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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SNOBOYI MHLANGANO HLONGWANE ............... APPELLANT

and

THE STATE ................................................................ RESPONDENT

CORAM: SMALBERGER, KUMLEBEN et HARMS JJA HEARD: 7 MARCH 1994 DELIVERED: 15 MARCH 1994

JUDGMENT

KUMLEBEN JA/...

KUMLEBEN JA:

The appellant was one of two accused charged in the Witwatersrand Local Division of the Supreme Court with murder, theft, attempted murder and two further counts relating to the unlawful possession of arms and ammunition. The appellant admitted killing the deceased but said that it was not intended. A plea of not guilty was entered. This notwithstanding, he was found guilty of murder, the degree of intent being dolus directus. For this offence he was sentenced to death. (He was also found guilty on the last mentioned two counts.) The appeal is restricted to the sentence on the murder charge.

The facts giving rise to this indictment appear from the evidence of the main State witness, Detective-Sergeant Estelle Enslin. On 29 July 1991 she and the deceased, Sergeant van Niekerk, were on duty and operating together. They were in a motor

car when another vehicle aroused their suspicion. They followed it and ordered it to stop. Its driver complied, only to pull off as the deceased alighted. A chase ensued until traffic forced the front vehicle to stop. The deceased parked his car on the verge of the road not far from the other stationary one. He went to its occupants and identified himself as a policeman. They were the driver (the second accused) with a passenger next to him (Joseph) and another on the rear seat (the appellant). The deceased asked Joseph to accompany him to open the boot of that car which was done. Detective-Sergeant Enslin noticed that the second accused appeared to be about to drive off, so she alighted and went towards them. She heard about three shots being fired and instinctively retreated for cover behind the police car. She could not see who had fired the shots. When she stood up she saw that Joseph had closed the

boot. He ran back to his seat next to the driver as the latter also seated himself behind the wheel. She never saw the appellant leave the car. It drove off. She found the deceased lying on his back in the middle of the road. His firearm had been drawn from its holster and was lying under his body. He had been fatally shot.

The second accused was also found guilty of murder (dolus eventualis) with reliance upon the doctrine of common purpose. His evidence was unsatisfactory in many respects, particularly when attempting to exonerate himself. Nevertheless in one critical respect the court found his testimony to be reliable and confirmed by other evidence. I refer to what he said on how the fatal shot came to be discharged. In evidence he explained that when one of the shots was fired, the deceased fell against the vehicle and to the ground. It was then, as he

attempted to crawl away, that the appellant shot him. The evidence of the district surgeon was that the deceased's body had two bullet wounds. The first, non-fatal, was in the chest. This, no doubt, caused him to fall. The trajectory of the fatal shot could be determined from the entrance and exit wounds: it was from the middle of the back upwards to mid-chest. It was thus convincingly consistent with the evidence of the second accused that the deceased was shot when in a crawling position. The appellant failed to testify and this evidence was therefore not contradicted on oath. Nor was this finding challenged on appeal.

Mr van Eck relied upon, and stressed, two circumstances which he submitted ought to be regarded as mitigatory. The first was that the appellant had shown remorse. This, counsel said, was to be inferred from: his plea of guilty (though in fact it was

equivocal and inaccurate: "I plead guilty but I had no intention"); and the fact that from the time of the arrest he co-operated with the police and complied with his bail conditions. I have some doubt whether this is sufficient proof of real contrition. But, in any event, in the context of this crime such remorse cannot play a significant role as an mitigating circumstance. Secondly, counsel drew attention to the conclusion of the trial court that the appellant ought to be regarded as a first offender. (His two previous convictions were, relatively speaking, minor ones committed a long time ago.) What can be regarded as a clean record is indeed a mitigating factor and would ordinarily indicate that the appellant is capable of rehabilitation and not an inherently vicious character.

However, the countervailing aggravating features override this consideration and oblige one to lay stress on the deterrent and retributive requirements of punishment. Counsel could suggest no plausible or clearly discernible motive for the killing. It would seem to have been an act of blind vengeance. It was perpetrated on an injured and defenceless policeman involved in the execution of his official duties. In the circumstances one is obliged to conclude - as did the trial court after a comprehensive consideration of the question of sentence - that the death sentence was the only proper one. (Cf S v Munqati 1992(1) SACR 550(A) 5561.)

The appeal is dismissed and the

sentence on the murder charge is confirmed.

M E KUMLEBEN
JUDGE OF APPEAL

SMALBERGER JA
- Concur
HARMS JA