208/92

CASE NO 58/92 /CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NELSON NEMAKHAVHANI MUNYAI FIRST APPELLANT

FRANS TSHILENGO NETSHIROMBENI SECOND APPELLANT

WILSON TSHIDZHIELWI NELUKALO THIRD APPELLANT

and

THE STATE RESPONDENT

CORAM: VAN HEERDEN, NESTADT et KUMLEBEN JJA

DATE HEARD: 5 NOVEMBER 1992

DATE DELIVERED: 25 NOVEMBER 1992

J U D G M E N T

NESTADT, JA:

The three appellants were part of a group of

persons who on the night of 28 June 1988 committed a so-called medicine murder in Venda. The victim was a two and a half year old boy. After his head was struck against a rock, he was gruesomely dismembered.

These events led to VAN DER WALT J, sitting with assessors in the Venda Supreme Court, convicting the appellants (and certain others) of murder. This appeal is against the death sentences imposed on each appellant consequent upon a finding that there were no extenuating circumstances.

Having regard to the provisions of the Venda Criminal Law Amendment Proclamation, 16 of 1991 (which is in similar terms to the South African Criminal Law Amendment Act, 107 of 1990) our task is to decide whether, having due regard to the presence or absence of any mitigating or aggravating factors, the death

sentence is, in each case, the only proper sentence.

It is necessary to particularise the circumstances of the crime in a little more detail. They are the following. The third appellant was about to open a new business. It was a motel. He apparently believed that its success would be secured or enhanced if his ancestral spirits were appeased; parts of a human body were needed in order to achieve this. They would be buried on the property on which the business was to be conducted. He accordingly recruited the first appellant to find someone who would be killed and whose organs would then be used for the purpose referred to. The first appellant was to receive R200 for his services. With the assistance of one of his co-accused (she was also found guilty of murder by the trial court and sentenced to 10 years'

imprisonment) the first appellant carried out his mandate. On the day in question and on his instructions she took the child to a pre-arranged spot in the mountains. Present there were the three appellants and certain others. At the instance of the first appellant the child was handed to the second appellant. He took it by the legs or thighs and dashed its head against a rock. This killed the child or at least rendered him unconscious. Whilst the first appellant held its one arm, second appellant using a knife then cut off the child's lips, half of the tongue and the penis. In addition he amputated certain other limbs and decapitated the deceased's head with an axe. The first appellant then handed certain parts of the body to the third appellant who took them away in a bag. What remained was put in another bag by the first

appellant and removed from the scene.

I propose to deal firstly with the appeals of second and third appellants. There is really very little that can be said in their favour. It is true that neither has any previous convictions and that the second appellant has never been to school and is obviously an unsophisticated person. But that is as far as mitigation goes. Both appellants are mature, middle-aged persons who must obviously have been fully aware of the heinousness of their actions. Second appellant was the actual killer who according to the trial judge was probably paid for what he did. The third appellant was the instigator of the crime. He was furthermore at the scene; he watched as the deceased was killed; and he carried away with him parts of the body. I agree with Mr Morrison, who argued the

State case with ability and fairness, that his belief in the supernatural is not a mitigating factor in casu. This is not a so-called witchcraft case (as to which, see eg S vs Motsepa en 'n Ander 1991(2) SACR 462(A) especially at 470 f-g) where the deceased is killed out of a fear of harm befalling the accused or members of his family or community. The third appellant's motive was purely financial, viz that his business should prosper. It is hardly necessary to dwell upon the horrific and reprehensible nature of the crime. It is self-evident. And, according to the trial judge, it is of a type which is not infrequently committed in Venda. This is a case where the aggravating factors are such that the deterrent and retributive objects of punishment must play a dominant role. In my opinion, the death sentence is imperatively called for.

I turn to the appeal of the first appellant. His moral guilt is not less than that of the other appellants. Perhaps it can rightly be regarded as greater. He put the murderous scheme into operation. He had almost a month to reflect on what he was doing. He took an active part in the killing. He not only assisted the second appellant, but in large measure supervised what happened. And above all, the person whom he selected or at least approved of as the victim was his own grandson. There was no evidence that he was actuated by anything other than the promise of payment of R200. The monstrous wickedness of his deed is almost beyond comprehension. Despite the fact that he too is a first offender and that he is an unsophisticated person with a low level of education, there is in the circumstances, and but for one factor,

no basis on which he should not also be sentenced to death. That one factor is his age. At the time of the trial (in June 1990) he was 77 years old. That means he is now 79. One instinctively baulks at the thought of a person of this advanced age being sent to the gallows. And, it seems to me, the objects of punishment do not require this. It is true that there is Roman-Dutch authority to the effect that, save where there is a loss of mental capacity and in relation to the imposition of corporal punishment, old age is, generally speaking, not a ground for leniency (see the writers referred to by RUMPFF JA in S vs Zinn 1969(2) SA 537(A) at 541 G - 542 A). Nevertheless, our courts have (as for example in S vs Heller 1971(2) SA 29(A) at 55 C) treated old age per se as a mitigating factor when deciding on an appropriate period of imprisonment.

This has been done on the basis of compassion coupled I think with the perception that the community expect old people to be treated with sympathy (D P van der Merwe: Sentencing 5-26). Perhaps the reason for this is embodied in the saying "pity at least is due to a feeble octogenarian (OED sv "Octogenarian"). Even in the absence of any evidence that the first appellant suffered from diminished insight or responsibility, I think that this approach should apply here. Of course, in sentencing, misplaced pity must be guarded against (see the footnote on p 72 in vol 2 of Gane's translation of Voet 5.1.57). But the first appellant is close to 80. This being so and notwithstanding the extreme repugnance of his crime, society would understand that, unlike in the case of the second and third appellants, the imposition of the death sentence on the first

appellant is inappropriate. It is therefore not the (only) proper sentence. The proper sentence, in my view, is one of life imprisonment.

In the result:

(1) The appeal of the first appellant succeeds. The death sentence imposed on him is set aside. He is, instead, sentenced to life imprisonment.

(2) The appeals of the second and third appellants are dismissed.

NESTADT, JA

VAN HEERDEN, JA) CONCUR

KUMLEBEN, JA)