207 /92

CASE NO 358/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ZENZILE MBOTSHWA Appellant

and

THE STATE Respondent

CORAM: **VAN HEERDEN, VIVIER et NIENABER JJA**

DATE HEARD: 19 NOVEMBER, 1992

DATE DELIVERED: 24 NOVEMBER, 1992

J U D G M E N T

NIENABER JA:

The appellant was convicted of murder and, on 29 May 1991, sentenced to death. He appeals against his conviction, alternatively, his sentence. The deceased, a 42 year old white man, was a miner. The appellant, a 29 year old black man, worked under his supervision. During the early morning of 9 August 1990 they were part of a working unit operating underground at level 82 at the President Steyn Gold Mine near Virginia in the Orange Free State. The deceased was killed. The cause of death was stated to be "hoof- en borskasbeserings met breuke van die skedel, borsbeen en ribbes met inwendige kneusing en skeuring van die brein en die hart". According to the medical evidence considerable force was required to inflict these injuries. The appellant admitted standing next to the deceased when he died. Three eyewitnesses, between them, testified that he hit

the deceased over the head with a 3.6 kg hammer. The appellant denied it. His version was that the deceased was fatally injured by a sudden rock fall. The court a quo (Cillié J and two assessors) disbelieved him. For good reason. The defence is fanciful. The evidence against the appellant is overwhelming on both counts – that he killed the deceased and that no rock fall occurred. I say so for the reasons which follow:

The three eyewitnesses, all of them co-workers of the appellant, all convincing witnesses, testified that the appellant, without prior warning and for no apparent rhyme or reason, launched a vicious attack on the deceased with the hammer. He floored the deceased with two blows to the head and continued the attack after he collapsed. All of them were adamant that no rock fall occurred. No criticism of any substance could be levelled against any of them. No reason was suggested during argument why they should have conspired to

incriminate the appellant falsely in a crime as serious as murder when, on the appellant's version, there was a perfectly innocent explanation for the death of the deceased. All of them testified that the appellant boasted that he had killed "die hond van 'n boer". The appellant thereupon suggested to his colleagues who had gathered at the scene that they should drop the body of the deceased down the "tip", i.e. the shute through which excavated rock is conveyed, and when they baulked at that suggestion, that they should loosen some rock above the deceased's body and simulate a rock fall. Once again they refused. One of the witnesses, Themba Fanyani, saw the appellant washing the hammer with which he had struck the deceased and dropping it behind a piece of equipment at the very place where a hammer was later discovered. Traces of blood of a primate were afterwards found on the head of that hammer. The first white man to arrive on the scene was Botha, a shift boss. He questioned the

appellant. The appellant tendered the explanation that the deceased had been killed in a rock fall. Botha did not believe him. He was an experienced miner who had witnessed many genuine mining accidents in the past and this did not appear to him to be one. That was also the conclusion reached by Roux, a mine officer in charge of safety, who hurried to the scene when the incident was reported to the authorities. The deceased's body was not covered in rock and stone nor were there particles of dust and stone in the wounds of the deceased. This accords with the observation of the pathologist, Prof. Olivier, who performed the post-mortem examination on the body of the deceased. He detected no particles of dust in the wounds, airways or lungs of the deceased, which one would have expected to find if, as the appellant maintained, there was a sudden explosion followed by a cloud of dust.

Mr Jardine and Mr Minney, the first a staff

geologist, the other a rock mechanic, were sent down the mine at the instance of the mine management some six days after the event to investigate its cause, more particularly, whether a rockfall had occurred, as was suggested by the appellant. Each prepared a sketch plan and a report and testified at the trial. Their conclusions were identical and firm: there were no signs of a freak rock fall and none had occurred. The inference is clear: if there had been no rock fall the appellant was lying and the eyewitnesses were telling the truth when they testified that the appellant killed the deceased.

The defence was granted a lengthy adjournment in order to search for an expert to counter their evidence. One was found. He was a Mr Martinson, a former lecturer at the University of the Witwatersrand and a regular consultant and adviser to the Union of Mineworkers and other trade unions. He had not visited the scene. Nor

had he taken the trouble to read the transcript of the evidence of Jardine and Minney. The gist of his evidence was that their reports were too unscientific and superficial to justify the conclusion that a rock fall had not occurred. But he was unable to meet the main points made by one or the other of them, namely that, contrary to the appellant's explanation, there were no signs of either a fresh splintering off of rock from the hanging wall, nor of a collection of fractured rock or a disturbance on the floor of the gully, indicating a recent fall. Martinson's criticism consisted in the main of generalities and inferences which he sought to draw from statistics. As the cross-examination of this witness progressed it became evident that he had evolved his own theory, based on the photographs of the body of the deceased, that the deceased had most likely been killed as a result of blasting operations which he assumed had occurred during the afternoon of 9 August

1990. In actual fact the incident occurred during the course of the morning, well before 10 a.m., when no blasting had taken place. At the end of his evidence it was difficult to escape the impression that Martinson had become an apologist for the appellant.

Finally, there is the evidence of the appellant himself. His showing in the witness box was distinctly unimpressive and his version was rightly rejected as false by the court a quo. There was only one feasible explanation for the death of the deceased: that he was murdered by the appellant.

