/CCC

CASE NO 356/93
372/93

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

MELVIN SANJITH — FIRST APPELLANT

BENJAMIN MOODLEY — SECOND APPELLANT

and

THE STATE — RESPONDENT

CORAM: VAN HEERDEN, NESTADT et NIENABER JJA DATE

HEARD: 13 MAY 1994 DATE DELIVERED: 30 MAY 1994

J U D G M E N T

NESTADT, JA:

In the early hours of the morning of 8 September 1990 the driver of a taxi operating in the

Durban area was abducted by his passengers. Having thereafter killed him, they stole his vehicle. Some five months later and in particular on the night of 14 February 1991 the driver of a van was hijacked. He was driven to a sugar-cane field near Tongaat where he was fatally shot. His vehicle and other personal possessions were taken from him,

These two incidents led to the appellants standing trial in the Durban and Coast Local Division on four counts, namely the murder and robbery of the first victim (counts 1 and 2 respectively) and the murder and robbery of the second victim (counts 3 and 4 respectively). The matter came before LEVINSOHN J sitting with assessors. The appellants were convicted on all four counts. In respect of the two robberies (with aggravating circumstances) they were each

sentenced to ten years imprisonment. The first appellant was sentenced to twenty years imprisonment for the first murder (count 1). However, the second appellant was sentenced to death on this count. And in respect of the second murder (count 3) the death sentence was imposed on both appellants. This appeal is against the death sentences respectively imposed on the appellants. The other sentences (of imprisonment) are not in issue. Nevertheless it will in due course be necessary to refer to them.

We have to determine whether, having regard to the presence or absence of any mitigating or aggravating factors, as also the purposes of punishment, the death sentence is in each case the only proper sentence. It is convenient to commence with those imposed on the second appellant and in particular his appeal arising

from the first murder. He was at the time 23 years of age. So he was relatively youthful. He had virtually no schooling and comes from an impoverished background. Also in his favour is that he had no previous convictions for crimes involving violence. This, coupled with his good work record, led the trial judge to conclude that "there is some prospect that he may be rehabilitated". And, so the learned judge further found, it was possible that he was at the time under the influence of alcohol or drugs though not to any great degree.

On the other hand, however, there are certain weighty aggravating factors which must be taken into account. They are described by the court a quo as follows:

> "The deceased...was going about his business...as a taxi driver. Taxi drivers work through the night in order to render a service to the public, and

> they are particularly vulnerable to attacks like this. The manner in which the crime...was committed was particularly brutal and heinous".

There is simple justification for this conclusion. During the journey the deceased (a married man aged 40) was overpowered. This was achieved by the second appellant suddenly producing a piece of wire and tying it round the deceased's neck. The first appellant's elder brother, one Ashwin (who was originally an accused but who absconded before the trial commenced) took control of the car. When the deceased attempted to grab hold of the steering wheel, the second appellant, who was armed with a knife, stabbed him in the back. Ashwin brought the car to a halt. He and the second appellant pulled the deceased out of it. They then stabbed him several times. They placed him in the boot of the car. He was still alive. The journey

continued. Near a river the deceased was taken out of the car. Not only did the second appellant again stab him, but he also gave his knife to one of the other passengers (he was the main witness for the State on this count) and directed him to also stab the deceased. Eventually the deceased was thrown into the river. As his body drifted away stones were thrown at it. When it was later recovered, the deceased's ankles were found to have been tied together. According to the post-mortem report the cause of death was "multiple incisions" of the head and chest.

What has been stated makes this case an exceptionally serious one. It is I think a more extreme case than S vs Nqcobo 1992(2) SACR 515(A) (which also involved the murder of a taxi driver in order to rob him but where, because the appellant was

a simple person not ordinarily given to violence the court, by a majority, set aside the death sentence). In casu the position is somewhat different. The deceased, who was of course an innocent, helpless victim, was subjected to a sustained and vicious attack. His was a slow, drawn out and obviously agonising death. The second appellant played a leading role in what happened. Clearly he acted with dolus directus. The deceased was shown no mercy. He was killed in order to obviate any possibility of him identifying his assailants. It seems to me that on a conspectus of the matter and having regard to the deterrent and retributive objects of punishment, one is obliged, despite the mitigating factors referred to, to conclude that the death sentence is the only proper sentence.

I turn to a consideration of the second

appellant's appeal against the death sentence imposed for the second murder. There were no eye-witnesses to the crime. Nor did second appellant testify. The facts on which his appeal must be decided appear from certain extra-curial but admissible statements which the second appellant made to the police subsequent to his arrest. They disclose the following. On the night in question he, a certain Errol, Ashwin, the first appellant and one Salim were, at Errol's instance, bent on stealing a van. They were driving on the freeway to Tongaat when they caught up with a van which Errol said he wanted. Errol, who was driving, caused the driver of the van to stop. At gun point he forced the driver into their car which, at Errol's command, the second appellant then drove to a sugar-cane field. Errol had given the firearm to Ashwin and told him to "make do with the

driver". At the plantation Ashwin, Salim and the first appellant took the driver out of the car to a spot about 25 to 30 metres away. The second appellant remained seated in the car. But he could see that the first appellant and Salim bound the driver's hands together with a rope. The second appellant says that what then happened was that first appellant "fired a shot and I saw the van driver running. After that I heard two more shots and I could not see the van driver as there was a bend. . .". Thereafter they left the scene. The post-mortem report states that the deceased died as a result of a bullet wound of the head (causing laceration of the brain and extensive intracranial and intracerebral haemorrhage).

