THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO 245/03

In the matter between

ANIETA NATASHA FERREIRA	**First Appellant**
BOSTON THYS CHILAMBO	**Second Appellant**
GEORGE KOESYN	**Third Appellant**

and

THE STATE	**Respondent**

CORAM: **HOWIE P, MARAIS, LEWIS, HEHER JJA AND VAN HEERDEN AJA**

Date Heard: 22 March 2004

Delivered:

Summary: Murder: life sentence: whether substantial and compelling circumstances warranted lesser sentence : first accused a woman living in intimate domestic partnership : repeatedly abused : paid co-accused to kill her partner.

J U D G M E N T

HOWIE P

HOWIE P

[1] The three appellants were sentenced to life imprisonment for murder. With leave of the trial Judge, Prinsloo AJ, they appeal against their sentences.

[2] The murder involved the killing of Cyril Parkman, a man then about 61 years of age. The first appellant, a woman of 39 at that time, had been living with him in an intimate relationship for over seven years. He repeatedly and extensively abused her mentally and physically. She eventually caused the other appellants, young black men then aged 22 and 20 respectively, to kill him. They did. She paid them for doing so.

[3] Because the murder was premeditated the trial court was obliged, in terms of the Criminal Law Amendment Act 105 of 1997 (s 51(1)(a) read with part I of schedule 2), to impose life imprisonment unless there were 'substantial and compelling circumstances' present, in which event, in terms of s 51(3)(a), a lesser sentence could be imposed.

[4] The learned Judge considered, on his interpretation of the expression 'substantial and compelling circumstances', that the evidence established none. In fairness to him this court's judgment in *S v Malgas*[1] had not yet been given when sentence was passed. That decision, which resolved marked differences of approach to the question displayed in a number of High Court cases, was considered by the Constitutional Court in *S v Dodo*[2] to be correct.

[1] 2001 (3) SA 1222 (SCA).
[2] 2001 (3) SA 382 (CC) paras 11 and 40.

[5] The important part of the *Malgas* judgment for present purposes is that which explains that the circumstances envisaged by the expression need not be exceptional but must provide 'truly convincing reasons' [3] or 'weighty justification'[4] for imposing less than life imprisonment, or they must induce the conclusion that the prescribed sentence would in the particular case be unjust or disproportionate to the crime, the offender and the legitimate needs of society.[5]

[6] It is common cause that the learned Judge took the wrong view of what the expression 'substantial and compelling circumstances' means and it is also common cause that such circumstances did in fact exist in the case of the first appellant (what they were I shall indicate in due course). It is in contention whether such circumstances were present in the case of the other appellants.

[7] The first appellant has been in prison since conviction on 27 November 2000 and over three years have passed since the imposition of sentence on 26 January 2001. This being so, counsel for the first appellant, while contending that the appropriate punishment at trial would have been a non-custodial sentence, accepted that the sentence to be substituted now, with imprisonment actually having been served, would be unrealistic were it to be wholly Non custodial imprisonment. It was therefore submitted that the substituted sentence be one of such form and duration that immediate release would follow on this

[3] Paras 8 and 25C.
[4] Paras 18 and 25B.
[5] Paras 22 and 25I.

court's judgment. For the State it was submitted that a sentence of the order of 20 years' imprisonment was required in the case of the first appellant and that the life sentences of the other appellants had to stand.

[8] It is convenient to deal with the appellants in their numerical sequence.

[9] In a written explanation accompanying her plea of guilty the first appellant tendered a version of the salient facts. She also recounted the facts to Ms Kailash Bhana and Ms Lisa Vetten, employees of the Centre for the Study of Violence and Reconciliation in Johannesburg and attached to its Gender Unit, the former as social worker, the latter as Gender Co-ordinator. They have acquired by research, by study and by dealing with cases of abused women themselves, knowledge and expertise regarding victims who kill their abusers.

