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CASE NO. 258/88
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BONGANI CELE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN, NESTADT et VIVIER JJA

DATE HEARD: 22 MAY 1989

DATE DELIVERED: 30 MAY 1989

J U D G M E N T

NESTADT, JA:

This appeal is against a sentence of 30 years' imprisonment imposed for murder. Actually, appellant's effective sentence is longer than that. It is 32 years' imprisonment. This is because he was also convicted on two

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other counts, viz, theft and housebreaking. They respectively carried sentences of one year and two years' imprisonment. Only the former was directed to run concurrently ~~with the sentence on~~ the murder count.

The proceedings in the court a quo (DIDCOTT J sitting with assessors in the Durban and Coast Local Division) took a somewhat unusual course. The State did not lead any evidence. Appellant, together with a co-accused ("first accused") were convicted simply on their respective pleas of guilty (which were accepted by the prosecutor), read with a statement they each made in terms of sec 112(2) of the Criminal Procedure Act, 51 of 1977 ("the Act"). Section 112, in effect, provides that in order to convict an accused on an accepted plea of guilty to an offence of a more serious nature than that postulated in sub-sec (1)(a), the Court is obliged, either by questioning the accused or on the strength of a written statement

by him, to ascertain the facts of the case in order to satisfy itself that the accused is guilty.

The statements as amplified by answers given to certain questions by the trial judge revealed that the crimes were committed on the evening of 27 September 1986 in the following circumstances. Appellant and first accused broke into the house of a certain Lawrence Bhengu. There they stole a so-called hi-fi set. They required transport to remove it from the place where they temporarily placed it. They decided to go to the house of Clement Bhengu ("the deceased"). They knew he owned a vehicle. They represented that they were policemen. Deceased was ordered into his motor car which appellant then drove to where the equipment had been left. Deceased was forced to accompany them lest he raise the alarm by reporting the taking of his vehicle. It was their intention, however, to later return it to deceased's house and there set him free. The hi-fi

set was loaded into the car. The three of them then proceeded... in the car en route to a place called Inanda where the hi-fi set was to be sold. On the way they stopped at a garage and put petrol into the vehicle. There deceased, all of a sudden it would seem, recognised them as people he knew. And, obviously realising that their claim to be policemen was bogus, he said that he would report them to the police. This led to the accused, shortly thereafter (the hi-fi set having been disposed of), deciding to kill deceased. They each stabbed him, appellant with a knife and first accused with a screwdriver. He died as a result of a penetrating wound of the chest (which severed the left internal jugular vein) inflicted "by one or the other" of the accused. The two of them then returned to deceased's house and there stole certain articles from it. Subsequently, the vehicle was abandoned after it had broken down.

It will be seen that in a number of respects the version thus put forward, and which was accepted by the

State, lacked clarity. There is, for example, no particularity as to what conversation (presumably) took place between appellant and first accused when it was decided that the deceased should be killed; how long thereafter and where he was put to death; and what the explanation is for the post-mortem report disclosing that the deceased had three stab wounds. This is unfortunate. The charge (of murder) was sufficiently serious to warrant a more thorough and penetrating examination and presentation of the precise circumstances in which the offence was committed (see the remarks of BOTHA JA in S vs Soci 1986(2) S A 14(A) at 17 I - 18 A). It would seem, however, that the State was not able to do this. Its representative at the trial told the court that the State case "consists basically" of statements made by appellant and first accused to a magistrate in terms of sec 119 of the Act and that such statements were "substantially in accordance" with the version put forward by the accused. It was in these circumstances that their pleas were accepted and the

accused convicted. The conviction of theft related to the articles taken from the deceased's house.

When it came to sentencing the accused, DIDCOTT J was quite rightly mindful of the proviso to sec 112(1)(b). It prohibits the imposition of the death sentence where the conviction (in respect whereof such a sentence is competent) is based on a plea of guilty; to justify the death sentence the guilt of the accused has to be proved "as if he had pleaded not guilty". It was obviously because of this provision that the learned judge, in his judgment on sentence said:

"Both accused must regard themselves as being fortunate to an extremely high degree that this is a case in which they do not stand in jeopardy of the death sentence. That sentence is not procedurally competent, in view of the absence of any evidence in the case and the conviction of the accused on their pleas of guilty."

DIDCOTT J went on to give the following reasons for the sentence of 30 years' imprisonment:

"We do not find that the moral culpability of either accused for this atrocious crime was to any extent at

all diminished by the liquor they had consumed. Apart from the fact that we do not know how much liquor they consumed, their crime was not that of somebody who was so inebriated that he did things which no sober man would ever do. Deliberation, calculation, marked every step of the affair. In any event I do not subscribe, and have never subscribed, to the proposition that blameworthiness for an act of deliberate violence is ever reduced by the consumption of liquor.

Then it is said that the killing was committed on the spur of the moment... It is quite true that the murder was not a premeditated one, to the extent and in the sense that the accused set out that night intending to kill anyone. But they decided to and did kill this man cold-bloodedly, and for the rational but atrocious reason that he would be able to identify them to the police...

