66/92

Case No 309/91
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

BLOM WELLINGTON PULE Appellant

- and -

THE STATE Respondent

CORAM: SMALBERGER, VIVIER et VAN DEN HEEVER JJA

HEARD: 5 MAY 1992

DELIVERED: 19 MAY 1992

J U D G M E N T

VIVIER JA.

VIVIER JA:

The appellant was convicted in the East London Circuit Local Division by LUDORF J and two assessors on one count each of murder, attempted murder and robbery with aggravating circumstances. He was also found guilty of the unlawful possession of a firearm and ammunition. No extenuating circumstances were found in respect of the murder conviction, and under the then prevailing law he was sentenced to death. In respect of each of the attempted murder and robbery convictions he was sentenced to twelve years imprisonment and for the unlawful possession of a firearm and ammunition he was sentenced to six months and three months imprisonment respectively. All the sentences of imprisonment were ordered to run concurrently. With the leave of the

Judge a quo the appellant appeals to this Court against the convictions and sentences.

The offences all arise from an attack on a 53 year old shopkeeper, Makaya Mark Soga ("the deceased") and his wife Lindiwe Andriena Soga outside their shop in Lamont Street, C.C. Lloyd Township, East London at about 9 o'clock on Sunday night 11 December 1988. They had just closed the shop for the day, and were already seated in their Toyota Hi-Lux bakkie which was parked in front of the shop, preparing to go home, when a man hooded with a balaclava cap and wielding a gun came up to their vehicle on the passenger side where Lindiwe was sitting, opened the door of the vehicle on that side and fired two shots at them. The first shot hit Lindiwe in the left buttock, lodging near the spinal column and the second struck the deceased, who was sitting behind the steering wheel, on the left side

of the chest penetrating the heart and left lung. The deceased died a short while later as a result of these injuries. The assailant fled with Lindiwe's handbag which contained the weekend's takings of some R3000 in cash.

At the trial the appellant was identified as the assailant by an eye-witness, a 15 year old boy Derrington Meth. He testified that on the evening in question he was playing with friends in the yard of a house directly opposite the deceased's shop. He was sent on an errand by his friend's mother and upon his return he observed an unknown Black man standing at a lamp-post in front of one Albert Hans's house which is diagonally across the street from the deceased's shop. The man was thickset and was wearing a balaclava cap which was rolled up to above his eyebrows, a black overcoat which extended to just above his knees and

white tackies. The man had a scar which ran vertically along the left temple next to the left eye. At the time the street lights were on, including the light on the post under which the man was standing. He saw Hans coming out of the shop and talking to the man before entering his house. When Hans later emerged from his house the man was still standing under the lamp-post as before. Meth further testified that shortly afterwards he saw the deceased closing the shop and getting into his vehicle with his wife. At this stage the man who had been standing under the lamp-post moved towards Meth and his friends, swore at them and fired one shot into the air. The balaclava cap was now pulled over his face. Meth was afraid and ran across the street to take shelter behind the deceased's vehicle which was parked in front of the shop. He ran around the front of the vehicle and hid behind the

driver's door. He saw the man coming to the passenger side of the vehicle, opening the door and firing a shot into the vehicle which struck Mrs Soga. The man grabbed the handbag which Mrs Soga was holding in her hands and then fired another shot which hit the deceased. The man ran off with the bag. He ran with a pronounced limp. Meth identified the appellant as the man he had seen under the lamp-post on the night in question.

The trial Court accepted Meth's evidence, describing him as an honest and intelligent witness who was mature for his age. It went on to say, however, that in view of his youth and the fact that his evidence was given some 15 months after the events, corroboration of the vital aspects of his evidence implicating the appellant was needed in order to sustain a conviction.

The trial Court found such corroboration in the evidence of a number of other witnesses as well as in certain circumstantial factors. The most important of these witnesses was a 19 year old youth Albert Hans who, as has been mentioned, lived just across the road from the deceased's shop.

Hans testified that on the night in question he assisted the deceased in the shop until about 7 o'clock when he went home. Lindiwe's evidence was that he only left the shop at 8 o'clock and the trial Court held that Hans was mistaken in this respect. It was not submitted before us that the trial Court erred in so holding. Hans testified that a Black man, whom he had never seen before, was standing under a lamp-post right in front of his house. He went right up to the man and in Xhosa enquired whom he was waiting for, thinking that he might be waiting for his sister.