[10] The first appellant did not testify but called Ms Bhana and Ms Vetten to give expert and factual evidence on her behalf. What they were told by the first appellant they recorded in written reports which they confirmed in evidence. That evidence was to the effect (I shall come to it in more detail later) that on the facts presented to them they considered that the first appellant's reaction to the deceased's abuse, including her decision to have him killed, fitted a well-known pattern of behaviour of abused intimate partners. In accordance with that pattern the mind of the abused partner is eventually so overborne by maltreatment that no realistic avenue of escape suggests itself other than homicide.

[11] In argument on appeal counsel for the State (who did not appear at the trial) criticised the evidence as one-sided, and as flawed by certain conflicts between the plea explanation and what the first appellant apparently told the two experts. That argument cannot prevail. At the trial counsel for the State confirmed, without qualification, the following statement by counsel for the first appellant (who did not appear on appeal):

'I am informed by my learned friend for the State that the State admits the contents of those two reports and that the State has therefore indicated that it will not be necessary to call any of the other witnesses regarding the facts as set out in those reports, those are accepted by the State. I had intended calling various neighbours and the accused herself but those facts are admitted.'

[12] In the light of that statement the facts before the trial court were those recounted in the reports and confirmed in evidence, and it was on those facts that the existence of substantial and compelling circumstances, and the eventual sentence, had to be determined. It is therefore not now open to the State to advance the sort of credibility arguments it sought to raise. Nor is the alleged one-sidedness, as an intended point of criticism, of any assistance to the State. It is always open to the prosecution where, because of a guilty plea, there is no evidence on record as regards the facts relative to the offence, and the defence does not propose to call the accused, to indicate unmistakably that facts in expert

reports are accepted purely for the purposes of assessing the expert's opinion and not as evidence of the true facts. It will then be for the defence to reconsider calling the accused to provide those facts and its failure to do so may well be at the accused's peril. If the accused is called after all, the prosecution can then test the defence version under cross-examination. In the present case the record indicates that the first appellant was available to be called and that the State accepted that that was unnecessary. The fact that she was the sole source of the relevant facts is in the circumstances neither here nor there. It need only be added that it was open to the State to consult with the neighbours and other persons interviewed by the two experts and call them as witnesses if they advanced the prosecution case on sentence.

[13] The crucial question, which the trial Judge considered could not be answered in favour of the first appellant, was why she decided on murder rather than to leave the deceased. The answer, according to the witnesses, lies in the cumulative impact of her whole personal history.

[14] Summarising as briefly as is appropriate, the evidence in this regard is as follows. Her sense of self-esteem was distorted in childhood by a mother who did not want a girl and rejected her and abused her, verbally and emotionally, for example, accusing her when a six year old of 'whoring' with her father and denying her meaningful contact with him. This predisposed the appellant to need

a father figure and, at the same time, as a coping mechanism, to repress rather than express anger, and also to tend to tolerate abuse. At the age of sixteen her mother left her to fend for herself.

[15] In her twenties she married and had four children. Her husband abused her physically and emotionally. He often left her and the children destitute and threatened to kill her. After five years she left him. She placed the children in foster care and obtained work as a housekeeper, but for board and lodging only. In due course she was on the point of taking up paid work when an acquaintance referred her to the deceased who offered to pay her more to be his housekeeper. She agreed.

[16] He lived on a farm in the Rustenburg area. He was about 20 years her senior. She lived in the staff quarters at first but after three months he said that he was in love with her and wanted her to move into the main house with him, which she did. From then onwards they lived together. Early on the deceased was like a father to her and she came to love him.

[17] However, the relationship deteriorated and became abusive. He coerced and intimidated her in order to control her emotionally, physically and economically. He referred to her as his child and she had to call him ‘Mr Parkman’. She accepted the role of a child in response to his requests and needs, and she reacted as a child in receiving punishment. He became increasingly

abusive and eventually violent. This was aggravated by his tendency to drink to excess. When drunk he was more abusive and violent than usual.

[18] He treated her as an unpaid servant. He gave her daily tasks including heavy manual work. If she failed to complete them he punished her. This included locking her in a room without food, sometimes for up to two weeks at a time. She survived because a farm labourer smuggled food to her.

