175/92

598/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

BHEKINKOSI ELLIOT SIKETI DLAMINI..... Appellant

and

THE STATE ..... Respondent

Coram: BOTHA, KUMLEBEN J J A et NICHOLAS A J A.

Date Heard: 11 September 1992

Date Delivered: 28 September 1992

J U D G M E N T

NICHOLAS, A J A:

On the morning of 3 June 1987 one Mkhize, a 62 year old man, was lying abed at his kraal at Nhlungwana Reserve in the Mahlabatini district in Kwa Zulu. His daughter, Ziphelele Penelope Mkhize ("Penelope"), a 12 - year old schoolgirl, was at home with him. At about half past ten she saw two men approaching. She informed her father, who told her to let them in. The two men followed her into the room, uttered greetings and without more started shooting. When the fusillade stopped, they went away. When the police arrived she told them what had happened and gave descriptions of the two assailants.

Mkhize died in the shooting. On post mortem examination there were found a number of bullet wounds : two on the front of the chest, one below the left scapula, one

on the upper lip and penetrating the jaw, six on the left leg and five on the right leg. The cause of death was "massive right haemothorax".

At a duly constituted and conducted identification parade held on 29 June 1988, Penelope pointed out Robert Phakathi as a person whom she saw kill her father Mkhize. And at a similar parade held on 18 October 1989 she likewise pointed out Bhiki Elliot Dlamini.

On 4 June 1990 Phakathi and Dlamini were arraigned as accused Nos 1 and 2 respectively in the Circuit Local Division for Zululand District sitting at Mtunzini, on a charge of murdering Mkhize on 3 June 1987. HUGO J and two assessors comprised the court. Each of the accused pleaded not guilty and confirmed a statement which was handed in by counsel representing them. Phakati said that on the date alleged he was staying with his brother in Alberton and that he never went to the district of Mahlabatini. Dlamini said that on the alleged date he was in Durban and never went

to the district of Mahlabatini.

The main witness for the State was Penelope. The account given in her evidence is that summarized above. She also gave evidence about her identification of the two accused at the respective identification parades.

Another important State witness was Det Sgt Mahaye of the Kwa Zulu police who was the investigating officer. He told how he went to Mkhize's kraal on 3 June 1987. He found his body lying under the bed. He collected a number of cartridge cases which he found scattered on the bed and on the floor, and some spent bullets. He took these to Capt Lubbe of the Ballistics Unit in Pretoria on 11 September 1987.

Arising out of an interrogation of one Ntombela regarding the death of his wife, Const Doris Ntombela, Dlamini was summoned to the police station at Mahlabatini. He was questioned about a firearm. At first he denied knowledge of such a thing and denied knowing

Ntombela. Later he changed his story. He admitted knowing Ntombela and asked the police to go with him to his home to fetch the firearm. In the yard he dug out of the ground a Beretta 7,65 pistol (exh 1). On 2 February 1989, Mahaye took exh 1, and also an empty shell found at the place where Ntombela's wife had been killed, to Capt Lubbe. The ballistics report was put in by consent. It emerged from the report that some of the shells handed to Lubbe in September 1987 had been fired from exh 1, as had the shell delivered to him on 2 February 1989.

Each of the accused testified in his own defence. It is unnecessary to refer to the evidence of Phakathi, who was acquitted by the trial court.

Dlamini said that on 3 June 1987 he was at his father's house at Umlazi, Durban, and he was not at Mahlabatini. He gave an explanation of his possession of exh 1 in February 1989. He said that Ntombela had arrived at his place one night, and, handing him a parcel in a plastic

packet, asked him to keep it, saying that he would return for it shortly. Dlamini did not inspect the parcel until the following morning. When he then saw what it contained, he threw it away. At the police station Ntombela asked him in the presence of Sgt Mahaye "to give him this thing", and Dlamini went with the police to the place where he had thrown it away, and looked for the parcel and found it. Under cross-examination, Dlamini said that he knew Ntombela only as someone who lived in the same area : he had not previously spoken to him. Ntombela gave no explanation for leaving the firearm with him. It did not occur to Dlamini to take the parcel to the police.

In the judgment of the trial court, HUGO J said that Penelope, who was 15 at the time of the trial, made an extremely good impression : the members of the court could find no fault with her evidence, either as to its contents or as to her demeanor. But while they accepted her honesty completely, caution was called for in dealing

with her evidence identifying Phakathi : she was a single witness - there was no other evidence connecting him with the crime; she was in June 1987, and still at the time of the trial, a fairly young person; and more than a year elapsed between the murder and the holding of the identification parade. Phakathi was therefore found not guilty.

In the case of Dlamini, if the case against him had rested entirely on Penelope's identification, the trial court would also have found him not guilty. But his possession of exh 1, which Capt Lubbe's ballistics report made it clear was used in the assassination, was decisive against Dlamini. The court found that his account of his dealings with the firearm could not reasonably possibly be true. As to the evidence that he was in Durban throughout 1987, the court regarded it as "an alibi painted in such broad strokes that it just did not hold water." It held that the sum of (i) Penelope's identification, (ii)

Dlamini's possession, not acceptably explained, of exh 1, and (iii) the inadequacy of his own evidence, proved beyond a reasonable doubt that he killed Mhize. He was accordingly convicted as charged. No extenuating circumstances were found and Dlamini was sentenced to death.

He now appeals against the conviction and sentence.

In regard to the conviction the only point argued was that it was a possible inference from his unsatisfactory explanation of his possession of exh 1, that he was afraid of being implicated in the murder of Nthombela's wife. That is a speculative possibility, but it leaves out of account the reality that Dlamini was standing his trial on a charge of murdering, not Const Nthombela, but Mkize. The important fact is that there was before the trial court no acceptable explanation for his possession. In my view the trial court's conclusion is unassailable, and the appeal against the conviction must

fail.

In regard to the sentence, this court has the duty under the regime introduced by the Criminal Law Amendment Act 107 of 1990 to make findings as to the presence of mitigating and aggravating factors, and then in the light of such findings to decide whether in all the circumstances of the case the sentence of death is the proper sentence.

The following are mitigating factors :

1. Dlamini was born in 1967, and was thus hardly out of his teens when the murder was committed.
2. He grew up in a reserve in Zululand, and reached Std IV at school. He was apparently a cattle herd and had otherwise been unemployed.
3. He has no previous convictions.

The aggravating factors are that this was a cold-blooded, planned execution; two assassins invaded Mkhize's home, and fired repeatedly into him as he lay defenceless on his bed, and then departed, leaving his body

riddled with bullets.

Counsel for the State argued that the aggravating factors so outweigh the mitigating factors that the case is one in which the death sentence is imperatively called for.

I would agree entirely if it were not for Dlamini's age. In a civilized State there is a natural reluctance to impose the death sentence on teenagers or those who are just reaching the threshold of manhood. (See S v Dlamini 1992(1) SA 18 (A) at 31). Such persons may be easily influenced by others or may find it hard to resist the temptation of easy gains; they are likely to lack the experience necessary for sound judgment; and their moral training may be incomplete or insufficient. Perhaps most important, because they are unlikely to have become hardened in the ways of crime, they may still be amenable to reform by discipline and training.

Heinous though the crime was, I am not

persuaded that the sentence of death is the proper sentence in this case, and I consider that a long term of imprisonment would be an appropriate punishment.

The appeal against the conviction is dismissed. The appeal against sentence succeeds. The sentence of death is set aside and there is substituted therefor a sentence of imprisonment for 20 years.

H C NICHOLAS A J A.