227/92

Case Number 557/91

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VUSUMUZI DAVID HLABA Appellant

and

THE STATE Respondent

CORAM: HOEXTER, EKSTEEN JJA ET KRIEGLER AJA

DATE OF HEARING: 23 NOVEMBER 1992

DATE OF JUDGMENT: 27 NOVEMBER 1992

J U D G M E N T

KRIEGLER AJA/.....

KRIEGLER AJA:

At about 8:30 on Thursday morning 26 January 1989 four black men burst into a bottle store in Isipingo and robbed the manager and his elderly father at gunpoint of some R3 000,00 in cash. Shortly after they had made their getaway the manager, Mr P.N. Hargovan, was shot in the jaw at a nearby taxi-rank while on the point of reporting the presence of the robbers to a traffic inspector. A little later and at another taxi-rank in the vicinity a group of police constables, acting on a report that the robbers were seated in the back of a minibus-taxi, surrounded the vehicle and ordered the occupants to alight. One of the policemen, Constable Gabela, who was in full uniform but unarmed, was shot in the chest and died shortly afterwards. Shots were also allegedly fired at Constables Mndaweni and Masuku. Later that morning three suspects, somewhat the worse for

wear, an Astra .38 Special revolver (containing five spent cartridges and one live round) and two bundles of banknotes (totalling some R420,00) were handed over to members of the Durban Murder and Robbery Unit at the Isipingo police station. Many months later a fourth man was arrested by members of that Unit.

Some two years later those four men appeared before Mitchell J and two assessors in the Durban and Coast Local Division on a number of counts arising out of the events described above. Count 1 was one of murder arising out of the death of Constable Gabela; counts 2, 3 and 4 alleged the attempted murder of Mndaweni, Masuku and Hargovan respectively; count 5 was one of robbery with aggravating circumstances relating to the events in the bottle store and counts 6 and 7 (against the appellant alone) related to the unlawful possession of the revolver and the ammunition. The appellant

and accused numbers 2 and 3 made common cause and were defended by the same advocate. Their case was that they had been arrested while innocently on their way to a medical consultation with a nyanga. They were unarmed and the money found in the appellant's possession was part of his savings of R800,00 which he had drawn to pay the nyanga and to meet incidental expenses. They had not been to the bottle store nor to the scene where Hargovan had been shot; they had never met accused number 4 and were severely - and gratuitously - assaulted once they had alighted from the taxi in compliance with the police command to do so.

A protracted trial ensued, including a fruitless attempt by the prosecution to establish the admissibility of extra-curial statements made by the appellant and accused numbers 2 and 3. The proceedings culminated in the appellant's co-accused being convicted only of the robbery (count

5) while he was convicted on all seven counts. On counts 2 and 3 the court a quo, having a doubt whether the appellant had actually intended to murder Mndaweni and Masuku when firing at them, brought in verdicts of guilty of contraventions of section 39(1)(i) of Act 75 of 1969, i.e. of unlawfully pointing a firearm. On count 1, the murder of Constable Gabela, the appellant was sentenced to death while an order that the sentences of imprisonment run concurrently resulted in an effective sentence of 27 years imprisonment.

By virtue of the provisions of section 316(A)(1) of Act 51 of 1977 the appellant now appeals as of right against his conviction and sentence on the charge of murder and, with the leave of the court a quo, against his convictions and sentences on counts 2, 3 and 4. Mr Haasbroek, who appeared on behalf of the appellant in both courts, assiduously examined the record in an

attempt to advance submissions helpful to the appellant's case on the merits of the convictions on counts 1 to 4. Ultimately however he was constrained to concede that the appellant's conviction on all seven counts and the sentences on counts 2 to 4 were unassailable. He therefore concentrated on the death sentence imposed on the charge of murder. In so limiting the scope of the appeal counsel displayed commendable realism. As will be shown shortly, the convictions on counts 2, 3 and 4 cannot be faulted.

In view of the limited scope of the appeal the soundness of appellant's conviction on the robbery charge and on the charges of unlawful possession of the firearm and its ammunition are not in issue. But quite apart from such technical limitation, the evidence established beyond any reasonable doubt that the appellant had been the leader of the gang of robbers who held Hargovan at gun point while two

of the others collected the spoils. The trial court's extremely favourable impression of Hargovan is amply supported by the record. It is true that, at an identification held long afterwards, he failed to identify accused number 4 and wrongly pointed out someone else. Upon analysis of his evidence as a whole, however, that detracts little from his reliability in general and casts no shadow over his evidence pertaining to the appellant. He was face to face with the latter in broad daylight for a period of approximately 15 minutes during the robbery. More than two years later he was asked in cross-examination to enumerate the physical features by which he could identify the appellant. He had not seen him in the interim and had to perform the exercise without looking at the appellant in the dock. His description was so detailed and true that the cross-examiner elected to go on to another point. Hargovan also

identified the firearm brandished by the appellant as a revolver. The witness was familiar with firearms, owned one himself and had been trained in their handling. He added that one of the other robbers carried what appeared to be a home-made firearm and remembered that the appellant wore a yellow T-shirt.