[19] When her children came to visit her on one occasion the deceased was harshly critical of one of them. This so upset them all that the foster authorities denied further visits. In any event he instructed her not to have any further contact with her children and she resorted to telephoning them. The deceased learnt of this from the details of his telephone accounts and hit her. This was where the history of physical assault began.

[20] With the passage of time the assaults became more violent. Once he came home drunk and demanded that she pour him a drink. She asked him to wait as she was making herself a cup of tea. He grabbed her and hit her with his fist, breaking her nose. He then locked her in her room. Neighbours helped her to escape down a stepladder. On another occasion he tried to stab her with a knife. When she tried to ward him off he broke one of her fingers. Once he threatened her with a firearm.

[21] When he injured her he rarely allowed her to obtain medical help. When he did, he would speak for her and threaten her not to divulge the true cause of her injuries.

[22] The deceased made excessive sexual demands and insisted that the appellant sleep naked so that her bedclothes would not impede him when he wanted intercourse. At times he throttled her during intercourse so that her eyes bulged and she could not breathe, claiming that he did so because she liked this deviation. He throttled her so severely on one occasion that she had to undergo corrective throat surgery.

[23] The appellant was subjected to constant criticism and demeaning verbal abuse, sometimes in public. Often it was sexually degrading. The deceased also made absurd allegations of infidelity. He tried to isolate her from contact with other people and made her totally financially dependent on him.

[24] The appellant left the deceased on at least four occasions. He traced her each time and by begging forgiveness persuaded her to return. His tactic was to be contrite and apologetic, promising change and material advantages. He would sometimes cry and once he got down on to his knees. The impression was instilled in her that she would never succeed in getting away from him.

[25] The appellant called for police assistance on three occasions. Only once did they arrive. They said the deceased was drunk and that the appellant should get him to sober up.

[26] The events leading up to the murder and their influence on the appellant's state of mind were set out as follows in Ms Bhana's report:

'This point [at which the abuse becomes intolerable] for the accused was two weeks before the murder. Mr Parkman had assembled approximately 15 of the black labourers and called the accused outside. When she did so he told her to remove her underwear and show her genitals to the men. The accused refused to do this and the men disbanded while she walked back into the house. Mr Parkman shouted verbal abuse at her. "… you are so useless that not even blacks want to [have sex with] you." The accused responded that she did not want anyone to have sex with her, and thought that Mr. Parkman had not heard this.

That evening, Mr Parkman repeated what the accused had said and said he would "show her". He then proceeded to rape her. That same evening, Mr Parkman threatened to hire black men to rape the accused if she ever tried to leave him again. This was a crucial turning point as the accused cognitively appraised the threat as real, especially given the events of the day. There are a few factors which led the accused to appraise the threat as a real danger to her physical and psychological integrity. Firstly, the timing of the threat led the accused to appraise the situation as intolerable and dangerous as she had been asked to display her genitals to a group of men only a few days prior. Second, following her refusal to comply Mr Parkman had raped her and this has been recognised within literature as the most extreme violation. It is possible the accused's state of mind following this event led her to appraise the situation as one in which Mr Parkman had made and acted on a threat, making the threat to have her raped an

imminent threat to her physical and psychological integrity. Thirdly, Mr Parkman repeatedly threatened her with the rape.

Her fear of Mr Parkman and that of the rape event compounded the accused's fear of the rape threat. The accused began to evidence the emotions and behaviour consistent with the Rape Trauma Syndrome *viz*., feeling dirty and violated, and fearful. She began to demonstrate post-traumatic reactions, *viz*. hyper vigilance, avoidance and sleep disturbances. This resulted in behavioural changes, namely sleep disturbances, where she would wake up in the early hours of the morning. Mr Parkman would wake up on a few occasions and found her awake and insisted that she was crazy. At that stage, the accused was responsible for selling fruit to the black customers. Every time she saw a black customer at the gate she began to fear that this was the man or men hired to rape her and wished to avoid situations in which she would have to interact with black men. Her fear escalated tremendously and she felt incredibly unsafe. It is important to note that the accused at this stage still did not express her anger at Mr Parkman and this part of her was split off.

