Case no 30/90
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

LUCKY MDUDUZI DLAMINI Appellant

and

THE STATE Respondent

CORAM: BOTHA, EKSTEEN JJA et PREISS AJA

HEARD: 19 November 1990

DELIVERED: 29 November 1990

J U D G M E N T

PREISS AJA.

PREISS AJA:

The appellant appeared before a judge and assessors in the Northern Circuit Local Division of Natal upon a number of charges including two counts of murder. Count 5 related to the death of a certain Mr Gunter and count 6 related to the death of Mrs Gunter, his wife. The victims were a middle-aged couple who lived a sequestered life on the farm Grootgeluk in the Vryheid district. They had rented out the grazing on their farm and retained for themselves no more than a small orange orchard. Their sole occupation seems to have been the sale of oranges to passers-by. Their home consisted of a simple four-bedroomed dwelling which was separated from an outbuilding some 15 metres distant.

The grazing on the farm had been let to a Mr Janse van Rensburg who used to visit the couple every Tuesday when he came to inspect his cattle. He last saw the deceased alive on Tuesday 19 July 1988. On the following Tuesday, 26 July 1988, he visited the house and knocked on the front door. There was no response although he noticed that the kitchen window was open. The absence of the occupants was unusual; they always told him when they planned to be away. On the following Tuesday, 2 August 1988, he visited the house once more and again received no response. The kitchen window was still open. By now his suspicions were aroused. He tried the kitchen door, found it unlatched and entered the house. In the main bedroom he found the corpse of Mrs Gunter. He summoned the assistance of an acquaintance and then found the corpse of Mr

Gunter in the outbuilding. Both bodies were in an advanced state of decomposition. The contents of the house were such as to indicate that they had not been tended for a long time.

Post-mortems revealed that both victims had been severely injured by blows to the head administered with a substantial degree of force. Virtually each one of the blows would have had fatal consequences.

At his trial the appellant denied that he had entered the house or the outbuilding and denied all knowledge of the two murders. The trial court had no difficulty in rejecting his evidence entirely. It found that he had administered the blows which caused the death of both victims. There is no doubt about the correctness of that finding. Two palm prints of the appellant's right hand were found in the house, one

on a dressing-table drawer in a spare bedroom and the other on a wardrobe door in the main bedroom. The appellant was found in possession of a beret and a jersey which belonged to Mr Gunter. There was evidence that he had sold a firearm, a .22 rifle, to one Sabelo Yaka, and that he had sawn off part of the barrel and part of the butt in order to convert it into a handgun. He produced the sawn-off portion of the barrel to the police. The serial number on the rifle had been partialy obliterated by the separation of the barrel but what remained tallied with Mr Gunter's licence. A Vryheid gunsmith identified the rifle by a welding repair which he had made at Mr Gunter's request.

In addition to these objective features the trial court made use of a series of admissions by the

appellant which were recorded in s 119 proceedings in the magistrate's court, Vryheid. In that court the two murders, counts 5 and 6 in the trial court, were recorded as counts 1 and 2. A robbery, alleged to have been committed at the same time and place, was count 3. The questions and answers are recorded as follows:

"KLAGTE EEN

V Het jy op die plaas Groot Geluk vir Courtney Alexander Günther doodgemaak?

A Ja.

V Wanneer was dit?

A Dit was op 'n Donderdag en ek dink twee weke terug.

V Dit was die 21 Julie 1988?

A Dit kan so wees.

V Hoe het jy hom gedood?

A Ek het hom met 'n byl 'n pik en 'n hamer

aangeval. Dit was in die motorhuis.

V Hoe het dit gekom dat julle mekaar in die motorhuis ontmoet?

A Ek het vir hom 'n werk gedoen deur die huis se fasiebord te herstel. Hy moes my op die betrokke dag R60 betaal. Daar het toe 'n rusie ontstaan oor die geld. Oorledene het gesê hy het nie geld om my te betaal nie. Hy sê ek moet lemoene gaan pluk en dit neem as betaling. Ek word toe kwaad en vat die hamer en kap hom twee maal.

V Waar op sy liggaam kap jy hom?

A Twee keer agter op sy kop.

V Hoe gebeur dit dat jy hom van agter slaan?