The reliability of Hargovan's identification of the appellant is important, not because it bears on the soundness of the robbery conviction - which at this stage is irrelevant - but because it is crucial to the conviction on count 4. And the soundness of the latter conviction, in turn, bears significantly on the murder conviction. That is so because the events of the fatal morning, although notionally divisible into four phases, actually constitute a continuum of interrelated occurrences. Thus the robbery in the bottle store and the subsequent shooting of Hargovan at the first taxi-

rank are interrelated. Indeed, the very reason why Hargovan was shot was because he had recognized the appellant and two of his companions, seated in a minibus-taxi adjacent to the open door, as three of the robbers who had fled from the bottle store shortly before. He stopped the car he was driving so as to block the departure of the taxi and walked towards a nearby traffic inspector to report the presence of the three persons whom he had identified as the robbers. Before he could do so he was shot in the face by the appellant at a distance of some 13 paces. Besides the reliability of his identification demonstrated in court, the very fact that he was shot establishes beyond any doubt that his identification was correct. There can be no other conceivable reason for his being shot in broad daylight, in a public place and in the proximity of a peace officer. Any possible doubt about the motive for the shot and its source

was immediately removed: The man clad in a yellow T-shirt sitting nearest the open door of the taxi, whom Hargovan had identified as the appellant, and his companions jumped from the taxi and ran away. It would have required very cogent refutation indeed to avoid the inference that the appellant had fired the shot in order to silence Hargovan. And such refutation as there was, with which I will deal shortly, was singularly unconvincing.

The scene of the next act of the drama was the other taxi-rank, some distance away. A shopkeeper by the name of Mansoor conducted business from two adjoining shops facing the taxi-rank, which he controlled. The one shop was a fast-food outlet with an entrance at each end. While he was standing in that shop supervising his employees he saw four black men enter at the rear entrance, run through the shop and pause outside on the edge of the taxi-rank. One of them then disappeared from

view round the corner of the building while the other three boarded a minibus-taxi standing in the rank. Shortly thereafter seven police constables, some in plain clothes and some in uniform, and all but Constable Gabela armed with firearms, arrived on the scene. The presence of the three men in the taxi was reported to them and Masuku ordered the driver, who was on the point of departing, to stop. Masuku saw three black men sitting on the back seat of the taxi with a woman to their left. Leaning against the left rear window of the vehicle he ordered the three men out and they made to do so. In the meantime Gabela, Mndaweni and another constable were standing near the right rear window of the taxi. Gabela ordered the appellant, who was sitting nearest to the righthand window, to produce the firearm. Without replying the appellant pulled out a gun and a shot went off. Gabela ran towards the front of the taxi and Mndaweni took cover under

the vehicle between the rear wheels. Mndaweni and Masuku testified that the appellant then jumped out of the right rear window, fired a shot at each of them and ran away. They both gave chase and heard a gunshot in the course thereof. According to the constables Masuku ran the appellant to ground in a bushy area on the edge of yet another taxi-rank, where he was dispossessed of Exhibit 1, the .38 Special revolver. It was subsequently established that the bullet that killed Gabela had been fired from that firearm. According to Masuku he took a quantity of bank notes from the appellant there and then. The money and the firearm were handed to the Murder and Robbery Unit members at the local police station shortly thereafter.

The appellant's version, supported by accused numbers 2 and 3, was that all three of them meekly alighted from the taxi when instructed to do so and were arrested. None of them was armed but

they did hear gunshots in the vicinity. Counsel for the appellant did not seek to argue in support of that version. Nor could he with any cogency. Not only were Masuku and Mndaweni individually and jointly impressive witnesses, but there was overwhelming support for their evidence that the appellant leaped from the right rear window of the taxi and fled to the bushy area where Masuku arrested him. With regard to the events at the taxi-rank they were supported by a third member of the police team, Constable Mnomiya, and by the shopkeeper, Mansoor, who were standing at the sliding door of the minibus when the fatal shot was fired. Mnomiya saw the appellant leap from the taxi and both of them saw him run away, pursued by Masuku and Mndaweni. They remained next to the taxi and, after a scuffle, subdued accused numbers 2 and 3 and arrested them. If that were not enough, two further policemen, Constables Govender

and Pillay, gave evidence which supported that of Masuku and Mndaweni as to the circumstances and place of the appellant's arrest and the seizure of the firearm and the money. Constables Govender and Pillay had been on charge office duty at the Isipingo police station nearby when they heard of the attack on their friend Hargovan. Rushing to the scene in a police vehicle they saw Masuku in hot pursuit of the appellant and joined in. Their evidence, thus given from an entirely different perspective, put paid to any possibility that the defence version could be true. That is why counsel for the appellant was constrained to advance the argument that, accepting the broad outline of the state case regarding the events in the bushes, there was yet a reasonable possibility that the appellant had not fired the shots that injured Hargovan and killed Gabela.