Two days after this one of the employees (Richmond) approached her with a suggestion to obtain muti from a Sangoma to sprinkle over Mr Parkman's food to make him a better person. The muti was supposed to take effect in a week's time. The accused at this stage was desperate to change her situation and was willing to try the remedy. Within a week however there had been no change, which led to the accused to appraise the situation as becoming worse, even though there was no objective change.

The accused's perception that she had no viable option to stop the violence and abuse was shaped by her prior experience of the cycle of violence. She genuinely believed that leaving Mr Parkman was not an option, as he would find her because she thought he had someone else monitoring her movements. The split off part that harboured the inhibited anger that had

never been expressed, together with the complex interplay of contextual factors discussed above led to her action of wanting Mr Parkman murdered as the finality of death, in her mind, was the only way of escaping him and getting her life back.'

[27] The murder was committed on the evening of 4 February 1999. The deceased was lying drunk on a couch when the second and third appellants arrived. They had been introduced to the first appellant by the deceased's domestic worker. According to her plea statement they had said they would kill the deceased for R10 000. They strangled him while she waited in her room. She paid them R5 700, saying it was all she had. They said they would take the deceased's car as well. They carried his body to the car. She opened the boot for them and they drove away.

[28] What the established facts did not show was where the first appellant obtained that money. If she was totally financially dependent on the deceased (and this fact was agreed) the inference must be that it was his money. How easily she obtained it and whether there was more, and if there was, whether taking it would have enabled her financially to achieve, and maintain, effective distance between him and herself are questions that were not explored. Nor does one know whether she even considered that. The probable result of escaping with his money, however, would have been a theft charge and police pursuit. She

had no effective family support. She had an ageing grandmother (since deceased) and she last saw her father when she was a teenager.

[29] In her report Ms Vetten said that the forms of abuse suffered by the first appellant and her psychological and behavioural responses were consistent with case studies in this country and overseas. In her view the appellant had eventually come to feel trapped and isolated. Her prior attempts to leave had not secured her release and the abuse, far from diminishing, had got worse. The fact that she did not carry out the killing herself was also consistent with the case studies. The witness said:

'The pattern of coercion and control to which she was subjected appears to have extended to every aspect of the existence, resulting in her entrapment within the relationship. The effects of the abuse upon Ms Ferreira were ultimately nothing short of disastrous.'

She concluded:

'In common with other abused women I have worked with who used third parties to kill their abusive partners, Ms Ferreira's decision was based on her personal inability to use physical violence against the deceased. Being personally unable to defend herself against Mr Parkman, she turned to others. The decision to kill Mr Parkman appears to have been a desperate act of self-preservation aimed at maintaining what little physical and psychological integrity Ms Ferreira felt she still possessed.'

[30] The evidence of both witnesses was supported by references they made to international literature comprising research and expert opinion on the frequency and consequences of extensive abuse of female domestic partners. Their expertise and objectivity were not questioned in cross-examination or by the court.

[31] The learned trial Judge, as his questions to the witnesses and his judgment on sentence reveal, did not accept that the first appellant was unable to leave the deceased and by that simple expedient put an end to the abuse. He considered the witnesses' evidence unconvincing and obviously held it against the first appellant that she had elected not to testify. It was aggravating in his view that the murder was a carefully planned and premeditated contract killing.

[32] There is no substance in the criticism that the first appellant did not testify. As I have already indicated, her trial counsel's statement, quoted above, which was confirmed by the counsel for the state, made it abundantly clear that the prosecution accepted the facts relayed by the first appellant to the two witnesses and recorded in their reports and that it was unnecessary for her in those circumstances to testify.

[33] As to the contract killing aspect, this is unquestionably a feature that in reported cases has been regarded as a severely aggravating circumstance. The moral blameworthiness of the procurer, however, must depend on the motive

and subjective state of mind with which a contract killer is engaged. This is not a case where the first appellant's motive was anything other than to end the relationship so as to preserve her bodily integrity. I shall revert to that. The point is, therefore, that the contract must be assessed in the light of each case's particular facts. This was not a killing, from her point of view, perpetrated in the heat of, or very shortly after, the grossly abusive events of the day of the rape but whether that is material is a question to which I shall also return.

