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N v H

BHEKI WALTER CELE

BONOKWAKHE MOSES NGCOBO

and

THE STATE

SMALBERGER, JA -

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BHEKI WALTER CELE	**First Appellant**
BONOKWAKHE MOSES NGCOBO	**Second Appellant**

and

THE STATE	**Respondent**

CORAM:	**SMALBERGER, GOLDSTONE, JJA, et KRIEGLER, AJA**
HEARD:	**21 FEBRUARY 1991**
DELIVERED:	**26 EEBRUARY 1991**

J U D G M E N T

SMALBERGER, JA :

The appellants were convicted in the Durban and Coast Local Division by NIENABER, J, and two assessors on two counts of murder, seven counts

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of robbery and one count each of attempted murder and rape. No extenuating circumstances were found in respect of the murder convictions, and under the then prevailing law the appellants were sentenced to death on both counts. In respect of the other convictions varying periods of imprisonment were imposed, leaving each appellant with an effective sentence of 29 years' imprisonment. The appellants were granted leave to appeal by the Judge a quo in respect of their convictions and the sentences of death imposed on the murder counts. Hence the present appeal.

The offences were committed over the period 22 January 1988 to 19 March 1988. The events giving rise thereto all occurred in the same general locality - along a section of the old North Coast Road near Durban. The appellants' modus

operandi (as found by the Court a quo) was to waylay passing motorists with a view to robbing them. It was in the course of these robberies that the other crimes of which they were convicted were committed.

It is not necessary, in considering the appellants' appeals against their convictions, to recount the evidence against them or to embark upon a discussion thereof. In convicting the appellants the Court a quo delivered itself of a comprehensive, well-reasoned and convincing judgment covering all aspects that were in issue at the trial. These included the reliability of eye-witness identification of the appellants, the regularity and fairness of two identification parades and the admissibility of certain statements and pointings-out made by the appellants to various police officials. Mr Meyer, who appeared for the

appellants, was unable to point to any material misdirection by the Court a quo which could have affected its assessment of the evidence and its findings against the appellants. Indeed, the evidence against the appellants as to their guilt was overwhelming, and they were quite clearly correctly convicted for the reasons set out in the judgment of the Court a quo. The appellants' appeals against their convictions must therefore fail.

There remains to be dealt with the appeals against the death sentences on the two murder counts (counts 1 and 4). Since the appellants' trial the Criminal Procedure Amendment Act, 107 of 1990, has come into operation. With regard to its provisions, this Court now has a discretion to determine, with due regard to the presence or

absence of any mitigating or aggravating factors, whether the death sentences on these counts was "the proper sentence". This is a very different test from that which the learned Judge a quo was enjoined to apply in order to arrive at the appropriate sentence on those counts. The phrase "the proper sentence" has been interpreted by this Court to mean "the only proper sentence", from which it follows "that the imposition of the death sentence will be confined to exceptionally serious cases; where (in the words of NICHOLAS AJA in S v J 1989 (1) SA 699 (A) to 682D, albeit in a different context) 'it is imperatively called for'" (per NESTADT JA in S v Nkwanyana and Others 1990(4) SA 735 (A) at 745 F). Is this such a case?

The relevant facts on count 1 are briefly the following. The appellants, armed with knives, and a third person, armed with a knobkierie, successfully hijacked a vehicle with two occupants.

Their motive was robbery. The vehicle was driven to a certain spot by the first appellant. When it stopped the two occupants fled in opposite directions. The one was chased by the first appellant. He was caught, stabbed and robbed before making good his escape. The other was pursued by the second appellant and the third person. He was less fortunate. He was caught, and was fatally stabbed by the second appellant. Six knife wounds, some of which were superficial, were inflicted upon him. He died as a result of a penetrating wound of the chest.

The precise events relating to count 4 are, for lack of an eye-witness account, not entirely clear. The second appellant gave a version of the events that occurred in his confession to Lt Loots. What he said is, however,

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not evidence against the first appellant. This much is evident. The deceased stopped his car alongside the road and entered an adjoining sugar plantation in order to relieve himself. The evidence establishes circumstantially that he was attacked by the two appellants while squatting with his trousers down. Their purpose was to rob him. After his arrest the first appellant admitted to Capt le Grange that he had stabbed the deceased; the second appellant admitted to striking the deceased with a stick. Five stab wounds, three of them superficial, were inflicted on the deceased. He died as a result of haemorrhage from stab wounds to the right lung and right axillary artery.

All murders are serious. The two of which the appellants were convicted are particularly so. The manner and circumstances in which the

offences were committed constitute an aggravating factor. Innocent, unsuspecting persons were set upon by the appellants whose motive was to rob them. Their conduct was not impulsive. It was planned in the sense that they preyed on any unfortunate victim they came across or were able to waylay in the area in question. They were prepared to meet any resistance with violence, and were indifferent to the fate of their victims. But it cannot be said that the intention to kill was foremost in their minds. This is evidenced by the fact that a number of their robbery victims were left unharmed. It was only to overcome encountered resistance, or in order to forestall resistance, that they resorted to degrees of violence sufficient for such purpose. Morally this does not make their conduct any less opprobrious, but it does indicate that it was not a

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passion for violence per se, nor an a priori decision to murder, which governed their conduct.

The two appellants are both in their early thirties. Both have previous convictions, but none for crimes of violence. The second appellant has never been to gaol. Apart from the offences they committed (and I do not seek to minimise their seriousness) there is nothing in their past history to suggest that the two appellants are such dangers to society that it is imperative that they be removed permanently therefrom. Nor can it be said that imprisonment is unlikely to have a rehabilitating effect upon them. Although this is very much a borderline case, it seems to me that society will be sufficiently protected, and the objects of sentence satisfactorily achieved, if the appellants are imprisoned for a substantial period

of time. 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 each of counts 1 and 4 in respect of both appellants. In order, however, to maintain a proper balance, and to ensure that the appellants are not called upon to serve an unreasonably long period of imprisonment, the sentences should run concurrently with those imposed on the other counts. This will leave an effective sentence of 29 years in respect of each appellant.

In the result the following order is made:

1. The appeals of both appellants against their convictions are dismissed.
2. The appeals against their sentences are allowed. The sentences of death in respect of both appellants on

counts 1 and 4 are set aside, and there is substituted in their stead in respect of each appellant the following:

"On counts 1 and 4: 20 years' imprisonment on each count. The sentences are ordered to run concurrently with each other, and with the total effective period of imprisonment imposed on the appellants on the remaining nine counts".

J W SMALBERGER

JUDGE OF APPEAL

GOLDSTONE, JA)

KRIEGLER, AJA) CONCUR