

SOUTH AFRICA / JUDGMENT

S v Nogqala (19/93) [1994] ZASCA 90 (30 May 1994)

[1994] ZASCA 90

COURT

Supreme Court of Appeal

BEFORE

Smalberger, Howie, Olivier

CASE / FILE NUMBER

19/93

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CASE NO : 19/93 N v H

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between:

GEORGE MONTI NOGQALA APPELLANT

and

THE STATE RESPONDENT

SMALBERGER, JA :-

Case No : 19/93 N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION) In the matter between: GEORGE MONTI NOGQALA Appellant and THE
STATE Respondent CORAM: SMALBERGER, HOWIE, JJA,

et OLIVIER, AJA HEARD: 13 MAY 1994 DELIVERED: 30 MAY 1994

JUDGMENT SMALBERGER, JA :-

The appellant and a co-accused were arraigned before MYBURGH, J and assessors in the Circuit Court (Transvaal Provincial Division) at Springs on charges of murder (count 1) and robbery with aggravating circumstances (count 2). The charges arose from

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certain events which took place on 17 September 1991 on the farm "Syferfontein" ("the farm") and gave rise to the death of Johan Godfried van der Merwe ("the deceased"). The appellant was convicted on both counts. He was sentenced to death on count 1 and to 15 years imprisonment on count 2. His co-accused was convicted of being an accessory after the fact to the crime of murder,

and theft, and sentenced to periods of imprisonment in respect of each offence. The present appeal, in terms of sec 316 A of Act 51 of 1977, is directed only against the death sentence on count 1.

The following relevant facts were found proved at the trial. The deceased, a 65 year old man in poor health, lived on the farm with his wife and two children. During weekdays he was alone on the farm while his wife (who was the family bread-winner) and children were away at work and school respectively. On 13 September 1991 the appellant sought, and was given.

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employment by the deceased as a general labourer. When seeking employment the appellant gave a false name and produced a false identity document. On 17 September 1991 (a Tuesday) the deceased and the appellant were alone on the farm. In the course of the morning the appellant brutally assaulted the deceased, bound his hands and feet with wire and tied him, critically injured, to a fence. The appellant's co-accused arrived on the scene after the deceased had died. He assisted the appellant in placing the deceased's body in a trough in a shed and covering it with large rocks and old tyres. The appellant and his co-accused then proceeded to ransack the farmhouse and remove certain items belonging to the deceased and his family. The deceased's body was discovered in the shed the following day.

At the later post-mortem examination the cause of the deceased's death was found to be complicated

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depressed fractures of the skull with resultant extensive brain damage. Multiple bruises, abrasions and cuts were found on the deceased's body. The district surgeon described the assault upon the deceased as a very severe one. The fatal injuries were said to be the result of "taamlieke erge geweld". From the evidence it appears that the deceased suffered a slow and cruel death.

The aggravating factors are many and manifest. Everything points to the attack on the deceased having been pre-planned rather than a spur of the moment decision. The deceased was an elderly, sickly man incapable of offering any significant resistance. He was brutally assaulted and callously treated. He died a lingering, cruel death. There was direct intent to kill. Robbery, in pursuit of personal gain, was the obvious motive for the attack upon him. There was no need for the appellant to have killed the deceased in

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order to rob him. The conclusion is inevitable that he was killed to prevent later identification. The appellant has shown no remorse for his conduct. Furthermore, as stated by the learned judge a quo:

"This kind of crime is prevalent in South Africa. Elderly people living on farms where they are particularly vulnerable to attack are often the victims of cowardly assaults of this kind."

The appellant was 30 years old at the time of the commission of the offence. He is a first offender, and the prospect of his rehabilitation cannot be ruled out. This is a significant mitigating factor, but the only one. The appellant admittedly comes from an economically deprived and domestically unsettled background. He has had only a rudimentary education and limited employment prospects. These are largely neutral factors, although they are relevant to the question of sentence.

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This Court has repeatedly emphasized of late that in matters such as the present the deterrent and retributive aspects of punishment must necessarily come to the fore. This has resulted in death sentences being confirmed even in cases of first offenders with prospects of rehabilitation (see *S v Khiba* 1993(2) SACR 1(A) at 4c-i). The ultimate test, as our law stands at present, is still whether, on a proper conspectus of all aggravating and mitigating factors and other relevant considerations, the death sentence in the present instance is the only proper one. In my view it is. In passing it may be mentioned that counsel for the appellant sought to rely upon the so-called "moratorium" in respect of the execution of death sentences as a matter relevant to the propriety of the death sentence. This Court has already rejected such argument for cogent reasons (*S v W* 1993(2) SACR 74(A) at 76h-77c).

But for the provisions of the Constitution of

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the Republic of South Africa 200 of 1993 ("the Constitution") the death sentence imposed upon the appellant would be confirmed. Sections 9 and 11(2) of the Constitution, however, cast doubt on the constitutionality of such a sentence. The Constitutional Court has sole jurisdiction to interpret these sections. While the provisions of section 241(8) of the Constitution may require this Court to decide the question of the death sentence as if the Constitution had not been passed, they could also be held to be restricted to procedural and jurisdictional aspects of pending proceedings. The proper interpretation of that section may also be a matter for the Constitutional Court to decide. It would consequently be inappropriate to dispose of the present appeal until the Constitutional Court is able to pronounce upon these questions. The proper course to adopt would therefore be to postpone the present appeal pending the decision

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of the Constitutional Court. It is accordingly ordered that the appeal be postponed to a date to be determined by the Registrar of this Court in consultation with the Chief Justice pending a decision of the Constitutional Court on whether the confirmation of the death sentence imposed in the present matter would be constitutional.

J W SMALBERGER JUDGE OF APPEAL

HOWIE, AJA) OLIVIER, AJA) Concur

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