Case No 166/94

223/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

PHOSELAKHE MHLONGO 1st Appellant

BHEKISISA ZWANE 2nd Appellant

LUTCHMEE GOVINDSAMY 3rd Appellant

and

THE STATE Respondent

CORAM : E M GROSSKOPF, EKSTEEN et HOWIE JJA

DATE OF HEARING : 17 NOVEMBER 1994

DATE OF JUDGMENT : 25 NOVEMBER 1994

J U D G M E N T

HOWIE JA/...

HOWIE JA :

The deceased had been having an adulterous relationship with third appellant's husband for some years. On 22 February 1993 the deceased was fatally assaulted. As a result the three appellants were arraigned before the Circuit Local Division for the District of Zululand and charged with murder.

The prosecution alleged that third appellant had hired first and second appellants to kill the deceased. The Court (Booysen J and assessors) found the charge proved and convicted appellants accordingly. First appellant was also convicted of stealing the deceased's watch.

On the murder charge first appellant was sentenced to death. Second and third appellants were sentenced to 11 years' imprisonment and 10 years' Imprisonment respectively. For the theft, first appellant received two years' imprisonment.

First appellant appeals in terms of section 316A of the Criminal Procedure Act, 51 of 1977, against his conviction for murder and against the death sentence. The other appellants

appeal, with the leave of the trial Judge, against their respective convictions.

It is not in dispute that the deceased was murdered. She received 47 stabwounds, two of which penetrated the heart and caused her death. The question, on the issue of liability, is whether the evidence established that appellants were adequately linked to the killing.

The relevant events occurred on or near a farm in the Mtunzini area. The deceased, a divorcee in her forties, and third appellant's husband, Manny, were both employed in clerical capacities in the office on the farm. Their affair was a matter of public knowledge. It had led in the past to physical confrontations between the deceased and third appellant and to understandable feelings of enmity on the part of the latter towards the deceased. It also resulted in arguments and fights between third appellant and Manny. On one such occasion she injured one of his eyes and he lost the sight of it. She wished to end either the affair or the marriage but he would not divorce

her.

First appellant and one Bongani, second appellant's brother, were labourers on the farm and shared a room in the compound. First appellant was a regular visitor to the house on the farm where third appellant and Manny lived. He would go there either to buy beer - third appellant appears to have operated an informal tavern - or to help Manny repair motor vehicles.

Patricia Mnyeni was a young woman who lived with one of the labourers. In the months preceding the murder she was often at third appellant's home where she helped with the housework. As a result, the two women were on friendly terms and frequently conversed.

The killing occurred on a Monday in the late afternoon. First appellant's defence was that he left the farm early that morning and did not return prior to his arrest on the following Thursday. He did not elaborate upon his plea of not guilty when the trial began and it was only in cross-examination of the relevant State witnesses and in his own evidence, that this alibi

emerged. It was comprehensively disproved by the prosecution evidence.

Firstly, he was found by the police after arrest in possession of the deceased's wristwatch. Secondly, he was seen by the farm foreman, Mzikayifani Mbangwa, in the company of the deceased on a farm road near the murder scene at a time shortly before its commission. Thirdly, according to Patricia's evidence, first and second appellants and Bongani visited third appellant on the preceding Sunday afternoon, again during the Monday in question and, finally, on the following morning. On this last occasion, said Patricia, while second appellant and Bongani remained outside, first appellant went in to speak to third appellant and demanded "his" money. Third appellant's response was that she did not believe they had killed the deceased. First appellant suggested that she send someone to the tea-room to find out if she was at work. (The tea-room was apparently near the office.) Third appellant accordingly sent Patricia to make a purchase at the tea-room and also to ask for

some medicine at the office. (One of the deceased's duties was to dispense medicines to the staff.) Upon Patricia's subsequent report that she saw nobody at the office except a person she referred to as a "missus", first appellant asked third appellant whether she did not now believe that the deceased had indeed been killed. Third appellant agreed and, having fetched R200,00 from her bedroom, she handed it to first appellant. He took the money and departed with his two companions.

The remaining items of evidence against first appellant comprised a confession he made to a magistrate and his pointings-out to a police captain of relevant places. Admissibility was not in issue on appeal. In the confession first appellant said this:

> "It was on Friday the 19/2/93 when 4-5 black boys arrived at my house and took my 'hi-fi'.
>
> I asked Bongani to come with me to look for my hi-fi. We came to a certain place and found a man there. He then sent some people to go and find this 4-5 boys who took the radio.
>
> This same man then also called ± 50 boys. And they became mad and started shooting.

