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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Saaleno. 667/91

In the matter between:

MFANUBOMVU MUNTUKATHENJWA ZONDI ..... Appellant

AND

THE STATE ..... Respondent

Coram: BOTHA, NESTADT et EKSTEEN, JJ.A.

Heard: 18 August 1992

Delivered: 27 August 1992

J U D G M E N T

EKSTEEN, J.A. :

On 23 April 1990 the appellant was charged together with one Ntuli with two counts of attempted murder and one of murder. He was acquitted on one of the counts of attempted murder but convicted on the other. He was also convicted of murder. The trial Court was unable to find any extenuating circumstances in respect of this latter count and consequently the appellant was sentenced to death. On 16 May 1990 an application to the trial Judge for leave to appeal was refused.

On 27 July 1990 the Criminal Law

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Amendment Act, No 107 of 1990, ("the Act") came into force and the matter was referred to the panel created by section 19 of the Act. The panel came to the conclusion that the sentence of death would probably have been imposed by the trial Court had section 277 of the Criminal Procedure Act, No 51 of 1977 as substituted by section 4 of the Act been in operation at the time sentence was passed, and so the matter was referred to this Court for its consideration. Section 19(12)(a) enjoins us to consider the matter as if it were an appeal by the convicted person against his sentence, and as if section 277 of the Criminal Procedure Act as substituted by section 4 of the Act were in opera-

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tion at the time sentence was passed by the trial Court.

The evidence led at the trial reveals that on Sunday 17 July 1988 the appellant was the driver of his silver-green Audi motor car. He was accompanied by his co-accused, Ntuli; by Mduduzi Buthelezi; and by one Thobezweni. They first drove to a spot near a forest where the appellant and Ntuli removed the number-plates from the car. They then drove on to a bottle-store owned by Amos Buthelezi ("the deceased"). The appellant did not drive round the building as most other cars did but instead drove straight up to the door and then reversed round so that the car

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was facing the way it had come. The engine of the car was also not switched off but continued to idle throughout their stay. Having parked the car the appellant gave Thobezweni R5 and sent him and Ntuli to the bottle-store ostensibly to buy beer. Ntuli was armed with a Smith and Wesson revolver supplied to him by the appellant. Shortly after these two had gone into the bottle-store the appellant also got out of the car and followed them. After a while he came out again, and went to the car where he armed himself with a Star pistol. He then returned to the store. Almost immediately thereafter he shot the deceased in the head - the bullet entering through the right

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eye orbit. The three assailants then ran out of the bottle-store to their car, got in and drove off. The deceased's son, John Buthelezi, who had been sitting just outside the bottle-store while these events took place, got up and ran to intercept the car. His intention was to throw a stone at it in an attempt to "mark" it. When he got to a spot some 20 metres from the passing car, the appellant slowed down, leant out of the window and fired two shots at John. Fortunately both were wide of their mark. This act formed the basis of the charge of attempted murder of which the appellant was duly convicted and sentenced.

The motive for the killing of the

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deceased appears from the evidence of Clement Mthimkulu, an 18 year-old servant of the appellant. He told the Court that one night, about the middle of 1988, a man called Ndlela came to the appellant's kraal. While Clement was preparing supper for them he says he overheard a conversation between Ndiela and the appellant. He heard Ndlela tell the appellant that he (i.e. Ndlela) was "having sleepless nights thinking about this man" and that appellant "should hurry up things and kill this man Buthelezi". To this appellant replied "No, Mr. Ndlela, that is not a problem, we are going to do your work". Noticing Clement in the room Ndlela said to appellant "Do not keep calling

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me Ndlela. Call me Mkhizi. Who is this youth?" To which appellant replied "No, don't worry about this youth, he is an inmate of my kraal. Don't worry about him".

From this evidence the trial Court came to the conclusion that appellant had killed the deceased to accommodate Ndlela for some unknown reason.

The evidence establishing the facts I have adumbrated above was found by the Court to have been "overwhelming" and warranted the rejection of the appellant's denial of any complicity in the murder as being false beyond a reasonable doubt. I see no valid reason to differ from

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this conclusion.

Since the conviction and sentencing of the appellant section 4 of the Act has introduced a new approach to sentence and this Court is called upon to reconsider the sentence in the light of these new principles. The concept of extenuating circumstances has been done away with, and the Court is now enjoined to consider and make a finding on the presence or absence of mitigating or aggravating factors. On a due consideration of these factors the presiding Judge will only impose sentence of death if he is satisfied that it is the only proper sentence in all the circumstances (Cf. Section 277 of Act 51 of 1977 as

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amended, S. v. Masina and Others 1990 (4) SA 709 (A) at pp 712 H - 714 C; S. v. Nkwanyana and Others 1990 (4) SA 735 (A) at pp 742 I - 745 G.)

