In the result, the appeal succeeds to the extent that the sentence imposed by the trial Court on the appellant is varied so as to read

"TWENTY (20) years imprisonment. The sentence of FOUR (4) years imprisonment imposed on 4 September 1981 is to run concurrently with the said sentence of 20 years."

H C NICHOLAS, JA

TRENGOVE, JA } Concur
ELOFF, AJA }