The only factors in this case which can be regarded as mitigating, and they are mitigating to only a slight degree, are that at the time the two accused were rather on the young side, being some 19 years old each, and the factor already mentioned that this was not a premeditated killing..."

In my opinion, the learned judge misdirected himself in two important respects. The first relates to his dismissal of liquor as a mitigating factor. That he did so is clear from the one passage I have quoted. He was not entitled to do this. Part of appellant's sec 112(2) statement (and that

of first accused as well) dealt with certain extenuating circumstances which were relied on. They included the fact that the accused were "intoxicated on the evening in question as the result of the intake of liquor" and that this diminished their moral blameworthiness. The State accepted this too. If the court was not prepared to do so, the accused should have so been told and afforded the opportunity of establishing their averment that they acted under the influence of intoxication (see S vs Soci, supra, at 18 B - C where a similar situation was being dealt with). But this was not done. On the contrary, the trial court, after conviction and despite expressing some doubt as to whether, in the light of the proviso to sec 112(1)(b) and the resultant incompetence of the death sentence, it was necessary to find extenuating circumstances, stated that "we formally find that they do exist". In these circumstances, the learned judge was bound, in sentencing the accused, to take account of their intoxication as a mitigating factor. It is true that the

court's finding was qualified; it was said that "insofar as the weight to be attached to these various factors is concerned, it will be dealt with in due course when sentence is passed". Presumably this was prompted by the consideration that the degree of intoxication had not been specified. Nor was there any information as to what quantity of liquor was consumed or when. There should have been. But this lack of detail, important though it was, and though it made the court's task more difficult, did not justify the learned judge in disregarding intoxication as a mitigating factor. Full effect had to be given to it and in particular to the fact that accuseds' moral blameworthiness was thereby diminished. This was, in other words, not one of those cases where the accused is simply shown to have consumed some liquor. The finding that it diminished the accuseds' moral blameworthiness carried with it the corollary that intoxication had impaired or affected their mental faculties or judgment and thereby influenced them in regard to the crime.

This was the approach to adopt rather than that it had to be shown that "their crime was that of somebody who was so inebriated that he did things which no sober man would ever do". And it should have tempered the inferential finding that the killing was a deliberate, calculated and cold-blooded one. The proposition that blameworthiness for an act of deliberate violence can never be reduced by the effects of liquor is plainly too widely stated.

The other criticism of the judgment on sentence is that whilst emphasising the retributive, deterrent and preventive aspects of punishment, it does not have regard to the reformatory aspect. Appellant and his co-accused were both youths. As appears from the earlier quoted passage from the judgment, appellant's age was about 19 years. More specifically, it was stated by his counsel, during the second proceedings, that he was born in 1967. The exact date could not be given. This means that he could, when the crime was

committed, have been less than 19. He had previous convictions (theft in 1984; housebreaking with intent to steal and theft in 1985 and unlawful possession of a dangerous weapon in 1986) but none involving crimes of violence. In these circumstances there were, I would have thought, prospects of rehabilitation deserving of consideration and which would have justified a substantially lesser sentence than the exceptionally long one imposed (see S vs Khumalo and Others 1984(3) S A 327(A) at 331 A - F). And the fact that the death sentence might have been imposed had it been competent to do so, should not have been allowed to detract from this.

We are therefore (as was fairly conceded on behalf of the State) entitled to consider sentence afresh. This was undoubtedly a dreadful crime. I fully understand the indignation it evoked in the mind of DIDCOTT J. With justification he described it as atrocious and appalling. Deceased was a defenceless, innocent victim of the accused's

decision to kill him because of his threat to report their unlawful conduct. Obviously a lengthy period of imprisonment is called for. In my judgment one of 20 years is an appropriate sentence. One of this duration was, incidentally, described as "massive" by HOLMES JA in S vs V 1972(3) S A 611(A) at 614 H. It is one which, I consider, will satisfy the purposes of punishment mentioned above and achieve a fair balance between the nature of the crime and the mitigating factors of appellant's intoxication and youthfulness. I propose to order that both the two other periods of imprisonment run concurrently with the sentence of 20 years' imprisonment.

The first accused has not appealed. It is likely that if he did, his sentence would also be reduced. It is desirable therefore that this judgment be brought to his attention as also that of his former pro Deo advocate. To this end I have in mind directing the Registrar of this Court to cause this judgment to be served on them.

The following order is made:

- (1) The appeal succeeds.
- (2) The sentence of 30 years' imprisonment imposed on appellant in respect of count 1 (murder) is set aside. A sentence of 20 years' imprisonment is substituted.
- (3) The sentences of 1 year and 2 years' imprisonment on counts 2 and 3 are to run concurrently with the sentence of 20 years' imprisonment.
- (4) The Registrar of this Court is directed to cause this judgment to be served on the first accused, Zamokwakhe Qholiyane Bhengu, and on his former pro Deo counsel who is requested to represent such accused in any further appeal proceedings that may result.

NESTADT, JA

VAN HEERDEN, JA)
)
 VIVIER, JA) CONCUR