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41/92

160/91
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

OUPA ALEX SEHERI APPELLANT

and

THE STATE RESPONDENT

CORAM: **SMALBERGER, MILNE, et KUMLEBEN, JJA**

HEARD: **16 MARCH 1992**

DELIVERED: **26 MARCH 1992**

J U D G M E N T

SMALBERGER, JA :-

The appellant was convicted in the Witwaters=rand Local Division of two counts of murder and various other counts - all the counts having arisen from a series of events which occurred on the night of 24-25

January 1987. No extenuating circumstances were found in respect of the two murder counts and the appellant was sentenced to death on each count. On the remaining counts he was sentenced to an effective 15 years' imprisonment. The appellant was granted leave to appeal to this Court against the sentences of death imposed upon him. The appeal was dismissed. Subsequent thereto the Criminal Law Amendment Act 107 of 1990 ("the new Act") came into operation. This brought about a new dispensation with regard to death sentence matters. The appellant's case was reconsidered in terms of section 19(1) by the panel appointed for that purpose. The panel found that the trial court would probably have imposed the death sentences if section 277 of the Criminal Procedure Act, 51 of 1977, as amended by the new Act, had been in operation at the time the sentences were imposed. The matter now comes before us in terms of section

19(12) of the new Act. We are required to consider afresh the death sentences imposed. The test to be applied is whether, having due regard to mitigating and aggravating factors, and the objects of sentencing, the death sentences imposed are the only proper sentences.

The facts which gave rise to the appellant's conviction on the two murder counts are set out fully in the judgment of this Court in respect of the earlier appeal (appeal 160/91). Those relevant to the present appeal may be briefly summarised as follows:

The appellant was a member of the ANC's military wing. He entered the Republic of South Africa illegally, one of his tasks being to train ANC members in the use of firearms. On the evening of 24 January 1987 he was due to instruct certain persons in the use of a Scorpion machine pistol ("the Scorpion") which had come into his possession earlier that day. The persons concerned failed to turn up. The appellant

then repaired to the shebeen of one of his co-accused at the trial (accused 2) where he consumed liquor. The two deceased ("Mlando" and "Xola") and certain of their friends were also present at the shebeen. An altercation arose between the appellant and Xola because the former had (possibly accidently) burnt the latter's trousers with a cigarette. The altercation was largely of the appellant's making. A fight ensued outside the shebeen between the appellant and Xola. Xola got the better of the fight. The appellant attempted to draw the Scorpion, presumably with the intention of using it in some manner. He was promptly dispossessed of the Scorpion by Xola's brother. The two deceased and their companions left taking the Scorpion with them. They refused to heed the appellant's request for its return. They went to Xola's house where the Scorpion was handed to Xola's sister, Faith, for safekeeping. She hid it under the dining room

table. The appellant went to muster forces with a view to recovering the Scorpion. He armed himself with an AK 47 rifle ("the AK 47") for this purpose. The appellant and his companions eventually converged upon Xola's house where the appellant fired a number of shots indiscriminately at the persons outside, seriously wounding two of them. Mlando was cornered and taken at gunpoint to Xola's house. Access was gained to the house on a pretext. Faith and her mother were inside the house. The appellant demanded the return of the Scorpion. Mlando then struck Faith on her chest, saying to the appellant "shoot this woman, it is she who has the firearm". Instead of doing so, the appellant shot Mlando in the right hip causing him injuries from which he eventually bled to death. Despite what had occurred Faith denied all knowledge of the Scorpion. The appellant left. After he had done so, Faith took the Scorpion and went and hid it in a coal box at

the back of the house. The appellant eventually tracked down Xola and took him back to his (Xola's) house at gunpoint. There in front of Faith and his mother, the appellant threatened to kill Xola. In response to a question by Faith the appellant stated that he would leave Xola alone if he found the Scorpion. She then hinted where it was, thus enabling the appellant to locate and retrieve it. After finding the Scorpion the appellant returned to the house (forcing open a door in the process) and threatened to kill Xola. He had Xola on his knees at his mercy. Faith pleaded with him to forgive Xola. The appellant apparently relented and he and his companions left the house. Outside accused 2 (who had accompanied the appellant and had pointed out Xola's house to him) asked if he had killed Xola. The appellant replied in the negative and said "I have taught him not to be forward". Accused no 2 told him to "go and kill the dog and erase

the evidence". The appellant returned to the house where Xola was still on his knees in the bedroom. There, in the presence of Faith and her mother, whom he had summoned to the room, and despite their pleas for mercy, he shot Xola in the head twice with his AK 47 killing him instantly. The appellant and his companions thereafter departed the scene.

The main factor advanced on behalf of the appellant as mitigating was that his conduct, when he committed the murders, was affected by a mental condition from which he suffered. Two witnesses, Mr Graeme Friedman, a clinical psychologist, and Dr Victor Nell, a clinical neuro-psychologist, testified in this regard. Mr Friedman's diagnosis was that the appellant suffered from a mixed personality disorder. A feature of this condition was a low tolerance of frustration and a poor ability to control his impulses, particularly under stress. Dr Nell was of the view

that the appellant suffered from a fairly rare personality disorder known as the dyscontral syndrome. Descriptions of this syndrome given by him included the following:

> "..... explosive outbursts by the subject, arising unpredictably, during which the subject is both irrational and unpredictable".
>
> "..... the basic picture of the dyscontrol syndrome is one of an irrational beast when in the grip of rage."

