CASE NO: 199/92

IN THE APPELLATE DIVISION OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PURPOSE BONGANI KHUMALO Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, GOLDSTONE JJ.A. et HARMS AJA

DATE HEARD: 1 MARCH 1993

DATE DELIVERED: 11 MARCH 1993

J U D G M E N T

GOLDSTONE JA:

Mr Trevor John Gale ("the deceased") was a part-owner and manager of TJ's Restaurant in Braamfontein, Johannesburg. On 27 November 1990, the deceased arrived at the restaurant at approximately 08:30. The shop next door was called Camp and Climb. Mr Andrew Hoy was employed there. Hoy and the manager of Camp and Climb heard sounds of violence coming from the restaurant. Hoy stated in evidence that they realised that something unusual was going on as the deceased was normally alone in his restaurant in the early morning. They decided to investigate and went to the restaurant.

The glass and security doors were wide open. As they entered, a black man walked past them. He looked suspicious, according to Hoy, because he had draped around him what appeared to be a large pink cloth. Hoy passed within half a metre of the man. He had a good look at his face. In the kitchen of the restaurant they found the deceased either dead or dying in consequence of multiple stab wounds to his face, chest and abdomen.

A short while later, when he arrived at the scene, the investigating officer, Detective Sergeant Eksteen, found an open safe in the store-room of the restaurant. The key was in the lock. From the books and records of the business it was later ascertained that cash in an amount of R6361,00 was missing. There were signs that a struggle had taken place in the store-room. On the floor the investigating officer found a poster. There was a finger-print cm it which, according to the

expert evidence led by the State, was not older than 72 hours.

The police investigation was unsuccessful until, in July 1991, they received an anonymous letter in which the appellant was named as the culprit. His address was also furnished. That led to the arrest of the appellant.

The evidence against the appellant was the following:

1. It was his finger-print which had been found on the poster.

2. At an identification parade Hoy identified him as the suspicious person whom he had seen leaving the restaurant on the morning of 27 November 1990.

3. He had worked for the deceased at the restaurant during 1990.

The appellant was charged with murder and robbery with aggravating circumstances. He stood trial in the Witwatersrand Local Division (Spoelstra J and two assessors). He was found guilty on both counts and on each he was sentenced to death.

Although the notice of appeal was only directed at the sentences of death, in heads of argument counsel for the appellant sought to place in issue the correctness of the convictions. However, at the hearing of the appeal counsel informed us that she was not pressing those submissions. And wisely so. The evidence against the appellant, to which I have already made reference, was damning. It was met with unsatisfactory evidence by the appellant who relied cm an alibi. His evidence, for good reasons, was rejected as untruthful by the Court a quo. There is clearly no basis for questioning the judgment of the trial court with regard to the convictions.

With regard to sentence there are a number of aggravating factors. They are the following:

1. Some eight months before the commission of the offences the appellant had been employed by the deceased at his restaurant. The appellant must have known that the deceased was usually alone in his restaurant in the early morning. He must also have anticipated that there would be cash in the safe kept in the store-room. 11 follows that the commission of the offences was planned by the appellant a time prior to their execution.

2. The appellant was known to the deceased. The robbery was committed at a time when the appellant knew and intended that the deceased would be present. The overwhelming probability is that the accused went there not only to commit a robbery but also intending to

to murder the deceased in order to avoid the risk of detection. Indeed, but for the anonymous communication received by the police, the deceased would not have been apprehended.

3. The manner in which the deceased was killed was savage. He was stabbed over 30 times.

4. The disturbing frequency with which robberies are committed in the larger urban areas of South Africa, and particularly in Johannesburg, is notorious. There is great fear present in the minds of vast numbers of people in our country in consequence of such acts of criminal violence.

5. The appellant was in fixed employment and the murder and robbery were committed for gain. It is possible that the appellant was also moved by feelings of revenge for having had his employment with the deceased terminated in

consequence of an argument with a co-employee. Even so, the offences were committed in cold blood months after the event and months after the appellant had succeeded in finding other similar employment.

The following are the mitigating factors. The appellant is 23 years old and has no previous convictions. He was a reliable employee and conscientiously maintained a child. No more than this appears from the record concerning the personal circumstances of the appellant. However, it does appear even from this meagre information that the appellant is not a person prone to commit acts of violence and he is probably capable of rehabilitation.

The aggravating factors, in my opinion, greatly outweigh these mitigating factors. The callous manner in which the offences were committed was such as to cause and must have caused outrage to the family and friends of

the deceased and also to the many persons who carry on business in the busy commercial area of Braamfontein. That outrage is a relevant factor in the imposition of a proper sentence. It is furthermore in this type of case that the deterrent and retributive objects of sentence come to the fore. A proper sentence should act as a deterrent to others who may be tempted to murder or rob defenceless and innocent people. It should also in a suitable case, such as this, reflect the demand by society for retribution in respect of crimes which reasonable people justifiably regard as shocking.

By any proper standard this is a case of exceptional seriousness. The murder calls for the maximum sentence allowed by the law. It follows, in my opinion, that on that count the only proper sentence is the death sentence.

In respect of the robbery, however, I have no doubt that the sentence of death is not the only proper

sentence. If one thinks away the murder of the deceased, as one must for this purpose, a sentence of imprisonment for a substantial period of time would be proper. A period of 12 years would be appropriate.

The appeal against the death sentence in respect of the robbery count succeeds. The death sentence is set aside and is replaced by a sentence of 12 years' imprisonment. The appeal against the death sentence in respect of the count of murder is dismissed.

R J GOLDSTONE

JUDGE OF APPEAL

E M GROSSKOPF JA)
HARMS AJA) CONCUR