

Pib.

38/92

1

Case nr 299/91

/MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

Between:

NAFTAN MCHUNU

First Appellant

MPHIKWA NDLELA

Second Appellant

- and -

THE STATE

Respondent

CORAM:

JOUBERT, SMALBERGER et VIVIER JJA.

HEARD:

19 March 1992.

DELIVERED:

26 March 1992.

J U D G M E N T

VIVIER JA.

VIVIER JA:

The two appellants ("accused No's 1 and 4" respectively) together with two others ("accused No's 2 and 3" respectively) were convicted of murder in the Natal Provincial Division by NIENABER J and two assessors. In addition accused No's 2, 3 and 4 were convicted of common assault. In the case of accused No's 1, 3 and 4 no extenuating circumstances were found in respect of the murder conviction, and under the then prevailing law they were each sentenced to death. Accused No 2 was sentenced to 15 years' imprisonment on this count. Accused No's 2, 3 and 4 were each sentenced to 2 years' imprisonment on the assault charge. The trial Judge refused an application by accused No's 1, 3 and 4 to appeal against the finding that there were no extenuating circumstances and the

consequent sentences of death imposed. Petitions by accused No's 1, 3 and 4 to the Chief Justice for leave to appeal were unsuccessful.

Since the trial the Criminal Law Amendment Act 107 of 1990 ("the Act") has come into operation and in terms of sec 19(8) of the Act the sentences of death imposed in respect of No's 1 and 4 were reconsidered by a panel appointed under the Act. (The sentence of death imposed upon accused No 3 had in the meantime been commuted by the State President). The panel made a finding in terms of sec 19(10)(a) of the Act that, in its opinion, the sentence of death would probably have been imposed by the trial Court in respect of each of accused No's 1 and 4 had sec 277 of the Criminal Procedure Act 51 of 1977, as substituted by sec 4 of the Act, been in operation at the time sentence was passed.

The case of accused No's 1 and 4 accordingly comes before this Court on appeal in terms of sec 19(12) of the Act. The principles to be applied and the approach to be adopted in an appeal against a sentence of death under the new legislation have repeatedly been stated in recent decisions of this Court and need not be repeated. It is only necessary to apply them to the facts of the instant case. For present purposes these may be summarised as follows.

During the early morning of Tuesday 31 March 1987 the deceased, a 35 year old woman, was arrested at her home in the Ntzinga area on a housebreaking charge by accused No's 2, 3 and 4, who were constables in the South African Police stationed at Impendle, which is about 20 km from the Ntzinga area. Accused No 4 was the investigating officer and he was being assisted by the other two. They took her to the charge office at

Impendle where she was later that day charged with the offence of having traded without a licence, and then released. After her release she complained that she had been assaulted by accused No's 2, 3 and 4 and the next day, 1 April 1987, she laid a charge of assault against them. That evening accused No's 2, 3 and 4 approached one Mandla Zondo, a shopkeeper in the Hlabankosi area near Impendle. They told him about the assault charge which had been laid against them and asked him to help them by killing the deceased. He refused. The following day the station commander at Impendle Police Station, warrant officer Kitching, took a statement from the deceased and had her medically examined by the district surgeon. After discovering a rubber tube in the police vehicle in which the deceased had been conveyed after her arrest on 31 March 1987 he informed accused No's 2, 3 and 4 that a charge of

attempted murder would be brought against them. Later that day accused No's 3 and 4 again visited Zondo's shop, but this time they asked to speak to Zondo's shop assistant who was accused No 1. They asked him to kill the deceased and he agreed to do this for the sum of R2 000-00. Later that week the deceased was pointed out to accused No 1 by the other accused and they handed him a 9 mm pistol.

During the morning of 7 April 1987 the deceased attended an identification parade at the Impendle Police Station where she identified accused No's 2, 3 and 4 as the men who had assaulted her. That afternoon accused No's 3 and 4 fetched accused No 1 from Zondo's shop and took him in a police vehicle to a mealie field near the deceased's home where they left him to wait for the deceased. Returning from Impendle, the deceased got off the bus at the Nxamalala

clinic near her home and followed a footpath across the mealie field where accused No 1 was lying in wait for her. When she was near him he fired two shots at her with the 9 mm pistol which he had earlier received from the other accused. One bullet struck the deceased in the face and the other in the back of the neck, killing her instantly.

