169/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MZINGELWA NGCOBO ..... Appellant

AND

THE STATE ..... Respondent

Coram: E.M. GROSSKOPF, KUMLEBEN et EKSTEEN, JJ.A.

Heard: 10 September 1992

Delivered: 24 September 1992

J U D G M E N T

EKSTEEN, JA :

The appellant was convicted before the Circuit Local Division of the Southern District of Natal of -

(1) the murder of Msangelwa Elphas Sikhosana;

(2) robbing the said Sikhosana of approximately R450;

(3) the unlawful possession of a 9 mm. Star pistol; and

(4) the unlawful possession of five rounds of 9 mm. ammunition.

He was sentenced to death on the first count; to 15 years imprisonment on the second count; and to

.... / 2

one years imprisonment on each of the third and fourth counts. In terms of section 316 A of Act 51 of 1977 ("the Act") the appellant had the automatic right to appeal to this Court against his conviction and sentence on the first count viz. that of murder. The learned trial Judge also gave him leave to appeal against his convictions and sentences on each of the other three counts. It is this appeal which is presently before us.

Msangelwa Elphas Sikhosana ("the deceased") was a taxi driver who plied his trade between Mkangala via Harding to Durban and back again. His taxi was a kombi designed to carry a driver, a conductor and 13 passengers. It seems to have

.... / 3

been a not uncommon practice, however, to squeeze in more than 15 passengers. On 13 January 1991 the deceased had conveyed passengers in his taxi from Mkangala to Durban, and at 9 o'clock that evening he commenced the return journey with a full load of passengers. His 33 year old cousin, Patrick Dlomo was his conductor. When they left Durban that evening Patrick took over the wheel and drove as far as Port Shepstone. There they collected the fares from the passengers and the deceased resumed the driving. It was then about half-past ten. Some passengers got off at a place called Izingolweni, some more at Harding, and about 9 passengers went on to Gugwini Ward.

.... / 4

Beyond Gugwini only three passengers remained aboard - one Joseph Mseleku and his young son, and another man whom Patrick did not know. The last stop was at Mkangala where Mseleku and his son got off. The stranger opened the door for Mseleku and helped him take his luggage down from inside the taxi. Patrick went to open the boot so as to unload some more of Mseleku's luggage, leaving the deceased, who was very tired, slumped over the steering -wheel. The kombi's engine had been switched off. As he opened the boot Patrick heard a "gunshot", and at the same time the kombi began moving down the hill. Two more shots were fired and as the kombi began picking up speed Patrick

.... / 5

saw the stranger jumping out and "running away". Patrick began running after the vehicle but Mseleku shouted to him to stop as the stranger might shoot him too. Patrick then noticed the figure of a man, presumably the stranger, running after the vehicle, and so he (Patrick) turned back. The kombi careered off the road and came to a stop some 250 metres further on. Patrick ran to his uncle's vehicle, and his uncle summoned the police.

Constable Cele received the report and arrived at the scene some time after 1 a.m. on 12 January. He went down to where the kombi was standing and found that the deceased had been shot

.... / 6

three times through the head from behind and that his body had been dragged out of the kombi on the surrounding grass. His trouser pockets had been turned inside out and he had no money on him. Patrick says that the deceased must have had about R400 on his person - being the fares for both the day's journeys. In fact after the fares had been collected from the passengers that night at Port Shepstone, Patrick noticed the deceased putting the money in his trouser pocket. On the floor of the kombi next to the driver's seat Cele found two 9 mm. bullet heads. A third bullet was found in the head of the deceased at the post-

.... / 7

mortem examination. On 14 January Patrick brought Cons. Cele a 9 mm. spent cartridge case. He told the court a quo that he had found it on the mat of the kombi on the driver's side while he was washing the vehicle on 12 January. In a previous sworn statement to Cons. Cele, however, Patrick had deposed to having found the spent cartridge case "next to the kombi" when he had returned to the scene of the crime the next day - i.e. 12 January.

Some time after the killing of the deceased Patrick saw the appellant seated in the dock at the Harding magistrate's court and purported to recognise him as being the stranger who had been in the taxi when the deceased was shot.

.... / 8

The trial court however felt that it would be dangerous to rely on this identification in view of the suggestive nature of the circumstances attendant on it. Before appellant's arrest Cons. Cele asked Patrick for a description of the man who had been in the taxi at the time the deceased was shot, and Patrick gave him one. Apart from describing the man Patrick added that he had been wearing a jacket which "in the night .... appeared to be of a blackish colour".

