134/92

CASE NO 518/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GAMLAKHE ELLIOT NGWEGWE	First Appellant
LINDEMNA LAWRENCE DADA	Second Appellant

and

THE STATE	Respondent

CORAM: **HEFER, NIENABER JJA et HOWIE AJA**

DATE HEARD: AUGUST 31, 1992

DATE DELIVERED: SEPTEMBER 8, 1992

J U D G M E N T

NIENABER JA:

The two appellants stood trial in the Cape Provincial Division on two counts of murder. Each pleaded guilty to one of the counts and not guilty to the other. On the first count the first appellant was convicted of assault with intent to do grievous bodily harm and the second appellant of murder, as charged. On the second count, conversely, the first appellant was convicted of murder and the second appellant of assault with intent to do grievous bodily harm. Each was sentenced to death by Williamson J, sitting with assessors, on the relevant murder count and to six months imprisonment for the assault. The only issue with which this court is concerned, an issue which comes before it by virtue of the provisions of Act 107 of 1990, is whether the death sentence imposed on each appellant was, in all the circumstances, the only proper sentence.

Those circumstances are as follows:

The two appellants and the two deceased, all unemployed black males between the ages of 28 and 37, hailed from Uitenhage. Uitenhage, at the time, was torn by unrest and strife, erupting in the wholesale destruction of property and a progression of assaults and killings, between the respective supporters of two organisations, the United Democratic Front (UDF) and the Azanian People's Organization (AZAPO). The two appellants were committed supporters of the UDF. The two deceased were suspected by them of being supporters of AZAPO. All four of them formed part of a group of between 40 and 50 contract labourers who were transported from Uitenhage to the farm Koelenhof near Koekenaap in the district of Vredendal to work on a farm during the harvesting season. Most of the workers were alligned to the UDF but there were some who apparently identified with AZAPO. Complaints were made to the owner of the

farm, one Strauss, inter alia by the two appellants, about the presence of AZAPO supporters in the shed on the farm where all of them were initially housed, and the known AZAPO supporters were thereupon accommodated elsewhere on the farm. The two deceased had the misfortune to remain behind. The political affiliations of the two deceased were never convincingly explained during the course of the trial. There were suggestions that they may well have been UDF supporters. It mattered not. The two appellants believed them to be followers of AZAPO. And that, the court a quo found, was the real incentive for the fatal assaults on the night in question, 15-16 March 1990, by the appellants on the deceased.

That political animosity was the root cause for the attack on the deceased, some ten days after their arrival on the farm, appears initially from the explanations tendered by each of the appellants on pleading guilty to

the murder for which he was eventually sentenced. Both tendered identical explanations: that the deceased he killed was a member of AZAPO who had been involved in an earlier attack on him in Uitenhage and who had uttered threats of violence against him on the farm. But there was no acceptable evidence to support this particular refinement nor a later elaboration, tendered in evidence, that it was the deceased who, on the night in question, provoked retaliation: not one of the eye witnesses, all of them UDF supporters and co-workers alike, knew anything about the earlier incident when the deceased was supposed to have threatened the appellants; the supposed provocation at the time was entirely against the probabilities; the appellants themselves declined to testify during the trial proper and were found, for good reasons, to be untruthful when they eventually testified in mitigation of sentence. The acceptable evidence showed rather that the two appellants sought out and

attacked the two deceased late at night when everyone else was asleep. The state witnesses all awoke as a result of the commotion. Nobody came to the assistance of the deceased although one of the state witnesses did remonstrate with appellant no. 2. The court a quo rightly found, on the evidence before it, that the attack on the deceased was unprovoked by any conduct on the part of the deceased. "The truth is rather", so it was held, "that the accused suspected the deceased of being AZAPO members and this is why they kept on telling the deceased to tell the truth".

The deceased were overpowered, their arms were tied behind their backs with wire from a nearby washing line, so tightly that it cut into their flesh and had to be removed with pliers at the post mortem examination and, notwithstanding their pleas and protestations of innocence, they were beaten with a pole and an iron bar and dragged to their place of execution. According to

one of the state witnesses appellant no. 1 asked his colleague, when he had deceased no. 2 at his mercy, "What am I to do with him now?", whereupon the other replied, "Well there is nothing you can do other than kill him". Appellant no. 1 then took a knife and proceeded to saw through the deceased's throat. Appellant no. 2 then announced to all the others that anyone "who is not strong enough to watch what was going on should go out". When deceased no. 1 continued to plead for mercy appellant no. 2 tore a piece off the latter's T-shirt and rammed it down his throat with a stick. He thereupon slit his throat. The trial court described the killings in these terms:

> "The two deceased had their arms pinioned behind their backs with wire so that they were utterly helpless. Their heads were forced back and their necks methodically sawed through so that they were virtually decapitated."