A Ek en oorledene het in die motorhuis gewerk en was besig om planke te saag. Ek wys hom 'n stuk hout aan sy anderkant en vra dat hy dit vir my aangee. Hy draai weg van my om die hout aan te gee en ek slaan hom met die hamer teen sy agterkop.

V Het jy hom verder aangeval?

A Tussen die twee houe het hy geskreeu vir sy vrou om die geweer te bring. Na die 2de hou het hy geval. Ek hardloop huis toe. By die huis se deur kom ek sy vrou teë. Sy het 'n geweer by haar. Ek gryp die loop en ruk dit af grond toe en slaan haar met die hamer op haar kop.

V Wat gebeur toe?

A Ek vat die geweer en patrone en gaan terug na garage. Oorledene staan toe net op en ek slaan hom met die pik. Ek weet nie presies waar nie. Pik was swaar. Ek kon nie reg slaan nie. Ek vat toe 'n kort byl met steel van plus-minus 1/2 meter. Ek slaan toe die oorledene met agterkant van byl op sy kop. Ek is toe weer terug na huis waar ek weermag barret geneem het. Ek het ook 'n kamera geneem asook 'n verkyker. Ek het toe weggeloop en die twee oorledenes net so gelos.

V Wou jy die oorlede man doodmaak?

A Ek wil nie leuens vertel nie. Ek wou gehad het dat hy doodgaan want ek was vir hom baie kwaad.

V Is dit reg om iemand dood te maak vir R60?

A Dit is nie reg nie.

V Die man was nie gewapen nie?

A Nee.

KLAGTE TWEE.

V Nadat jy die oorlede vrou Jeanetha Christina Günther met die hamer op haar kop geslaan het wat het gebeur?

A Sy het geval.

V Enige ander aanval op haar?

A Ek het nadat sy geval het en ek die vuurwapen gevat het haar nog 3 of 4 keer met die hamer gekap.

V Was dit terwyl sy klaar op die grond lê?

A Ek het haar drie vinnige houe geslaan terwyl sy val. Nadat sy geval het, het ek haar net een hou geslaan.

V Waarom het jy haar met die hamer gekap?

A Sodat ek die vuurwapen in die hande kon kry voordat sy my kon skiet.

V Was daar enige aanduiding dat sy jou wou

skiet?

A Ek weet die Blanke vrouens kan skiet en sy het geweet ek het man beseer want sy kon in die motorhuis sien vanwaar sy gestaan het.

V Beweer jy dus dat jy jou teen haar wou verweer en haar nie wou dood nie?

A Ek het my reg gemaak vir enige gebeurlikheid, daarom het ek gewapen na haar gegaan. As sy egter nie die geweer gehad het nie sou ek haar nie aangeval het nie.

V Was beide reeds dood toe jy die plek verlaat?

A Hoewel hulle beide nog asem gehaal het, het ek gesien dat beide besig is om dood te gaan.

V Was enigiemand anders op die plaas?

A Nee.

Hof is nie oortuig dat beskuldigde al die elemente van die misdryf op klagte 2 erken nie. Hy opper 'n verweer van noodweer en 'n pleit van ONSKULDIG word aangeteken.

KLAGTE DRIE

V Het jy die geweer met geweld van die vrou afgeneem?

A Nee.

V Waarom sê jy so?

A Sy was in die proses om te val so toe ek die geweer vat het sy dit klaar gelos gehad.

V Was jou doel om haar te beroof?

A Nee maar nadat beide van hulle gelê het en niks meer kon doen nie het ek besluit om die geweer en die ander goed te steel.

V Het jy geweet dis verkeerd om die goed soos genoem in klagte drie te vat? "

(No answer to the last question is recorded.)

The trial court concluded that the account given by the appellant in the s 119 proceedings, despite his denial in evidence, constituted a

relatively accurate picture of what must have taken place. Objective corroboration was furnished by the nature of the injuries sustained by each of the deceased, the possession of the rifle by the appellant (which accorded with his admission that he had taken a firearm), his possession of a beret and a pair of binoculars (which he admitted that he had taken), and the presence of the two palm prints in the house. Furthermore, his statement contained certain exculpatory matter which was a further assurance of its correctness, despite his evidence that he had been forced by the police to produce a made-up story.

