IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

XOLANE MNGUNI..... Appellant

AND

THE STATE ..... Respondent

Coram: JOUBERT, EKSTEEN JJ A et KANNEMEYER, AJA

Heard: 25 February 1994

Delivered: 17 March 1994

J U D G M E N T

EKSTEEN, JA :

The appellant was convicted in the Wit-watersrand Local Division of the murder, on Friday 29 November 1991, of Matsosale William Aphane (the deceased) by throwing him out of a moving train at Doornfontein station. Despite the fact that the appellant was a first offender the learned trial judge came to the conclusion that the offence was of such a heinous nature that the death sentence was the only proper sentence to impose. Appellant was accordingly sentenced to death. The present appeal is brought in terms of section 316 A of Act 51 of 1977 against both the conviction and the

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sentence.

The conviction rested to a large extent on the evidence of one Trevor Jabulani Ndlovo. He told the court that for about a year prior to 29 November 1991 he had regularly boarded the 05h45 train from Kwezi station to Doornfontein on his way to work. The appellant had likewise been a regular commuter on the same train between the same two stations, so that, although Ndlovo had never spoken to the appellant, he knew him well by sight. The regular commuters on this train seem to have included a large number of Inkhata supporters and an equally large number of "Batha" or A.N.C. supporters. These two factions seem to have been in-

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clined to engage in physical violence against each other on the slightest pretext, so, as a matter of self-protection, they tended to travel in separate coaches. The appellant was a member of Inkhata and travelled in the Inkhata coach. Ndlovu was a Ndebele, and though not a member of Inkhata, he felt it safer to travel in the Inkhata coach, assuming that they would regard him as one of themselves.

On the day in question Ndlovu boarded the train as usual and sat down in one of the inkhata coaches. From the evidence it would appear that there were two interleading coaches in which Inkhata members travelled. One of these coaches

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was fully occupied by passengers whereas the coach in which Ndlovu travelled was not so full. It only had some 16-18 passengers. The passengers - particularly those in the full coach - were singing Inkhata songs and shouting slogans. The appellant walked about from the one coach to the other. At Park station a number of people got off the train, and when it moved off again to Doornfontein station, Ndlovu noticed a commotion in the other coach. It soon transpired that the appellant and another man were chasing the deceased. The deceased ran into the coach where Ndlovu was. When he got to the end of that coach, where Ndlovu was standing, he found that he could go no further as the door

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leading to the next coach was closed. The deceased was cornered, and appellant and his companion soon came up to him. Appellant was armed with something that looked like an umbrella but with a sharpened spike at the end. His companion had a knobkierie, with which he beat the deceased while the appellant stabbed him, shouting "kill the dog". Together they dragged the deceased to the door and pushed him out of the coach. The deceased hung on to an iron bar at the door while his feet dangled out of the coach. The appellant and his companion continued to beat the deceased, still shouting "kill the dog". Eventually they prised his fingers loose from the iron bar to which he was clinging and

pushed him under the wheels of the train as it was entering Doornfontein station. The mangled remains of the deceased were later picked up over a distance of some 30 metres.

The appellant and his companion spoke Zulu, whereas the deceased, who kept asking what he had done to deserved being killed like that, spoke Pedi. Ndlovu got off the train at Doornfontein. So did the appellant and his companion. The two of them jumped up and down on the platform, shouting, with their hands in the air, to express their joy at what had happened. Ndlovu waited on the platform until the police arrived. When enquiries were made by sergeant van Loggerenberg as to the

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presence of any witnesses of the gruesome events, most of the bystanders left, but Ndlovu, much to his credit, indicated his willingness to tell the police what he had seen. Sgt Van Loggerenberg thereupon took him to detective-sergeant Mokhola at Park station and there Ndlovu made a statement to Mokhola in which he indicated that, although he did not know the appellant by name, he knew him as a regular commuter on that particular train and would be able to point him out to the police. That Monday, 2 December, Mokhola went to Ndlovu's place of employment, and attempted to arrange with his employer to allow Ndlovu to point the deceased's assailant out to him the following morning -

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i e on Tuesday 3 December. His employer was not particularly eager to be of assistance but eventually agreed to let Ndlovu go on Wednesday 4 December. On that day Ndlovu boarded the train as usual, and when they got to Doorn-fontein station he pointed the appellant out to Mokhola who arrested him.

There is therefore no merit in Mr Ver-meulen's argument on behalf of the appellant, that the police were remiss in not looking for the appellant immediately after the incident. They obviously had no information as to who the assailant may have been until Ndlovu offered his assistance. By that time the appellant and his companion had left the station and there was no way of finding out where he had gone. Ndlovu told

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them that he was a regular commuter on that train and that he would be able to point him out any morning. Ndlovu - and presumably the other commuters too - did not work on the Saturday or Sunday, 30 November and 1 December. On Monday the 2nd Sergeant Mokhola tried to arrange for Ndlovu to identify the man, and the soonest this could be arranged was Wednesday 4 December.