The man did not reply. Hans went into his house and when he came out shortly afterwards he again spoke to the man who still remained silent. Hans gave a detailed description of the man's clothes and his physical features which entirely accorded with the description given by Meth, adding that the man appeared to him to be knock-kneed. After observing the man for the second time Hans left and only returned to the scene after 9 o'clock that evening. He found the police there and upon learning what had happened, immediately furnished the police with a description of the man he had seen under the lamp-post. According to the police that description was in full accord with the description Hans gave in his evidence. Two days later Hans attended an identification parade where he pointed out the appellant as the man he had seen under the lamp-post on the night in question.

Meth's evidence that he saw the appellant running with a limp is corroborated by Zamile Soga, who said that he was sitting in the back of the deceased's vehicle at the time of the attack but that he jumped out and fled after his mother had been shot. He ran to the back of the shop from where he saw the assailant running away with his mother's handbag. Zamile said that the man was stoutly built and that he ran with a pronounced limp. He also observed the man wearing a balaclava cap, a knee-length coat and white tackies. A number of other witnesses, including the district surgeon, Dr Wingreen, and an orthopaedic surgeon, Mr Smit, confirmed that the appellant walks and runs with a limp.

Meth's account of the attack is fully supported by the evidence of Lindiwe and Zamile. Both testified that they saw Meth running around the front

of the deceased's vehicle moments after they heard the first of the three shots being fired. Lindiwe testified that when the left front passenger door was suddenly opened she looked up and saw a Black man wearing a black overcoat standing next to her with his back against the open door. His face was covered by a balaclava cap and he had a gun in his hand. Without saying anything the man fired a shot which struck her in the left buttock. The man told her in Xhosa to hand over her handbag, and as she pushed it towards him the deceased said: "Give it to him" and made a movement with his hands to indicate that she should do so. The man took the handbag and at the same time shot the deceased and ran off.

In its judgment convicting the appellant the trial Court said that every feature by which Meth had identified the appellant was corroborated by other

evidence and by such features as were apparent to the Court: the appellant was stoutly built with a prominent stomach; he had a noticeable scar over the left temple as was described by the witnesses and was knock-kneed.

Another State witness, Dorothy Smiles, testified that at about 11 o'clock on the night in question she and her husband gave an unknown man, whom she later identified as the appellant, a lift in their car. They live in Duncan Village, East London, and were on their way home when the appellant waved them down at a spot which is about an hour's walk from the deceased's shop and pleaded with them to take him to Mdantsane, offering to pay for the petrol. He said that he had been gambling. At a filling station he produced a R20 note from a wallet which contained a thick wad of notes. After dropping the appellant at a

house in Mdantsane they were stopped by the police and she gave the police a description of the man they had given a lift. She confirmed that the appellant wore a black knee-length coat on the night in question.

The appellant's defence at the trial was that of an alibi. He testified that at about 6 o'clock on the evening in question he left his house in Mdantsane by taxi for Duncan Village where he gambled at a gambling house. He described himself as, **inter alia**, a professional gambler. He took with him R52, leaving another R300 at home, and after losing R50 of the money he had with him, decided to go home to get more money as there was "good money" in the pool. He left the gambling house shortly before 8 o'clock and went home by taxi to fetch the R300. He returned to the gambling house at about a quarter to nine, won a lot of money and left at about 11 o'clock. He stopped

a passing car which took him to his house in Mdantsane.

The appellant's evidence that he left the gambling house at about 8 o'clock after losing R50 was confirmed by the state witness Ndevo, who said that the appellant returned some time between 9 and 10 o'clock, but not earlier than 9.15, and continued gambling. Ndevo testified that when the appellant returned he was sweating profusely.

The trial Court accepted Ndevo's evidence regarding the time the appellant returned to the gambling house on the evening in question. It is clear that during the time he was absent from the gambling house there was ample opportunity for the appellant to have committed the crimes as it was common cause at the trial that it takes only 14 minutes to walk from the gambling house to the deceased's shop at normal walking pace. The trial Court rejected the appellant's

evidence regarding his movements during the time he was away from the gambling house, and referred to a number of weaknesses and improbabilities in his evidence concerning this crucial time. To these may be added a number of other weaknesses in his evidence generally. To mention only three: firstly, he persisted in his denial that he walks with a limp in the face of overwhelming evidence that he has done so for many years; secondly, he twice avoided the police when they visited his house in Mdantsane later the same night and, thirdly, he clearly lied about the clothes he was wearing on the night in question.