The appellant was arrested at about 9 a.m. on the morning of 12 January while he was a passenger in a taxi proceeding from Harding to Durban. This taxi had been stopped at a police road-block between

.... / 9

Harding and Port Shepstone. While Cons. Botes was noting down the registration number at the rear of the taxi he heard the sound of a metal object falling onto the floor of the vehicle's boot. He immediately asked the driver to open the boot, and there he found a 9 mm. Star pistol lying below the last row of seats on the right of the taxi - more or less below the seat on which the appellant was seated. It had four rounds of ammunition in the magazine and one in the breech. The magazine could hold eight rounds. Appellant was found to be wearing a navy blue jacket which appeared to have bloodstains near the right pocket and on one of the sleeves. The blood was still

.... / 10

fresh and came off at the touch. In one of the pockets of the jacket an amount of R450 was found.

In evidence the appellant denied that he had been wearing the jacket I have referred to, but conceded that he had been in possession of R450. He also denied that he had been in possession of the pistol. He told a patently absurd story to explain his presence in the taxi that morning. He said that he had left Durban at about 6 or 6.30 a.m. in order to see an "inyanga" in Harding. This "inyanga" had undertaken to cure two of appellant's children who suffered from epilepsy. His appointment was to meet the "inyanga" at Harding at 8.30 a.m. He got to

.... / 11

Harding at 8.30 a.m. and went straight to the place where he had arranged to meet his "inyanga". The "inyanga" was not there and appellant decided not to wait for him or to look for him elsewhere but to return to Durban at once. At 8.45 a.m. he says he boarded the taxi back to Durban. He was arrested at the road-block shortly afterwards. This is an inherently improbable story, and it is, moreover, contradicted by several other witnesses. The taxi driver told the court that the taxi had left Harding at about 8 a.m. and not 8.45 a.m. He noticed the appellant on the taxi. He was wearing a navy blue jacket and was seated in the back row just above where the pistol was found. He adds that the appellant was untidy in his dress and

.... / 12

looked as though he had been walking through wet grass. Two other passengers in the taxi, Thunzi and Dlamini, both deposed to the appellant wearing the navy blue jacket and sitting in the seat above the spot where the gun had been found. Both testify to the taxi having left Harding at 8 a.m. or shortly thereafter. Finally a female pssenger, Buyiswa Basi, told the court that she had boarded the taxi at about 7.15 a.m. and that the appellant had boarded it shortly afterwards. The two of them had quite a long conversation at the time. His clothes, she says, were untidy and dirty. He wore the navy blue jacket before the court, and sat in the back row of seats. All this evidence,

.... / 13

which the court a quo believed, refutes the appellant's version. Not surprisingly, therefore, the court rejected the appellant's evidence as not being reasonably possibly true.

Ballistic examination showed that the cartridge case which Patrick Dlomo had handed to Cons. Cele had been fired by the pistol found in the taxi. The three bullet heads had been so deformed as not to make any such deduction possible.

Whether this cartridge case was found inside the kombi of the deceased, or just outside it in the veld, makes very little difference. The fact that it was found in or near the kombi is strongly indicative of the fact that it was

.... / 14

one of the rounds which had been fired at the de-
ceased on the night he was killed. And that round
had been fired by the pistol found in the boot of
the taxi the next morning. The evidence pointing
to the appellant as having possessed that firearm
and having been the person who shot the deceased
is overwhelming. The gun was found under the
seat which he occupied in the taxi. That gun
had been used to fire a shot in the taxi driven
by the deceased on the night he was killed, and
which must have been one of the three shots that
killed the deceased. The magazine of the pistol
was designed to hold eight rounds of ammunition and
five rounds were found in the pistol. The pistol

.... / 15

smelt of cordite - indicative of its recent discharge. Early on the morning of 12 January the appellant, who lives in Durban, arrived at Harding looking dishevelled as though he had been walking through wet grass. He wore a dark jacket similar to the one Patrick had noticed the strange man in the taxi wearing, and the jacket was blood-stained. The blood was still fresh and came off at the touch. In a pocket of the jacket appellant had R450 - approximately the amount taken from the deceased after he had been shot. When confronted with all this evidence at the trial the appellant resorted to patently false denials and lies. In the light of all the circumstances

.... / 16

the court a quo was, in my view, justified in coming to the conclusion that the only reasonable inference to be drawn was that the appellant had been in possession of the pistol in the taxi when it was stopped at the road-block, and that he had dropped it onto the floor below the seat on which he had been sitting. This leads to the inevitable conclusion in the absence of any credible explanation from the appellant that he was the man who shot the deceased, and robbed him of the money which he had in his trouser pocket. He was also guilty of the unlawful possession of the pistol and ammunition.

