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Case Number 650/91

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IN THE SUPREME COURT OF SOUTH-AFRICA

(APPELATE DIVISION)

In the matter between:

BONGANI WELLINGTON MAPHUMULO Appellant

and

THE STATE Respondent

CORAM: Hefer, Goldstone JJA, et Kriegler AJA

DATE OF HEARING: 14 September 1992

DATE OF JUDGMENT: 28 September 1992

J U D G M E N T

KRIEGLER AJA/.....

KRIEGLER AJA:

This is an appeal in terms of section 316A(1) of Act 51 of 1977 against a sentence of death imposed in the Durban and Coast Local Division on 25 April 1991 on a charge of murder.

The appeal was noted out of time and consequently an application for condonation first had to be considered. Counsel who represented the appellant pro deo at the trial (and who has since left the Bar) was only advised in June 1991 that the appellant wished to appeal. The record was prepared and on 21 August 1991 an application for condonation, supported by an explanatory affidavit, and a notice of appeal were signed by counsel. Such documents were only lodged with the registrar of this court on 20 November 1991, without any explanation for the delay. Condonation was nevertheless granted at the hearing, there being no opposition by the State.

The reasons for such order follow. The appellant at all times desired to prosecute the appeal and the initial delay was due to a lack of communication between himself and his pro deo counsel. Once counsel knew of his client's desire the initial steps were taken with due expedition. The delay thereafter was probably due to the fact that counsel left the Bar. In any event, if the appeal were not to have been heard in terms of section 316A(1) of Act 51 of 1977 it would have been necessary for two judges of this division to review the sentence of death on written submissions in accordance with the provisions of subsections (4) and (5) of that section. Full heads of argument had been filed on both sides, counsel were ready to argue the matter and it was convenient to deal with it with the assistance of counsel's oral argument.

Before turning to the facts of the present

case, some prefatory remarks concerning the scope and effect of the amendments to the Criminal Procedure Act 1977 introduced by the Criminal Law Amendment Act No 107 of 1990. These have been clearly delineated in a number of judgments of this court, eg in S v Masina and Others 1990 (4) SA 709 (A); S v Senonohi 1990 (4) SA 727 (A) and S v Nkwanyana and Others 1990 (4) SA 735 (A). Detailed discussion thereof is unnecessary. In short, this court is now called upon to consider all death sentences afresh. The vital enquiry is whether such penalty is the only proper sentence. And in such enquiry aggravating factors established beyond reasonable doubt are considered in conjunction with possible mitigating factors for which there is a factual foundation in the evidence. Ultimately such factors are evaluated in context with the general objectives of punishment.

The death sentence was imposed pursuant to

appellant's conviction on a charge that he had murdered one Zandile Muriel Maphanga ("the deceased") near the Illovo Sugar Mill on 19 March 1988. An alternative to the charge of murder alleged a conspiracy to murder the deceased. The appellant was indicted as accused number 1 and Daniel Dadu Maphumulo as accused number 2. The latter will henceforth be referred to as DADU. After some initial confusion the appellant pleaded guilty to the main charge and a written statement in terms of section 112(2) of Act 51 of 1977 was handed in on his behalf. In such statement he admitted having assisted Dadu in a fatal assault on the deceased, who died of multiple stab wounds of the chest and severing of her throat. The statement alleges that the appellant had, on the day of the murder, refused a request by the deceased's husband, Selby Maphanga, to kill the deceased but had undertaken to try to enlist the

services of somebody who would assist Maphanga. They happened to come across Dadu and upon appellant's suggestion Maphanga and Dadu conversed with one another out of his earshot. They then drove to the scene of the murder where Dadu stabbed the deceased repeatedly with a knife, which he then handed to Maphanga, who used it to slash the deceased's throat.

The appellant also pleaded guilty to the alternative charge on the basis that he had been present. Dadu pleaded not guilty to both counts but also stated that he had been present.

The State case against the two accused rested upon the evidence of Maphanga, as also on statements which the accused had made to a magistrate on 26 and 27 January 1989 respectively. The appellant challenged the accuracy of the transcription of his statement (Exhibit "E") and a trial within a trial on that issue ensued. The

appellant failed lamentably to assail the accuracy of the statement and the trial court held that it was a true transcription in English of what the appellant had stated to the magistrate in Zulu. In essence it amounted to a damning confession that he had participated in the murder.

The State thereupon adduced the evidence of Selby Maphanga, who was warned at the outset of his evidence in terms of section 204 of Act 51 of 1977. He testified that his marriage to the deceased had been unhappy for many years. As a result of advice he received from a sangoma called Constance Makhatini he decided to get rid of the deceased. Constance introduced him to the appellant and they arranged for the latter to kill the deceased. According to Maphanga the appellant confirmed to him that he would do the killing quickly for a fee of R200,00. Subsequently Maphanga handed the money to Constance for transmission to the appellant.

(The latter admitted in evidence that he had received - and spent - the money.)

