

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO: 272/91

In the appeal of:

SHIMANE OUPA NDHLOVU

APPELLANT

and

THE STATE

RESPONDENT

Coram: BOTHA, NESTADT JJA et HARMS AJA.

Date heard: 22 November 1991

Date delivered: 28 November 1991

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J U D G M E N T

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HARMS AJA:

The appellant and his co-accused, Zacharia Tseleng, were convicted in the Witwatersrand Local Division (coram O'Donovan AJ with assessors) on 2 June 1988 on a charge of murder. The court found no extenuating circumstances and imposed the mandatory death sentence. The appellant was, in the course of that judgment, also found guilty of a conspiracy to commit robbery, an attempted murder, unlawful possession of a firearm and unlawful possession of ammunition. An effective sentence of 18 years imprisonment was imposed in respect of these latter charges. Tseleng was also convicted of the conspiracy and the attempted murder.

The appellant's application for leave to appeal was dismissed by O'Donovan AJ and his subsequent petition for leave to appeal, directed to the Chief Justice, met the same fate. His case was thereafter reconsidered by the panel appointed in terms of section 19 of the Criminal Law Amendment Act 107 of 1990. The panel found that, in its opinion, the sentence of death would probably have been imposed by the trial court had the amended section 277 of the Criminal Procedure Act 51 of 1977 been in operation at the trial date, in other words, that the trial court would probably have found that the sentence of death was the only proper sentence for this murder. This court is called upon to consider the case as if it were an appeal against sentence under the regime created by Act 107 of 1990. It may be noted in passing that Tseleng was granted leave to appeal against his death sentence by this court, but that appeal was dismissed on 17 August 1989. It was established by the Registrar that his sentence had since been commuted.

The facts of the case are fairly simple. The appellant had previously attempted, unsuccessfully, to remove a safe from a farm house near Hekpoort, district Krugersdorp. He then recruited Tseleng to assist him in robbing the occupants of the house and to remove the safe. The appellant had previously worked on this farm and the house was occupied by an elderly couple, Mr and Mrs Gobey. The two accused went to the house by foot. On their way the appellant loaded the Browning pistol in his possession. He had, earlier, obtained this pistol in the course of a housebreaking at Brits. When the accused arrived at the Gobeys' home, the appellant entered and, upon seeing the Gobeys, first shot Mrs Gobey, and thereafter her husband. Mrs Gobey was hit in the middle of the nose and the bullet penetrated her spinal cord. She died immediately. Mr Gobey was also shot in the face, survived the shot wound but died shortly thereafter from other causes. Tseleng fled from the scene and the appellant followed suit. It may be noted that the Gobeys

were unarmed and did not possess any firearms.

The appellant's guilt was established by way of a fingerprint found at the scene, his admitted possession and pointing out of the weapon used, his pointing out of Tseleng who, in evidence at the trial, admitted the commission of the offences, the appellant's confession, and lastly, his pointing out of the scene of the crime. At the trial he relied on an alibi which was rejected by the trial court.

In considering whether a sentence of death is the only proper sentence for the crime committed, the appellant's personal circumstances have to be taken into account. He was 28 years of age when the crime was committed and was, therefore, a mature man. He was not married nor did he have children. He has a relatively low level of education and, one can assume, a similar level of sophistication. He was gainfully employed prior to the commission of this crime. He had, however, two relevant previous convictions, both for

housebreaking with intent to steal and theft. In each case he stole, inter alia, firearms. The firearm stolen at the last instance was the weapon used on the Gobeys. It was submitted on his behalf that these previous convictions could not be regarded as aggravating factors because those crimes did not involve an element of violence to other persons. That is an oversimplification. The fact that he had no previous conviction for a crime involving violence is a factor which can be taken into account in his favour. On the other hand, the murder was the direct result of a housebreaking or robbery attempt. There is, therefore, a sufficiently close causal link between the previous convictions and the murder to conclude that the commission of the previous offences is an aggravating factor. Sight should also not be lost of the fact that the murder was committed during a second attempt to rob the Gobeys.

It was also submitted that the killing of the deceased was committed on the spur of the moment, was unplanned and was

an unexpected consequence of the attempted robbery. Therefore, it was said, a lesser degree of moral blameworthiness attached to the appellant's conduct. I do not agree with the factual premise of this argument. The trial court found, in convicting the appellant, that the inescapable conclusion was that the appellant had acted with dolus directus. That finding is supported by the following facts: the appellant had loaded the gun before entering the house; he knew the house was occupied by the Gobeys; since he had worked on the farm, he knew that the occupants were elderly and were living alone; the Gobeys were unarmed. He first shot the wife; he then briefly left the house and returned to shoot the husband; and he shot both victims in the face. Some reliance was placed on the fact that the appellant did not proceed to rob but ran away after the shooting. That fact could hardly be a mitigating factor. The appellant never explained why he abandoned his carefully prepared plan to rob the Gobeys. The only conceivable reason can be because Tseleng, whose assistance he needed to

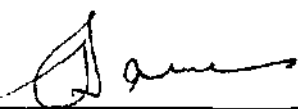
remove the safe, had fled.

No other mitigating factors were suggested. On the other hand, the aggravating factors are overwhelming. Two elderly and defenceless people were attacked in broad daylight in the privacy of their house at a lonely spot on a farm. The attack was planned well in advance and was initiated by the appellant. He was armed and loaded the weapon whilst approaching the premises. He was the leader of the two. The murder was cold-blooded, committed with dolus directus and in the course of a robbery attempt.

If regard is had to the objects of sentencing, the question of rehabilitation does not really arise in this case. Public interest demands that retribution and deterrence should prevail above all other considerations. The prevalence of murders committed in the course of housebreaking or robbery, especially on elderly people, is a matter of serious concern to all. The present case, in

particular, is one which demands the imposition of the ultimate penalty. S v S 1991 (2) SA 93 (A) 102 F - 103 C; S v Makie 1991 (2) SACR 139 (A) 143 e - i; S v Sesing 1991 (2) SACR 361 (A) 365 f - h.

The appeal is dismissed and the sentence of death is confirmed.



L T C HARMS AJA

BOTHA JA     ) CONCUR

NESTADT JA    )