

Re: 1/10/92

Case No 521/91

7/1/92

DCLD

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

CLEOPAS NDODA SHANGASE .....APPELLANT

and

THE STATE.....RESPONDENT

CORAM : HEFER, VIVIER JJA et NICHOLAS AJA.

HEARD : 12 MAY 1992.

DELIVERED : 21 MAY 1992.

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J U D G M E N T

/HEFER JA

HEFER JA:

The appellant was convicted in the Durban and Coast Local Division of murder and robbery with aggravating circumstances and sentenced to death for the murder. On appeal this court refused to interfere with the trial court's finding that there were no extenuating circumstances and dismissed the appeal against the sentence. After the Criminal Law Amendment Act 107 of 1990 came into operation the sentence was considered by the panel appointed in terms of sec 19(1) of the Act. It is presently before us for consideration in terms of sec 19(12).

The charges against the appellant arose from an incident which occurred on 11 April 1987 at the Umgababa Holiday Resort between Umkomaas and Illovo where Mr Arnold Hlophe was employed. On the day in question Mr Hlophe collected the previous day's takings from the bottle store. Outside the building the appellant and two associates, Zola Mthethwa and Gideon Khuzwayo, who had planned to rob

him, were waiting. When he emerged Mthethwa shot him to death with a home-made shotgun whereupon one of the appellant's associates grabbed and made off with the bag containing the money amounting to some R2 750,00. Later that day the appellant received R600 when the proceeds of the robbery were shared.

In the first appeal this court approved of the trial court's rejection of the appellant's evidence to the effect that Mthethwa had coerced him to take part in the robbery. Mthethwa, it emerged at the trial, was a vicious murderer who had inter alia robbed two taxi drivers after killing them in the appellant's presence with the same weapon that he used at Umgababa. The trial court rejected the appellant's evidence that he feared Mthethwa, and that he had for that reason accompanied him and Khuzwayo to Umgababa. The court found that he had willingly taken part in the robbery. In its first judgment this court confirmed the trial court's finding.

Realizing the futility of relying on his client's evidence, the appellant's counsel in the present appeal tried to persuade us that there is a reasonable possibility that the appellant was at least influenced by Mthethwa. I do not agree. At the time of the incident he was a mature man (33 years old) and there is no reason to believe that he was susceptible to any kind of influence. Apart from his own evidence which the trial court rightly rejected there is no indication whatsoever of influence being exerted upon him. On the contrary the only reasonable inference from the evidence is that he was a willing member of a well-organised gang of robbers in which he had his own allotted task.

The only other factors on which the appellant's counsel sought to rely in mitigation are the absence of previous convictions and the fact that he played a minor role in the robbery. In a proper case either of these may be decisive. But not so in the present one. Although

the appellant is a first offender his active and willing association with the criminal activities of Mthethwa's gang reveals his real character. The incident at Umgababa was by no means the only one in which he associated himself with that kind of conduct. He was a willing member of a nefarious gang whose only business it was to kill for gain. The trial court found - and I respectfully agree -

"that he went to Umgababa in the full knowledge that a robbery was to be committed on that day; that after he knew that Zola was armed with the lethal fire-arm he nevertheless agreed to continue to play his part in the robbery. We are satisfied that he knew and expected Zola to make use of the gun to shoot the deceased if anything went wrong, and that what in fact happened that morning was what he expected and anticipated would happen."

Nor does it avail him in these circumstances that he played a minor part. This is precisely how the gang operated; Mthethwa was the leader who was - to the knowledge of the other members - always ready to kill the victim if necessary

while each of the others had his own allotted task. Without the others the gang could not operate. In any event the gravity and sheer brutality of the offence committed at Umgababa far outweigh the mitigation that might otherwise have affected the sentence. In my view the death penalty is the only appropriate one.

The appeal is dismissed and the death sentence confirmed.

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J J F HEFER JA

VIVIER JA       )  
NICHOLAS AJA    ) CONCUR.