

137/92

Case No 38/91

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

AMON THEMBA MLOTSHWA

APPELLANT

AND

THE STATE

RESPONDENT

CORAM

:

HEFER, NIENABER JJA,
et HOWIE AJA

HEARD

:

31 AUGUST 1992

DELIVERED

:

11 SEPTEMBER 1992.

J U D G M E N T

HEFER JA:

This is an appeal in terms of sec 316 A (1) of the Criminal Procedure Act 51 of 1977, as amended, against the sentence of death imposed on the appellant after his conviction for murder by Howard JP in the Natal Provincial Division.

The trial court found that the appellant, who had worked for Mr Robert Murray on his farm near Pietermaritzburg and who had left his employment only about a month earlier, went to the farm on 9 February 1990 in the company of a co-accused, Albert Mkhize. Their purpose was to rob Mr Murray. The appellant killed his former employer with a large piece of concrete brick. Thereafter, having taken some of his belongings from his house, they used his truck to convey his body to the nearby Delville Wood station where they left it in the veld. They were both convicted, on count 1 of murder and on count 2 of robbery, but whereas the appellant was sentenced to

death on count 1 Mkhize was sentenced to life imprisonment.

The trial court's findings in terms of sec 277(2)(a) were recorded as follows:

"We find that the following aggravating factors are established beyond reasonable doubt on the evidence:

1) The accused went to Meadow farm on the occasion in question with the common purpose to rob the deceased.

2) They invaded the deceased's private domain and he was attacked and killed there in brutal and merciless fashion for the basest of motives, that is in order to rob him of his possessions.

3) Having incapacitated the deceased they entered his home and stole various items of considerable value including his firearms and his motor vehicle.

4) They displayed callousness and depravity by dumping the deceased's body to rot in the veld.

5) There is a complete lack of remorse.

6) In the case of accused No 1 mens rea in relation to the murder took the form of dolus directus.

7) Accused No 1 murdered his former employer who had treated him well for a period in excess of eight years.

It is difficult to find any mitigating circumstances that operate in favour of

accused No 1. He cannot plead youth or immaturity in mitigation because he was 27 years old at the time the crimes were committed. He has three children, has some level of education and had been employed by the deceased in a fairly responsible position for more than eight years. It is to his credit that he has reached the age of 28 years now with only one previous conviction, a conviction in 1983 for which he received a suspended sentence of six months' imprisonment..... His counsel submitted as a mitigating factor that there was no direct evidence that the robbery and murder were pre-planned. Granted that there is no such direct evidence, the inference that the accused went to the farm to rob the deceased is inescapable and the murder was undoubtedly committed to facilitate the robbery.

With regard to accused No 2, we find that there are two factors which according to the decision of the Appellate Division in S v Ntuli 1991 (1) SACR 137 (A) at 143/4, serve as mitigation. The first is his lesser degree of participation in the killing, the evidence being that it was not he but accused No 1 who inflicted the fatal injury and the other injuries which were deliberately inflicted. The second is that mens rea in his case takes the form of dolus eventualis."

No fault can be found with the trial

court's findings relating to the aggravating features of the case. The appellant's counsel challenged none of them save the one relating to dolus directus which, he submitted, had not been established. But the submission is plainly wrong. The precise manner in which the appellant set about killing the deceased - particularly whether he struck the deceased or threw the brick at him - is not known but the medical evidence established that there was, at first, an attempt to subdue the deceased with a ligature round his neck - probably the nylon cord with which his feet were still tied when the body was found - and that he was then killed with the brick. It is clear that the appellant could not have struck, or thrown the brick, once only because there were at least two major injuries to the deceased's head. One was above the right eye, and the other to the left temporal area which crushed the head to the extent that

cranial bone was driven into the brain with death as the almost immediate result. These two injuries could not have been inflicted simultaneously. That the deceased's feet were tied point, as a strong probability, to the attack with the brick having occurred at a stage when he had already been rendered helpless and thus not with the intention of merely incapacitating him. Taking further into account the degree of force which the injuries required; that more than one injury was inflicted; and that the attack was aimed at the deceased's head, the appellant's intention prima facie must have been to kill him. The appellant did not testify and there is no other evidence to counter this prima facie inference.

The appellant's counsel relied for his submission on the absence, at the stage when the two assailants went to the farm, of an intention to kill.

He pointed out that they apparently went unarmed and that the trial court found that their purpose was merely to rob the deceased. But the question relating to the intention with which the murder was committed falls to be decided on the evidence as a whole and these facts, though plainly relevant to the enquiry, do not preclude an inference that the intention to kill was formed at a later stage. Viewing the evidence in this manner, the only reasonable inference is that it was indeed formed at a later stage.

By way of mitigation the appellant's counsel relied on the factors (1) that his client's only previous conviction was for theft committed during 1983, (2) that he has only a standard 1 education and (3) that he had been employed and was an exemplary worker for about 8 years prior to the murder and (4) that the appellant and his co-accused

were unarmed, indicating that the murder had not been planned beforehand. The factors listed as (1) and (3) obviously count in the appellant's favour as tending to indicate that he is not an entirely irresponsible person who is beyond redemption. Factor (2) must be regarded as neutral since the appellant's lack of education has no bearing whatsoever on the murder. Factor (4) also serves to mitigate his conduct but only to the extent that his resort to lethal violence must have occurred more or less on the spur of the moment. But, as the trial judge indicated in the passage from his judgment cited earlier, the murder was undoubtedly committed to facilitate the robbery. The deceased could only have been killed through a sheer lust for blood (which does not appear likely), or to overcome his resistance, or to avoid detection when it occurred to the appellant that he would have to dispose of his

victim who knew him well and would doubtless have incriminated him if he were left alive (as the evidence seems to indicate). The baseness of any of these motives by far outweighs the consideration that the appellant had not originally planned to kill the deceased. In any event the trial judge said in his judgment:

"In the case of accused No 1 the aggravating factors far outweigh the mitigating factors but that does not in itself warrant the death penalty for the murder. The question remains whether in the circumstances that is the only proper sentence. It cannot be said that accused No 1 is beyond redemption. If a very lengthy prison sentence can serve to reform anyone, it may well be that such a sentence would serve to rehabilitate accused No 1. However, I have to balance his interests against the interests of society and consider whether this is a case in which the deterrent and retributive purposes of punishment should prevail over other considerations. The incidence of violent crimes of this nature has reached alarming proportions in the area of jurisdiction of this Division and the victims are all too frequently persons living on isolated farms or small-holdings. People no longer feel

safe in their own homes. Under these circumstances society is entitled to, and demands, the protection of the courts, and I think that I reflect the view of the overwhelming majority of right-thinking people when I say that crimes of this nature are exceptionally serious ones in which the death penalty is imperatively called for. In my opinion the sentence of death is the only proper sentence for accused No 1 on count 1."

I respectfully agree. The appeal is accordingly dismissed.

J J F HEFER JA

NIENABER JA)

CONCUR:

HOWIE AJA)