Faced with these insurmountable deficiences in the defence case, counsel for the appellant, in his heads of argument, sought to convert a straightforward criminal appeal into a complex review, founded, in the main, on the failure of the court a quo to insist that the inspector of mines, who visited the scene of the killing on the day it happened, testify before it. The attempt

does not merit serious consideration. Whether the inspector of mines conducted an enquiry, and if so what his findings were, are matters of indifference to the court trying the appellant on criminal charges. Such an enquiry was not a statutory precondition to the criminal proceedings. The onus to prove the complicity of the appellant in the death of the deceased rested on the prosecution. If it could prove its case, as it sought to do, without the benefit of the opinion of the inspector of mines, that was its prerogative. Nor was the court obliged to call him. Indeed, the suggestion that the court should have done so falls strangely from counsel for the appellant who, at the trial, did not request the court to consider calling him. In any event the evidence of such a person cannot be adjudged to be essential to the just decision of a case where the nature of the case is so conclusive against the appellant that the opinion of the mining inspector could not conceivably have

altered it. To fail to call the inspector of mines in those circumstances cannot constitute an irregularity (cf **S v B and Another** 1980 (2) SA 946 (A) at 953A-D). I do not propose to say more about this and the several other side-issues, in the form of special entries and the like, which counsel introduced in his heads of argument, for at the hearing before us he did not persist in these submissions. Wisely so.

About the correctness of the conviction of the appellant there can accordingly be no doubt. His appeal against it must fail.

That leaves the question of sentence.

Doubtless the most puzzling thing about this crime is why it was committed. Nothing in the state case suggested any ill-feeling or friction between the appellant and the deceased. There was no history of tension in the team itself. Nor did anything happen on that particular day which, as far as the evidence goes,

could have provoked the attack. Because the appellant persisted in his defence that the deceased's death was accidental, he did not take the court into his confidence about his motive for the murder - whether the deceased somehow annoyed him that morning when no one else was about; whether he was instructed or influenced by somebody else to attack the deceased; or whether the attack was linked to the general unrest conditions and the hostility between black mine workers and management which prevailed in the area since May of that year, and which erupted the night before in acts of violence which the appellant happened to witness. One can speculate about these or other possible causes for the assault on the deceased. But in the end, one simply does not know. What one does know, judging from the evidence of some of his co-workers, is that the appellant was in a state of high dudgeon immediately after he had killed the deceased. The words he uttered "ek het die hond van 'n

boer doodgemaak" do carry a racial connotation and suggest that the deceased might have been killed because he was white or perhaps because he belonged to the ruling class associated with management. This is what the court a quo found: that the deceased was killed because of the colour of his skin. And on that finding it considered it to be, rightly so, a highly aggravating factor. Indeed, it was mainly on that ground - that the interests of society, in the times in which we live, demand the severest reaction from the courts in order to stamp out killings across the colour bar, be it black on white or white on black - that the court a quo felt that the death sentence was the only appropriate one. I have no real quarrel with the sentiments expressed but I am unsure whether they are apposite. The onus now rests on the state to prove not only the absence of mitigating factors but also the existence of aggravating ones, and this must be done not on a balance of probabilities but beyond a

reasonable doubt. On the evidence before the court I am not convinced, applying the more stringent test, that one can find, based on the appellant's utterances and actions after the event, that racial hatred was necessarily the cause for the killing. In my view the motive for the murder has not been established; consequently the issue of sentence must be approached on the basis that motive must be discounted as an aggravating factor.

But there were several other aggravating factors, properly proved. It was not an impulsive act, committed on the spur of the moment. The appellant deliberately set out to find a hammer with which to attack the deceased. There can be no doubt about his direct intent to kill the deceased: of that the nature of the deceased's wounds bear witness. It was a brutal and cowardly attack, launched from behind, without prior warning, executed with great force, by the appellant on an unarmed and unsuspecting man going about his ordinary

business. The arrogance with which it was committed, in full view of his co-workers, and which the appellant displayed afterwards, boasting about his deed and taking it for granted that his co-workers would aid and abet him, is also, in my opinion, an aggravating factor. Nor did the appellant express any remorse or regret for what he had done. On the contrary, he persisted in his fabricated account that the appellant was accidentally killed.

On the other hand there is the consideration, an important one, that the appellant reached the age of 29 without any previous convictions and that he regularly contributed to the maintenance of his family in the homelands. On the face of it he seems, therefore, to have been a responsible member of society, and worthy and capable of rehabilitation.

All things considered, especially the absence of motive as an aggravating factor, the present case does

not strike me as being one where the death sentence is the only feasible alternative. But the crime for which the appellant was convicted remains most serious and merits a most serious punishment.

The following order is made:

(1) The appeal against conviction is dismissed.

(2) The appeal against sentence succeeds to the extent that the death sentence imposed is set aside.

(3) In its stead the appellant is sentenced to 20 years imprisonment.

(4) In terms of section 282 of the Criminal Procedure Act, No. 51 of 1977, the aforesaid sentence is antedated to 29 May 1991.

P M Nienaber
Judge of Appeal

Van Heerden JA]
] Concur
Vivier JA]