I turn now to consider the sentence

.... / 17

imposed on the first count. Section 322 (2A) of the Act enjoins this Court, if it is of the opinion that it would not itself have imposed the sentence of death to set aside the sentence and to impose such punishment as it considers to be proper. Section 277 of the Act provides that the sentence of death shall only be imposed if, after having regard to all the mitigating and aggravating factors found by the court, the trial judge "is satisfied that the sentence of death is the proper sentence" - i.e. is the only proper sentence (S. v. Nkwanyana and Others 1990 (4) SA 735 (A) at 745 E - F). The learned judge in that case then goes on to say (at 745 F - G):

.... / 18

"It follows that the imposition of the death sentence will be confined to exceptionally serious cases; where (in the words of Nicholas A.J.A. in S. v. J. 1989 (1) SA 669 (A) at 682 D, albeit in a different context) 'it is imperatively called for'."

(See also S. v. Senonohi 1990 (4) SA 727 (A) at 734 H; S. v. Ntuli 1991 (1) SACR 137 (A) at 143 d - e; S. v. Mthembu 1991 (2) SACR 144 (A) at 145 g.)

The appellant was 38 years old at the time the offence was committed and he was a first offender. This tends to indicate that he is not ordinarily given to violence and this must therefore be seen as a mitigating factor. The court a quo found him to be an unintelligent and simple person, and this seems to be borne out by the inept and absurd false-

.... / 19

hoods to which he resorted in his attempts to escape liability for his misdeeds.

On the other hand the trial court found the following aggravating factors viz. the baseness of appellant's motive for killing the deceased; his direct intention to kill; the premeditation of his act; and the fact that he killed the deceased in order to rob him but without waiting to see whether he could rob him without killing him. Finally the learned judge, drawing on his own experience, referred to the prevalance of attacks on taxi drivers - presumably in Natal - who "live in constant fear of attacks and of being killed". These are undoubtedly serious factors which must weigh heavily with the

.... / 20

court in considering punishment. They may well be considered to be such serious factors as to warrant the death sentence being regarded as an appropriate sentence. The matter to be decided, however, is not whether the death sentence is an appropriate sentence, but whether it has been shown to be the only proper sentence. Regarded from another point of view the question may be posed whether, having regard to all the mitigating as well as all the aggravating circumstances, this case can be placed in the category of the "exceptionally serious cases" which call imperatively for the death sentence. Bearing the seriousness of the aggravating factors in mind, and giving due weight to the mitigating

.... / 21

factors found by the trial court, I find myself unable to answer that question in the affirmative. It follows therefore that I cannot confirm the sentence of death as contemplated in section 322 (2A)(a) of the Act. This does not, however, in any way detract from my view of the seriousness of the offence. Such actions as those perpetrated by the appellant pose a threat to ordered society and the sentence imposed for this offence must be designed to deter others from seeking to emulate such behaviour. In my opinion a sentence of 25 years imprisonment would adequately serve such an end.

The sentences imposed by the trial court

.... / 22

in respect of the remaining three counts were not seriously challenged before us on appeal and I see no good reason to interfere with them in any way.

In the result -

(1) The appeal against the convictions on all four counts is dismissed.

(2) The appeal against the death sentence on the first count succeeds and for it is substituted a sentence of 25 years imprisonment.

(3) The appeal against the sentences imposed in respect of the remaining three counts fails, but it is ordered that these latter sentences will be served concurrently with

.... / 23

the sentence imposed on the first count.

J.P.G. EKSTEEN, JA

E.M. GROSSKOPF ..... I concur

133/92
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MZINGELWA NGCOBO ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : E M GROSSKOPF, KUMLEBEN et EKSTEEN JJA

HEARD : 10 SEPTEMBER 1992

DELIVERED : 24 SEPTEMBER 1992

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA:

As the Chief Justice recently observed in S v Tloome 1992(2) SACR 30 (A) 39h:

> "This Court has on a number of occasions indicated that in determining whether or not the death penalty should be imposed the main objects of punishment, retribution, prevention, deterrence and reformation should be weighed. At the same time, in cases of murder of elderly victims in their own homes with robbery as the motive, inevitably the factors of retribution and deterrence tend to come to the fore."

The significant mitigating factor in the present appeal is that the appellant is a first offender. One therefore accepts in his favour that a prison sentence could lead to his reformation and rehabilitation. However, this consideration is to be weighed against the other purposes of punishment and the aggravating circumstances of this particular case. As pointed out in the majority judgment of my Brother Eksteen, which I have had the privilege of reading, it

was a premeditated and cold-blooded murder of a defenceless person in order to rob him. The trial court stressed that taxi drivers, who ply their trade and render an essential service particularly in rural areas, live in constant fear of lethal attacks and these are prevalent. From the very nature of their work, taxi drivers are more vulnerable than, say, a person within the comparative security of a home or a store-keeper, who can take certain measures to protect himself. I share the view of the trial court that murdering to rob in the context of this case, obliges one to attach overriding weight to the other purposes of punishment.

In the result I respectfully differ with the conclusion reached in the majority judgment. I would dismiss the appeal.

M E KUMLEBEN
JUDGE OF APPEAL