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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

KHOLEKILE KHESI ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : KUMLEBEN, VAN DEN HEEVER JJA et VAN COLLER AJA

HEARD : 18 AUGUST 1992

DELIVERED : 31 AUGUST 1992

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA:

The appellant, then accused no 2, stood trial in the Eastern Cape Division of the Supreme Court with a co-accused ("no 1"). He, the appellant, was convicted inter alia of murder. In the absence of extenuating circumstances the death sentence followed. The trial judge granted leave to appeal to this court against the conviction and sentence. The argument on appeal was however restricted to sentence, that is, to the finding that there were no extenuating circumstances: the conviction of the appellant was proved beyond any shadow of doubt. This court (per Nicholas AJA) confirmed the sentence and the appeal was dismissed. As a result of the amendment brought about by the Criminal Law Amendment Act, no 107 of 1990, the sentence was reviewed by the panel constituted in terms of s 19(1) of the amending Act. The panel concluded that, had the provisions of that

Act applied at the time of conviction, the death penalty would probably still have been imposed. Thus the correctness of the sentence is again before us in terms of s 19(12)(a), to decide whether, having regard to any mitigating or aggravating factors, the sentence of death is the proper one.

It would be supererogatory for me to state in my own words the proved facts which gave rise to the conviction. They have been set out in the two previous judgments. However, in so far as it is necessary or convenient to recount them again, I include them as set out by Nicholas AJA. One must do so in some detail since the conduct of the appellant before the actual murder has a bearing upon sentence. The learned judge thus summarised such evidence:

> "At about 6 o'clock on the morning of Wednesday 15 April 1987, Mr Jacobus Postma drove his car from his property in Montmedy Road, Port Elizabeth, to go to gym training. He closed the garage door

before leaving. On his return at about 7.30 a.m. he saw that the door was ajar. Investigation showed that his daughter's Raleigh 12-speed racing bicycle was gone. Examining the road, he saw bicycle tracks leading away from his house and along Montmedy Road. He returned to his car, and drove along the road following the tracks. He found a Black man riding a bicycle which he recognized as his daughter's. He stopped next to the man and, taking out his Walther 9 mm pistol, ordered him to alight. Postma operated the automatic release catch in the car which opened the boot, and at gun-point told the man to bring the cycle to him. Holding the fire-arm in his right hand, he started to put the cycle (which was light) into the boot with his other hand. The pedal got hooked and, while he was trying to free it, the Black man seized his opportunity, and got hold of Postma's gun-hand. A struggle ensued. Postma was stabbed several times in the head and the pistol was wrenched away from him. He then managed to make his escape in his car.

It was later established that the Black man was accused No. 2. The pistol, which was handed in at the trial as Ex 7, was found on 17 April 1987 in No 2's room under his clothes. It was to play a prominent part in the events of 16 April to which I now turn.

At about 5 pm on that day, Xoliswa Khesi arrived home from work. She found sitting there No. 1 accused and No. 2 accused, who is her brother. No. 2 asked her for money, which she did not give him, whereupon he produced the firearm Ex 7 which

he pointed at her. No. 1 and 2 left later. At No. 2's request she accompanied them for part of the way. While they were walking, No. 2 fired a shot into the air - for what reason she did not know. No. 1 told No. 2 that he should not fire 'because there are only two bullets left'. Xoliswa then left them and returned home.

The scene now changes to Walmer Heights, Port Elizabeth. At about 7 o'clock on the evening of 16 April, Mr Alfred Allan and his wife Maria went for a stroll after dinner. As they walked hand-in-hand along the street they saw two Black men coming towards them. (It was established at the trial that these were accused Nos 1 and 2.) They passed, and the Allans walked on. A little later they heard behind them the footsteps of someone running. Then the two accused were alongside them. One of them (it must have been No. 2) said, 'Friends', and, pointing a firearm at Allan, said, 'This is a hold-up.' Acting instinctively, Allan grabbed hold of the barrel of the gun and shouted to his wife to run. Mrs Allan tried to help her husband, and got a blow on the mouth and had her glasses knocked off. She then ran to summon help.

Allan himself screamed for help, shouting 'Koos! Koos!' - the name of his neighbour. He struggled with No. 2 for possession of the pistol. No. 1 joined in, grabbing hold of Allan's arm. He felt a blow on the head, and an article of clothing was thrown over his head. The next thing he remembered was that he was on his back on the ground. He managed to kick No. 2 between the legs. At the same time someone was kicking him on

the left eye and against the left side of his neck and head. Somehow he managed to get loose, and to get up and make his escape.

That evening Mr Raymond Llewyllyn Thomas and his wife Ester (who was sometimes called Hetta) had visitors. They were Mr and Mrs Lötter. At about 7.30 p.m., when they were sitting drinking coffee, they heard a row outside, and a man's voice calling out, 'Help, help, Koos, help.' All four got up and ran outside. They could see people who appeared to be fighting. Thomas went to telephone the police. Mrs Thomas and Lötter ran closer. They saw two Black men kicking and hitting a person who was lying in the street. When Lötter approached them, ne shouted, 'Wat maak julle? Los die man!' One of them (it was shown to be No. 1) said to the other(No. 2) 'Skiet hom!' Lötter turned to Mrs Thomas, and shouted, 'Hetta, hardloop, hulle is gewapen'. The man lying on the ground managed to get to his feet and to run away. Immediately the two accused started running. They went over a fence and disappeared among some bushes. Mrs. Thomas ran back to her house, followed by Lötter. He told her to tell Llewellyn (her husband) to get firearms. She ran into the bedroom and got her husband's 9 mm service pistol (he was a warrant officer in the South African Air Force) and gave it to Lötter. He and a neighbour, Esterhuizen, who had in the meantime arrived at the house, got into the front of Lötter's car which was parked outside. Thomas arrived with his personal .22 revolver and got into the back seat, and Lötter drove off.