But even that limited argument holds no

water. Hargovan's evidence established that the appellant was the only robber armed with a revolver during act one, the robbery in the bottle store. The only revolver found was Exhibit 1, the weapon with which Gabela had been killed. The four state witnesses present when the three robbers were cornered in the taxi were ad idem that a single shot had been fired from the taxi and struck Gabela. Their evidence also established beyond any doubt that it was the appellant who had sat nearest the right rear window, through which he fled after that shot had been fired. Masuku and Mndaweni corroborated one another as to the two further shots that were fired at them by the appellant immediately thereafter. In the course of the pursuit he fired a further shot. Significantly, when the appellant was cornered there were five fired cartridges in the revolver seized from him. The overwhelming probability is that those five

shots were fired at Hargovan, the deceased, Mndaweni and Masuku respectively and at the pursuers during the chase.

Counsel suggested that it was possible that one of the other robbers had fired the shots at Hargovan and the deceased. There is no merit in the argument. In the first instance there is no support in the defence evidence, which was a denial that any of the three had possessed a firearm that day. In any event the proposition is inherently so improbable as not to warrant serious consideration. According to Hargovan the appellant was the ostensible leader of the gang and the only robber armed with a revolver. When he saw them again at the first taxi-rank the appellant was sitting nearest the door and fired the shot which struck him in the jaw. When Gabela was shot the appellant was sitting nearest the window from which the fatal shot was probably fired and immediately thereafter

it was the appellant who fired at Mndaweni and Masuku. There simply is no room for a finding that the appellant could possibly have divested himself intermittently of the firearm. He was the leader, he was the bearer of the revolver during act one and used it during acts three and four, i.e. when they were cornered and during his subsequent attempted escape. The inference is irresistible that he was in possession of the revolver from first to last - and that he was the one who used it. It follows that the convictions on counts 1 to 4 must stand. The sentences imposed on those counts (one year's imprisonment on counts 2 and 3 and 15 years on count 4) are undoubtedly appropriate and Mr Haasbroek wisely submitted no argument in favour of interference.

It remains to consider the death sentence imposed on count 1. It is unnecessary to discuss yet again the nature and effect of the changes

brought about by the Criminal Law Amendment Act 107 of 1990. Suffice it to say that it is this court's duty to consider afresh whether only a sentence of death would be proper for the murder of Constable Gabela. In doing so aggravating factors established and possible mitigating factors not refuted beyond reasonable doubt are to be weighed in conjunction with the general objectives of sentence. If, ultimately, it cannot be said that only hanging would be proper, some other sentence must be imposed.

It would be convenient to commence such exercise with an enquiry into aggravating factors. They, as the trial court found, are manifest and grave. Focusing for the moment on the immediately surrounding circumstances, it is clear that an unarmed policeman in uniform was shot down in cold blood and at pointblank range. Although the other members of the police team were armed none of them

had actually produced his firearm and the appellant was not threatened by any imminent violence. An order had been given for the passengers to alight from the taxi and some of them had commenced doing so. For the sole purpose of avoiding apprehension the appellant produced the revolver and deliberately fired a shot at the torso of the nearest policeman. Then, having leaped through the window, he fired two further shots at close range at Mndaweni and Masuku, who were at that stage closest to him. Although he acted in a desperate attempt to escape, there is nothing to suggest panic on his part. Some time had elapsed since the taxi had been surrounded; the order to alight had been given; Gabela had demanded production of the firearm and the appellant, with time to reflect, produced the revolver, leaned through the window and fired the first shot directly at his target.

If one then views the firing of the fatal shot

in the broader context of the events of that morning the gravity of the appellant's conduct is heightened. He and his co-accused had planned and executed a daring day-light robbery in the course of which the appellant had used the revolver to enforce compliance with their evil demands. Clearly he had armed himself with the weapon for that specific purpose. Then, having made their getaway and on the point of driving off in the first taxi, their escape was threatened when Hargovan appeared on the scene. Without any apparent hesitation the appellant shot him in the head and ran off. Then, during the last act, after he had shot his way out of the police net, he fired a fifth shot to deter his pursuers. That shot, like the other four, was fired in a busy public place where injury or death to bystanders were real possibilities. Viewed in that context, therefore, the shooting of Constable Gabela was but one of

several manifestations of the appellant's determination to stop at nothing in attaining his nefarious ends. His conduct throughout was characterised by a callous resolve to use the revolver as and when it suited his purposes.