The appellant was found guilty of murder on count 5 as well as on count 6. In the light of the overwhelming evidence to which I have referred there can be no quarrel with that finding.

When it came to sentence, however, the trial court drew a distinction between the two counts. On count 5, the murder of Mr Gunter, the court found that extenuating circumstances were present and imposed a sentence of 18 years' imprisonment. These circumstances were elicited from the contents of the *s 119 proceedings*. PAGE J dealt with the matter in the following terms :

> "On that statement he had been deprived by Mr Gunter of the money to which he believed he was entitled for his work and this had made him extemely angry, so angry that he wanted to kill him. We are well aware of the punctiliousness which the Zulus demand (and observe) in money matters and of the rage which they experience when they believe they have been cheated. It has been submitted that the conduct of the Accused in using a subterfuge to make Mr Gunter look away before

striking him shows that he was not so carried away by rage that he could not think clearly; but we do not consider that the fact that he was still able to reason effectively negates the influence of his anger as an extenuating factor.

Of greater cogency is the reliance by the State on the fact that having assaulted Mrs Gunter he returned to Mr Gunter to administer the coup de grâce. It was submitted that by that stage his initial outrage must have subsided to the extent that it was no longer operative as an extenuating factor. As was pointed out by his counsel, however, the intervening period was not so long, nor the intervening events of such a nature as to ensure that he had fully regained control of himself at that stage and we are satisfied on a balance of probabilities that his resentment of the treatment he had received from Mr Gunter remained an operative factor throughout his murder. As such it sufficiently detracts from the Accused's moral blameworthiness in respect of that

murder to justify us in returning a verdict of guilty of murder with extenuating circumstances on count 5."

Dealing with count 6 PAGE J went on to consider whether extenuating circumstances were present and came to the conclusion that there were none. The learned judge stated:

"As regards count 6, the murder of Mrs Gunter, the only factor that has been advanced and, indeed, the only factor that could be advanced as an extenuating circumstance, is the fact that the Accused was aware that Mr Gunter had called for Mrs Gunter to bring a gun and that he feared that she might shoot him. It was not suggested, even by the Accused, that his resentment of Mr Gunter's treatment of him extended to Mrs Gunter. One is left, therefore, with a situation of a man who is in the process of committing one murder and is threatened in

the course thereof by someone whom the victim has summoned to his aid. If, in order to avert the threat posed by such a person, the murderer kills him, then there is no doubt that his fear of that person was a factor which influenced him in the killing. But does it detract in any way from the moral blameworthiness of what he has done? The situation in which he finds himself is one due entirely to his own unlawful act. The threat posed by the person intervening is not unlawfully to attack the murderer but lawfully to prevent him from consummating his crime. We do not think that such motivation in any way detracts from the moral blameworthiness of the act. Although we have not been referred to any authority dealing precisely with the present situation, those cases in which a criminal seeks to avoid the consequences of his crime by killing the victim or some other potential witness, pose a moral problem bearing some resemblance to that in the present case. Cf S v Ramatsheng 1977(3) SA 510(A); S v Kosztur 1988(3) SA

926(A). If it is morally indefensible to kill to avoid the consequences of one's crime, it must surely be equally indefensible to kill to avert interference in its commission. It is clear on the facts of the present case that the Accused ran to the house to neutralise Mrs Gunter immediately after Mr Gunter called out for her aid. He met her whilst she was still in the main bedroom and not only disarmed her after striking the first blow, but continued with four further blows each of which in itself was sufficient to cause her death. We are unable to find any shred of moral justification for this conduct and our verdict on count 6 is accordingly one of guilty of murder without extenuating circumstances."

On this count the appellant was sentenced to death.

The appellant through his counsel applied for leave to appeal on several grounds. In the result leave to appeal was granted by PAGE J on count 6 only, but in respect of both the conviction and the sentence.

In argument before us counsel for the appellant confined his submissions to the question of sentence only. In this respect he exercised a wise discretion in my opinion. As I have indicated the evidence connecting the appellant with the murderous assault upon Mrs Gunter was overwhelming. The appellant's statement in the magistrate's court, the wealth of circumstancial detail in that statement and the many features of objective corroboration which I have listed constitute proof of his guilt beyond reasonable doubt.

