Case no. 364/90

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**IN THE SUPREME COURT OF SOUTH AFRICA**

**(APPELLATE DIVISION)**

In the matter between:

**ZIZWE ISRAEL MKHIZE** Appellant

and

**THE STATE** Respondent

Coram: **VAN HEERDEN, F H GROSSKOPF JJA et NICHOLAS AJA**

| Heard: | Delivered: |
|---|---|
| 23 November 1990. | 29 November 1990. |

# J U D G M E N T

**F H GROSSKOPF JA:**

The appellant was convicted in the Natal Provincial Division on a charge of murder. The trial court found no extenuating circumstances and consequently the death sentence was imposed. The learned trial Judge granted the appellant leave to appeal to this Court against the finding that there were no extenuating circumstances.

The facts are not in dispute. The deceased was an elderly woman who lived with her sickly husband in their house at Hilton near Pietermaritzburg. The appellant, a 29 year old male, was employed by the deceased to work in the garden. He started working for the deceased on Tuesday 27 June 1989. Before then the appellant had been unemployed and desperate for work. After working for only two days the appellant became dissatisfied with the conditions under which he had to work. He later mentioned some of his complaints to his sister-in-law. The appellant apparently felt that he

was being ill-treated by the deceased, and he objected to the way in which she kept on reprimanding him. He was also convinced that the deceased was giving him cat food to eat.

On the morning of Thursday 29 June 1989 the appellant and the deceased went to clean the stables on the premises. He asked her what salary she was going to pay him, and this led to a disagreement or misunderstanding between them. The appellant then told the deceased that he was no longer prepared to work for her. He demanded that she pay him for the two days which he had worked, but the deceased apparently refused to do so and told him to get off the premises. The appellant left in anger and went to his room to fetch his knife. The servant's quarters were on the other side of the property and some 100 metres away. The appellant returned with his knife, grabbed the deceased by the neck and stabbed her. According to the appellant's version he stabbed her three times in the chest, but the district surgeon who conducted the post-mortem examination found at least twelve

stab wounds on the deceased's body. The appellant left the deceased lying in the stable and returned to his room. He took off the overall which had been supplied by his employer and changed into his own clothing. The appellant then went to the house where he left the overall on the verandah. At the house he asked the deceased's husband for his money for the two days, but the husband told him to wait for his wife. Thereafter the appellant left for his home at Sweetwaters, near Hilton, where the police arrested him that same night.

The appellant made a confession to a police captain shortly after his arrest. The next day he also pointed out certain places at the deceased's home to another police captain. Later that day the appellant appeared in the Magistrate's Court where he pleaded guilty to a charge of murder. When questioned by the Magistrate in terms of section 112(1)(b) of the Criminal Procedure Act no 51 of 1977 ("the Act") the appellant again made a confession. He gave the same reasons for stabbing the deceased in both

confessions.

At the trial the appellant denied that these confessions were freely and voluntarily made. In the course of a trial within a trial which was then held the appellant alleged that he had been assaulted and threatened before making the confessions. The trial Court rejected his evidence in this regard and allowed the confessions. The appellant did not give evidence on the merits of the case. When the question of extenuating circumstances had to be decided at a later stage the appellant elected once again not to give evidence.

The appellant's version appears mainly from the confessions which he made to the police captain and to the Magistrate. He also confessed to his sister-in-law that he had killed the deceased. His version could not be tested under cross-examination, but it is consistent with the general trend of the evidence. It also accords with the probabilities.

The trial Court found that the contents of the appellant's statements were substantially true. Mr **McAdam**, who appeared for the State before us, accepted that the appellant's reasons for his attack on the deceased, as set out in the statements, were the true reasons for his conduct. In my view the appellant's version is reasonably possibly true, and I accept that the reasons which he gave were indeed the reasons which motivated him to commit the crime.

The trial Court considered all the relevant facts and decided that there were no extenuating circumstances. The provisions of the old section 227 of the Act were still in operation at the time when sentence was passed, and the learned trial Judge was accordingly obliged to impose the death penalty.

The compulsory imposition of the death sentence has since been abolished by the Criminal Law Amendment Act no 107 of 1990 ("the amending Act"), which came into operation on 27 July 1990. The more important provisions of the amending

Act have been set out and interpreted by this Court in three judgments delivered during September 1990, but as yet unreported. See **S v Masina and Others** (case no 695/89); **S v Senonohi** (case no 619/89); **S v Nkwanyana and Others** (case no 52/90). I shall briefly refer to some of those provisions and the construction placed thereon by this Court in the cases referred to above.