[34] The learned Judge's view that the first appellant could simply have walked away from the relationship can be understood in one of two ways. Either he did not accept the witnesses' expertise or he thought that they were unconvincing because the facts did not support them.

[35] I have difficulty in either event with the learned Judge's conclusion. If the witnesses in this case spoke with acceptable authority on the subject of abused women and the reason why they sometimes kill their abusers (and, as I have said, neither the facts nor their expertise were in dispute), they conveyed, at the same time, the explanation why the abused woman, subjectively, feels unable to escape by any other route than by homicide. A proper analysis and understanding of the evidence given in this case shows, in my view, that that is indeed what the first appellant, subjectively, did feel and that what she experienced and eventually did, conformed, as regards a victim's behaviour in

response to grave abuse, to a pattern which has been documented and written about scientifically, legally and judicially in the major English-speaking jurisdictions around the world.

[36] Counsel for the first appellant said that for the purposes of the present case it was unnecessary to review the international scientific and legal literature; it was wholly adequate to decide the matter on the evidence of Ms Bhana and Ms Vetten, supported, as their views were, by reference to the international works they cited.

[37] I agree with that approach and would merely say this. There is an established body of research which has given rise to internationally published books and articles on the effects of partner abuse.[6] The foundational work which pioneered that study was by a clinical psychologist in the United States of America, Dr Lenore E Walker, who propounded a theory called 'The Cycle Theory of Violence.'[7] Her work has been referred to in leading cases *inter alia* in Canada and Australia dealing with the evidential question of the admissibility and cogency of expert evidence on the subject of woman abuse in the context of self-defence.[8] The writings and the judgments in that regard are also, of course,

[6]See, too, *South African Criminal Law and Procedure* Volume 13 ed by JM Burchell p 212

[7] Her first book was *The Battered Woman* (Harper & Roll 1997) and in *The Battered Woman Syndrome* (Springer, 1984) she summarised the Cycle Theory at 95-6.

[8] *R v Lavallee* (1990) 1 SCR 852 [SCC] (Canada) (also reported at 55 C.C.C. (3d) 97) and *Osland v The Queen* [1998] HCA 75 (10 December 1998) (Australia).

relevant where abuse is not the kernel of a self-defence plea but of a plea in mitigation of sentence.

[38] What has to borne in mind in each case, however, as remarked by Wilson J in *Lavallee* [9] is that abused women may well kill their partners other than in self-defence and that the issue in each case is not whether the accused is an abused woman but whether the killing was objectively justifiable in self-defence. I would add: or subjectively seen as justifiable in mitigation of sentence. In *Osland* a similar point was made where it was said by Kirby J [10] that the question is whether the evidence in each case establishes that the abuse victim is suffering from symptoms or characteristics relevant to the legal rules applicable to that case.

[39] The evidence shows that on the day that the deceased raped the first appellant she was earlier subjected to intolerable degradation before a group of assembled labourers. Added to the fact of the rape there was the threat to have her raped by black men. (The crude utterances of the deceased, and the first appellant's reaction in that regard, point up the stark racial and cultural divides which permeated their social attitudes, all of which is discomforting to read and recount but crucial to an understanding of her subjective state of mind.) The deceased made that threat repeatedly. What is most important is that he

[9] 55 C.C.C. (3d) 97 at 126.
[10] Para 160.

threatened to implement it if she ever left him again. Given her personal history and the pass to which her life had come, the reason for killing rather than leaving was adequately established by the evidence. She felt exposed to that risk at the time when the killing occurred. What the deceased's threats amounted to was that she would be raped if she left and could, at any time the mood took him, be raped again if she stayed. Persistent abuse of an order she had earlier been able to live with had become abuse of a degree and depravity it was not possible to live with.