The trial court accepted the evidence of Dr Nell (and by implication also that of Mr Friedman) albeit "with some misgiving". (The court's misgiving is understandable - the views expressed were based on rather tenuous considerations and were not very convincing.) It found, however, that the appellant's condition, whatever it was, did not influence his conduct on the night in question. There is no need to

traverse the trial court's reasons for coming to this conclusion. Suffice it to say that they were cogent and compelling and were not only accepted, but also further supported, by this Court in its judgment. Even if we were free to differ from this Court's findings in the above regard there would be no sound reason for us to do so.

The appellant's own evidence was that he was "not much affected" by the liquor he had consumed. While he no doubt was angered and distressed at being deprived of the Scorpion (bearing in mind that his loss of the Scorpion would undoubtedly have been viewed by his superiors in a very serious light), the situation in which he found himself was one largely, if not entirely, of his own making. But, as this Court pointed out in its judgment, it does not follow that because he was angered and distressed he therefore lost his self-control and acted impulsively without any

realisation of the consequences of his conduct. On the contrary, the evidence reveals that he acted throughout in a controlled, calculated and rational manner (given what he sought to achieve), as appears fully from this Court's judgment. Even if, as held by the trial court, the decision to shoot Mlando was one made on the spur of the moment, it was none the less a deliberate and callous act calculated to intimidate anyone who dared stand in the appellant's way. The appellant's subsequent conduct reveals that he was in full control of himself - right up to the time that he responded to the pleas of Faith and her mother that he spare Xola's life. There was certainly no evidence that the appellant behaved in a way characteristic of the dyscontrol syndrome described by Dr Nell.

At the stage the appellant left Xola's house he had recovered the Scorpion. He had thereby achieved his objective. The anger and frustration he felt

because of its deprivation would have largely subsided. Yet when told by accused 2 to go and kill Xola he went and did just that (even though accused 2 was in no position to instruct him to do so). It was contended that the appellant's change of mind, following so closely on his decision to spare Xola, amounted to irrational behaviour on his part attributable to his abnormal mental condition. The most plausible reason for his conduct - and the only one the evidence suggests - was that he agreed with accused 2's suggestion that Xola be eliminated as a witness, and hoped that by doing so he would sufficiently intimidate Faith and her mother to neutralise them as potential witnesses. But even it there is no obvious explanation why the appellant changed his mind when he did, there was nothing irrational in the calculated way he went about his task. He had time to reflect as he returned to Xola's house on what he was going to do. The act he performed was

one of cold-blooded execution. He even went so far as to insist that Faith and her mother be present to witness the execution. In the circumstances the appellant's mental condition can be ruled out as a causal factor in the two killings. It played no relevant or material part in his behaviour on the night in question and therefore cannot amount to a mitigating factor.

The appellant was 33 years of age when he committed the murders. He has one previous conviction as a juvenile for housebreaking and theft. For practical purposes he can be regarded as a first offender. This is a mitigating factor. So too is the fact that he may well be capable of rehabilitation, although he has not shown any true remorse - a consideration which could militate against reformation.

There are serious aggravating factors present. The whole operation to recover the Scorpion was well planned and executed. The appellant armed himself with the AK 47 which, as his later conduct reveals, he was prepared to use to achieve his purpose regardless of the consequences. He fired indiscriminately on the persons outside Xola's house. The shooting of Mlando, who posed no threat to him, was totally unnecessary and uncalled for. Having deliberately shot and seriously wounded Mlando, he callously left him to bleed to death. Even if the appellant did not have the direct intent to kill Mlando,he must subjectively have forseen, and by inference did forsee, his death as a strong possibility. In the circumstances his intent, at the very least, bordered an dolus directus. The cold-blooded and brutal execution of Xola was clearly done with the direct intent to kill. Moreover it was callously and deliberately performed in full view of Faith and her

mother. It is in my view relevant to have regard to the fact that the appellant killed not once but twice - in separate but related incidents. The earlier killing of Mlando in no way deterred him from later killing Xola. The appellant's conduct reveals him for what he is - a ruthless killer.

The aggravating factors in the present matter substantially outweigh the mitigating factors. No self-respecting community can countenance the appellant's appalling conduct. While due regard must always be had to all the objects of punishment, in a matter such as the present the appellant's prospects of rehabilitation must yield to considerations of retribution and deterrence. By any civilized and decent standards this is a case of exceptional seriousness where the death sentence is imperatively called for on both counts as the only proper sentence.

The appeal is dismissed and the death sentences are confirmed

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J W SMALBERGER

JUDGE OF APPEAL

MILNE, JA) CONCUR

KUMLEBEN, JA)