Case no./330/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOSEPH CELE — Appellant

and

THE STATE — Respondent

CORAM: E M GROSSKOPF, STEYN, F H GROSSKOPF, JJA

HEARD: 8 March 1991

DELIVERED: 26 March 1991

J U D G M E N T

E M GROSSKOPF, JA

The appellant was convicted of murder in the Circuit Local Division for the Southern District, Natal, by MITCHELL J and two assessors. The Court a quo found no extenuating circumstances and the appellant was sentenced to death. With leave of the trial judge he now appeals to this court against his sentence. Since the date on which he was sentenced (15 May 1990) the Criminal Law Amendment Act, no. 107 of 1990 has come into force. This appeal will accordingly have to be decided under that Act in accordance with the principles laid down in cases such as S. v. Masina and Others 1990(4) SA 709 (A); S. v. Senonohi 1990(4) SA 727 (A); S. v. Nkwanyana and Others 1990(4) SA 735 (A) and S. v. Mdau 1991(1) SA 169 (A).

The facts are as follows. The appellant, a man of approximately 40 years of age, owned a small shop in the rural area of the Odeke Reserve in Southern Natal. His dwelling was adjacent to the shop. The deceased, also a man of about 40 years of age, lived with the appellant, and helped to serve in his

shop. Others who lived in the deceased's house and helped in the shop were three young men (or perhaps more properly, boys) Ndimo Doncaba (18); Jabulani Cele, (19) who was a nephew of the appellant's, and the appellant's son, Vusi (15). Ndimo and Jabulani were state witnesses. What follows derives mainly from their evidence, which was accepted by the Court a quo.

On 22 January 1989, in the late afternoon or early evening, the appellant was drinking with Ndimo, Jabulani and Vusi. Previously he had been drinking with the deceased. The latter was now sleeping in his bed. After the three young men had become intoxicated the appellant told them that he wished them to kill the deceased because the deceased was causing trouble both to the appellant and to his customers at his shop. He promised them money if they would do so. He then sent his son Vusi to fetch a knob-kierie, an iron pipe and a bush knife from his office. Vusi did so, and on his return the appellant handed each of the young men one of these weapons. The appellant finally gave them instructions to cut off the deceased's head and

bring it to him.

The young men then went on their own to where the deceased was sleeping. They hit and stabbed him, and, when he was dead, decapitated him. They took the head back to the appellant. According to Ndimo, the appellant's reaction, when shown the head, was as follows: "He just looked at the head of the deceased and he ordered us to go and bury the head behind the toilet." The evidence in chief of Jabulani was to the same effect. However, under cross-examination, he expanded on this, saying:

> "When the head was brought to the Accused it was placed on the ground in front of him and he kicked it. Then he gave the instruction that it should be buried behind the toilet."

If indeed it is true that the appellant kicked the head, one would have expected it to have made such an impression on the witnesses that it would have been in the forefront of their minds. However, Ndimo's evidence is inconsistent with its having happened, whereas Jabulani remembers it only undercross-examination. It is difficult to resist the conclusion that

Jabulani's evidence about the kick was an embellishment.

As far as the headless body is concerned, the appellant instructed the boys to bury it in the banana garden in the yard of the appellant's homestead. They buried the head and body in separate shallow graves as instructed.

The next day the appellant sent Ndimo to buy paint in Port Shepstone. On his return the room of the deceased was painted to remove bloodstains caused by the murder. In fact this job was inefficiently done - some bloodstains remained and were found by the police.

On 27 January 1989 the deceased's skull was found in the open approximately 500 m from the appellant's home. Const. Nzama of the SAP made enquiries about this skull at the appellant's kraal. This caused the appellant to take fright. He had Ndimo, Jabulani and Vusi remove the deceased's body from the grave and burn it with petrol. It was partially incinerated. The appellant, Jabulani and Vusi then took the burnt corpse some distance away by car and threw it down a slope

next to the road. There it was found the next day.

It is on these facts that this court must decide whether the death sentence is "the proper sentence" in this case (sec 277(2)(b) of the Criminal Procedure Act, no. 51 of 1977, as substituted by sec 4 of the 1990 Criminal Law Amendment Act). The first step in this enquiry is to determine what mitigating or aggravating factors are present (ibid., sec 277(2)(a)).

