

70/92

Case No 11/92
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ZACHARIA SIMANGA NGEMA

and

THE STATE

CORAM: HOEXTER, MILNE JJA et HOWIE AJA

DATE OF HEARING: 15 May 1992

DATE OF JUDGMENT: 21 May 1992

J U D G M E N T

/MILNE JA.....

MILNE JA:

On 1 September 1989 the appellant was convicted of the rape and murder of a certain Mrs B. These offences were committed on 26 March 1988. On the murder charge he was sentenced to death, no extenuating circumstances having been found, and on the rape charge he was sentenced to 7 years' imprisonment. He was also convicted of theft committed on 16 April 1988 in respect of which he was sentenced to 6 months imprisonment, housebreaking with intent to rob and robbery and indecent assault, which offences were committed on 17 June 1988 and in respect of which the appellant was sentenced to 3 years and 6 months imprisonment respectively, and on a further count of robbery and rape, also committed on 17 June 1988 in respect of which he was sentenced to 3 years' and 10 years' imprisonment respectively. Certain of the sentences were ordered to run concurrently.

Leave to appeal against the convictions and

sentences was refused by the trial court and by this court. Thereafter, in terms of the amendments effected by the Criminal Law Amendment Act No 107 of 1990, the matter was considered by the panel in terms of section 19(8) of that Act. The panel found that the trial court would probably have imposed the death sentence in respect of the murder charge if section 277 of the Criminal Procedure Act, as amended, had been in operation at the time the sentence was imposed. The matter now comes before us in terms of section 19(12).

The question for determination is whether the death sentence imposed on the murder charge is the only appropriate sentence. The test to be applied is the same test as that applied in appeals under section 316A of the Criminal Procedure Act, as amended. That is a substantially different test from that which the trial court was obliged to apply and the enquiry is now a wider one. That is apparent from a number of decisions of this

court to which it is unnecessary to refer. What we are required to do is to weigh up the mitigating factors and the aggravating factors and in the light thereof and of the objects of punishment to consider whether the death sentence is the only appropriate one in the circumstances.

The factual background has to be pieced together from a statement made by the appellant to a magistrate, his statement at the proceedings held in terms of section 119 of the Criminal Procedure Act, and the circumstantial evidence of various State witnesses. The appellant, having conceded that he had fired the shot that killed Mrs B and having conceded that he raped her (in the statements made to a magistrate and in terms of section 119) gave evidence at the trial denying any implication in the commission of either offence. His evidence was however totally rejected.

The picture which emerges is as follows: The appellant was a constable in the Kwa Zulu Police at the time when he committed all the offences referred to above. On 26 March 1988 the deceased, who was 57 years of age and lived on a farm in the Mtunzini district, had done the catering at a wedding reception held in the Mtunzini Town Hall. She left there at approximately 9 p.m. to take children to the home of a Mr Markham and as she turned from the dirt road which led to the Markham home onto the N2 highway she encountered the appellant. The appellant hurled a stone at the deceased in her car smashing the front passenger window. The deceased tried to drive away but the vehicle stalled. The appellant then tried to gain entrance to the vehicle but the deceased locked the door on the driver's side and then on the passenger side. The appellant then opened one of the rear doors and at that stage the deceased managed to put the vehicle in motion. The appellant then shot the deceased, the fire-arm having been held either touching

the appellant's body or within a centimetre or so of it. The vehicle went out of control, left the road and collided with a tree. The deceased died as a result of intra-thoracic haemorrhage caused by the bullet. The trial court found that the service pistol with which the appellant shot the deceased had a "not inconsiderable trigger pressure" and that the appellant, as a policeman, had received some training in the use of fire-arms. It was found that the inference was inescapable that it was a deliberate act of murder. It is not in dispute that this was a finding of *dolus directus*.

In his statement to the magistrate the appellant said, referring to the time immediately after the deceased's vehicle had collided with a tree, "Ek het toe gemeenskap met haar gehad want sy was nog warm gewees" and at the section 119 proceedings, in answer to the question "Het sy nog gelewe toe u geslagtelik met haar verkeer het?" the appellant said "Sy het nog

beweeg". The medical evidence established that the deceased would have lived for at least five minutes after being shot and possibly longer than fifteen minutes. The trial court found, in effect, that the appellant had raped the deceased while she was in her death throes.

It is apparent from this recital that there are a number of aggravating factors:

- (1) This was not an offence committed on impulse. The appellant must have planned to waylay vehicles passing the junction where he had stationed himself.
- (2) The appellant was not deterred by the fact that the deceased locked the two front doors of the vehicle but was determined to carry out his purpose.
- (3) He shot the deceased in the chest at point blank range with his official service fire-arm.
- (4) Far from experiencing the slightest tremor of regret about the fact that he had shot the deceased the

appellant proceeded to rape her in the last minutes of her life.

- (5) Within the next three months the appellant committed the series of serious offences already referred to.
- (6) The appellant was, at the time he committed all these offences, a police constable whose manifest duty it was to uphold the law and protect the public.

There are certain mitigating factors present. The first is that the appellant had no previous convictions and the second is that he was only 21 years old at the time of the commission of these crimes. These factors are normally ones which would be strongly mitigating. With regard to the age of the appellant, however, the trial judge (Hugo J) remarked

"Not only, however, has the accused spent some years in the police force, but the impression he created on us in this court was not that of an immature youth. Indeed he displayed a quite surprising degree of maturity."

The appellant was referred for mental observation but no abnormality of any kind was found. In fact it was established that he was of normal intelligence and that he had passed standard nine examinations. It also appears that the appellant had been in the police force since 1986. There was, furthermore, nothing of any significance in the background of the appellant to indicate why he had so grossly abused his possession of a service fire-arm as to commit a number of serious crimes with it. In fact he was the son of the induna of the complainant on the second rape charge with whom the complainant and her husband were still at the time of the trial on very good terms (and all credit to them). The appellant's father testified and said that he had worked for the other complainant's husband since 1956 and had always been treated well by him. There was, therefore, no history of a deprived or embittering background.

Nor does the fact that the appellant has no

