32/92

CASE NO 301/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

PHINE MICHAEL MABASO	First Appellant
MVAYISA SIPHAMANDLA SITHOLE	Second Appellant
BHEKISITHA NZUZA	Third Appellant
MFILUSWA BHACILE ZUMA	Fourth Appellant

and

THE STATE	Respondent

CORAM: HEFER, SMALBERGER et GOLDSTONE JJA.

DATE HEARD: 13 March 1992

DATE DELIVERED: 20 March 1992

J U D G M E N T

GOLDSTONE JA:

The four appellants and John Benghu were found guilty of murder by Law J and assessors in the Zululand Circuit Local Division. In the case of Benghu extenuating circumstances were found and he was sentenced to a term of imprisonment. No extenuating circumstances were found to be present in respect of the appellants and they were all sentenced to death. These sentences were imposed on 2 July 1988.

Appellants 1, 2 and 4 were given leave by Law J to appeal against their convictions, and all four

appellants were given leave to appeal against the imposition of the sentences of death. On 24 May 1989 this Court dismissed the appeals of appellants 1, 2 and 4 in respect of their convictions and those of all four appellants in respect of the sentences of death.

On 27 July 1990, the Criminal Law Amendment Act, 107 of 1990 ("the new Act") came into operation. In terms of sec 19 of the new Act the death sentences were reconsidered by the panel appointed under that Act. The panel found that the trial court would probably have imposed the death sentences if sec 277 of the Criminal Procedure Act, 51 of 1977, as amended by the new Act, had been in operation at the time the sentences were imposed. The appellants case now comes before us in terms of sec 19(12) of the new Act.

The material facts were very fully set out by Steyn JA in the judgment he delivered on behalf of this Court in the appeal. I propose therefore to repeat only

those facts necessary to make this judgment intelligible.

The first and second defendants, aged respectively 24 years and 25 years, were hired by the third and fourth appellants, aged respectively 34 years and 49 years, to murder the deceased. The deceased was the driver of a bus which plied a route which until shortly before the murder had been the sole preserve of the taxi service operated by the third and fourth appellants. The new bus service had resulted in a substantial loss of business for the third and fourth appellants. Indeed, it was not challenged by the State, during the trial, that the competition from the bus service "would kill the taxi drivers' business". They offered to pay the first and second appellants to kill the deceased. They supplied the firearms to the first and second appellants and provided the transport to the place where they boarded the bus driven by the deceased.

They waited for the two killers at the bus stop where the first and second appellants had been instructed to shoot the deceased. The firearms were returned and the first and second appellants were paid. It is clear that by having the deceased killed, the third and fourth appellants hoped to induce the owner of the bus service to abandon the route which took customers away from their taxis.

The Mitigating Factors

The fourth appellant has a previous conviction for common assault and malicious injury to property. Those convictions took place in 1968 and should consequently be ignored for present purposes. The third appellant has no previous convictions for crimes involving violence. The first and second appellants have no previous convictions at all. They are all, therefore, to be treated as first offenders and that is clearly a mitigating factor. They were all in

employment at the time of the murder and that indicates that there are good prospects of rehabilitation in respect of each of them. They each would appear to come from a stable home and family life. The prospects of rehabilitation are further strengthened, in the case of the first and second appellants, by their comparative youth and in the case of the third and fourth appellants by the consideration that they reached middle age without a brush with the criminal law.

On behalf of the first and second appellants it was submitted that they were not professional assassins and that the murder of the deceased was not accompanied by any brutality. In my opinion, neither of those grounds constitute mitigating factors. If they had been professional assassins and if the murder had been accompanied by brutality, those would undoubtedly have constituted aggravating factors, but that is another matter.

It was further submitted that the first and second appellants' services were hired a short time before the murder. That, too, in my judgment, is not a mitigating factor. On any version they had at least one night to repent of their agreement with the third and fourth appellants. And, as was put to counsel during argument, when they sat travelling in the bus, the realisation of what they were about to do must have been starkly present in their minds. The murder was a cold-blooded and calculated one. Again, there is no merit in this submission.