They made a reconnaissance of the neighbourhood, and eventually saw two Black men walking on the other side of the road. Lötter called on them to stop. They ignored him: they did not look round, or run away - they just continued walking. Lötter drove up to them and stopped. The crucial incidents which followed can best be described in Lötter's own words:

> '... Toe ek langs hulle stop het die swartman sy arm omgeswaai na die voertuig toe. Hy het 'n vuurwapen in sy hand gehad wat hy gerig het op mnr Boeta Esterhuizen wat links voor in my voertuig gesit het. Op dieselfde tydstip het mnr Thomas egter die agterdeur oopgemaak .... Mnr Esterhuizen se ruit was nie afgedraai nie. Toe die swartman die vuurwapen op hom rig, het hy gekeer met sy hande ... Ek het gesien dat mnr Thomas die voertuig se deur oopgemaak het, want ek het gekyk na die linkerkant van die voertuig. Die swartman het dadelik sy arm wat hy gerig het op die voorste persoon na agter toe geswaai en hy het 'n skoot afgetrek .... Ek het dadelik weggetrek. Die voertuig se linker deur was nog oop gewees ... Toe die skoot afgetrek is het mnr Thomas geskree 'the bastard shot me. I want to get him back.' En hy het agteroor geval.'

Thomas rattled in his throat once. Lötter drove him to the Provincial Hospital and he was found dead on arrival."

I pause to mention that on this evidence no 1

was likewise convicted of murder and sentenced to death. His appeal also failed but one infers that the panel made a favourable recommendation in terms of s 19(11)(a) and that his case was further dealt with in terms of that sub-section.

Mr Koekemoer, who appeared on behalf of the appellant, relied on two grounds which he submitted could be regarded as mitigating factors: the age of the appellant; and the manner in which the offence was committed.

As to his age, the appellant said at the start of his evidence-in-chief that he was 23 years old, that is at the time of the trial during February 1989. Since the offence was committed on 16 April 1987, it follows from this assertion that he would have been about 21 years old at that time and that 1966 would have been the year of his birth. This statement of his was not challenged or controverted. It is nevertheless

open to grave doubt when one has regard to his admitted previous convictions. The first one recorded is dated 20 February 1976 and was for housebreaking with the intent to steal and theft. He was sentenced to five strokes with a light cane in terms of s 345 of Act 55 of 1956. One also notes that in the same year, a couple of months later, he was again sentenced to seven strokes for a conviction of theft. It is highly improbable, if not inconceivable, that corporal punishment of this order, or at all, would have been imposed on a youth of only 10 years of age. (Cf S v Khubeka en Andere 1980(4) SA 221(O) 223 C; S v du Preez 1975(4) SA 606(C) 607 C.) This Mr Koekemoer readily conceded. But whatever his true age might have been, it does not in this case point to immaturity. Any such inference is belied by the way he conducted himself throughout that day, particularly the manner in which he acquired, displayed and ultimately used the

pistol when confronted by his pursuers.

There is likewise no merit in the second alleged mitigating factor: that the appellant thought that he was about to be shot by one of the occupants of the motor car and reacted by shooting first. This was not the explanation given by him at any stage: he denied that he was present or in any way involved in the occurrence. It is moreover refuted by the evidence of Lötter. Two of the occupants of the motor car were armed: Lötter had a service pistol and the deceased a revolver. When they first saw the appellant and no 1, Lötter did point his pistol at them and call upon them to stop. They, however, continued walking without even turning round, which led the deceased to conclude that they were not the culprits they were searching for. Lötter proceeded to drive nearer to them. When he had drawn level with them and stopped the motor car he recognised them. His account of

events continues as recorded in the extract from the judgment of Nicholas AJA quoted above. From this evidence it is clear that the appellant first aimed at Mr Esterhuizen, who was unarmed. When he instinctively reacted by raising his hands in the vain hope of protecting himself, the deceased opened the car door to alight. The appellant immediately directed his attention to the deceased and shot him. There is no suggestion that either Lötter or the deceased were at that stage aiming a firearm at the appellant. The inference is inescapable that he simply shot the deceased to avoid arrest, no doubt assuming - correctly as it turned out - that this would cause his pursuers to flee.

The aggravating factors are self-evident. The appellant was bent upon armed robbery with a pistol he had unlawfully and forcibly acquired. To avoid arrest, as I have said, he was prepared to use it with

fatal consequences.

It is unncessary to refer to details of his previous convictions. They include three counts of theft, 6 counts of housebreaking with intent to steal and theft, 4 counts of robbery and 3 counts of attempted or actual escape from custody. His chronology of crime reveals a steady progression - to call it that - in the seriousness of the crimes he committed and indicates that a variety of punishments, also increasing in severity, did nothing to stem his criminal proclivity. But even if it can possibly be said in his favour that his previous convictions do not necessarily rule out the remote possibility of rehabilitation, in my view this consideration is far outweighed: by the absence of any mitigatory factors; by the callous manner in which he committed crimes on that and the previous day; and by his motive for killing the deceased.

Taking all relevant considerations into account, I am satisfied that the sentence imposed was the only proper one. The appeal is dismissed and the sentence of death confirmed.

M E KUMLEBEN
JUDGE OF APPEAL

VAN DEN HEEVER JA)
VAN COLLER AJA) Concur