A bullet then hit me on my chest. Bongani and I ran to a sugar cane field and shot back at the people. I shot twice at the crowd of people with a homemade firearm. I didn't see and know whether anybody was injured.

This people ran away and Bongani and I went home.

On Sunday 21/2/93 a man they call him Man, a Indian male, his wife asked me, Bongani Zwane and Bhekisizwa Zwane to kill a certain black female, Gladys and she further said she will give us R2000,00 if we do it.

Bongani, Bhekisizwa and me then went to Gladys' workplace at Schmidt Estates and waited for her in the path.

When Gladys left the office, she met us on the path. We then grabbed hold of her and pulled her into the bush. In the bush I said to her that Man's wife told us to kill her because she slept with her husband.

Gladys said we shouldn't kill her but have sex with her.

Bhekisizwa then had sexual intercourse with Gladys.

I then told Bongani and Bhekisizwa that if we murder Gladys we will be in trouble.

Gladys then said she will go to the police. I then said to her we were paid to kill her. I then told Bongani and Bhekisizwa that we must better kill Gladys because she will make trouble.

I then took a knife, a fixed blade knife ±20cm long, I then stabbed her once on the right hand side of her chest and I pulled it out. Gladys was crying. Bheki then took the knife and stabbed Gladys with the same knife.

Gladys was crying and I told Bongani that we should kill her and make sure. Bongani then held Gladys and Bheki stabbed her again. Gladys then fell and we left her there because she was dead.

We then went to Man's wife to collect our money. She didn't have enough and only gave us R200,00 and told us to leave Mtunzini. I then went to my place where I live.

Later I was arrested. That's all."

The captain's record of the pointings-out reads as follows:

"Suspect directs me to take the main road, leaving town, towards the N2 (old road). Reaching the N2 the suspect directs me to turn right into the N2 towards Empangeni. Eight kilometres from the police station (km reading 19928) the suspect requests me to turn left at the Schmidt Estates signboard, onto a gravel road.

Approximately 150 metres from the tar road the suspect requests me to stop. We alight from the car. The suspect makes a report to me that it was more or less at this point where he and his accomplices took the deceased after they drew their knives, and dragged her through the sugarcane. (A photo is taken at this point.) The suspect points their path through the sugarcane in the direction of the toll gate.

The suspect requests me to make a U-turn, which we do. Approximately 40 metres from the N2 the suspect requests me to take the farm road on the right where the road forks. A few metres onwards we start travelling parallel to the N2 past five telephone poles (approximately 200 metres) where

the suspect requests me to turn right into a cane-break.

After travelling metres, approximately 100 metres from an Escom powerline, I'm requested to turn left into another cane-break. Another 100m onwards I'm requested to turn left again into a cane-break. Approximately 165 paces onwards I'm requested to stop. We are requested to alight from the car. The suspect leads us onto a narrow path into the sugarcane. Approximately 110 paces onwards we turn right into another path. After 30 paces we turn left and after 10 paces the suspect stops. The suspect points to a spot in the middle of the path. He makes a report to me that this is the point where his accomplices raped the deceased. A photo is taken at this point.

The suspect requests us to return to the vehicles which we do. We alight the vehicles and I'm requested to turn left 20 metres onwards through a bamboo bush. Eighty metres onwards I'm requests to turn right until we reach the Umlalazi River. We are requested to travel parallel with the river until we reach a cul-de-sac. The suspect requests us to stop and alight from the vehicle. He leads us into the forest. After walking for about 120 metres the suspect stops. He looks around for a while and then points to a spot on the ground. He makes a report to me that that is the spot where him and his accomplices made the suspect to sit. She took off her skirt and blouse and sat on top of it. Suspect says: I demanded money but the deceased refused. I stabbed her first with a knife. Deceased tried to get up but I stabbed her several times. While she was still having convulsions I left her and I returned to my friends'. A photo is taken at this point.

Suspect informs me that he also wants to show me the box from where the woman who hired them, took the money from to pay him, after he reported to her that he killed the

> deceased. He requests me to return to Schmidt Estates. On our arrival at the main buildings we are requested to turn left. Suspect takes us to a house below the water tower, which is occupied by Asians. He leads me into the house to a bedroom leading from the lounge. He points to a kist and makes a report to me saying: 'This is the box from which the woman took out the money to pay me'. A photo is taken at this point. We leave the house. Suspect reports that he has got nothing else to show me. We return to the police station."

