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LL Case No 666/1991

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

TSIDISO LETO Appellant

and

THE STATE Respondent

CORAM: BOTHA, MILNE JJA et NICHOLAS AJA

HEARD: 7 MAY 1992

DELIVERED: 21 MAY 1992

JUDGMENT

BOTHA JA:

This appeal comes before us pursuant to the provisions of section 19(12) of the Criminal Law Amendment Act 107 of 1990. What falls to be considered is the sentence of death imposed upon the appellant in the Witwatersrand Local Division on 27 September 1989, for the crime of murder. The principles governing the enquiry are well settled. I proceed to apply them to the facts.

The appellant was charged and convicted together with two others, who were designated accused Nos 1 and 2 at the trial. The murder in question was committed by the appellant and accused Nos 1 and 2 in the course of robbing the deceased of his motor car. The following brief summary of the manner in which the deceased was killed and the appellant's complicity in the murder is gleaned from two extra-curial statements made by the appellant and duly admitted in evidence at the trial. The three robbers

encountered their victim at night in a street in Soweto, Johannesburg. The deceased's car was parked alongside the roadway and the deceased was asleep behind the steering wheel. The appellant and his co-accused, on observing this situation, conspired to rob the deceased of his car. They found that the doors of the car were locked. Accused No 1 and the appellant used stones to smash the right front window of the car. They opened the door and grabbed hold of the deceased, who resisted. Accused No 1 and the appellant took out knives and stabbed the deceased. They forced him onto the back seat of the car, while accused No 2 took up a position behind the steering wheel. The deceased was struggling to free himself, and accused No 2 was told to drive away, lest a night-watchman who was seen at a garage close by should observe what was happening. Accused No 2 did so, and after some distance brought the car to a

standstill. At that stage the deceased managed briefly to free himself, but he was grabbed and accused No 1 and the appellant again stabbed him. The appellant instructed accused No 2 to join in the stabbing. As a result of the assault the deceased fell to the ground. He was picked up and placed in the car, which was then driven to a place where there was an open area of veld next to the road. There the deceased was taken out of the car and dumped in the veld. The robbers left in his car.

At the place where the deceased had been dumped in the veld (which was about 8 kilometers away from where the appellant and his co-accused had come upon the parked car), the police later found the deceased's body, clad only in a pair of blood-stained underclothes. Blood stains and drag marks were discernible over a distance of about 10 meters, between the body and the road, and a large stone was

found near the body. A post-mortem examination revealed that the deceased had sustained some 22 stab wounds on the chest, shoulders and back, seven of which had penetrated the deceased's lungs. In addition, the deceased's skull had been smashed with a heavy, blunt object.

The facts recited above proclaim the aggravating factors in this case. It was not the only object of the assault upon the deceased to subdue and overpower him, in order to dispossess him of his motor car. When that had already been achieved, the assault was persisted in, and it was cruelly protracted over a considerable period of time, for no apparent purpose other than to kill. This was a particularly brutal and senseless murder.

With regard to mitigating circumstances, the matters raised in argument by counsel for the appellant require a prefatory reference to the case

of accused No 1. He was also sentenced to death for the murder of the deceased. An appeal against that sentence was heard by this Court on 23 August 1991, and in a judgment handed down on 2 September 1991 the appeal was dismissed. Like the present appellant, accused No 1 had at the trial denied all knowledge of the crimes with which he was charged. This Court considered the propriety of the death sentence in the case of accused No 1 on the basis of an extra-judicial confession which had been made by him. As is evident from what has been said above, a similar course is being followed now in respect of the present appellant and his extra-curial statements.

Counsel argued that the present appellant had played a lesser role in the commission of the murder than accused No 1 and that that feature constituted a mitigating factor in the appellant's favour. There is no substance in the argument. In

the appellant's statements there is no suggestion at all that the appellant and accused No 1 were anything but equal partners in crime. Nor is there any other evidence in the record to sustain the argument.

Counsel argued next that there was a reasonable possibility that the appellant was under the influence of liquor at the time when he took part in the murder, and in this regard relied on evidence given at the trial by accused No 2. There is, again, no substance in the argument. In this respect the position of the appellant is the same as that of accused No 1. In the latter's appeal this Court, agreeing with the finding of the trial Court, held that on all the available evidence liquor had played no significant role in the commission of the murder. Counsel was constrained to concede that that finding was unassailable and that it applied to the case of the appellant.

Finally, counsel relied on the fact that the appellant, who was 28 years of age at the time of the trial, has no previous convictions. This is inded a mitigating factor, and in this respect the appellant's position differs from that of accused No 1 (who had a previous conviction for the theft of a motor car). Counsel rightly stressed the prospect that the appellant, as a first offender, might be rehabilitated. However, that factor must be weighed up against the aggravating factors mentioned above. As was observed by NIENABER JA in S v Majoli and Others 1991 (2) SACR 532 (A) at 541e, with reference the prospect of rehabilitation of a first offender,

> "that factor, weighty as it undoubtedly is, must yield to considerations of retribution and deterrence when the horror of the crime, the callousness of the criminal, and the frequency of its recurrence generally,

> are such that the perceptions, sensibilities and interests of the community demand nothing less than the extreme penalty."

The present is such a case. This was a vicious and wanton killing of the deceased. It calls for vigorous condemnation by the Court, which cannot properly be expressed by imposing any penalty other than the death sentence.

The appeal is dismissed and the death sentence is confirmed.

A S BOTHA JA

MILNE JA

CONCUR

NICHOLAS AJA