On Saturday afternoon 19 March 1988 he met the appellant by arrangement at a shop. Maphanga was driving his employer's furniture van with the deceased as a left front-seat passenger. The appellant, who appeared to be "in liquor", directed him to a point where the appellant alighted and went to fetch Dadu. They then departed with Maphanga driving. He stopped at a remote spot where the appellant and Dadu first attacked him and then turned their attentions to the deceased. She had locked herself into the cab but Dadu broke the left hand window, whereupon the deceased jumped out of the driver's door and ran into a sugar cane plantation. The two accused followed and Maphanga heard her crying. The accused returned and Maphanga asked them whether they had done the job, to which he received an affirmative answer from the

appellant.

Subsequently, in the course of cross-examination on behalf the appellant Maphanga denied ever having put such a question or having received an answer thereto. Later, when it was put to him by appellant's counsel that he, Maphanga, had cut the deceased's throat, he said that the deed had been done by the appellant. He added that the appellant had told him so after their arrest. Quite apart from that vital self-contradiction, Maphanga was generally an unsatisfactory witness. He was ultimately found to be wholly unworthy of credence and no indemnity from prosecution was extended to him.

The next witness was the appellant. Judging by the record and the strictures expressed in the course of the judgment, he too must have cut a sorry figure in the witness box. He sought, ineffectually, to deny numerous averments in

Exhibit E and in his statement in terms of section 112(2). Indeed, during cross-examination by counsel for the State and by counsel for Dadu, he even denied several statements he had made in the course of his evidence-in-chief.

Then Dadu entered the witness box and fared no better. In the result, the trial court was left with the appellant's plea of guilty, two extra-curial statements and three unreliable witnesses as to what had transpired prior to the murder and at the commission thereof. The conundrum was resolved by applying the doctrine of common purpose, resulting in the appellant's conviction and Dadu's acquittal. Referring to the judgments of this court in S v Safatsa and Others 1988 1 SA 868 (A) at 894G et seq and S v Mgedezi and Others 1989 1 SA 687 (A) at 705I and, quoting the latter passage, the learned judge held that the legal requirements for a conviction based on such doctrine had been

established. However, a resort to the doctrine was neither apposite nor necessary. On his own showing the appellant had been a co-perpetrator. He pleaded guilty to the charge of murder qua co-perpetrator and in Exhibit E admitted having agreed with Maphanga to arrange the murder. At the trial he sought to suggest that the arrangement had only been made on the day of the murder but Exhibit E and the circumstancial evidence establish that it must have occurred earlier. Be that as it may, he admitted having approached Dadu and meeting with him on the Saturday afternoon of the murder by arrangement. He acknowledged having accompanied the deceased, Maphanga and Dadu to the scene of the murder where he had struck the deceased with a stick while Dadu was stabbing her. He had therefore on his own version not only procured Dadu to commit the murder but had participated in the commission thereof. On that basis there can be no

doubt as to his guilt as a co-perpetrator. With regard to the fatal stab wounds inflicted with the knife, he was a mediate perpetrator, he having specifically engaged Dadu to inflict such wounds. His admitted personal participation in the fatal assault had been intended to contribute to the deceased's death and renders him additionally liable as an immediate co-perpetrator. He admitted having so acted in concert, pursuant to and in terms of the agreement to put the deceased to death. It follows that the appellant's conviction rests not on his making common cause with the criminal acts of others but on his own conduct as a perpetrator. (See S v Williams en 'n Ander 1980 1 SA 60 (A) at 63 and, as to terminology, S v Khoza 1982 3 SA 1 019 (A) at 1 031B-F.) To that extent, therefore, the trial court's approach to the identification of aggravating and mitigating factors favoured the appellant.

The first aggravating factor found by the court a quo was that the appellant's motive had been monetary gain. Counsel for the appellant submitted that there may also possibly have been an element of sympathy for Maphanga present to appellant's mind, which could to some extent be counted in his favour. Maphanga had been informed by the sangoma that the deceased intended poisoning him and that is why he wanted to be rid of her. It follows, so it was argued, that the appellant may not have been motivated purely by the blood money but may have been swayed by the belief that the deceased was an evil woman who deserved to be killed. There is no support in the evidence for such a possibility. Indeed the appellant himself made no such suggestion in either his confession or in the witness box. The finding by the trial court is the only one open on the evidence: the appellant arranged for assistance and personally

participated in the murder solely for a financial motive.

The second aggravating circumstance found by the court a quo is linked to the first. Maphanga was a stranger to the appellant; so was the deceased; she had done the appellant no harm and he bore her no grudge. Here again counsel for the appellant suggested that Maphanga's belief that the deceased intended poisoning him may possibly have weighed with the appellant. To assist in the elimination of a poisoner is less reprehensible, so the argument ran, than putting to death an innocent woman. The submission founders on the evidence. In the absence of any suggestion by the appellant that he ever considered - or even knew - Maphanga's motives, the line of argument is speculative, not inferential.