It was mainly on the basis of these admissions that the trial court found that the second appellant was

"present and participated in the robbery and the murder of the second deceased...It is safe to infer beyond a reasonable doubt that (he and the first appellant) acted in common purpose with certain other persons who are not before the Court". As I have said, there is no appeal against the conviction. It was argued, however, on behalf of the second appellant, that on the evidence referred to, his actual participation in the crime was relatively minor and that the death sentence was therefore not appropriate. I am unable to agree. True, one is bound by the second appellant's version that it was not he who shot the deceased; indeed that when this happened he was in the car. Even so, I do not think his moral blameworthiness is materially reduced by this consideration. The fact that an accused who is a party to a common purpose to kill is not the one who

fires the fatal shot, does not by itself preclude the imposition of the death sentence (S vs Sithebe 1992(1) SACR 347(A) at 355 e). As my Brother Nienaber points out in that case, it remains a question of degree (see too S vs N 1992(1) SACR 499 (TkA)). Here it was the second appellant who drove the deceased to the plantation. This he did after Ashwin had been given Errol's firearm and told to "make do with the driver". The inference is unavoidable, and the court a quo so found, that this meant and was understood by the second appellant (and the others) to mean that the driver was to be killed. Otherwise why not just take the van and leave the driver on the side of the road? Plainly, he (like the deceased in the first murder) had to be prevented from being able to identify his assailants (by for example noting the registration number of their

car). The second appellant cannot profit from the evidence given in mitigation by a social worker that he told her that "he was afraid and he told them...not to use the gun and not to do anything because he felt that the deceased was very young". It constitutes a hearsay assertion which, as I have indicated, the second appellant did not confirm in evidence. Bear in mind also that after the murder, the second appellant with knowledge that the driver had been killed, used the deceased's credit-card to make certain purchases for himself. So he fully associated himself with the crime. It too was a particularly reprehensible and ruthless one. The defenceless deceased (who according to the first appellant had pleaded for his life) was simply executed. This type of offence is all too prevalent. And there is the further aggravating factor

arising from the second appellant's participation in the previous murder. Though he had not yet been convicted, it could be taken into account (S vs S 1988(1) SA 120(A) at 123 E-H; S vs Mvuleni 1992(2) SACR 89(A) at 94 i). It confirms his propensity for violence. In my opinion, the interests of society require the imposition of the death penalty on the second appellant for the second murder as well.

There are two further matters that must be referred to before concluding the discussion of the second appellant's appeal. The one is that we were informed during argument that subsequent to the appellants' trial, Ashwin was re-arrested, tried and convicted on the same four counts as appellants were. In his case, however, the death sentence was not imposed. He was apparently sentenced to an effective

period of 25 years imprisonment. While uniformity of sentence is desirable (S vs Marx 1989(1) SA 222(A) at 225 B), I do not believe we can, in the exercise of our discretion, be influenced by the sentence passed on Ashwin. We do not know what the facts were on which he was sentenced; in particular what role he was proved to have played in the two murders. Nor do we know what his personal circumstances were. In any event, I remain convinced that in the case of the second appellant, the death sentences are the only appropriate sentences.

The other issue concerning the second appellant arises from the new Constitution of the Republic of South Africa 1993 (Act 200 of 1993). When the appeal was heard, the additional argument was advanced on behalf of the second appellant (and the

first appellant) that the death penalty, even if imposed prior to the coining into operation of the Act on 17 April 1994, is in conflict with certain of its provisions; and that it is therefore unconstitutional. In a number of recent cases this Court has held that it should not decide this issue and that in matters of this kind (ie when the death sentence is not set aside) the appeal will have to be postponed pending the resolution of the problem by the Constitutional Court. An order to this effect will therefore be made (in relation to the second appellant's appeal). As will be seen, the point does not arise as far as the first appellant is concerned.