The trial Court subjected all the evidence in the case to a thorough examination and ,evaluation. First appellant's evidence was rejected as false. That finding is amply justified. Understandably, it was not attacked on appeal. All that was argued on this appellant's behalf as to the conviction was that it was improbable that he would have made damning admissions in Patricia's presence during his conversation with third appellant on the Tuesday morning; that the differences between the confession and what he said to the captain deprive these statements of all reliability as incriminating matter; and that, standing on its own, the possession of the watch was insufficient to establish guilt on the murder charge.

it is unnecessary to recount all the evidence or the trial

Court's reasons. It suffices to say here that Patricia, whose evidence I shall discuss in more detail presently, was found to have been a simple but truthful and reliable witness. A study of the record supports that assessment. Moreover, it is not improbable that she was present on the Tuesday. She was frequently at third appellant's house. It is also not improbable that first appellant was insensitive to the fact that Patricia could hear what was being said. If third appellant was indeed reluctant to believe that first appellant had carried out her instructions he would have been concerned to convince her that the deceased was dead.

As to the differences between first appellant's confession and the explanations he gave during the pointings-out, none of them detract from the force of the crucial admissions, common to both accounts, that he was in the deceased's presence when she was murdered and that he participated in the fatal assault.

In the circumstances the possession of the watch is by no means the sole incriminating evidence. In fact the case against

first appellant is so strong that his appeal against his conviction is bereft of merit.

The State case against second appellant consisted of Patricia's evidence and a confession which he made to a magistrate. The admissibility of the confession was not disputed in this Court. The thrust of Patricia's evidence, in so far as it concerns this appellant, has been summarised already. As for the confession, it reads thus:

> "I from Xaxase where I was plastering a house. I then went to Schmidt Est. I was going to get money from the boys working at Schmidt Est. to get money to get home at Esikhaweni.
>
> When I arrived there I found that the boys from the reserve had stolen my brother's Hi-Fi. My brother suggested that we should go to those boys to fetch the Hi-Fi. When we arrived there we found one of them. We instructed him to fetch the others who was with him. He returned with them - they were in possession of homemade firearms. They fired at us. We ran away back to where we stay at Schmidt Est. We then heard that the boys in question were looking for us.
>
> On Sunday we went to Schmidt Est Hall. We found the boys in the hall pointing the firearm at the stomach of a SAP Official. We fought with firearms, shooting at each other. We had homemade firearms which we had taken from him.

We left for the house on Schmidt Est. There we learnt the boys were looking for us and driving in a minibus. The bus allegedly had small windows. We started sleeping in the sugarcane.

We to an Indian's house. He is called 'Man'.

We drank liquor there. Geqelane spoke to the Indian's wife. They discussed that a female person must be killed. The Indian's wife discussed it with Genqelane. I didn't know the female they were referring to. There was a money issue discussed. The Indian's wife was going to pay Genqelane in order to kill the female.

Genqelane is my brother-in-law.

The female who was going to be killed was in love with 'Man'. Man was not present. Genqelane returned to us. He told us in order to get money to go home with we must kill the female.

We felt tempted. Genqelane stopped the female. We walked through the canefield to the bridge. She came from the front. Genqelane stopped her. I saw him talking to her. They spoke to each other. I then saw him stabbing her on her chest and back. We were a distance away from the scene. We were afraid. He stabbed her many times. She fell down. We then left for Man's house.

There Genqelane went into the house. When he came out he had money with him.

We used that money to go home and we spent some to buy food.

I don't know what Genqelane did with the other money. I

didn't get a share. I only managed to get home. We were arrested yesterday. That is all."

Second appellant's evidence was that he was walking along the farm road with first appellant and the deceased on the fatal afternoon when he remembered that he had a lot of ironing to do. He parted company with them and went back to the compound. He was therefore not present when the deceased was killed and had nothing to do with the murder. He admitted going to third appellant's house on the Sunday to buy beer and also being there on the Monday but denied having being present on the Tuesday.

Second appellant's evidence was rejected by the trial Court and not relied upon in the appeal. The argument advanced by his counsel was based on the two sentences in the confession in which second appellant said:

"We were a distance away from the scene. We were afraid." On that slim foundation counsel sought to contend that it was reasonably possible that the appellant had dissociated himself from any prior conspiracy, and any consequent common purpose, to kill the deceased. At worst, so ran the argument, second

appellant was initially a co-conspirator and afterwards became an accessory after the fact when he shared in the money paid to them by third appellant.

