145/92

Case No 207/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MSAWENKOSI EDWARD GCABA Appellant

and

THE STATE Respondent

CORAM : HEFER, VIVIER, JJA et VAN COLLER AJA.

HEARD : 3 SEPTEMBER 1992.

DELIVERED : 15 SEPTEMBER 1992.

J U D G M E N T

HEFER JA/

This appeal comes to us in terms of sec 316 A (1) of the Criminal Procedure Act. It is directed at the appellant's conviction of murder in the Durban and Coast Local Division and the sentence of death which the trial judge imposed.

The charge arose from an incident at the Charles Hlengwa High School in the Umbumbulu area on 22 May 1990. That morning two armed men burst into a classroom occupied by the standard 9 class. At point-blank range one of them fired three shots with a handgun at one of the pupils, Henry Cele. None of the bullets struck him. In the ensuing confusion Cele managed to run to the door where he encountered other men who stabbed at him with knives. He escaped them as well and ran into the nearby bush. His assailants, including the two who had entered the room, pursued him. Further shots were heard and later that day his body was found in the bush about

300 metres from the school. He had been stabbed and shot to death.

The issue at the trial was whether the appellant was the man who fired at Cele in the classroom. Since that man joined in Cele's pursuit into the bush and the concerted action which caused his death the appellant's guilt would be established if it could be proved that he was the man in question. Two State witnesses affirmed, but the appellant denied, in evidence that he was that man. The trial court accepted the evidence of the State witnesses. Hence the conviction.

In this court appellant's counsel challenged the acceptance by the trial court of the evidence of the State witnesses, Monica Makhupulo and Hlengiwe Mthembu, and the latter's brother, Boyo Mthembu, whom the trial judge called as a witness. It is not necessary to deal with all the details of

the argument presented to us for, as appellant's counsel rightly submitted, the crux of the dispute about the identity of the man who fired on Cele was, and still is, Monica and Hlengiwe's assertion that the appellant was known to them. I say this in view of the well-known requirement in cases where the identity of the perpetrator of an offence is an issue, that the evidence of an identifying witness must not only be truthful, but reliable as well in the sense that the court must be convinced beyond reasonable doubt of the reliability of his identification, in order to eliminate the possibility of an honest mistake. The facts of the present case are such that there is no reasonable possibility of an honest mistake on the part of the witnesses if their assertion that they knew the appellant is found to be true.

Monica and Hlengiwe both testified that

they knew the appellant as KK and had come to know him (although he did not know them) at regular meetings of the Amaqabanes (members or sympathisers of the African National Congress) which they attended. In addition Hlengiwe claimed to have seen him on several occasions at her own home where he used to go in order to send her brother Boyo to his girlfriend, Mompumelelo Gudazi, who lived in a neighbouring kraal. In his evidence the appellant denied that he ever attended meetings of the Amaqabanes and, whilst admitting that his girlfriend was indeed Miss Gudazi, further denied that he had ever sent Boyo to her or had ever been to Boyo's (and Hlengiwe's) house.

Appellant's counsel directed his challenge of the trial court's findings entirely at the credibility of the State witnesses; neither in his written heads of argument nor in his address did he

try and meet the trial court's criticism of the appellant's own evidence. This being the case there is no need for a discussion of the demerits of the appellant as a witness. Suffice it to say that his counsel exercised a wise discretion in not pressing his evidence upon us. Counsel must have been as surprised as everyone else at the trial when, in answer to a question from the presiding judge, the appellant denied that he had ever attended meetings of the Amaqabanes since Monica or Hlengiwe's evidence that he used to attend those meetings was never questioned in cross-examination. The denial of his presence was clearly a desperate attempt at distancing himself as far as possible from the State witnesses and thus at casting doubt upon the reliability of their identification.

The rejection of the appellant's evidence does, of course, not by itself justify the acceptance

of the State witnesses' evidence. Nor is this how the trial court viewed the matter. Monica and Hlengiwe's evidence was carefully scrutinised. They impressed the trial court with their candour and impartiality and were ultimately found to be excellent witnesses. The criticism which appellant's counsel levelled at their evidence in the trial court was repeated in this court. The trial court's judgment did not effect their credibility and I have not been persuaded to take a different view. What I find of particular importance is that there was no suggestion, either at the trial or in this court, that Monica and Hlengiwe did not go to the Amaqabane meetings. There is no reason for disbelieving them in this regard and, taking into account what has been said earlier about the appellant's own attendance of the meetings, it is hardly possible to conceive of any reason for disbelieving them when they say that

disbelieving them when they say that they saw and got to know him there. (For the sake of completeness I may say that Boyo Mthembu was clearly not as impressive a witness as his sister. The trial court nevertheless believed him and we have no reason to differ. His evidence supports not only that of the other two State witnesses to the effect that the appellant attended the Amaqabane meetings, but also that of his sister to the effect that the appellant used to go to their house when he wanted to see his girlfriend.)