It need hardly be added that the deliberate shooting down of a policeman engaged in the execution of his duties is a seriously aggravating feature. Particularly in the troubled times in which we live, peace officers going about their thankless - and often dangerous - task look to society for protection and support. It is the duty of the courts, in expressing the sentiments of the rightminded, to make plain, loudly and clearly, that they will not brook conduct of the kind in question in this case. Statistical evidence adduced by the prosecution at the trial relating to the incidence and increase of violent crime in the Durban area and the consequent death of members of

the local Murder and Robbery Unit of the South African Police makes shocking reading. Sadly, however, such evidence comes as no surprise. On the contrary, no informed South African can be unaware that violence perpetrated against peace officers engaged in their lawful duties continues unabated throughout the land. No amount of socio-economic and political readjustment can justify harm to the very forces necessary for the peaceful and orderly attainment of those ends. It follows that a crime such as this, committed against a peace officer in the aftermath of an armed robbery, should be visited with the full rigour of the law.

But that does not mean that mitigation is irrelevant. Notwithstanding the gravity of the aggravating factors it may yet be that there are mitigating factors of sufficient cogency to render the imposition of the death sentence inappropriate. That, indeed, was the main thrust

of the argument presented by counsel for the appellant with regard to the sentence on count 1. Four points were stressed, three relating to the appellant as a person and one to the crime. At the time of the commission of the offences the appellant was 24 years old and he had part-time employment as an assistant to a manager at a taxi-rank. He had grown up in a normal but relatively deprived home. His father had died when he was 14, leaving his mother to care for a large family. From this it followed, so counsel argued, that the appellant had not enjoyed the benefit of proper parental guidance and discipline during his formative years. That, in turn, was a major contributor to the appellant's propensity for violent crime. In consequence, so the argument concluded, the appellant's moral blameworthiness was sufficiently diminished to constitute a mitigating factor.

The absence of a factual foundation renders it unnecessary to consider the logical validity of the argument. There is no evidence that the appellant's home evironment was such as to predispose him to violent crime. On the contrary, the appellant attained standard 7 at school and was able to obtain relatively responsible and remunerative employment. Nor is there any evidence of a disrupted childhood. The appellant's only previous conviction was for a robbery he committed a few days less than a year before the present crimes and for which he served some five months in prison.

Counsel for the appellant also submitted that, having regard to the appellant's age, his gainful employment and the absence of any evidence of innate evil, the prospects of rehabilitation through prolonged imprisonment were good. I cannot agree. Although the appellant was a young man he

was the leader of a gang of daring robbers consisting of two young novices (accused numbers 2 and 3) and accused number 4, a hardened recidivist in his mid-thirties. By his ruthless - and deadly - use of the firearm the appellant proved himself worthy of his leadership role. The way he played that role, if not manifesting him to be innately evil, at least indicates that the prospects of rehabilitation are remote. He was a man of above average scholastic training and was making a reasonable living. Less than eight months after he had emerged from prison after his previous robbery, he led a planned gang robbery at a bottle store in a shopping complex during business hours. Clearly his first exposure to imprisonment had no reformative or deterrent effect. On the contrary, with the memory of prison fresh in his mind he led and executed the self-same crime as before, only on this occasion with extreme violence.

The final submission made on appellant's behalf was that he had not planned killing a policeman. That is true. Had Hargovan not fortuitously come across the gang at the first taxi-rank they would have got away with their spoils. At that stage already, however, the appellant showed his readiness to use the firearm - and to do so competently. When he and accused numbers 2 and 3 were cornered in the back of the second taxi his conduct was not frantic, as counsel typified it, but ruthlessly efficient. Surrounded by no less than seven policemen he managed to escape from the taxi and to break through the police cordon. Had it not been for the singular courage and devotion to duty of Constables Masuku and Mndaweni he may well have made good his escape.

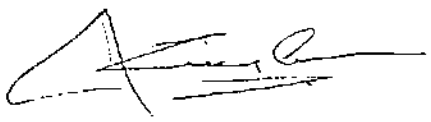
In all the circumstances this is indeed a case where the enormity of the crime, the absence of any

mitigation and the objectives of the criminal justice system imperatively call for the imposition of the death sentence. As was said in S v Majosi 1991 (2) SACR 532 (A) at 541d-h, the appellant's personal circumstances

> "... must yield to considerations of retribution and deterrence when the horror of the crime, the callousness of the criminal, and the frequency of its recurrence generally, are such that the perceptions, sensibilities and interest of the community demand nothing less than the extreme penalty."

In the present case there is the additional and materially aggravating factor that a policeman was murdered in the performance of his duties.

The appeal is dismissed.



J.C. KRIEGLER

ACTING JUDGE OF APPEAL

HOEXTER]

] CONCUR

EKSTEEN]