In its judgment on the merits the trial Court found that although accused No 2 did not accompany the others on the mission when the deceased was killed, he was from the beginning as deeply involved as accused No's 3 and 4 in the plot to kill the deceased. The trial Court held that accused No's 2, 3 and 4 conspired to kill the deceased in order to eliminate her as a witness against them, and that they used accused No 1 as the instrument to do so.

The aggravating factors in the case of both

accused No's 1 and 4 are obvious. Accused No 1 was a hired assassin acting for reward. Accused No 4 was a policeman who had solicited an outsider to kill an innocent woman for no other purpose than to cover up a crime which he had committed in his capacity as a policeman. Both accused No's 1 and 4 acted with dolus directus. The deceased was not killed impulsively but only after days of careful plotting and preparation which allowed plenty of time for reflection. Referring to accused No 4 the trial Court said in its judgment on the issue of extenuating circumstances that his conduct reflects an attitude and approach which is truly chilling to all who place their confidence and trust in the integrity and discipline of the members of the police force. I agree. The use of a hired assassin has always been viewed by this Court in a very serious light. (See S v Nkwanyana and Others 1990(4))

SA 735(A) at 748-749; S v Mlumbi en h Ander 1991(1) SACR 235 (A) at 251 g-i; S v Dlomo and Others 1991(2) SACR 473(A) and the recent unreported decision in S v Mabaso and Others, delivered on 20 March 1992 in case no 301/91.) When the assassin is used by a policeman in order to cover up a crime which he has committed the latter's conduct is even more reprehensible.

The mitigating factors advanced on behalf of accused No 1 were the following: his relatively youthful age (he was 21 years old at the time of the commission of the crime); his lack of previous convictions; the influence of Zondo and the influence of the other accused. Accused No 1's relative youth and the fact that he is a first offender are clearly mitigating factors and must be taken into account. That he acted under the influence of Zondo was mentioned for the first time when accused No 1

testified on the issue of extenuating circumstances. The trial Court rejected this evidence as untrue and added that nothing that accused No 1 had said during his evidence in extenuation had persuaded it that his actions were anything less than the cold-blooded, brutal, self-serving execution of an innocent and unsuspecting victim. I am not persuaded that the trial Court erred in rejecting accused No 1's evidence that he was influenced by Zondo. With regard to the submission that accused No 1 was influenced by the other accused, accused No 1 never claimed that the others had influenced him and there is no factual basis for this submission.

In the case of accused No 4 a number of mitigating factors were relied upon: his relatively youthful age (he was 26 years old when the crimes were committed); the fact that he had no previous

convictions; his background and character; the influence exerted by the other accused and the lesser role played by accused No 4. In my view only his age and his clean record can be regarded as mitigating factors. The other factors relied upon are entirely without merit. Accused No 4 was the most senior and experienced of the three constables, having been a member of the police force for eight years. He conducted the negotiations with Zondo and accused No 1 and acted as the spokesman for the three constables. He clearly played a leading role in the commission of the crimes and was not in the least influenced by the others.

The final question which has to be answered is whether, having regard to the aggravating and mitigating factors, the death sentence is the only proper sentence in the case of each of the accused. An

assassination for reward is by nature a heinous crime. In the present case accused No 1 killed an innocent victim in a cold-blooded, callous manner for no other reason than for monetary gain. Accused No 4 acted in order to cover up a crime which he had committed in his capacity as a policeman. There are no special circumstances in the present case which could serve to reduce the heinous nature of the crime. In such a case the deterrent and retributive aspects of punishment outweigh all other considerations. In Mabaso's case GOLDSTONE JA said, after referring to the judgment in Dlomo's case,

"[I]t 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."

The present case must accordingly be regarded as one of those exceptionally serious cases where the death sentence is imperatively called for.

The appeals are dismissed and the death sentences imposed upon accused No's 1 and 4 are confirmed.

W. VIVIER JA.

JOUBERT JA)
SMALBERGER JA) Concurred.