Since the acceptance by the trial court of the evidence of the identifying witnesses cannot be faulted the appeal against the conviction must fail.

What remains is the sentence. In view of the amended provisions of secs 277(2) and 322(2A) (b) of the Criminal Procedure Act this court is enjoined to consider the propriety of the death sentence, as

the only proper one, in accordance with its own assessment of any mitigating and aggravating factors. In his judgment on sentence the trial judge said:

> "Mr Mkhize submitted rightly that the main mitigating factor in favour of the accused is the fact that he is a first offender. That being so there is a prospect that he may, with a long term of imprisonment, be rehabilitated. He is unable with any conviction to refer me to any other mitigating factors. He faintly submitted that I had to take into account the unrest in the area at the time and the age of the accused.
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> There was some evidence of unrest in the area at the time but there is nothing to suggest that the murder of the deceased had anything to do with such unrest, whether tribal, political or otherwise. The two State eyewitnesses and the youngster called by the Court all attended meetings of the Amaqabane or ANC in the area and the Court found in its judgment that the accused also attended these meetings and played a leading role. There is, however, no evidence before me to suggest that the deceased was a member of a rival political organisation. He may, for all I know, have been a member of the ANC who was, for reasons of discipline, executed. Because of the accused's refusal to testify after conviction I have been left totally in the dark and I am not prepared to, nor am I

entitled to, speculate whether the deceased's death was politically motivated or not. On his own evidence the accused is at least twenty-three (23) years of age. There is evidence that he is in fact older and that his age is twenty-seven (27). Youth is therefore not a factor upon which can be relied.

The aggravating factors which I have found to have been present are the following:

The murder of the deceased was premeditated. It was intended to be done in public and it was apparently to achieve the maximum impact for whatever reason the assassins had in mind. It was carried out in cold blood. The classroom was surrounded. It was ten o'clock in the morning and the accused walked into the classroom full of Standard Nine pupils writing a test straight to where the deceased was seated (a boy whose age was estimated as twenty by the pathologist who conducted the post-mortem), and opened fire on him. Nothing was said by the accused. No warning was given. No opportunity was afforded the deceased to defend himself. He was pursued from the classroom by the accused and others. More shots were fired and the deceased was then brutally stabbed to death. The post-mortem report revealed a bullet wound in the upper left chest region and multiple stab wounds in the back. As a result of these events the Charles Hlengwa High School was closed indefinitely and at least one of the

pupils, Monica Makhuphulo, and her family fled the area. The accused has shown no remorse whatsoever and he has clung to his false alibi, namely that he was herding cattle elsewhere at the time.

In my view the other purposes of punishment, namely deterrence, prevention and retribution far outweigh considerations of the reformative effect of a period of imprisonment. I will be failing in my duty if I did not pass a sentence which would demonstrate to the ordinary people who have become the victims of the murders, robberies and other violent crimes which are racking Natal, that the Courts will protect them and will punish those who are perpetrating these deeds severely, and in appropriate cases to the extent of imposing the ultimate penalty. It is difficult to think of a more serious and heinous murder than the one that the accused committed, an innocent schoolboy who was executed in broad daylight in front of his school companions.

On weighing up all the factors I have mentioned I am convinced that this is a case in which the only appropriate sentence is one of death."

I have cited this passage because it broadly reflects my own views. Regarding the appellant's age I think it should be mentioned that

he was born during October 1963 according to the information in his identity document but that he claimed at the trial that he had given wrong information to the authorities in order to procure work. His evidence about his actual age is totally confused but the trial court indicated in its main judgment that he appeared to be far closer to twenty-seven than to twenty-one (as he alleged at one stage of his evidence).

In this court appellant's counsel raised, apart from the factors mentioned by the trial judge, the fact that the appellant was only one of a group of assailants as a possible mitigating factor. I fail to see, however, how this can benefit him. There is no evidence about his status within the group but, in what was plainly intended to be Cele's execution, he played the leading role of executioner. Making full allowance for every conceivable

mitigating factor I share the trial judge's view that the death sentence is the only proper one.

The appeal is dismissed.

J J F HEFER JA.

VIVIER JA)
VAN COLLER AJA) CONCUR.