The third aggravating feature identified by the trial court is that the appellant had been a

party to a murder which had been preplanned, considered and deliberately and intentionally executed. Counsel for the appellant, rightly, did not challenge such finding. It is an irresistible conclusion from the appellant's evidence. Likewise the fourth aggravating factor found by the court a quo is an ineluctable finding on the appellant's own version. An unsuspecting woman was led to the place of slaughter and there brutally cut down. Quite apart from the reprehensibility of planning a cold-blooded murder, the execution thereof was shocking in its brutality.

This is therefore a case falling four-square in the category discussed by this court in S v Mlumbi en 'n Ander 1991 (1) SACR 235 (A); S v Dombeni 1991 (2) SACR 241 (A) and S v Dlomo and Others 1991 (2) SACR 473 (A). The appellant was a hired assassin, pure and simple. Persons of that ilk "must be made aware that, save possibly in

exceptional circumstances, the court will impose the ultimate sentence on them" S v Mlumbi, supra, at 251G-H).

Nevertheless and notwithstanding the compelling nature of those features, it may still be that the ultimate penalty is not imperatively called for. The existence of reasonably possible mitigatory factors, viewed in context with the aggravating factors and with the general objectives of punishment, may yet serve to found a conclusion that the incomparably extreme sanction of hanging is not unavoidable. Counsel for the appellant submitted that there were indeed such factors to be found in this case. In particular he stressed the appellant's personal circumstances and his allegedly less blameworthy role in the putting to death of the deceased.

The appellant, effectively, has a clean record at the age of 36. He is apparently a simple,

unsophisticated man of humble origins. Maphanga also mentioned an impression that the appellant was "in liquor" when they met on the afternoon of the murder. That impression, however, found no support in the evidence of either appellant or Dadu. In any event it would have been of minimal consequence as it is clear that the intention to murder had been formed earlier, at a time when the appellant's sensibilities were not blunted by intoxication. Yet it is not wholly without significance in that it lends some support to the impression created by the involvement of Dadu, namely, that the appellant did not have the stomach for the deed. Whether that is a mitigating factor is questionable but, seen in the context of the evidence relating to his back-ground and personality, it does lend some support to the accused's evidence that he had been reluctant to get involved in Maphanga's scheme. On the other

hand, once he had been swayed to participate he did so willingly, actively and effectively. He procured an assassin less squeamish than himself and assisted in leading the victim to her slaughter and putting her to death. The submission that his role at that stage was relatively minor or, at least on the evidence may reasonably possibly have been such, is double-edged. On the one hand it may be true enough that he did not personally inflict any fatal wound; but at the same time the very reason why the evil deed could be done with a possibly minor physical contribution by the appellant is that he had obtained the services of a competent executioner.

Counsel raised a further feature which he submitted could be regarded as mitigatory. That was that the appellant was the only member of the murderous triumvirate to be convicted and punished. It does indeed offend the right-minded that

Maphanga, the originator and beneficiary of the plot, and Dadu, its ruthless executioner, get off scot-free. But that does not serve to ameliorate the appellant's role nor to soften the punishment such role warrants. It is indeed regrettable that the prosecution had to put Maphanga in the witness-box and not in the dock, where he richly deserved to be. However, the quality of his evidence was such that the indemnity proferred to him under s. 204 of the Criminal Procedure Act 1977 did not eventuate. Were he to be prosecuted now he may therefore yet receive his just deserts. Dadu, of course, has irreversibly escaped condign punishment. But that is frequently the case where multiple accused participate in committing crimes. Often some of the miscreants escape apprehension or prosecution. Then again, as happened in this case, some accused benefit from the policy of our law not to convict unless guilt has been proved. But

counsel was unable to refer us to any authority suggesting that such circumstance can be regarded as mitigatory per se. It would indeed be logically and morally insupportable to regard it as such in a case such as this. The appellant's participation in the planning of the crime was crucial and his part in its execution significant. Consequently one's sense of justice is not offended that he is punished, but by the circumstance that his confederates are not.

Considerations of personal deterrence and rehabilitation are of little significance in the circumstances of this case. General deterrence and retribution are to the fore. Still that does not mean that the appellant as a person is to be ignored. By back-ground and nature he was an unlikely candidate for the role selected for him. That he manifested by his initial reluctance to accept the mandate, his resort to Dutch courage and

the otherwise unnecessary involvement of Dadu, but it took slight persuasion and little money to move him to arrange and execute a particularly cold-blooded and vicious murder. There are no special features taking his case outside the category of hired killers simpliciter.

In the result the enormity of the crime and the gravity of the aggravating factors so substantially outweigh the relatively insignificant mitigating factors that the sentence of death is indeed the only proper penalty.

The appeal is dismissed.

KRIEGLER AJA

HEFER JA]

] CONCUR

GOLDSTONE JA]