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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

PETER SMITH — FIRST APPELLANT

BONGANI MJWARA — SECOND APPELLANT

and

THE STATE — RESPONDENT

CORAM : HEFER, VIVIER JJA et NICHOLAS AJA

HEARD : 7 NOVEMBER 1994

DELIVERED : 17 NOVEMBER 1994.

# JUDGMENT

HEFER JA/...

HEFER JA:

The appellants were convicted of murder and sentenced to death. Their appeals in terms of sec 316A of the Criminal Procedure Act 51 of 1977 as amended are directed at the convictions and sentences. Two co-accused who were arraigned and convicted on the same charge did not receive the death sentence and are not parties to the appeals.

A brief resume of the facts appears in the State's summary of substantial facts which is to the following effect:

" 1 The accused and the deceased were inmates of Waterval Prison, Utrecht. All the accused were members of the '28' gang.
2. A few days prior to the day in question there had been an attack by the members of the ' 26' gang on a member of the '28' gang. [It emerged at the trial that several members of the latter gang, including the appellants, were attacked.]
3. On the day in question the accused,

deceased and others were in the Hospital Control Yard of the Prison.

4. The four accused confronted the deceased in cell no. 1, where they proceeded to assault him, stabbing him with sharpened metal spoons. Each of the accused was armed with such a spoon, and each took part in stabbing the deceased.

5. The deceased sustained 37 stab wounds and the cause of death was found to be consistent with exsanguination following multiple penetrating wounds."

At the trial the appellants and their co-accused conducted their own defence after declining to avail themselves of the services of pro deo counsel. In cross-examining the State witnesses they did not seriously dispute that four prisoners attacked the deceased in cell No 1 on the day in question nor that the latter was repeatedly stabbed with sharpened metal spoons and died of his injuries later that day after his removal to hospital. What was in issue was the identity of

his assailants. It was suggested to the State witnesses in cross-examination that the accused were all locked up in their own cells at the relevant time and could not possibly have been involved in the assault in cell No 1. But none of the accused saw fit to confirm the suggestion by testifying under oath. The result was that they were convicted on the uncontradicted evidence of the State witnesses,

I have no doubt that the appellants were rightly convicted. The first State witness, sergeant Mjiyako, actually saw them stabbing the deceased in cell No 1 and shortly afterwards three other warders who rushed to the scene when Mjiyako called for assistance observed them holding blood-stained sharpened spoons in their similarly stained hands in the corridor near the door leading to cell No 1. They were conducted to their own cells

where they surrendered the spoons. This was the uncontradicted evidence of the State witnesses.

Admittedly, as counsel who represented the appellants in this court indicated, there are discrepancies in the evidence of the State witnesses but of these the trial court was well aware and yet found the evidence to be credible. I have not been persuaded that there is any reason for coming to a different conclusion. Admittedly too the trial court did not specifically deal with the reliability of sergeant Mjiyako's identification of the assailants whilst observing the attack through the window of cell No 1. But, taking into account that the witness knew the appellants and their co-accused well, and that the incident occurred in broad daylight at a distance of no more than a few metres, it is obvious that he required only a glance to recognise them before he

went for assistance. And, of course, his identification receives very material support from the other warders who arrived on the scene shortly afterwards. In these circumstances there is no room for an argument based on the possibility of an honest but erroneous identification.

I turn to consider the sentence.

In terms of sec 322 (2A) (6) read with sec 277(2) of the Criminal Procedure Act as amended this court is enjoined to consider the propriety of the death sentence in any particular case with due regard to the mitigating and aggravating factors found to be present. In his judgment on sentence in the instant case the trial judge refers by way of mitigation to the fact that the deceased was killed "in the course of gang warfare which is apparently endemic in prisons" and that the appellants had been attacked earlier by the gang to

which the deceased belonged and to the fact that "they caused no further trouble within the prison" after the murder.

