74/89

Case No. 385/88

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

PIETER MOKOENA ..... Appellant

AND

THE STATE ..... Respondent

Coram: HOEXTER, MILNE et EKSTEEN, JJ A

Heard: 2 May 1989

Delivered: 1 June 1989

J U D G M E N T

EKSTEEN, JA :

The appellant was charged before a Circuit Court at Vereeniging on six counts, viz. murder, robbery with aggravating circumstances, attempted robbery with aggravating circumstances, theft, a contravention of section 2 of Act 75 of 1969 (the unlawful possession of a firearm), and a contravention of section 36 of the same Act (the unlawful possession of ammunition).

The court convicted him of murder on the first count; of theft on the second count; and of common assault on the third count. He was also convicted on the fourth, fifth and sixth counts. Although the court found extenuating circumstances to have been present in respect of the murder, the learned trial judge exercised his discretion against the appellant and sentenced him to death on the first

count. The present appeal is directed solely against the sentence on this count.

From evidence at the trial it appears that the appellant and two of his companions arrived at the house on plot No. 41, Rietspruit, in the district of Vanderbijlpark in a stolen truck or "bakkie" during the morning of 4 November 1986. Their intention was to break into the house and to steal whatever they might fancy. The only people at home at the time were a visitor to the plot, Mrs. Kowie Visser with her eight month old baby, and a coloured servant Mrs. Hester Nthebe. In what follows frequent reference will have to be made to Mrs. Nthebe to whom for the sake of brevity I will refer to as Hester. The appellant was the driver of the truck. When he saw Hester looking out of the window at them, he beckoned to her to come out. As she approached, the appellant got out of the truck, caught her round the neck with his arm throttling her, and demanded the key of the house. Meanwhile appellant's two companions also got out of

the truck and attempted to open the kitchen door. Mrs. Visser had, however, locked the door and they were unable to open it. They thereupon returned to where the appellant was still holding Hester in a grip, and began searching her for the key of the house.

At this very moment, Constable Odendaal, the deceased in this case, happened to drive up to the house in a police car. He appears to have been about certain administrative duties. When the three miscreants saw the police car approaching they immediately let go of Hester and ran away. As Constable Odendaal got out of his car Hester told him what had happened and pointed to two of the assailants who could still be seen running away. Constable Odendaal attempted to pursue them and actually fired a shot from his service revolver in the general direction in which they were running. They both, however, succeeded in making good their escape.

On returning to the house Hester told Odendaal that

there had been three assailants and that the third man must be hiding in the vicinity. Odendaal thereupon began looking for him and found the appellant hiding in the stable. He went into the stable with his revolver in his right hand and caught the appellant by the shirt with his left hand. He led the appellant in this fashion out of the stable and up to the kitchen door. He knocked at the door with his revolver and asked Mrs. Visser to phone the police station at De Deur presumably to inform them of what had happened.

As they were standing outside, Hester says, she suddenly saw a quick movement, and when she looked up she saw that the appellant had broken free from the constable's grip and had snatched his revolver out of his hand. The appellant now had the constable at his mercy, and the constable began to back away from him. Hester says that she also began to back away and as soon as she felt it safe to do so, she turned and fled to her house nearby.

The narrative of events is then taken up by John

Mogoge, a labourer who was working on the adjacent smallholding. Earlier on he had heard the shot fired by Constable Odendaal at the two fleeing men and seen the Constable returning to the house. Mogoge says that he then went on with his work, until his attention was again aroused by the sound of two shots fired in quick succession. When he looked up he saw the constable running away chased by the appellant, who had a firearm in his hand pointed at the policeman. The constable ran up to a fence at the front of the house and jumped over it near the gate. As he landed on the other side of the fence he fell down. The appellant then came up to the fence, pointed the gun at the constable, and fired another shot at him. He thereupon turned round, got into the truck and drove away.

From the evidence of the district surgeon who performed the post mortem examination, it appears that the deceased had been shot through the heart and in his head. The shot through the heart must have been fired while the

deceased was facing his assailant as the bullet entered the front of his chest. According to the district surgeon's evidence the deceased would still have been able to run away after sustaining this wound. The shot to his head entered through the left cheek, shattered his false teeth and penetrated his brain. This wound, says the district surgeon, would have rendered the deceased unconscious immediately. In the view of the district surgeon therefore the deceased must first have sustained the wound through his chest and his heart, and, after having run away and fallen down, the wound to his head.

In his evidence the appellant conceded that he and his two companions had driven to the house on Plot 41 in a stolen truck with the intention of breaking into the house, and that he had caught Hester Nthebe round her neck after she had been enticed from the house. He also conceded that when they saw Constable Odendaal's car arriving they let Hester go and ran away. He agrees that he hid in the

stable while his companions made off, and that Constable Odendaal found him there and arrested him. He says that the cconstable then began hitting him with the butt of his gun, and banging his head against the wall. He then grabbed the gun out of the constable's hand and stepped backwards. He denies that Odendaal backed away from him as Hester had deposed, but says that instead he advanced towards him. When Odendaal ignored his warning not to come any closer, he says he instinctively fired a shot or shots in his direction. He says that Odendaal then turned round and ran away. He then went to his truck and drove off. He denies having gone after Odendaal and having shot him after he had fallen down. The appellant's evidence was properly rejected by the trial court, and his conviction of murder with dolus directus is not being questioned in the appeal before us.