The sentences quoted from the confession simply do not suffice to raise the reasonable possibility contended for. Neither when read in isolation, nor in conjunction with any other contents of the confession, do these self-serving and untested allegations convey, whether expressly or even impliedly, that there was conduct on his part such as warrants the conclusion that he had genuinely dissociated himself from the plot by the time the murder was committed. And the appellant chose not to proffer this defence in his plea or in his evidence. The elements of this suggested defence (as to which, see s v Nduli and others 1993 (2) SACR 501 (A) at 504d - 505h) were therefore not established as a reasonable possibility. Second appellant's appeal must accordingly fail.

The prosecution case against third appellant rested predominantly on Patricia's evidence concerning the three visits

paid by first and second appellants and Bongani. On the occasion of the Sunday visit, said Patricia, first appellant left his two companions outside and entered the kitchen to speak to third appellant. She could not hear, from where she was in the sitting room, what they spoke about. When the men left, however, third appellant told her that she had found people who were going to kill the deceased who had been worrying her for seven years.

When Patricia was at third appellant's house on the Monday the latter told her that first appellant and his two friends would kill the deceased. Shortly after that they arrived. Once again, first and third appellants conversed inside. As was the case the previous time, she could not hear what they said. After he had left, third appellant repeated to her that the three men were going to kill the deceased.

The salient features of the Tuesday visit have already been mentioned.

Patricia went onto say that she came across third appellant while the latter was on bail awaiting trial. The appellant

wanted her to give evidence that the money paid to first appellant was a loan. Patricia said she feared that she might also be killed and so she agreed. In due course she made a statement to the police in which she did say that the money was lent to first appellant.

In cross-examination by counsel for third appellant, it was put to Patricia that there was an occasion when she met with third appellant and told her that the police had disbelieved her loan story and had threatened to assault her if she did not tell the truth. Patricia denied this. She explained that having given the police the version required by third appellant, they said they did not believe it and told her to come back to them the following day. This she did and then proceeded to tell them the truth. When she encountered third appellant again she concealed the fact that she had given the police the correct story.

When it was suggested to Patricia that it was improbable that third appellant would have confided in her, the witness

commented, significantly, that third appellant was "one of those people who cannot keep a secret".

Third appellant gave evidence denying that she had made the self-incriminatory statements attributed to her by Patricia. As regards the payment of money to first appellant she claimed that he had come to her for a loan of R200,00 the previous week. She told him to come back on the Sunday. When he did so she said that the money was available but he then asked her to keep it for him until later in the week. On the Tuesday he came to pay her for beer he had bought the evening before and she then gave him the R200,00. She denied the conversation described by Patricia or sending her to the tea-room or the office for the reason alleged by the witness. The appellant said that she sent Patricia to the shop to get some change and that because Patricia had a headache she went to the office to get tablets for it. The appellant accordingly denied any complicity in the murder.

The trial Court, having weighed the evidence of Patricia and third appellant found that where their evidence conflicted

Patricia had been truthful and third appellant not. The Court considered that the appellant's evidence was a glib improvisation in particular as regards the reason why Patricia went to the shop and to the office.

The crux of the argument advanced by third appellant's counsel on appeal was that the trial Court should have assessed third appellant's testimony as being reasonably possibly true and should have borne in mind in evaluating Patricia's evidence that she was a single witness. The Court's failure to appreciate this last point, so ran the

constituted a material

misdirection. In the alternative it was submitted that the deceased was killed pursuant to the other appellants' own purpose to rob or rape her, without third appellant having had anything to do with the killing or its planning.

The submission that Patricia was a single witness is not tenable. A single witness or, to follow the words of s.208 of the Criminal Procedure Act, a witness on whose "single evidence" a court may competently convict, is one whose testimony provides

the only incriminating prosecution evidence. That is clearly not the case here. Quite apart from Patricia's evidence, the inference of third appellant's guilt could be drawn from the evidence showing that, as was indeed the case, she had a very strong motive. It could also be drawn from the fact that the men who carried out the killing met with her very shortly before the killing and again the next morning when she paid first appellant R200.00. (Cf S v Snyman 1968 (2) SA 582 (A) at 586F - 587B.) The trial Court therefore did not misdirect itself in this regard.

