IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CLIVE BESSICK ..... Appellant

AND

THE STATE ..... Respondent

Coram: SMALBERGER, EKSTEEN, JJA et HARMS, AJA

Heard: 14 November 1991

Delivered: 21 November 1991

J U D G M E N T

EKSTEEN, JA :

The appellant was arraigned before the Cape of Good Hope Provincial Division on an indictment alleging:

(1) that he murdered one Michael Smith at or near Valhalla Park on 27 August 1988;

(2) that, at the same time and place, he attempted to murder Igshaan Galant;

(3) that he unlawfully possessed a fire-arm in contravention of section 2 of Act 75 of 1969; and

(4) that he was in unlawful possession of ammunition in contravention of section 36 of the same Act.

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He pleaded not guilty to the first two counts but guilty to the last two. At the end of the trial he was convicted on all four counts, and sentenced to death on the first count. He now comes on appeal before us in terms of section 316 A of Act 31 of 1977 against his conviction and sentence on that count.

The State case rested to a large extent on the evidence of Igshaan Galant. He was 14 years of age at the time of the incident, and his friend Michael Smith (the deceased) was 15 years old. On the night of 27 August 1988 at about 10 or 11 o'clock, he and the deceased were walking down Oliver Street in Valhalla Park. It was a Saturday evening and they were on their way home from a "braai" held at a house in

Edmund Street and attended, amongst others, by certain members of a gang known as the Hard Living Kids ("HLKs"). Both Igshaan and the deceased were members of this gang. As they walked home in Oliver Street they suddenly saw a group of between 20-30 people come running down the street in front of them. These people were members of a gang known as the Americans, and they were armed with pick handles and pangas. In the van was the appellant dressed in a cream-coloured, fur-lined coat.

The deceased and Igshaan stopped in their tracks when they saw this gang approaching. When the appellant had advanced to some 20 metres or so from them he stopped; drew a fire-arm from under his cream-coloured coat; took aim, and began firing at them. The second shot

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hit the deceased in the mouth and he fell down. Igshaan was standing next to his friend when he fell. He looked at the deceased and bent down to him, but then turned and ran away. The appellant continued to fire and Igshaan was hit in the left shoulder and chest. He collapsed on the pavement not far from where the deceased lay. At the time of the shooting Igshaan says he heard the appellant shouting: "Ek het twee varke. Ek het twee varke". It is not clear whether these words were uttered while the appellant was shooting or immediately thereafter. The trial Court was favourably impressed by the evidence of Igshaan and accepted it as being substantially true.

He was supported by the evidence of Cecilia

Williams. She was a woman who lived in Oliver Street and who happened to be leaning over her front gate and looking down the street at the time, while she smoked a cigarette and listened to the music emanating from the "braai" in Edmund Street that Igshaan had referred to in his evidence. While standing there she saw the appellant in his cream-coloured fur-lined coat coming down the street accompanied by his girlfriend, Zelda Muller, and a group of what appeared to be his friends. At the corner of Oliver Street and Edmund Street the appellant and Zelda became embroiled in an altercation. She was urging him to come home and not to look for trouble with "those people". He responded by drawing his gun and telling her to keep

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quiet or he would shoot her in the mouth, and then hurling obscenities at the HLKs and threatening to kill any one of them that he may come across. The appellant and his group then turned round and walked back along Oliver Street in the direction from which they had come. Some short while later Igshaan and the deceased appeared and also walked past Cecilia along Oliver Street. She spoke to them and warned them to be careful. The next thing she noticed was the appellant standing in the middle of the street firing at Igshaan and the deceased. This was some distance from her - a distance which she estimates at some 12 houses further along the street. The appellant fired two shots at the deceased and as Igshaan fled he fired

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a third shot which hit Igshaan. Appellant gave a triumphant shout to the effect that he had shot two of them. Then he turned and ran away. One of appellant's friends then ran to the deceased and hit him on his lower leg with a panga. Such a wound was indeed found on the deceased's lower leg at the post-mortem.

Mrs. Williams also impressed the trial Court as being an independent and honest witness and the Court accepted her evidence as being reliable and true, and as supporting the evidence of Igshaan in all material respects.