In terms of the amended section 322 (2 A) of Act 51 of 1977 this Court is now vested with an independent discretion in respect of sentence. If it is of the opinion, after considering all the mitigating and aggravating factors, that it would not itself have imposed the sentence of death, it may set such sentence aside.

In the present case the age of the appellant is given in the indictment as 32 years. It appears from the record that certain previous convictions were proved against the appellant at

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the end of the trial, but what they were does not appear, nor do they form part of the record before us. There is also no explanation for the omission of these, generally very relevant, documents. The record however does reflect a remark by the presiding Judge to the effect that the previous convictions proved "don't seem to be very relevant". I propose therefore to regard the appellant as a first offender without any previous convictions. The fact, therefore, that he is a man of 32 years of age without any previous convictions must redound to his benefit and be regarded as a mitigating factor. (S. v. Senonohi 1990 (4) SA 727 (A) at 733 I - J; S. v. Ramba 1990 (2) SACR 334 (A) at

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342 f.)

As against this, however, there are serious aggravating factors. No other motive for the killing of the deceased has been suggested than that which appears from the evidence of Clement Mthimkulu to which I have referred. From this, as I have indicated, it would appear that the appellant killed the deceased merely to accommodate Ndlela. Whether he did so for mercenary gain or not, we do not know. Moreover the appellant was no unsophisticated person who may have been easily taken in by the blandishments of Ndlela. In his evidence he describes himself as a businessman "operating taxis" and who "had mini-buses".

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He also sold gold which he bought from "people working at the mines" who "used to smuggle it out of the mines". He goes on to explain that he "used to buy raw gold" and "would then cook it and make it solid gold", which he then sold. This tends to reflect a sophisticated person well able to appreciate the full implications of the crime Ndlela was asking him to commit.

The carrying out of the crime was not only premeditated, but carefully planned. The appellant used his own car to drive to the bottle-store of the deceased after having taken the precaution of removing its number-plates in order, obviously, to make identification more difficult.

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The way in which he drove up to the bottle store and turned his car round so as to facilitate a quick "get-away" after the commission of the crime is but another facet of his careful planning. After sending his two accomplices, one of whom was armed, into the bottle-store under the pretext of wanting to buy beer with the R5 provided by him, and not hearing any evidence of a shot being fired, he went into the store himself. There he probably realized that it was unlikely that the deceased would be killed unless he did it himself. He therefore returned to the car, armed himself with a pistol, returned to the store and shot the deceased in the head. In the light of these facts

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the trial Judge's remark that they reflect "a cold-blooded execution of the deceased" seems to be fully justified.

The appellant was clearly the leader of the group that went to kill the deceased. He was older than his 24 year-old co-accused, Ntuli, and the 18 year old Mduduzi Buthelezi, both of whom were employed by the appellant. There is no suggestion therefore that he acted under any form of duress, or of coercion by his accomplices. His intention in killing the deceased was also clearly dolus directus.

In considering whether the sentence of death is the only proper sentence in all the

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circumstances and in the exercise of its independent discretion this Court must have regard to all the mitigating and aggravating factors I have referred to above. If one were merely to weigh the one set of factors up against the other there seems, to my mind, to be little doubt that the aggravating factors would considerably outweigh the mitigating factors. Regard may also, however, be had to other factors such as the interests of society, and the recognized purposes of punishment i.e. the deterrent, preventative, reformative and retributive purposes. One or more of these additional factors may, in the circumstances of a particular case, not only be relevant but decisive. (S. v.

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Ntuli 1991 (1) SACR 137 (A) at p 142 E - H.)

The interests of society must weigh heavily against the appellant in the present case. No society can tolerate the killing of a person on the whim of an instigator, by assassins whether hired or acting gratuitously. Such serious crimes strike at the very root of an orderly society, and the sentence of the Court should serve not only to deter others from committing such crimes, but also to reflect the revulsion which any reasonable person feels for such a heinous deed. The deterrent and retributive objects of punishment seem therefore to be decisive in the present case. (S. v. Nkwanyana and Others (supra) at 749 C and S. v. Shabalala and

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Others 1991 (2) SACR 478 (A) at 483 c - e.) With a full appreciation of the drastically extreme nature of the sentence of death and with due consideration of all the circumstances of the case I am driven to the conclusion that that sentence is the only proper sentence in the present instance.

The appeal is therefore dismissed.

J.P.G. EKSTEEN, J.A.

BOTHA, J.A. )
NESTADT, J.A. ) concur