Furthermore, I am not persuaded that the Court erred in evaluating the evidence, more particularly that of Patricia and third appellant. The possibility that Patricia invented the various statements which she says third appellant made to her could only be reasonable in the event of an extraordinary coincidence. Obviously first and second appellants and Bongani could have waylaid and attacked the deceased for a nefarious purpose of their own at any time, on any day they chose. They

happened to do so very proximately in time to a series of visits they made to the deceased's aggrieved enemy. There, on each occasion, the two younger men waited outside while first and third appellants engaged in variously furtive or agitated discussion, quite out of keeping with a social visit or the negotiation of a loan. And first appellant happened to be handed R200,00 on the morning immediately after the deceased's death. It would indeed be an extraordinary coincidence if third appellant had not been involved in the conspiracy as Patricia alleges.

In all the circumstances neither argument raised on third appellant's behalf has substance and her appeal therefore cannot succeed.

Turning to the matter of the death sentence in the case of first appellant, the most aggravating factor is, obviously, that this was a premeditated "contract" murder in return for payment. In addition, the appellant took, the leading role among the assassins; the killing was brutal and merciless; and he has

neither expressed nor displayed any remorse for his actions.

The mitigating factors are that he is a first offender, that he had been in employment at the farm for 18 years and that the idea of killing the deceased did not stem from him.

His counsel urged that it was also mitigating that the appellant made a clean breast of things on arrest as evinced by his confession and his pointings-out. Any force inherent in that consideration is neutralised by his false defence. His initial conduct is conceivably attributable more to the attitude that there was no point in denying his guilt rather than that he regretted what he had done.

The further submission was made that this was not a killing just for gain in so far as first appellant was concerned. He was a regular visitor at third appellant's house and, said counsel, knew what torment she was going through and therefore assisted her by killing the deceased. The problem for the appellant is that this submission lacks any evidential basis. There is no suggestion that he acted out of sympathy for her. Nor, one might

add, is there any vestige of proof that she persuaded him, against his better judgment (possibly an immature and limited judgment) to commit this crime. Finally, it would be pure speculation to say that his share of the promised sum posed such an irresistible temptation that it reasonably possibly prompted him to do what he would not otherwise have done.

From the aforegoing it is clear that the aggravating factors substantially outweigh the mitigating ones. It is also manifest that, being a killing by hired assassins, this instance falls within the category of murder cases which this Court has labelled as of exceptional seriousness, where the need for deterrence and retribution predominates over other considerations and where the death sentence has been held to be the only proper sentence: See, for example, 5 v Mlumbi en 'n Ander 1991 (1) SACR 235 (A) at 251g-i; S v Dlomo and Others 1991 (2) SACR 473 (A) at 477i - 478b; S v Mabaso and Others 1992 (1) SACR 690 (A) at 693j - 694g; S v Zondi 1992 (2) SACR 706 (A) at 709i - 710a.

Where there are exceptional mitigating circumstances

favouring the accused in a case such as the present, it may well be that the ultimate sentence is not the only proper one: Mabaso, supra, at 694d-e. On the evidence in this matter, however, there do not appear to me to be any such circumstances. During the course of argument counsel for first appellant and counsel for the State were invited to consider the implications, possibly favourable to the appellant, inherent in the disparity between his sentence and the sentences imposed on the other appellants. Counsel for the State pointed, relevantly, to the lesser role played by second appellant and the strongly mitigating factors applicable to the case of third appellant, and submitted that these features warranted a disparate approach to their sentences on the one hand compared with the sentence on first appellant on the other. It seems to me that this submission is sound. The parity principle in sentencing postulates offenders whose participation in the crime and whose mitigating circumstances are broadly similar: S v Giannoulis 1975 (4) SA 867 (A) at 873G-H; 8 Marx 1989 (1) SA 222 at 225I.

Even if the sentences upon the other two appellants were to be regarded as arguably on the light side (I would stress that it was not contended that they were and it is unnecessary to make any finding in that regard) it is nonetheless clear that despite this case involving a killing by hired assassins there are mitigating factors in their instances which qualify as exceptional in the sense referred to above. It follows that disparity between their sentences and that of first appellant is justified and that first appellant can draw no benefit from any such disparity. In my assessment the death sentence is indeed, as the law stands, the only proper sentence to impose in respect of his crime.

As the constitutionality of the death sentence is to be decided by the Constitutional Court in the relatively near future it is proper to postpone first appellant's appeal until that issue has been resolved.

The following order is made:

1. The appeals by all three appellants against their

convictions for murder are dismissed. 2. First appellant's appeal on sentence is postponed to a date to be arranged by the Registrar in consultation with the Chief Justice.

C/T. HOWIE JUDGE OF APPEAL E.M. GROSSKOPF JA ]

AGREE

EKSTEEN JA ]