His appeal (in respect of the second murder) must naturally have as its foundation what has been said about the aggravating circumstances of that crime. In

his case too the seriousness of his actions is compounded by the fact of him having been a party to the previous murder. A further feature that counts against the first appellant is the degree of his participation. Of course, the second appellant's statement that the first appellant fired at the deceased is not admissible against the first appellant. But the first appellant himself admitted (in a statement accompanying a pointing out he made to the police) that, having tied the deceased's hands together (as will appear it was actually his legs), he "fired a shot at the deceased but missed him". (He goes on to say that it was Ashwin who having obtained the firearm from Salim then shot the deceased.) The inference to be drawn from the terms of this admission is that the first appellant intended (and attempted) to kill the deceased. In evidence in

mitigation, however, he sought to negative this. He testified that "the shot that went off was accidental whilst I was trying to pull the gun away from Salim...I didn't want them to kill the man". Though the trial judge does not specifically deal with this evidence, it can safely be assumed that he rejected it. The first appellant tendered no explanation for what is essentially a different version to that contained in his pointing-out statement. His original allegation (advanced during a trial within the trial concerning the admissibility thereof) that the police officer who took the statement had put words in his mouth, was found to be a "blatant lie". And in dismissing his alibi defence, LEVINSOHN J categorised the first appellant as "a thoroughly untruthful witness".

What has been said puts the first appellant

close to the line beyond which one would feel compelled to conclude that the death sentence is imperatively called for. Yet I shrink from deciding that it has been reached. There are a number of reasons for my hesitation. Despite the active role he played and though he admitted that he had been a party to the plan to hijack a motorist, the actual killing of the deceased was not his idea. Secondly, having been born on 12 July 1970, he was not yet 21 when the second murder was committed. Indeed he was not much more than a teenager. The tendency of our courts is, save in exceptional cases, not to impose the death sentence on persons of this age (S vs Dlamini 1991(2) SACR 655(A) at 666-8). They are prima facie regarded as emotionally and intellectually immature (S vs Cotton 1992(1) SACR 531(A) at 536 c). There is no reason to think that the

first appellant had a maturity beyond his years. He only left school at the end of 1989 (albeit with a matric). Thirdly, so LEVINSOHN J held, it was reasonably possible that in acting as he did he was "strongly influenced by his brother Ashwin" (who, on the evidence, played a leading role in the commission of both murders). Support for the finding that the first appellant was under the influence of his brother, was . the father's evidence that Ashwin was a bully and that the first appellant was "scared" of him. The first appellant himself testified that it was on the command. of Ashwin that he bound the deceased's legs together. He complied because "I feared him". There was also the testimony of the first appellant's employer that the first appellant was "submissive" (and, I should add, "well-behaved"). Moreover, a clinical psychologist

described the first appellant as "timid" and below average in intelligence. Perhaps the latter view was not well-founded, but I see no reason not to accept the former. And fourthly there is the first appellant's evidence that on the night in question he was under the influence of dagga. However unsatisfactory he was as a witness and though the evidence in question was only given under cross-examination, this further mitigating factor cannot be discarded.

The distinction between the two appellants as far as sentence for the second murder is concerned may be a fine one. But the cumulative effect of the factors I have cited is such that, unlike in the case of the second appellant, I do not think that the death sentence should be imposed on the first appellant. In my opinion, the deterrent and retributive purposes of

punishment would adequately be served by the imposition of a lengthy period of imprisonment. In have in mind the same sentence that was imposed on the first appellant in respect of the first murder, namely twenty years imprisonment. But this must, to a large extent, run concurrently with such other sentence (and the ones of ten years each for the two robberies). The total period of imprisonment should not exceed 25 years. Anything more would in this case be excessive (cf S vs Mokgethi en Andere 1990(1) SA 32(A) at 48 B).

This raises a problem. LEVINSOHN J did not direct (in terms of sec 280(2) of the Criminal Procedure Act) that the sentences of imprisonment he imposed on the first appellant should run concurrently. The result is that the first appellant was on counts 1, 2 and 4 sentenced to an effective 40 years imprisonment.

Such a sentence cannot stand. However, there being no appeal against these sentences, it is not possible for this Court to interfere. Nor would sec 298 of the Act (which provides for a wrong sentence passed by mistake to be amended), apply. Even if the trial judge's omission to apply sec 280(2) was per incuriam, it would now be too late to have resort to this remedy. What the first appellant can do is to apply to the trial judge for leave to appeal against the other sentences and in the event of its refusal to petition the Chief Justice. Obviously such application(s) will have to seek condonation for being out of time. The difficulty is what to do in the meantime? It seems to me that the course to adopt is to substitute a period of twenty years imprisonment for the death sentence on count 3 and to order that it run concurrently with the

twenty year sentence on count 1. The extent to which the remaining two periods of imprisonment of ten years each (on counts 2 and 4) should be ordered to run concurrently with the twenty years on counts 1 and 3, will be left over for later decision by the court hearing the appeal, should the first appellant appeal against such other sentences.

The result is the following:

(1) The first appellant's appeal succeeds. The death sentence imposed on him in respect of count 3 is set aside. There is substituted a period of imprisonment of twenty years. This sentence is to run concurrently with the twenty year sentence on count 1.

(2) The appeal of the second appellant is adjourned to a date to be determined by the Registrar of the

Court pending a decision of the Constitutional Court on whether" having regard also to the provisions of sec 241(8) of the Constitution the confirmation of the death sentences would be constitutional.

NESTADT, JA

VAN HEERDEN, JA )
) CONCUR
NIENABER, JA )