

CASE NO 490/90

/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

IVAN DE BRUIN

FIRST APPELLANT

HILLERY MEYER

SECOND APPELLANT

and

THE STATE

RESPONDENT

CORAM: NESTADT, KUMLEBEN et F H GROSSKOPF JJA

DATE HEARD: 3 MAY 1991

DATE DELIVERED: 16 MAY 1991

J U D G M E N T

NESTADT, JA:

This appeal is against the death sentences respectively imposed on appellants consequent upon them having been found guilty in the Witwatersrand Local

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Division of murder without extenuating circumstances. It is combined with an informal application to remit the matter to the trial court for the hearing of further evidence in mitigation. In my opinion, this application is not well-founded. It is necessary therefore to deal with the merits of the appeal.

The deceased was 31 year-old Ruben Orr. He lived in Reiger Park, Boksburg. At about 4:30 pm on 26 August 1988 he was standing outside his home. As he was about to enter a taxi, he was approached by appellants and a certain Deon Danster ("Donny"). They were each armed with a knife or similar weapon. Danster pulled deceased out of the car. Deceased, who was not armed, ran away. Appellants and Donny followed him. They caught up with him at the front door of deceased's house. Deceased then ran round the side of the house to the back door. Again appellants and Donny were quick on his heels. From there

they chased him for a further distance of about 60 metres down a street and thence into a lane. A short while later, appellants and Donny were seen to emerge from the lane and leave the scene. Deceased was found lying in the lane. He was mortally wounded. He had been stabbed some 25 times. He was taken to hospital but died there a little while later. The doctor who performed the post-mortem examination gave the cause of death as "veelvuldige steekwonde".

That in brief is a description of the nature of the crime. Clearly it was a brutal killing. Both appellants (and Donny) participated in it. The only reasonable inference is that they acted with dolus directus. Deceased was quite defenceless. The attack was committed with a contemptuous disregard for the feelings of members of the public who witnessed it. And it was a protracted and determined one. It would seem

that deceased was first stabbed at the front door of his house. When he attempted to enter it, first appellant closed the door. At the back of the house the attack on deceased continued. First appellant again prevented deceased from escaping (into the kitchen). He instructed deceased's wife (she was standing just inside the room) to close the door failing which he threatened to kill her. At one stage, whilst deceased was being stabbed in the lane, an occupant of a nearby house implored the group to stop what they were doing. This had no effect. On the contrary, first appellant whilst speaking to this person, was called on by one of his accomplices to come and "finish off" deceased. First appellant then went back into the lane where he presumably resumed stabbing deceased. The trial court was quite right in rejecting first appellant's evidence that deceased had earlier that day stabbed him in the hand. So it cannot be said that

first apppellant may have had some legitimate grudge against deceased. Neither appellant was in any way affected by liquor. They are mature men. At the time of the murder first appellant was 27 and second appellant 35. Both have relevant previous convictions. Those of first appellant are four convictions for assault with intent to do grievous bodily harm and one of robbery. Second appellant has previously twice been found guilty of assault with intent to do grievous bodily harm, once of robbery and once of housebreaking with intent to steal and theft. There is no evidence that either appellant has shown any remorse.

What has been stated makes this a particularly serious case. I can well understand the trial court's finding that there were no extenuating circumstances. Indeed had the correctness of this finding been the issue before us, the appeal would probably have failed.

However, the effect of the Criminal Law Amendment Act, 107 of 1990, is that we have to consider sentence afresh. We have to decide whether having due regard to the presence or absence of any mitigating and aggravating factors, as also to the main purposes of punishment, the death sentence is the only proper sentence (S vs Nkwanyana and Others 1990(4) SA 735(A)). After anxious reflection and whilst acknowledging that this is a borderline case, I have come to the conclusion that the question should be answered in the negative. This is because there are certain mitigating factors that must be taken account of. They do not emerge from appellants' evidence. Their defence was an alibi. And it having been rejected, one is left without any explanation by them for their attack on deceased. However, there are indications from the State evidence itself that it might not have been planned; that appellants acted spontaneously after an argument

developed between Donny and deceased; that they took Donny's part because the three of them belonged to the same gang; that deceased was a member of a rival gang; and that there was great animosity between the gangs. In fact there is evidence supporting the conclusion that gang strife and gang allegiance might have lain at the root of this incident. No other motive for the killing appears from the record. Some of what has been stated cannot be said to be more than a reasonable possibility. Nevertheless, as the Nkwanyana case shows, this suffices. The State having failed to negative the factors referred to, due regard must be had to them. Also, appellants have not had what was called the benefit of a long term of imprisonment. They cannot be regarded as beyond rehabilitation. I do not in any way condone the gang activities revealed by the evidence. This notwithstanding, it seems to me that in the special