After having been convicted of murder the appellant again gave evidence on the issue of extenuation. He then alleged that on the morning of the offence he had gone to a

"stokvel" where he had consumed a "nip" of gin and three bottles of beer. Had it not been for the liquor he had consumed, he said, the thought of embarking on such an escapade would never have occurred to him.

This excuse was accepted by the majority of the trial court who then found extenuating circumstances to have been present. The majority of the court was of the view that the appellant and his companions had gone to break into the house without any premeditation; that the unexpected arrival of Constable Odendaal had come as a surprise and a shock to them; and that the appellant's use of the gun after he had snatched it out of the constable's hand was the result of a feeling of bravado induced by the alcohol he had consumed.

Despite this finding of extenuating circumstances the learned trial judge exercised his discretion, as he was entitled to do, in sentencing the appellant to death. The appellant, I may say, admitted twelve previous convictions

including four of housebreaking with intent to steal and theft during 1977 for which he was sentenced to 18 months' imprisonment on each count, and three of assault with intent to do grievous bodily harm. The last of these latter offences was committed during 1984 and the appellant was then again sentenced to 18 months' imprisonment.

In sentencing the appellant to death the learned trial judge adverted to these previous convictions as being indicative of the fact that the appellant was a person inclined to violence. He then referred to the circumstances in which the deceased was shot, and came to the conclusion that there was no reason for the appellant to have used the firearm to shoot the deceased. Having snatched the gun from Constable Odendaal the appellant could have kept the constable at a distance while he got into his "bakkie" and drove off. Instead he deliberately fired at the policeman, who was merely doing his duty, wounding him mortally. Had the appellant desisted at this stage there might still have

been something to be said for him. But the appellant then ran after the fleeing constable, and, after he had fallen down, again fired at him. The learned Judge then concluded by saying:

> "The interests of the community must be stressed. Criminals cannot have the licence to kill policemen in the performance of their duties. Respect for the law and for the police will disappear if those murderers are not properly punished. The community will lose respect for the Courts."

In argument before us it was submitted that the trial judge had erred in overemphasising the interests of society and the fact that the deceased was a policeman killed in the execution of his duty.

I cannot agree with this submission. The crime, in my view, was certainly a vicious one, and the fact that the deceased was a policeman killed in the execution of his duty does seem to me to be an aggravating factor which

clearly has a bearing on the interests of society. The remarks of the learned judge in this respect do not therefore, in my view, constitute a misdirection.

Appellant's counsel also submitted that the trial judge had erred in "basing his decision to impose the discretionary death penalty on the fact that the appellant has previous convictions for crimes of violence." The previous convictions referred to were clearly relevant to the consideration of an appropriate sentence, (S v Letsolo 1970 (3) SA 476 A at p 476 H) and I do not think that the learned judge placed undue emphasis on them in his judgment. It cannot, in my view, be said that he based his decision on this consideration, as seems to have been the case in S v Jack 1982 (4) SA 736 (A) (Cf. p 742 C-D). In fact, on a careful reading of his judgment, I doubt whether he placed much reliance on these previous convictions in the final exercise of his discretion. His prime consideration in this regard seems to have been the vicious and deliberate nature

of the crime and the fact that the appellant had killed a police constable in the execution of his duty. This consideration, as I have indicated, cannot be seen as a misdirection.

Then Mr. Knopp, for the appellant, submitted that the trial judge had erred in not considering a lengthy period of imprisonment as an alternative to the death penalty. It is true that the learned judge does not mention having considered such an alternative, but this cannot be seen as an indication that such an alternative was not considered by him. (R v Dhlumayo 1948 (2) SA 677 (A) at pp. 702, 706; S v Pietersen 1973 (1) SA 148 (A) at p 153 F-G; S v Pillay 1977 (4) SA 531 (A) at p 535 A-D.) In fact as in S v Pieters 1987 (3) SA 717 (A) at p 728 D-F it seems quite unthinkable that he did not consider this alternative. This, after all, was the very aspect he was considering viz. whether he should impose a sentence of imprisonment or exercise his discretion to impose the death penalty. From

the learned judge's remarks it seems clear to me that he considered the crime to be so heinous that he felt compelled to visit it with the ultimate penalty.

Finally Mr. Knopp submitted that the sentence imposed was, in all the circumstances too severe or excessive. In this regard, however, it must be borne in mind that sentence is a matter pre-eminently in the discretion of the trial judge, and that this Court would only be entitled to interfere with it if it was satisfied that the trial judge had not exercised that discretion properly or judicially. This Court will not readily come to such a conclusion in the absence of some material misdirection or irregularity, or where it is satisfied that the sentence was so unreasonable as to amount to an improper exercise of that discretion (S v Pietersen (supra) at p 152 A-C; S v Pillay (supra) p 535 E-G). In the present case I am not persuaded that the trial judge misdirected himself in any significant respect, nor do I consider the exercise of his discretion to

have been so unreasonable as to be improper.

In the result therefore the appeal is dismissed.

J.P.G. EKSTEEN, JA

HOEXTER, JA)

concur

MILNE, JA)