The district surgeon who conducted the post mortem examination on the bodies of the two deceased commented:

> "Ek is 37 jaar distriksgeneesheer en ek het nog nooit so iets gesien nie, so 'n wreedaardige ding soos dié nie."

Appellant no. 2 also announced to the others in the shed that they need not be concerned, he would "stand for what I am doing."

Afterwards some of the others in the shed helped to drag the bodies of the two deceased to a nearby gravel pit where they were buried. Their bodies were discovered the next day.

The circumstances described above make it plain that the actions of the two appellants are deserving of severe punishment. The court a quo, having evaluated the mitigating and the aggravating factors, concluded that it justified the severest punishment of all. It is that question, whether the death sentences are the only proper sentences, which this court must now re-examine and re-assess afresh.

The single most aggravating feature is doubtless the savage and gruesome manner in which the deceased were butchered to death. It is also indicative of premeditation. Although there was no direct evidence of how the assault on the two deceased started, the conduct of the appellants - confronting the two deceased in the middle of the night, tying and beating them up, dragging them away and then severing their heads in identical fashion - shows such correspondence that it could not have happened spontaneously and must therefore have been contemplated.

What, then, are the mitigating factors?

The appellants are uneducated, not particularly intelligent and relatively unsophisticated labourers who lived in a community where, for a significant period prior to the incident in question, violence, upheaval and political confrontation had become a way of life and death. From the profile of the appellants prepared by

the clinical psychologist called on their behalf, Dr Cooper, and the fact that they reached adulthood without any previous convictions of note, one can, I think, infer that they were not, by disposition, cruel and violent persons. Yet they committed these truly atrocious acts. They found themselves cooped up with people they regarded, most likely wrongly, as their mortal enemies. Precisely what incident triggered off the final confrontation between the appellants and the deceased one does not know. What one does know is that most of the occupants of the shed, including the appellants and the deceased, had been drinking earlier that evening. Each labourer was issued with a bottle of raw wine. Many of the witnesses conceded that they were, to a greater or lesser extent, under the influence of liquor. Both appellants claimed to have been heavily intoxicated. The trial court concluded that they were exaggerating the amount of liquor which they had consumed but that the

wine nevertheless did impair their inhibitions. It doubtless fuelled the antagonism which they felt towards the deceased whom they identified as enemies in their midst; it may even have spurred them on and quelled misgivings. That the killing of the two deceased was inspired by hostility and tension between the two political groupings goes almost without saying and was never really in dispute. The appellants must have been exposed to a good deal of political indoctrination to have responded in such a frenzied fashion. There is no other rational explanation for their conduct. The method they employed to kill the deceased, hacking at their throats as if they were animals at slaughter, reveals the contempt they felt for their victims; and the gratuitous cruelty and bravado which accompanied it strongly suggest that they were swept along in a surge of hatred and emotion. It is these facts which coloured the conduct of each of them to such an extent that the death

sentence, in my view, is not imperatively called for.

What sentence should then be substituted in its stead? The only alternative is a lengthy period of imprisonment. Although there are some indications in the evidence that appellant no. 2 assumed a more dominant role than his comrade, I do not believe that it justifies a differentiation in sentence. Having regard to all the circumstances of this case, its background, the motivation of the appellants, their personal circumstances and the general jurisprudential objectives of punishment, a period of imprisonment of 25 years for each appellant would in my opinion be appropriate.

The following order is accordingly made:

1. The appeal of each of the appellants against his sentence succeeds to the extent that the death sentence imposed on him is set aside.

2. In its stead the first appellant is sentenced to twenty-five years imprisonment on count 2 and the

second appellant is sentenced to twenty-five years imprisonment on count 1.

3. It is directed that the period of imprisonment of six months which is imposed on each appellant for assault with intent to do grievous bodily harm on the remaining count is to run concurrently with the above sentence.

P M NIENABER
Judge of Appeal

Hefer JA]
] Concur
Howie AJA]