One does not have to look far for aggravating factors. The murder itself was brutal and savage. The deceased was living in the appellant's home. While he was sleeping, the appellant had him killed in a barbaric manner, even insisting on his decapitation. And although I do not accept Jabulani's evidence that the appellant kicked the deceased's head, the mere fact that the accused wanted to see the head of the deceased separated from the trunk points to a repulsive attitude of savagery. If the appellant merely wanted to ensure that the deceased was dead, it would have been easy for him to inspect the deceased's body in his bedroom. The decision to have the d[redacted]

deceased's head buried behind the toilet may also have been intended to show contempt for the deceased's remains.

An even worse feature of the case is that the appellant prevailed upon the three young men to commit this dreadful deed, and to help him in his attempts to cover up their tracks. Vusi was his own son, and only 15 years old. Jabulani was his nephew, a young man who said that he looked up to the appellant as to a father. Ndimo was a friend, to whom the appellant was also in a sense in loco parentis. These young men he plied with liquor and then, relying in part on their intoxication, in part on his parental or quasi-parental authority over them, and in part on a promise of reward, prevailed upon them to commit this atrocious crime. The effect on them, in practical terms, was that they were all convicted of murder in proceedings held prior to the trial in the present matter. The two older ones, Ndimo and Jabulani, were sentenced to twelve years imprisonment each, and the youngest, Vusi, to five years. Although one is not able to assess with precision what psychological damage the offence

itself and its aftermath would have caused these three young men it is clear that the effect upon their lives was disastrous.

I turn now to mitigating factors. The only clear mitigating factor is that the appellant was a first offender. This is an important feature. It indicates that the appellant is not a man with a criminal nature, and, more particularly, that he is not inclined to violence.

This then raises the question: why did he turn to such extreme violence against the deceased? It is difficult to get a clear answer to this question from the record. The appellant denied at the trial that he had given instructions for the murder of the deceased. Because of this stance he was reluctant to admit that he had had any reason or motive to kill the deceased. During examination-in-chief he suggested that there were difficulties with the deceased but that they arose mainly from a bad relationship between the deceased and the three young men who helped in the shop. When the appellant was away, he said, the deceased would assert his authority over the others to take

money and goods for himself. He had also once assaulted a customer. Moreover he quarrelled with the young men (this was denied by Ndimo and Jabulani although they confirmed that the deceased did sometimes draw money when the appellant was not there). The appellant said he had some time previously reported the deceased to his tribal chief, and the chief had sent his tribal constables to evict the deceased from the premises. However, after a few weeks the deceased had returned, promising that he would not harm any of the people. The appellant allowed him back. The reason he gave was: "Because he was feared by other people I also feared him at the time."

Apparently, however, things did not improve. During questioning by one of the assessors, it appeared that the appellant was in financial difficulties at the time of the deceased's murder. Under further cross-examination by the prosecutor, the following then emerged:

> "MR PAVER Did you blame the deceased for the financial difficulties which your shop was in? --- No, I did not. Well, wasn't it the deceased that was driving your

customers away by assaulting them? He was assaulting the customers? --- Yes, he was.
There were other shops in the area? --- Yes, there are other shops in the area.
So wasn't the deceased responsible for the financial difficulties that you were experiencing with regard to your business? --- Well, the behaviour of the deceased, assaulting customers, would cause them to boycott my shop.
Exactly. And if he took things - money - out of the till or goods from the shelves, that would also affect your business wouldn't it? --- Yes, that was the cause.
Then did you not blame the deceased for the financial difficulties you found yourself in relating your shop? --- May you repeat this question.
INTERPRETER I will do so M'Lord. --- No I did not think of that.
MR PAVER Are you serious about that? You're taking a very long time to answer my questions Mr Cele That's a perfectly simple question. --- Yes, I agree with you.
Yes. Now are you seriously suggesting that you didn't blame the deceased for the bad performance of your business? --- Yes, I did blame him."

As appears from this passage, the appellant was loath to admit that he had a grievance against the deceased. His eventual concession consequently has the ring of truth.

It seems, therefore, that the motive for the deceased's murder was that the deceased was causing trouble at the shop which led to lower profits and, no doubt, unpleasant personal

relations. This is in accordance with what the appellant told the three young men when he instructed them to murder the deceased.

The extent to which this motive may be regarded as a mitigating factor is debatable, but it would be best to postpone the debate until I have discussed a further factor relied upon, viz., the appellant's state of intoxication.