The appellant's version of what occurred differed toto caelo from that of the State. He says

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that he took Zelda out for a drink that evening and on their way home at about 10.30 p.m. they came across a group of some 20 Americans at the top end of Oliver Street. Lower down in the street he saw an even larger group of HLKs. The Americans persuaded him to join them in attacking the HLKs by reminding him that they had been responsible for the scar he bore on his face. He succumbed to this persuasion and asked Zelda to give him his gun which she carried. The HLKs were armed with pangas and one of them had a "zip-gun" - apparently a home made gun which could only fire one shot at a time. The two gangs rushed at each other. The zip-gun was fired and appellant returned the fire. After firing six shots he saw one of his opponents

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fall but did not know whether anyone else was hit. Although he knew Igshaan Galant he denied having seen him at all that evening. After the shooting, he said, two of the Americans ran to the deceased and chopped at one of his knees with a panga. Thereafter the two gangs, which had shortly before been spoiling for a fight, simply melted away. He and Zelda then walked home.

Zelda Muller also gave evidence. Her evidence conflicted with that of the appellant in several respects. She denied having carried appellant's gun that evening. She said that she and the appellant came across some 6 - 10 Americans in the "veld" and walked along with them to Oliver Street. There they

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saw about 5 HLKs standing outside a house. Appellant, for no apparent reason, fired two shots in their direction. She and appellant then turned round and walked home. In cross-examination the prosecutor put a statement to her that she had made to the police on the day after the incident, in which she denied that she had been with the appellant at all on the night in question. Small wonder therefore that the trial Court rejected her evidence out of hand and labelled her "an out and out liar".

Finally the appellant called one Stanley Thompson. He purported to be one of the Americans who were with the appellant that night. He said that there were only 4 of them who joined appellant and

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Zelda. They walked down Oliver Street right to its intersection with Edmund Street close to where a "braai" was being held. He saw Cecilia Williams leaning over her gate as they walked back along the street. All of a sudden a group of HLKs ran out of Cecilia's yard and proceded to attack them. Their attackers numbered some 30. A shot was fired from one of the yards, whereupon appellant turned round and fired two shots in retaliation. The HLKs were armed with pangas which they scraped on the tarred surface of the street. They also carried bricks and stones with which they pelted the hapless Americans. As they were greatly outnumbered by the heavily armed HLKs they decided to run away. Despite the fact that some 5 or 6 shots

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were fired at them from various yards, the appellant only fired two shots in return. The HLKs pursued them to the end of Oliver Street and then turned round. He was hit on the head with a brick, and this, on his evidence, seems to have been the only injury suffered by anyone that evening. He did not see that anyone had been hit by any of the shots fired by the appellant.

This version of Thompson's also differs in many significant respects from that of the appellant. Moreover much of it was not put to the State witnesses e.g. to Cecilia Williams. The trial Court disbelieved him and was left with the impression that he had tailored his evidence to fit in as far as he could with the State's case so as to lend some credibility to his

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story. It found both him and the appellant to have been "appalling witnesses", highly unsatisfactory, unconvincing and lying - witnesses "whom we simply just do not believe".

In accepting the evidence of Igshaan and Cecilia Williams the trial Court found that on the night in question the appellant "was in a belligerent frame of mind", that "he was out for trouble", armed with a fire-arm, and that

> "when he saw these two youngsters walking along the road towards him, he took out his fire-arm and shot them in cold blood".

Mr. Wittenberg who appeared before us on behalf of the appellant sought to attack this finding on the basis of a number of so-called "misdirections"

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by the trial Court. Some of the "misdirections" on which he relied consisted in the alleged failure of the Court to have regard to features such as the state of rivalry between the Americans and the HLKs; the previous assault by the HLKs on the appellant as alleged by him; the possibility that Cecilia Williams might have been prejudiced against the appellant; the suggested improbability of the two young boys walking home alone in such a dangerous area, or continuing to do so in the face of Cecilia Williams' warning to them. These were all relied on as misdirections simply because the learned Judge a quo had not dealt with them in his judgment. This, however, does not mean that therefore the trial Court had not been aware of them or considered them.

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As Davis AJA held in R. v. Dhlumayo and Another 1948 (2) SA 677 (A) at p. 702:

> "Indeed, even in a written judgment it is often impossible, without going into the facts at due length, to refer to all the considerations that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in the judgment .... they have not been taken into account by the trial Judge in arriving at his decision. No judgment can ever be perfect and all-embracing. It would be most unsafe invariably to conclude that everything that is not mentioned has been overlooked."

In the light of the very strong findings of credibility made by the trial Court in the present case, it is perhaps understandable that the learned Judge did not deal specifically with these aspects in his

judgment. They were, however, very pertinently before the Court and were such an integral part of the factual background to the offence that I find it difficult to imagine the trial Court not having regard to them. There is certainly nothing in the judgment to suggest that the Court ignored them.

The other so-called misdirections relied on amounted to findings of credibility by the Court. As I have already indicated the Court believed Igshaan Galant and Cecilia Williams and rejected the evidence of appellant and his two witnesses in strong and un-equivocal terms. This conclusion of the Court a quo seems to be borne out by a mere reading of the evidence. The submission that the evidence of the defence witnesses

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was wrongly rejected, was not strongly urged on us, and suffice it to say that I can find no adequate reason on the record to differ from the conclusion to which the trial Court came.