On behalf of the appellant it was submitted before us that the trial Court erred in accepting as reliable the evidence of Meth and Hans. It was submitted, firstly, that it was improbable that these witnesses could have seen the scar on the appellant's

face on the night in question, and it was suggested that they only subsequently learned of this fact when the police showed them a photograph of the appellant. I can find nothing improbable in the evidence of either of these two witnesses that they saw the scar on the evening in question, and there is no basis for the suggestion that they were subsequently shown a picture of the appellant. The same suggestion was made to these witnesses and to the police at the trial and denied by them. Hans, in any event, told the police that same evening that he saw the scar. This was before the police obtained possession of the photograph.

Meth's account of the actual attack was criticised by counsel for the appellant in a number of respects, such as that he said that he did not move his head or blink his eyes when the shots were fired close

to him; that he said that he was scared when the first of the three shots was fired and that he ran away but that he was able afterwards to stand still and calmly observe the appellant firing the second and third shots; and that he said that he did not see the gun in the hand of the assailant. The relevance of these aspects escapes me. It was not suggested that Meth did not observe the attack and the accuracy of his account of the attack was not in issue.

I do not consider it necessary to deal with certain other points of criticism against the evidence of Hans and Meth which were raised by counsel for the appellant. They are all of an insignificant nature and do not, in my view, affect the reliability of these witnesses in any way.

Counsel for the appellant has indeed been

unable to point to any material misdirection by the trial Court in its assessment of the reliability of the evidence of the State witnesses and of the evidence given by the appellant. In my view the evidence against the appellant was overwhelming. The identification of the appellant by Meth and Hans as the man who was standing under the lamp-post shortly before the attack was based on a number of striking features and was corroborated by other evidence such as that of Smiles, Lindiwe and Zamile as well as by the circumstantial factors I have referred to. It was not in issue that the man who stood under the lamp-post was the same person who later shot the deceased. As to the appellant, it has not been shown that the trial Court erred in rejecting his alibi. The appeal against the convictions must therefore fail.

I proceed to deal with the appeal against the

sentence of death imposed for the conviction of murder. Since the trial the Criminal Law Amendment Act 107 of 1990 has come into operation and this Court now has a discretion to determine, with due regard to the presence or absence of any mitigating or aggravating factors, whether the death sentence is the only proper sentence on the murder charge.

Counsel for the appellant was able to advance only one possible mitigating factor namely that the appellant did not have the direct intent to kill. I cannot agree that the appellant acted only with **dolus indirectus.** He fired a shot at point blank range at a vital part of the deceased's body and in the absence of an explanation from the appellant the only reasonable inference is that he had the direct intent to kill. The absence of mitigating factors will not, however, mean that the death sentence must or should be passed.

There are a number of aggravating factors. The murder was committed in the course of a well planned, premeditated robbery. The appellant stood waiting for some time for his victims to come out of the shop and there was ample opportunity for reflection and reconsideration. His victims offered no resistance and he could have achieved his object without inflicting any injury. Instead he shot the deceased in a callous, cold-blooded manner. His motive was greed of the worst kind viz to obtain money in order to gamble.

The appellant, who was 42 years old at the time the offences were committed, had a long list of previous convictions, starting as far back as 1960, and including five convictions for assault and assault to commit grievous bodily harm, five for robbery and three for theft. His prospects of rehabilitation must be

regarded as minimal, despite the fact that eight years had elapsed between his last release from prison and the commission of the present offences.

The final question then is whether, having regard to the number of aggravating factors and the absence of any mitigating factors, the death sentence is the only proper sentence. To decide this question the main purposes of punishment must be considered, namely deterrence, prevention, reformation and retribution. Consideration will be given to whether these objects can properly be achieved by a sentence other than the death sentence. In my view the manner and circumstances in which the present crime was committed are such that one is driven to the conclusion that this is one of those exceptional cases where the deterrent and retributive aspects of punishment outweigh all other considerations and the

death sentence is imperatively called for. I regard the present case as one where the "perceptions, sensibilities and interests of the community demand nothing less than the extreme penalty" (**S v Majosi and Others** 1991(2) SACR 532 (A) at 541 e-f).

Although leave was also granted to appeal against the sentences imposed on the other counts, no argument was addressed to us in respect of those sentences and there is no basis upon which this Court could interfere with the exercise of his discretion by the trial Judge.

In the result the appeals against the convictions and sentences on all counts are dismissed.

W. VIVIER JA.

SMALBERGER JA)
VAN DEN HEEVER JA) Concurred.