Subsequent to the appellant's conviction but

prior to the hearing of this appeal the Criminal Law Amendment Act No 107 of 1990 was promulgated, namely, on 27 July 1990 (the Act). Section 20(1)(a) of the Act serves to ensure that its provisions apply to this pending appeal. The effect of the Act has been considered in a series of hitherto unreported judgments of this court. They are Masina and Others v S (Case No 695/85 delivered on 13 September 1990); Senonohi v S (delivered on 17 September 1990); Nkwanyana and Others v S (case no 52/90 delivered on 18 September 1990); Bezuidenhout v S (case no 76/90 delivered on 28 September 1990) and Mdau v S (delivered on 28 September 1990). It is sufficient in my view to refer to these decisions in outline and only insofar as they affect the present appeal.

The compulsory death sentence has been

abolished. A court is now vested with a discretion. The obligation to impose a death sentence only arises where the presiding judge is satisfied that it is "the proper sentence" ie the only proper sentence. In deciding on this issue the presiding judge is enjoined to have due regard to the presence or absence of any mitigating or aggravating factors. The former is wider in concept than extenuating circumstances. The State is fixed with the onus of establishing the presence of aggravating factors and the absence of mitigating factors. Proof beyond reasonable doubt is required. Where both aggravating and mitigating factors are found to be present they must be weighed against each other in order to determine whether a sentence of death is the proper penalty. In deciding this latter question a court will have regard to the

main purposes of punishment, namely, deterrence, prevention, reformation and retribution. If these purposes can be achieved by any other sentence then the death sentence will not be passed since, ex hypothesi, it is not the only proper sentence. The death sentence is accordingly to be reserved for exceptionally serious cases.

The Act also defined and extended the powers of the court of appeal so that it exercises a discretion of its own. It must itself consider, upon a weighing up of the aggravating and mitigating factors, whether a sentence of death is the proper sentence. If this Court therefore takes the view that it would not itself have imposed the death sentence it may impose such other sentence as it considers to be proper. It will thus be appreciated that this Court's

power to interfere is substantially wider than was previously the situation, where an appeal court would only interfere on well-known limited grounds.

Applying the above principles I turn now to a consideration of the sentence of death which the trial judge passed on count 6, the murder of Mrs Gunter.

The trial court found, in my view correctly, that the account given by the appellant at the s 119 proceedings in the magistrate's court was a reasonably accurate and acceptable version of what must have occurred on the fateful day. PAGE J referred to a few differences between the statement and the objectively ascertainable facts. First, there was no medical proof of the blow or blows which the appellant claimed to have struck at the back of Mr Gunter's head. The learned judge accepted, however, that the appellant

could have clumsily been describing a blow delivered to the adjacent temporo-parietal area. Secondly, the appellant could not have encountered Mrs Gunter at the door of the house; it must have been at the door of the main bedroom. Thirdly it is incorrect, as the appellant claimed in the statement, that Mrs Gunter could have observed what was going on in the outbuilding from inside the house. The learned judge nevertheless concluded that these three features did not detract from the essence of the version put forward by the appellant in his statement. I agree.

The aggravating factors would include the following:

(a) The savagery and brutality of the assault - the victim sustained at least four, and

possibly five, severe blows to the head. Each of these blows would have been fatal and each one involved the application of a fair degree of force. All the blows were aimed at the victim's head.

(b) The appellant had a hammer in his hand. He took it with him when he left the outbuilding to enter the house in search of Mrs Gunter. He foresaw that he might have to use it.

(c) He could have seized the rifle after striking only one disabling blow but he continued to bludgeon his victim as she sank to the ground. The last blow was struck as she lay on the floor.

(d) His victim was a middle-aged woman of slight build; according to the post-mortem report she weighed no more than 47 kilograms. There may have

been a weight loss accompanying the decomposition of the body, but it could not have been substantial.

(e) The appellant had no less than seven previous convictions. Two were for crimes involving violence, namely, robbery committed in November 1983 and assault with intent to do grievous bodily harm committed in August 1986. On the other hand, neither of these offences seems to have been serious; on the robbery count the violence consisted of threats and the sentence was 12 months imprisonment. On the other count the weapon was a stick and the sentence no more than a modest fine.

