232/92

Case No **69/92**

/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

MATTHEWS KUKU SIYANDA NGCOBO Appellant

and

THE STATE Respondent

CORAM: VIVIER JA et VAN COLLER, KRIEGLER AJJA.

HEARD: 13 November 1992.

DELIVERED: 27 November 1992.

J U D G M E N T

VIVIER JA./

VIVIER JA:-

The appellant was convicted in the Durban and Coast Local Division by **BOOYSEN J** and two assessors on one count each of murder, robbery with aggravating circumstances and housebreaking with intent to steal and attempted theft. On the murder count he was sentenced to death. On the robbery count he was sentenced to twenty years' imprisonment and on the housebreaking count to five years' imprisonment, which sentences were ordered to run concurrently. The appeal is against the death sentence only. The appellant was initially charged with two others, to whom I shall refer as accused Nos 1 and 2 respectively, but at the commencement of the trial a separation of trials was ordered and the trial of accused No 1 was separated from the trial of the remaining accused. At his trial with the appellant accused No 2 was found

not guilty on the murder count and guilty on the remaining two counts.

The deceased was the 42 year old Pauline Susan Speed who lived with her husband Kevin Frederick Speed and their two young children in a house at No 7, Maryland Avenue, Durban North. The three accused arrived at the house shortly before nine o'clock on Monday morning 26 November 1990, intending to break into the house while the occupants were away. Mr Speed used to leave the house early on weekdays in order to take the children to school and the deceased used to attend early morning exercise classes. Accused No 2 had been employed by them as a gardener for a number of years and he knew their routines. It was he who had suggested to the other accused that they break into the house that Monday morning. Although their plan was to break into the house in the absence

of the occupants, the three accused had considered the possibility that the deceased might return to the house unexpectedly while the burglary was in progress and for that reason the appellant had armed himself with a knife and they had taken with them a pair of handcuffs with which they intended to subdue the deceased preparatory to removing the stolen goods in her car.

The appellant and accused No 1 gained entry to the premises by climbing over the boundary wall while accused No 2, who was afraid of being recognised, waited elsewhere. The deceased arrived shortly afterwards and parked her car in the garage. The appellant and accused No 1 stood waiting outside the side door of the garage, and when she opened the door from the inside they rushed into the garage and attacked her. She started screaming and put up fierce resistance. The appellant tried to strangle her and

accused No 1 hit her several times over the head with a brick which he had picked up from the garage floor. The deceased weakened but continued to struggle and the appellant then produced his knife and stabbed her no fewer than ten times in the face, neck, chest and head. None of the stab wounds, however, caused any serious injury. At some stage of the struggle the attackers managed to put the handcuffs on the deceased's wrists but it is not clear whether that was done before or after she was stabbed. Eventually the deceased collapsed and the appellant removed her wrist-watch, which he kept. He took the key of the front door of the house from the deceased's handbag and opened the front door. The alarm was activated and the attackers fled. The deceased was still alive when her neighbour came to her assistance a few minutes later, but she died shortly afterwards. The appellant was

arrested on 3 January 1991.

According to Prof Botha, the pathologist who conducted the post-mortem examination on the body of the deceased, the cause of death was either multip fractures of the skull resulting from blows with a blunt object such as a brick, or a fractured hyoid bone and associated injuries which, he said, were typical consequences of pressure having been applied to the neck by a pincer movement of the hand around the throat.

The trial Court found that it had not been established that the appellant had, prior to the commencement of the attack on the deceased, formed either a direct or indirect intention to kill her. I agree. On the available evidence it must be accepted that the three accused intended to commit burglary and theft and that, should the deceased unexpectedly return

home, to subdue but not to kill her. The last-mentioned inference can, I think, reasonably be drawn from the fact that the three accused took with them a pair of handcuffs and the fact that accused No 2 did not enter the premises with the other two accused for fear of being recognised by the deceased.

The trial Court went on to find that the appellant had formed the direct intent to kill by the time he commenced stabbing the deceased. While it is true that the stab wounds were, with one exception, all delivered to vital parts of the deceased's body, the nature of the wounds raises a doubt, in my view, as to whether the appellant had the direct intention to kill her. The stab wounds would all appear to be superficial wounds, three of them being puncture wounds of 6mm, 2mm and 7mm in length respectively. Although some of them caused severe bleeding, none caused any

serious injury. It would further seem that they were all inflicted with the minimum of force. The doubt as to whether the appellant had **dolus directus** is strengthened if regard is had to his statement in terms of sec 112 of Act 51 of 1977 in which he admitted fully to his participation in the commission of the crimes. He said there that he had stabbed the deceased in order to scare her. Neither the appellant nor accused No 2 testified at the trial and the appellant's version of the events contained in the said statement was, in the event, substantially in accordance with the facts found by the trial Court. In my view there is insufficient reason to reject his version with regard to his intention. The trial Court should accordingly have found that there was insufficient proof of an intent to kill in the sense of **dolus directus**, but that the appellant clearly acted with intent to kill in the form

of **dolus eventualis**, both when he strangled the deceased and when he stabbed her.

The absence of a direct intent to kill constitutes a mitigating factor in the circumstances of the present case. Another mitigating factor is the fact that there was no premeditation. When the appellant arrived at the deceased's house there had been no contemplation that she might be killed. She was killed in the heat of the moment during a short, violent struggle to overpower her. The appellant was 23 or 24 years old when the crimes were committed and had one previous conviction for housebreaking with intent to steal and theft, committed when he was 16 years old and for which he was sentenced to three cuts with a light cane. In my view it cannot be said that imprisonment is unlikely to have a rehabilitating effect on him.

The aggravating factors are clear. The deceased was a defenceless woman who was killed in her own home with greed as the motive. The attackers were armed and could have overpowered their victim without killing her. Instead she was attacked in a brutal and vicious manner.

The present must be regarded as very much a borderline case. The circumstances of the offence - the killing of a defenceless woman in her own home by armed intruders with greed as the motive - and the frequency with which murders of this kind are committed, are most serious. In recent decisions of this Court the retributive and deterrent objects of punishment in cases of this kind have been emphasised. See **S v Tloome** 1992(2) SACR 30 (A) at 39h. There are, however, the mitigating factors to which I have referred. According these their due weight, I am not

satisfied that this is a case where the death sentence is imperatively called for. See **S v Mabizela and Another** 1991(2) SACR 129 (A) at 134g. Accordingly it cannot be said that the death sentence is the only proper sentence. In my view a sentence of 20 years' imprisonment should be substituted for the death sentence on the murder count, to run concurrently with the sentences imposed in respect of the other counts.

In the result the appeal is upheld. The death sentence on the murder count is set aside and there is substituted a sentence of 20 years' imprisonment. It is ordered that this sentence is to run concurrently with the sentences imposed in respect of the other two counts.

W. VIVIER JA.

VAN COLLER AJA)
KRIEGLER AJA) Concur.