B6 63/92

/CCC CASE NO 591/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MOHAHENG DAVID MDENI APPELLANT

and

THE STATE RESPONDENT

CORAM: NESTADT, GOLDSTONE et VAN DEN HEEVER JJA

DATE HEARD: 12 MAY 1992

DATE DELIVERED: 14 MAY 1992

J U D G M E N T

NESTADT, JA:

The Appellant was convicted on two counts of murder. No extenuating circumstances having been found

he was in each case sentenced to death. This appeal is before us consequent upon the panel having in terms of sec 19(12)(a) of the Criminal Law Amendment Act, 107 of 1990 decided that the death sentences would probably have been imposed by the trial court had the amended section 277 been in operation.

The facts appear from the judgment of the trial judge, STRYDOM J, sitting on circuit in the Transvaal Provincial Division. The essential ones are the following. The appellant was a hired assassin. He confessed that he had some weeks before the murders been employed by Mthuthi Nxumalo (Nxumalo) for a fee of R2 000 to murder two persons. They were Junius Nxumalo and Eric Nxumalo. The appellant stated that Nxumalo told him that he wished them to be killed because so it would seem they had been instrumental in having him

dismissed from a tribal post he held in Gazankulu. On the day of the murders appellant approached a friend of his, Vusimuzi Mndebele (who was accused 3 at the trial) to assist him in his nefarious purpose. He had with him two firearms one of which he handed to accused 3. They proceeded from Johannesburg to Junius Nxumalo's house in Gazankulu. It was now about 9 pm. They entered the kitchen where they found him sitting at a table. They each shot him several times in various parts of his body. He died instantly as a result of "multiple injuries" (I have quoted from the post-mortem report). From there the appellant and accused 3 drove to the nearby residence of Eric Nxumalo. At the gate of his premises they were confronted by two guards. The appellant and accused 3 opened fire on them. The one guard, Bento Ntamelo, was struck several times. He

collapsed and died at the scene (also because of "multiple injuries"). Appellant and accused 3 then aborted their mission and made their escape.

On behalf of the appellant Mr Venter submitted in the first place that the appellant had not acted from purely mercenary motives and that this constituted a mitigating factor sufficient to justify the conclusion that the death sentence was not the only proper sentence. It was said that what also influenced him was the sympathy he probably had for Nxumalo in the wrong that he had suffered at the hands of the two Nxumalos; appellant's actions were thus "politically inspired". Another reason for associating himself with Nxumalo's "cause" arose from certain other information which the appellant had allegedly been given, namely that the Nxumalos had shortly before been

responsible for the death of two children. There was also (so the argument continued) the consideration that the appellant was possibly overawed by the status and age of Nxumalo. This was particularly so because the appellant was uneducated and of low intelligence. And finally it was submitted that the appellant succumbed to the temptation of the reward offered because he was in financial difficulties. (I should mention that Nxumalo was accused 1 in the appellant's trial. But having denied any involvement in the crimes, and the appellant's confession not being admissible against him, he was acquitted.)

Counsel's attempt to glean the mitigating factors referred to from the record is praiseworthy. But in my opinion there is no merit in the argument. To begin with they cannot reduce the appellant's moral

blameworthiness in relation to the murder of the guard. In any event the considerations relied on have no factual foundation. They rest purely on speculation. The appellant's evidence does not deal with what caused him to carry out the murders. This is because his defence was an alibi. So as regards his state of mind one is left with his confession. I do not propose to quote from it. Suffice it to say that the clear impression to be gained from it is that it was solely the promise of payment that led him to undertake the proposed murders. No other reason is mentioned. There is no reference to any of the factors now relied on. Moreover that they played any role is contraverted by other evidence that the appellant had no connection with the tribe to which Nxumalo belonged; that the appellant was a mature man, aged 37; that he was in

employment (in Johannesburg where he had lived for many years); and that he owns property and a car (and of course two firearms).

The task of sentencing the appellant must therefore be approached on the basis that he committed the murders (or at least that of Junius Nxumalo) purely for financial gain. Even on this basis, so it was contended, the death sentences were not the only proper sentences. This was counsel's second argument. It rested on the basis that accused 3 (who was also found guilty of the two murders) was not sentenced to death. He was sentenced to 20 years imprisonment on each count, which sentences were ordered to run concurrently. I am unable to agree. In the first place I think the trial judge was justified in regarding the appellant as deserving of more extreme punishment. He clearly

played the leading role. He made the arrangements with Nxumalo. He supplied the firearms. It would seem too that accused 3 had less time for reflection than the appellant. In any event the desire for uniformity of sentences between persons found guilty of the same crime cannot be pressed too far (S vs Marx 1989(1) SA 222(A); S vs Malepe 1991(1) SACR 114(A) at 119 f-g). It may be that accused 3 was fortunate to escape the death sentence. As far as the appellant is concerned his crimes can only be regarded in the most serious light. As GOLDSTONE JA said in S vs Dlomo and Others 1991(2) SACR 473(A) at 477 i "(a)ny decent members of society will instinctively and roundly condemn the hired killer". In this case the death sentence for this type of murder was confirmed. Other cases in which this Court has taken up the same attitude are S vs Smith

and Others 1984(1) SA 583(A) (in relation to the actual killer), S vs Nkwanyana and Others 1990(4) SA 735(A), S vs Mposula 1991(1) SACR 52(A) and S vs Mlumbi en 'n Ander 1991(1) SACR 235(A). The present matter illustrates the aggravating features inherent in this sort of crime. The appellant had ample time for reflection. The first murder was planned. Both crimes were cold-bloodedly carried out obviously with dolus directus. The victims were defenceless persons who had done the appellant no harm. According to his confession it was the appellant who "enquired whether he (Nxumalo) does have money". I should add that the appellant has a number of previous convictions inter alia for assault with intent to do grievous bodily harm and one for the unlawful possession of a firearm. In my opinion, in respect of both murders, the death

sentence is imperatively called for.

The appeal is dismissed. The death sentences are confirmed.

NESTADT, JA

GOLDSTONE, JA)
) CONCUR
VAN DEN HEEVER, JA)