(f) The appellant was convicted by the trial court on three additional charges in respect of offences committed shortly before the murders, namely, one count of escaping and two counts of housebreaking

with intent to steal and theft. He was also convicted on a charge of robbery committed after the murders. The latter was a serious offence; in the course of its commission the appellant fired a shot. Furthermore, after the assaults upon the two victims, the appellant searched the house and removed several items including the rifle, and was accordingly convicted on a further count of theft.

(g) The deceased met her death while she was lawfully engaged in attempting to save her husband and defend herself. The appellant did not need to attack her; he could have run away after striking Mr Gunter in his rage. In other words, his unlawful assault upon Mr Gunter created the very situation which he attempted to overcome by neutralising Mrs Gunter and thereafter continuing the attack upon Mr Gunter.

(h) The appellant, at least by his untruthful denial in evidence at his trial, showed no remorse for his deeds.

The mitigating factors, on the other hand, consist of the following:

(a) The assault on the occupants of the farm was unplanned. It was precipitated by Mr Gunter's refusal to pay the appellant his R60. This takes the present case out of the class of crimes so often encountered in our courts where occupants on lonely farms are singled out for attack in the course of planned robberies or thefts.

(b) The most important single mitigating factor is the sense of outrage and loss of self-control which characterised the appellant's attack upon Mr Gunter. PAGE J painted a graphic picture of the

effect upon the appellant of a refusal to pay and an attempt to discharge the debt by the delivery of oranges. The learned judge described how such treatment would incense a person such as the appellant.

What is particularly significant in the conclusion of the trial court is the finding that the appellant's sense of outrage and loss of control was such as to constitute extenuating circumstances in respect of count 5 even though the appellant, after felling Mrs Gunter, returned to the outbuilding and thereafter despatched Mr Gunter. A question poses itself in the following terms - if the second attack upon Mr Gunter was reduced in seriousness by the appellant's sharp sense of grievance, can it be argued that he regained temporary control over himself during

the preceding attack upon Mrs Gunter? I think not. Everything points to a series of attacks precipitated by Mr Gunter's refusal to pay, and characterised by the appellant's consequent frenzy.

The trial court was alive to this apparent inconsistency but found justification in the moral blameworthiness of the attack upon Mrs Gunter. The learned judge sought an analogy in the type of crime where an accused kills to wipe out a potential eye-witness. The concept of moral blameworthiness was of course a relevant consideration in the assessment of extenuating circumstances prior to the Act. This was the law which governed the conduct of the trial. This Court is now at large to consider whether on a weighing-up of the aggravating and the mitigating factors it would itself have imposed the death sentence

as the only proper sentence.

Despite the number of listed aggravating factors it seems to me that the appellant's rage, frustration and loss of control - features which were recognised by PAGE J as reducing the appellant's moral blameworthiness on count 5 - must inevitably have operated upon the appellant's state of mind during the intermediate attack upon Mrs Gunter. It runs, as it were, like a thread throughout both the attacks. I conclude that this is the one dominating feature of the course of events. I am accordingly of the opinion that the death sentence is not the only proper sentence in this case.

The question of an appropriate alternative sentence presents some difficulty. The prospect of the appellant's rehabilitation is somewhat remote. He

has a fairly serious record of previous convictions although he has never served a long period of imprisonment. His two convictions for murder were accompanied by convictions on four other counts at least one of which (count 8, robbery) was serious. In his evidence the appellant stated ingenuously that "I am a man whose living is dependent upon burglaries".

Apart from count 5, the trial court so arranged the various sentences that the period of effective incarceration was 21 years - 18 years for the murder of Mr Gunter plus 3 years for the series of other offences, by ordering certain sentences to run concurrently. I am of the view that the purposes of punishment, namely, deterrence, prevention, reformation and retribution can most appropriately be achieved by a lengthy gaol sentence. His conviction for a double

murder, perpetrated in so brutal a fashion, requires in my view that whatever sentence is imposed in place of the sentence of death, at least some portion should be added to the effective 21 years imposed by the trial court.

The order of the court is that the appeal is allowed. The death sentence is set aside and the following is substituted for it :

> Twenty (20) years' imprisonment, of which sixteen (16) years' imprisonment will run concurrently with the sentence imposed on count 5.

This means that the effective period of imprisonment will be increased to twenty five (25) years.

H.J. PREISS AJA.

BOTHA JA)
EKSTEEN JA) Concur.