It follows then that the conclusion that the trial Court came to viz. that the appellant was guilty of murder, cannot be disturbed, and that the conviction must stand.

In regard to sentence Mr. Wittenberg submitted that the death sentence was not the only proper sentence to impose and that a lengthy sentence of imprisonment or even life imprisonment would also be a proper sentence. In dealing with the mitigating factors to be taken into account he submitted in the first place that the

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appellant must have been influenced by a "mob psychology" which de-individuated and aroused the appellant and led him to conform to the aggressive attitudes of the Americans he felt impelled to join. There was no evidence on the record to support this theory and Mr. Wittenberg was driven to seek support for it from extracts from judgments in cases where such evidence had been had, and from what he seemed to submit was common knowledge. In the present instance we have to do with a gang rather than a mob, but in any event - and quite apart from the fact that there is no evidence to adumbrate the ambit and effect of this alleged psychological phenomenon - there is no factual basis to suggest that it affected the appellant at all. He

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was not compelled to join the gang of Americans, or "sucked into the vortex of their aggressive intentions" as Mr. Wittenberg put it. He joined them voluntarily, and having joined them he seems to have taken on a prominent, if not leading role in their subsequent activities. He seems to have been the only one of that group in possession of a fire-arm, and, on Cecilia Williams' evidence, he openly displayed it and threatened Zelda with it if she sought to cross his purpose. It was he who hurled obscene abuse and threats of death at the HLKs at the "braai", and when it came to the confrontation with the unfortunate deceased and Igshaan, he occupied the centre position at the head of the gang. It would hardly seem, therefore, that he

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was overawed by the gang or impelled to conform to whatever pattern of aggression they may have harboured.

Then it was submitted that the scar the appellant bore on his face had been inflicted by the HLKs and that this constituted some form of provocation. The allegation that he had been attacked by the HLKs on a previous occasion rests only on the appellant's own defence which was rejected by the trial Court. But even if his allegation be accepted the attack must, on his evidence, have taken place some 16 months earlier. It could therefore hardly have constituted provocation. In fact it would rather tend to afford evidence of a motive for the deliberate and intentional killing of the deceased also reflected

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in his threat to kill any HLK he may come across.

The aggravating factors in this case are overwhelming. Appellant admitted a long list of previous convictions commencing with one for robbery in 1977. He was subsequently convicted on four counts of assault with intent to do grievous bodily harm (during 1979), on two more counts of robbery (in 1979 and 1981), and of rape (in 1982). In 1989 he was convicted of murder with extenuating circumstances and sentenced to 12 years imprisonment. This latter offence was apparently committed on 11 March 1988 - some 5 months before the present offence.

The nature of the offence and the circumstances in which it was committed also seem to me to constitute

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aggravating factors. The appellant, as I have indicated above, was not compelled to join up with the gang of Americans but did so of his own free will. He was in possession of a fire-arm at the time and his action in going along with them seems indicative of his intention to seek a confrontation with the HLKs and to wreak vengeance on any of its members for the imagined grievance he bore them. This intention is again reflected in the way in which he brushed Zelda's protestations aside and the vituperative obscenities and threats he shouted at the HLKs near Cecilia Williams' gate. This clearly expressed intention to kill any HLK he might come across was given effect to when he noticed the two young boys in the street and shot the

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deceased in cold blood. The settled and deliberate nature of his intention, and his insensitivity as to its effects is once again reflected in his contemptuous shout of triumph at having picked off two of his marked victims. His intention was deliberate and settled. His action in killing this young boy was cold blooded and cruel.

In my view there are no mitigating factors whereas the aggravating factors are overwhelming. In the light of the appellant's previous convictions where prison sentences of up to 3 and 4 years in the past have failed to deter him from his adopted career of serious crimes of violence, the prospects of reformation seem slim. This is such a heinous and repulsive

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crime and the manner of its commission poses such a threat to the interests of society, that the retributive aspects of punishment must override all other considerations. Seen against the background of the appellant's previous convictions, and his total lack of remorse it seems to me that this is a crime so evil, so shocking, so clamant for extreme retribution, that society demands the destruction of the appellant as the only expiation for his wrongdoing. (S. v. Matthee 1971 (3) SA 769 (A) at 771 D.) In the circumstances the death sentence is the only proper sentence.

The appeal is dismissed.

J.P.G. EKSTEEN, JA

SMALBERGER, JA)
HARMS, AJA) concur