[40] Her decision to kill and to hire others for that purpose is explained by the expert witnesses as fully in keeping with what experience and research has shown that abused women do. It is something which has to be judicially evaluated not from a male perspective or an objective perspective but by the court's placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence such as that given here. Only by judging the case on that basis can the offender's equality right under s 9(1) of the Constitution be given proper effect. It means treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment.[11] 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African

[11] Cf *R v Malott* [1998] 1 SCR 123 (SCC) paras 38 and 40.

women.'[12] It also, therefore, means having regard to an abused woman accused's constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed.[13]

[41] It is also necessary, it need hardly be said, that in the weighing up process due weight be accorded to the fact that the offender has taken the extreme step of depriving the abuser of his constitutional right to life.

[42] For the first appellant, counsel sought to emphasise the constitutional duty which the State has to protect its citizens from crime and to protect their fundamental rights. It was argued that the State and society had failed the first appellant and that this was a factor to be taken into account in determining her moral blameworthiness. The duty referred to, of course, exists but the submission made can have scant weight in this case. The police were called three times and came once. The full extent of their knowledge of the appellant's plight was not proved. Moreover she did not seek legal advice much less try to interdict the deceased. If the neighbours and any others who knew of her situation took no action to help her this is not an omission attributable to the State but to ordinary human nature's very prevalent disinclination to become involved in another's problems.

[12] *Carmichele v Minister of Safety and Security and Another* (*Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC) para 45.
[13] *S v Chapman* 1997 (3) SA 341 (SCA) 344J-345E; the Constitution, ss 10, 12(1)(c) and 12 (2).

[43] Nevertheless, on the facts, and by reason of all the considerations discussed above, I conclude that there are substantial and compelling circumstances which would make the prescribed sentence unjust in the case of the first appellant. The sentence of life imprisonment imposed upon her must therefore be set aside and another sentence substituted in its place.

[44] The criterion for determining moral blameworthiness, it is said, is subjective.[14] This means that one must look solely at what an accused believed and intended when deciding for purposes of sentence whether moral blameworthiness has been reduced. (Substantial and compelling circumstances would seem self-evidently to reduce it.) However, the taxing question is whether degrees of reduction must be determined in order to arrive at an appropriate sentence in comparable cases and whether that is an objective or subjective exercise or has elements of both subjectivity and objectivity. Take these examples: A, B and C are all abuse victims guilty of the murder of their respective abusive partners in the subjective belief that there was no alternative way to protect their rights to bodily integrity and freedom from violence. In each case there is a long history of substantially similar abuse and a triggering event which instilled that belief. A committed the offence a day later, by herself. B committed it one week later, by herself. C committed it two weeks later, by hired contract killers. There are objectively viewed, distinctions between their

[14] *South African Criminal Law and Procedure* Volume 13 ed by JM Burchell p 219.

respective circumstances but do they constitute material differences for purposes of sentence? Say A is less resolute, or more decisive or possibly acts more precipitately. Say B can, on the day, just summon the resolve to do it by herself. Say C is too physically and mentally frail ever to do it by herself. Can one ignore those subjective differences and say that C is more morally blameworthy than the others because she had more time to reflect and appears to have shown callousness by getting others to commit the crime?

[45] It seems to me that the true question to be answered is whether the threat from which each sought to escape was still, subjectively, perceived to be a real and present danger (albeit not imminent enough to escape criminal liability altogether) at the time of the offence. If the answer is in the affirmative then I think it is extremely difficult to conclude that the sentences of A, B and C should differ. In each case the homicide committed will have been not too far across the borderline between lawful and unlawful conduct. If there were good reason to impose a non-custodial sentence on A (and I think there would be such reason) there would be, I think, in the case of C as well, who approximates to the first appellant. I say so because the threats she feared increasingly pervaded her thinking in the two weeks before the murder and in the interim she tried an alternative expedient, albeit that it was, objectively, destined to be ineffective.