Section 277 was repealed and a new section 277 substituted therefor by section 4 of the amending Act. The term "extenuating circumstances" is no longer used and in its place there has been introduced the concept of "mitigating or aggravating factors". It was held in the **Masina** case, **supra**, that the term "mitigating factor" has a wider connotation than the term extenuating circumstance. Factors unrelated to the particular crime, such as an accused's behaviour after the commission of the crime, or the fact that he has a clean record, may be considered as mitigating factors. See also **S v Senonohi**, **supra**, where a clean record

was regarded as an important mitigating factor in the case of an accused who was 28 years old.

In terms of the new section 277 the trial Court is obliged to make a finding on the presence or absence of any mitigating or aggravating factors. The section further provides that the sentence of death shall be imposed only if the presiding judge, with due regard to that finding, is satisfied that the sentence of death is "the proper sentence". It was held by **Nestadt JA** in the **Nkwanyana** case, **supra**, that the words "the proper sentence" (unlike "a proper sentence") must be interpreted to mean "the only proper sentence". The learned Judge then concluded:

> "It follows that the imposition of the death sentence will be confined to exceptionally serious cases."

The following remarks by **E M Grosskopf JA** in the **Senonohi** case, **supra**, are to the same effect:

> "As algemene riglyn meen ek dat die afskaffing van die verpligte doodstraf vir moord 'n aanduiding is dat die wetgewer beoog het dat die doodstraf

voortaan net in gevalle van uitsonderlike erns opgelê sou word."

In appeals against the death sentence this Court now exercises an independent discretion by virtue of the provisions of section 13(b) of the amending Act. (See the **Masina** and **Senonohi** cases, **supra**).

The present appeal falls within the ambit of section 20(1)(a) of the amending Act, and must therefore be dealt with as if section 4 (the new section 277) and section 13(b) had at all relevant times been in operation. This Court must accordingly decide, in the exercise of its discretion and with due regard to the mitigating and aggravating factors, whether the death sentence is the only proper sentence for the appellant in the present case.

There are certain mitigating factors which, in my view, ought to be taken into account in this case. An important mitigating factor is the intense sense of grievance which the deceased's unjustified refusal to pay aroused in

the mind of the appellant. In considering the circumstances which gave rise to the appellant's attack on the deceased, one should not, however, lose sight of the other events which preceded the deceased's refusal to pay the appellant. It appears from the evidence that the appellant had been desperate for work and delighted to be employed, but that from the outset he and the deceased did not get along at all. The appellant resented the way in which the deceased treated him, and when he met her at the stables that fateful morning, their relations were already strained. Their discussion about the appellant's salary gave rise to some disagreement, which in turn led to further tension between them. Then followed the deceased's unfortunate refusal to pay the appellant his wages. On top of that the deceased ordered the appellant off the premises. To withhold someone's wages would normally provoke indignation and anger, and it is obvious that the appellant lost his temper. The number of stab wounds which he inflicted upon the deceased is an

indication that the appellant must have been beside himself with rage.

A further mitigating factor is the fact that the appellant, at the age of 29 years, had no previous convictions. There is no reason to expect that he will commit a similar crime in future, and there is nothing to suggest that he cannot be rehabilitated.

On the other hand there are also certain aggravating factors. Counsel for the State laid stress on the fact that the attack on the deceased did not occur on the spur of the moment when the appellant had lost control of himself, but only after he had gone to his room to fetch his knife. It was submitted that the appellant had enough time to reconsider his decision to kill the deceased. This is indeed an aggravating feature which has to be considered, but the fact that the appellant did not take his knife along with him in the first instance shows that this was, in any event, not a planned or premeditated murder.

The great number of stab wounds is an indication that the appellant intended to kill his victim, but, as pointed out above, it also shows in what state of rage he was when he killed her.

It was further submitted by counsel for the State that the deceased had been an elderly woman, and that that in itself constituted an aggravating factor. In my view, however, the age of the victim should not be regarded as an aggravating feature in the particular circumstances of this case.

Having due regard to both the mitigating and aggravating factors referred to above, I do not consider that the sentence of death is the only proper sentence for the appellant. It is therefore necessary to determine what a proper sentence would be. Having regard to the serious nature of the murder, I am of the view that a proper sentence would be one of 20 years' imprisonment.

In the result the appellant's appeal against sentence succeeds. The sentence of death is set aside and there is substituted a sentence of 20 (twenty) years' imprisonment.

F H GROSSKOPF JA.

VAN HEERDEN JA

NICHOLAS AJA Concur.