Despite the lack of direct evidence to that effect the conclusion that the deceased was killed in the course of "gang warfare" is the only reasonable one on the available information. He belonged to the 26 gang whose members had attacked the appellants and other members of the 28 gang the previous week in A section of the prison. The appellants were high ranking "officers" in their gang and in order to avoid reprisals for the attack they were transferred to the hospital section. To be isolated from their companions did not please them in the least but the prison authorities refused to budge. How the deceased - an elderly man who served as a cook in the kitchen - came to their attention is not known. But they were aware

of his presence and of his membership of the 26 gang for, in what the authorities regarded as a desperate attempt to achieve their return to A section, they complained that he might poison them. In the absence of evidence one can only speculate on the reason for the killing. He might have been killed in vengeance or retaliation for the previous attack or as a result of a suspicion that he might harm them or in an attempt to create a situation which would bring about their return to A section or simply because he was a member of a rival gang and an easy victim.

What is abundantly clear, however, is that this is not a case (eg like S v Masuku and Others 1985(3) SA 908 (A)) where murder was committed by gang members of subordinate rank on the instructions of their superiors. The appellants were no underlings; as mentioned

earlier they were high ranking "officers" (indeed "generals") in the 28 gang. They were not called upon to follow orders or face the consequences but were free to take their own decisions. It must be accepted that they personally took the decision to terminate the deceased's life and carefully planned his demise. Having done so they contrived somehow to isolate him in cell No 1 (a hospital ward for prisoners) and set about slaying him with cold deliberation. That they may have been and probably were influenced by the culture of violence which permeates life in prison (cf S v Bradbury 1967(1) SA 387 (A) at 404H; S v Monqesi en Andere 1981(3) SA 204 (A) at 212 B-C) is in all the circumstances of the case not a weighty consideration. Taking into account the obvious brutality of the murder, which is evidenced by the fact that they inflicted no less than 37

penetrating and incised wounds on the body of their victim, I agree with the trial court that the aggravating factors far outweigh the mitigating ones.

In order to decide whether the death sentence is the only proper one reference must further be made to the appellants' lists of previous convictions. First appellant's record commences with a conviction during 1965 of housebreaking and theft. Since then no less than 13 similar convictions are recorded. In addition there are 3 convictions of theft, 4 of escaping from custody, 1 of assault (committed in gaol), 1 of assault with intent to do grievous bodily harm, 2 of robbery with aggravating circumstances, 1 of the unlawful possession of a firearm and finally one of murder. Prior to 1970 he was sentenced to varying periods of imprisonment In 1973 to

imprisonment for the prevention of crime. During 1975 he was declared an habitual criminal. The robberies and the murder referred to earlier were committed after his release on parole. He was sentenced to death for the murder but on appeal to this court the sentence was reduced to one of life

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imprisonment. This occurred less than a year before he committed the present murder. Second appellant has an equally lamentable record of convictions for housebreaking and theft (5), theft (3), escaping from custody (2), assault with intent to do grievous bodily harm (2), (one of which was committed in prison), robbery (1). During 1991 he was convicted of a murder which he committed in gaol while serving a 10 year sentence for robbery. For that murder he was sentenced during February 1991 to 12 years' imprisonment. During April 1992

he was again convicted of assault with intent to do

grievous bodily harm committed with a sharp instrument and declared an habitual criminal. Three months later he committed the present murder.

Both the appellants are obviously hardened criminals and beyond redemption. They pose a threat to society generally and to fellow prisoners in particular. The only proper way to deal with them is to impose the death sentence. However, since the constitutional validity of that sentence is presently an issue in the Constitutional Court, I propose making an order similar to the one made in S v Makwanyane en 'n Ander 1994(2) SACR 159 (A) at 162e-i. The following order is made:

(a) The appeals against the convictions are dismissed.

(b) The appeals against the sentences

are postponed to a date to be arranged by the registrar in consultation with the Chief Justice.

J J F HEFER JA

VIVIER JA )
CONCUR
NICHOLAS AJA)