Evidence was led in the trial Court concerning a mental illness suffered by the third appellant. Law J held that it had not been established on a balance of probabilities that such condition influenced his participation in the murder of the deceased. It was submitted on behalf of the third appellant that under the provisions of the new Act, the onus of negating

mitigating factors now rests upon the State and that it cannot be said that the onus was discharged with regard to this issue. I do not agree. The evidence of Dr. Lind, who testified on behalf of the third appellant, was to the effect that he suffered from an underlying state of anxiety with recurring episodes of acute anxiety during which he would be in a state of diminished responsibility. During periods between such acute episodes he would be normal. Dr. Lind conceded that if third appellant was in an acute state of anxiety he would have been incapable of driving his car long distances, as he admittedly did twice on the day of the murder. He conceded further that the appellant must have been in a normal state and consequently not suffering from any diminished responsibility at the relevant time. Two other psychiatrists, who testified on behalf of the State, gave it as their opinion that the third appellant suffered from a neurotic condition

which could periodically result in phases of hysteria. According to them there were no indications that the third appellant was in a state of diminished responsibility at any relevant time. It follows that the evidence placed before the trial Court established beyond a reasonable doubt that the third appellant's mental state at the time when the murder was planned and at the time of the killing itself was not abnormal. It did not, therefore, constitute a mitigating factor.

On behalf of the third and fourth appellants it was pressed upon us by counsel that their motive was not one of greed. They feared that the whole of their livelihood would be taken from them. Accepting that to be so, I have difficulty in appreciating how, in relation to the murder of an employee of a lawful competitor in order to intimidate the latter into abandoning his enterprise, the effect of that competition can constitute a mitigating factor. If the

motive was only greed, that might have constituted an aggravating factor.

The Aggravating Factors

The aggravating factors are obvious in this case. In S v Mlumbi en 'n Ander 1991(1) SACR 235(A) at 251 g, Steyn JA said:

> "'n Kontrak-sluipmoord is 'n verfoeilike vergryp wat mense van vroegtyd af al met afgryse vervul. Dit is ook 'n soort misdaad wat dodelike gevaar inhou vir enige menslike gemeenskap. ... Die hedendaagse Suid-Afrikaanse gemeenskap word ernstig deur sulke gedrag bedreig, en durf dit nie duld nie."

And in S v Dlomo and Others 1991(2) SACR 473(A), after referring to the passage just cited, it was said that in this type of case the deterrent and retributive objects of sentencing come to the fore. The judgment continued at 477j-478a:

"Hired killers must be made aware that, save possibly in exceptional circumstance, the Court will impose the ultimate sentence upon them. Furthermore, society is unlikely to regard even a life sentence as adequate retribution."

Counsel for the appellants referred us to two recent decisions of this Court in which death sentences imposed on hired killers were set aside. In both of those case, however, there were "special circumstances". (Whether one refers to "special" or "exceptional" circumstances in this context, does not appear to me to matter). In S v Dombeni 1991(2) SACR 241(A) the appellant was one of a group of three people who were hired to murder the deceased. They were accompanied by the hirer. The appellant was held to have acted impulsively in deciding to join the group. He was recruited on the evening that the murders were committed. It was held further that the appellants

participation in the murder was a minor one. In S v Mjezeni Ziyagolima Nkosi (case No 36/91, judgment delivered on 6 September 1991), it was held that the appellant had not committed the murder for mercenary reasons only. To quote Hefer JA:

> "... it is more than likely that he was drawn into the feud, not merely by the promise of a reward, but by the desire to correct a wrong which he conceived to have been perpetrated upon a friend."

Again, therefore, there were special or exceptional circumstances present.

Counsel correctly submitted that in respect of a hired killer, the death sentence is not automatically the only proper sentence. As indicated in the Dlomo case, exceptional circumstances may lead the court to conclude that a sentence other than death is a proper one. However, it should be re-emphasized that hired killing fills any decent person with revulsion and

loathing. No civilised society will tolerate such conduct. That is why the deterrent and retributive objects of sentencing here predominate.

In the present case there are no special or exceptional circumstances present. The aggravating factors outweigh by far the mitigating factors. Having given the latter, and especially the personal circumstance of the appellants, due consideration, I am of the opinion that, in respect of all four appellants, the only proper sentence is one of death. It is no easy question as to who is more morally blameworthy - the hirer or the killer. It is unnecesary in this case to attempt to give an answer thereto. There is clearly no basis for treating any of the four appellants differently from the others.

The appeals are dismissed and the death sentences are confirmed.

R J GOLDSTONE

JUDGE OF APPEAL

HEFER JA)

SMALBERGER JA) CONCUR