20/93

Case no 395/92
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

TAKALANI ALFRED GADIVHANA Appellant

- and -

THE STATE Respondent

CORAM: BOTHA, VIVIER JJA et KRIEGLER AJA.

HEARD: 2 March 1993.

DELIVERED: 9 March 1993.

J U D G M E N T

VIVIER JA.

VIVIER JA:

The appellant was convicted in the Venda Supreme Court by **VAN DER WALT J** and assessors on one count each of murder and robbery with aggravating circumstances (counts 1 and 3) and of offences involving the unlawful pointing and possession of a firearm (counts 2 and 4). On count 1 no extenuating circumstances were found, and under the then prevailing law the appellant was sentenced to death. On count 3 the appellant was sentenced to 18 years' imprisonment. On count 2 he was sentenced to a fine of R500-00 or 6 months' imprisonment and on count 4 to 18 months' imprisonment. The terms of imprisonment imposed on counts 2 and 4 were ordered to run concurrently with that imposed on count 3. Since the trial the provisions of the Criminal Law Amendment Act 107 of 1990 have been adopted in Venda by Venda Proclamation 16 of 1991. In terms of sec 316 A of the Criminal

Procedure Act 51 of 1977, as amended ("the Act"), the appellant appeals to this Court against the sentence of death imposed on count 1 and, with the leave of the trial Judge, he further appeals to this Court against the sentence imposed on count 3.

The relevant facts are the following. At about 3 o'clock on Saturday afternoon 23 September 1989 the appellant entered the Masikhwa Store in the Tshivhilwi rural area, some 20 km from Thohoyandou. He was armed with a loaded revolver and intended to rob the store. He waited until a delivery vehicle which had arrived with bread for the store had been off-loaded and the vehicle with its personnel had left, before he produced the revolver and pointed it at the cashier behind the counter, one Anderson Makhuvha ("Anderson"), demanding all the money in the store. Anderson handed him the money from the till, which came to about R300-00, but the appellant was not satisfied

and started searching the store, informing Anderson that he would kill him if he found more money. He found none and forced Anderson and one Elinah Madima, who was the only other person in the store, at gunpoint into the kitchen and then into the storeroom where he conducted a fruitless search for more money. Afterwards Elinah Madima was ordered to remain in the storeroom and the appellant took Anderson at gunpoint ahead of him through the front door of the shop. The deceased's taxi, conveying some 15 members of a burial society on their way back from a funeral, had in the meantime stopped in front of the shop. The deceased, Muvhango Tshamaano, had alighted from the taxi and was standing at the gate in front of the shop waiting for one of the passengers who had also alighted on an errand, to return to the taxi.

When the appellant noticed the deceased at the gate he pointed the revolver at him and ordered

him to approach him. The deceased refused, saying that he was not employed at the shop. The appellant thereupon fired a shot at the deceased from a distance of about 9 paces, hitting him in the stomach and fatally wounding him. When Anderson ran away the appellant shot at him but missed. The appellant thereafter calmly walked away from the scene, wiping the gun with his scarf and putting it in his pocket as he did so.

The appellant said in evidence at the trial that when he saw the deceased standing at the gate he pointed the firearm at him merely in order to scare him so that he would run away. He did not intend to shoot the deceased and did not know how it happened that the shot was fired. The deceased was not known to him. This was in direct conflict with what the appellant had earlier told the Magistrate during the proceedings held in terms of sec 119 of the Act, namely

that he had shot the deceased, who knew him, because he was afraid of being identified. The Court **a quo** rejected the appellant's evidence and found that he had shot the deceased with the direct intention of killing him in order to avoid being identified. On the charge of attempting to murder Anderson the appellant was convicted only of the statutory offence of pointing a firearm.

I shall deal first with the appeal against the death sentence imposed in respect of count 1. At the time when the appellant was sentenced the death sentence was mandatory, no extenuating circumstances having been proved. Under the new legislation this Court now has a discretion to determine, with due regard to the presence or absence of any mitigating or aggravating factors, whether the sentence of death was the only proper sentence.

The appellant was 29 years old at the time of

the commission of the crimes. He had left school when he was in standard 5. He told the trial Court that he had come out of prison a little more than a month before he committed the present crimes, that he was unemployed and that he needed money to help his mother who had to support his two younger brothers and sister. The appellant admitted six previous convictions: two for theft, one for housebreaking with intent to steal and theft, one for rape, one for bestiality and one for the possession of suspected stolen property.

Counsel for the appellant submitted in this Court that the appellant acted impulsively to avoid being identified and that this should be regarded as a mitigating factor. I do not agree that the appellant acted impulsively or in a state of panic. After realising that he was known to the deceased he first spoke to him and it was only when the latter refused

to come closer that he fired the shot which killed the deceased. He thereafter calmly strolled away from the scene. As for killing the deceased in order to prevent being identified, I consider this to be an aggravating rather than a mitigating factor. It was further pointed out that the appellant was an unsophisticated, poorly educated man from a primitive society. I do not, however, regard the appellant's background as a mitigating factor in the present case. The trial Court described him as a self-assured, intelligent person and his conduct and history showed that he was a man seasoned in crime.

Counsel for the appellant further submitted that he had shown genuine remorse for what he had done. At the trial there was no sign of remorse until after his conviction. In his evidence before his conviction he persisted in his defence that the shooting of the deceased had been an accident and in his denial that he

had previously told the Magistrate that he had intentionally killed the deceased. After he had been convicted the appellant expressed regret for what he had done without taking the trial Court fully into his confidence. In my view remorse, as an indication that the offence will not be committed again, is not a valid consideration in the present case.

The aggravating factors are self-evident. The deceased was killed in the course of a carefully planned armed robbery. As the trial Court pointed out, the particular target was carefully chosen because it was situated in a sparsely populated area where the appellant considered that there was less chance of detection. The appellant acted with the direct intention to kill. An innocent, defenceless bystander was ruthlessly gunned down in cold blood for no other reason than to escape identification. Another aggravating factor is the appellant's criminal record.

That leaves the appeal against the sentence of 18 years' imprisonment in respect of the robbery count. In the present case it is necessary, in order to avoid a duplication of punishment, to ignore the fatal consequences of the appellant's attack on the deceased. When this is done I consider the sentence for the robbery to be unduly severe. No physical harm was suffered during the robbery. In my view a sentence of 12 years' imprisonment would be a fitting punishment.

Accordingly the following order is made:-

(1) The appeal against the death sentence imposed in respect of count 1 is dismissed;

(2) the appeal against the sentence of 18 years' imprisonment in respect of count 3 is allowed. The sentence is set aside and there is substituted a sentence of 12 years' imprisonment.

W. VIVIER JA.

BOTHA JA)
KRIEGLER AJA) Concurred.