Ndlovu was a single witness as to the events on the train and the identification of the appellant as one of the deceased's assailants. The trial court was therefore obliged to approach his evidence with due caution. Mr Vermeulen submitted that the trial court had failed to exercise

proper caution in that

(1) it had failed to consider whether Ndlovu had had an adequate opportunity of observing the appellant;

(2) it had failed to consider to what extent if any, Ndlovu's previous acquaintance with appellant offered a safeguard to his identification; and

(3) it had failed to consider that Ndlovu may have had a bias adverse to appellant. The court a quo was fully aware of the fact that Ndlovu was a single witness, and that his evidence should be approached with caution. Nevertheless it found him to have been "an impressive

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witness", "satisfactory in every respect", and "a very good witness, truthful, reliable, trustworthy". Ndlovu testified to having witnessed the assault on the deceased over a period of some three minutes, and the final ejectment of the deceased from the train occurred in the immediate vicinity of where Ndlovu was standing. His opportunity of observing the assailants was therefore, on the face of it, perfectly adequate. Moreover after the train had stopped at Doornfontein station, Ndlovu again saw the appellant and his companion jubilantly celebrating the success of their escapade by jumping up and down on the platform. Mr Vermeulen conceded that Ndlovu's evidence of identification had not

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been challenged in cross-examination in any way. Nor in fact had his evidence that he knew the appellant well by sight having commuted regularly with him in the same coach for about a year. It can therefore hardly be suggested that he could have been mistaken about the person he saw, and whom he later pointed out to the police.

So, too, there seems to me to be no merit in the suggestion that Ndlovu had been prompted by bias against the Inkhata movement to incriminate the appellant - one of its members -falsely. There was no evidence that he was baised against Inkhata in any way. He was not a member, but felt safe in travelling with them in

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the same coach, and was happy enough to allow the impression to be created that he was one of them. There was no suggestion that he bore any grudge against the appellant or the Inkhata movement. In fact appellant denies knowing Ndlovu or ever having noticed him on the train. No weight can be attached to the appellant's complaint that he has simply been implicated because he belonged to Inkhata and that "mense hou nie van Inkhata nie".

The appellant was not a good witness and his evidence was rejected by the trial court. He contradicted the State witnesses on a number of relatively unimportant issues. For example, when both Van Loggerenberg and Ndlovu deposed to

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the train stopping at platform 1 at Doornfontein, appellant insisted that it had stopped at platform 4. When both Mokhola and Ndlovu told the court that appellant had been arrested at the station while in the company of a woman, appellant insisted that he had been arrested in a street opposite Jazz Stores while in the company of two women. These are senseless contradictions which, for the purposes of his defence are neither here nor there. The gist of his defence, however, was that he had left the Inkhata coach at Park station and gone to another coach where a church service was being conducted. As he boarded this coach another man, armed with a knobkierie, also got in. This man

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walked up to a young man and began hitting him. The young man thereupon ran to a door, opened it, and jumped out. This happened shortly after they had left Park station and some time before they got to Doornfontein. Van Loggerenberg, however told the court that no bodies were found between Park station and Doornfontein on that day other than the remains of the deceased. In argument it was suggested that the young man that appellant had spoken about may have survived his fall from the speeding train, and walked away. This whole story seems inherently improbable and was rejected by the trial court as not being reasonably possibly true. In any event, whatever one may say about

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this story, it does not meet the credible and reliable evidence of Ndlovu that he saw the appellant and his companion assaulting the deceased and pushing him off the train. In the absence of any misdirection the strong findings of credibility by the trial court cannot be overlooked, and must be accepted. It follows, therefore, that the conviction must stand.

In considering sentence the trial court found the following to be mitigating factors:

(4) that the appellant was 28 years old;

(5) that he had passed standard 3 at school;

(6) that he was a first offender;

(7) that he had a stable work-record; and

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(e) that he had a potential for rehabilitation. To my mind (a) and (b) cannot in themselves be regarded as mitigating factors. At best they are neutral. (a) and (c) taken together, however, could constitute a mitigating factor. (e) does not carry a great deal of weight standing alone. It is perhaps a necessary corrolary to any first offender. The only two mitigating factors therefore are (a) and (c) taken together, and (d).

The aggravating factors are obvious. The deceased was "a helpless, unarmed victim who tried to run away from his attackers". He was cornered and beaten before being callously pushed

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out of the speeding train under its wheels. The killing was brutal, cruel and inhuman. The appellant and his companion showed no remorse, but rather gloated over their infamous deed.

The trial court also found that the killing of passengers on commuter trains is an almost daily occurrence, and that it is extremely rare for the killers to be apprehended because of the fear of death being instilled into potential witnesses. This tends to give such killers a licence to kill and brings the administration of justice into disrepute. These findings are amply borne out by the evidence of Ndlovu and Mokhola.

Mr Vermeulen submitted that the crime must be seen to have been politically motivated and the appellant as a simple unsophisticated person emotionally inflamed by political agitation. These submissions, however, find no support from the evidence. The passengers in the two inter-leading coaches in which Ndlovu and appellant were travelling were overwhelming Inkhata in their affiliation. They were singing Inkhata songs and shouting Inkhata slogans. The appellant, however, was accustomed to travelling in these coaches where the singing of these songs was a daily occurrence. He was 27 years old; had had a measure of education; and had been gainfully employed in the city

for about a year at least. He can therefore hardly be seen as a simple unsophisticated person. In any event there is no evidence to that effect, nor did appellant suggest that the offence was politically inspired. All that the evidence discloses is that the deceased spoke Pedi while the appellant spoke Zulu. The evidence also shows that the deceased did not know why he was being assaulted in this way. There is no suggestion of any provocation. The attack on the deceased would therefore appear to have been unprovoked, sustained, and cruel.

In the circumstances of this case where the lives of commuters are persistenly threatened

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by remoreseless attackers such as the appellant and his companion, and where the appellant was quite prepared to murder his victim in the presence of two coachloads of commuters, and to send him to such a gruesome death, the interests of society must outweigh the personal considerations of the offender. The retributive aspects of punishment must therefore weigh heavily with the court. The appellant's deed is so evil and so shocking as to call for extreme retribution and the death sentence seems to me to be the only proper sentence in this case.

The appeal is therefore dismissed.

J.P.G. EKSTEEN, JA

JOUBERT, JA)
KANNEMEYER, AJA) concur