The appellant denied that on the day in question he drank with the three young men. This denial formed a part of his general denial of their evidence, and need not be taken too seriously, as I shall show. However, he also said that he had earlier been drinking with the deceased. They had had a bottle of Viceroy brandy. After 3 pm. there was just about a nip of that liquor left. The deceased then left to go and sleep.

Ndimo testified that the appellant and the three young men, between the four of them, consumed about one and a half bottles of Smirnoff vodka and a number of cartons of sorghum beer. Jabulani could not remember whether the appellant shared

their liquor but remembered that he had been drinking during the day. In the light of this evidence the trial court accepted that the appellant had been drinking with the deceased earlier the day, and that he shared the liquor given to the three young men. How much he drank, and to what extent it influenced him, is however not clear.

The picture that emerges from this evidence is that the appellant had had trouble with the deceased for some time. He had invoked the assistance of his tribal authorities but without success. On the day in question he had been drinking with the deceased. It is reasonable to infer that something happened during this session to inflame the appellant's anger. What is was, we do not know. It is also reasonable to infer that the appellant's decision to have the deceased killed may have been induced to some extent by the influence of the liquor he had consumed. The question then is whether these factors inducing the offence can properly be described as mitigating. The fact that a person was a burden and an embarrassment, it may be argued

on the one hand, may explain why he was murdered, but does not per se mitigate the extent of the murderer's guilt, and the mere fact that the murderer had consumed an unknown quantity of liquor with an undetermined effect on his faculties would take the matter no further. There is much to be said for this point of view, but there is also a counter-argument. This is that the death of the deceased arose out of a concatenation of particular circumstances - the relationship between the parties (which the appellant apparently found difficult, or, perhaps even impossible, to terminate otherwise than by the death of the deceased), the effect of the deceased's actions on the appellant's business, the consumption of liquor by the appellant, and, the fact that something was probably done or said by the deceased to trigger off action by the appellant. Whether these circumstances extenuate the moral guilt of the appellant may be a moot question, but their very special nature does indicate that there is no likelihood that the appellant will ever commit a similar offence again, particularly since he has shown no inclination to

violence in the past. This is a feature which may properly be taken into account by a court in mitigation of sentence, and is accordingly a mitigating factor for the purposes of the Act (see S. v. Senonohi (supra) at p. 732 G).

The final question then is whether, due regard being had to the above mitigating and aggravating factors, the death sentence is the "proper sentence", which means the only proper sentence - S v. Senonohi (supra) at p. 734 F-G - or, as it was put in a phrase approved in S. v. Nkwanyana and Others (supra) at p. 745 F, whether the death sentence is "imperatively called for". To decide this question we must consider the main purposes of punishment, namely deterrence, prevention, reformation and retribution. Now in the present case there is, it seems to me, a strong need to deter others from committing offences of this nature. Society cannot countenance the brutal murder of its members simply because they create economic and social problems. By the same token the retributive effect of sentence requires emphasis in the present case. On the other hand, there is, as

I have said, no reason to suppose that the appellant will ever again be in circumstances in which he will be tempted to commit a similar crime. And, if one accepts that he apparently does have a latent streak of violence, a long sentence of imprisonment should have a sufficient rehabilitative effect. In sum, in this case the deterrent and retributive purposes of punishment have to be weighed against the preventive and rehabilitative ones. There is substance in the argument presented to us that the nature of the murder was so gross that the deterrent and retributive aspects should override all other considerations and that the death penalty is the only suitably severe punishment. After mature reflection I do not, however, agree with this argument. It seems to me that a sentence of life imprisonment would be sufficient to express society's revulsion at the appellant's deed and to deter others from committing similar ones, while the appellant would, for his part, not be entirely denied the possibility of rehabilitation and eventual release. See sec 64 of the Prisons Act, no. 8 of 1959, as substituted by

sec 18 of the 1990 Criminal Law Amendment Act, and S v. Mdau (supra) at p. 176 D to 177 A. In Mdau's case the Court emphasized the role of life imprisonment as a punishment where the protection of society is an imperative consideration (p. 177 B). This is, of course, not the position here, but it seems to me that imprisonment for life is also appropriate where the circumstances of the case call for punishment which is so severe that no lesser period of imprisonment would suffice. In my view this is such a case.

In the result the appeal succeeds. The death sentence is set aside and replaced by a sentence of imprisonment for life.

E M GROSSKOPF, JA

STEYN, JA
F H GROSSKOPF, JA Concur