[46] The first appellant has, on the evidence, never presented a threat to society or needed the imposition of a correctional sentence regime. I think that in all the circumstances an imprisonment sentence of six years would have been appropriate on trial, suspended on conditions. Such conditions could have pertained, for example, to appropriate forms of community service. However subsequent events have removed the need to formulate such sentence in any detail because the first appellant has by now served a sentence of direct imprisonment for over three years. All that can be done, therefore, is to order that the substitute sentence now imposed is six years' imprisonment, that portion of which has not been served, to be suspended.

[47] Turning to the cases of the second and third appellants, all that is on record are their respective plea explanations and their personal circumstances as outlined by their counsel. They did not testify.

[48] The second appellant was 22 years of age at the time of the murder. No previous convictions were proved against him. He left school after standard 2. The relevant part of his plea explanation reads as follows:

'Gedurende Januarie 1999 het Dora Modise my pa se woning te Spruitfontein besoek en gemeld dat 'n sekere dame haar man wil laat doodmaak. Dora, wat vir hierdie dame as bediende gewerk het, het ook gemeld dat die dame die moordenaar van haar man goed sou betaal. Ek het toe aan Dora gemeld dat ek eers met hierdie dame wil gesels.

Dora het later teruggekeer en gemeld dat die dame (later aan my bekend as Anieta Ferreira, beskuldigde 1 in hierdie saak) my wil sien.

Op Dinsdag, 2 Februarie 1999, het ek en my broer, George Koesyn (beskuldigde 3 in hierdie saak), die woning van Anieta Ferreira besoek. Laasgenoemde het bevestig wat Dora Modise my vroeër meegedeel het en gemeld dat ons R90 000,00 sou ontvang as ons haar man sou doodmaak. Anieta Ferreira het ook aan my ’n vuurwapen gegee sodat ek die man kon skiet.’

Op Woensdag 3 Februarie 1999, gedurende die oggend, het Dora by my vader se woning aangekom en gesê dat Anieta Ferreira haar vuurwapen soek, Ek het toe die vuurwapen vir Dora gegee. Ek was nie van plan om die vuurwapen te gebruik nie aangesien ek nie weet hoe om ’n vuurwapen te hanteer nie.

Later die middag, ongeveer 15:00, het Dora weer daar aangekom en gemeld dat Anieta Ferreira beskuldigde 1, vir my en my broer wil sien. Ons is gevolglik die aand omstreeks 18:00 na beskuldigde 1 se woning. Op beskuldigde 1 se versoek het ons in ’n klein kamertjie op die boonste verdieping weggekruip. Beskuldigde 1 het later na ons toe gekom en gemeld dat ons die man moet “uitlos”, want hy is nugter. Ek en my broer sê toe dat ons die volgende dag sal terugkom en ons is toe weer na my vader se woning toe waar ons geslaap het.

Op Donderdag 4 Februarie 1999, omstreeks 19:00 die aand het ons weer by die betrokke woning gearriveer. Beskuldigde 1 het ons deur die venster gesien en gemeld dat ons eers moet wag sodat sy die honde kan toemaak. Na sy dit gedoen het, is ek en my broer in die huis in. Anieta Ferreira het ons toe meegedeel dat sy “klaar is met die man”. Sy het oogdruppels in sy bier gegooi. Sy het gemeld dat ons nou die man kan doodmaak en as ons klaar is, sal sy ons betaal. Ons moet ook die man met die kar wegneem en ontslae raak van hom.

Ek en my broer het toe die man, wat in die sitkamer op die rusbank aan die slap was, doodgemaak. Ek het hom eers met ’n skoenveter van my tekkie verwurg om sy nek. Toe die

man wakker word, het ek en my broer, George, hom met ons hande gewurg totdat hy dood is. Ek erken dus dat ek die oorledene vermoor het deur hom te verwurg en die oorledene was later aan my bekend as Cyril Parkman. Tydens die moord was beskuldigde 1 ook in die sitkamer gewees en het na ons gekyk.

Hierna is ek, my broer en beskuldigde 1 na die oorlede se slaapkamer waar beskuldigde 1 ’n kluis oopgesluit het en geld daaruit gehaal het. Sy het die geld vir ons gegee en gemeld dat ons op 8 Februarie 1999 moet terugkom vir die ander geld.

Ek en my broer het daarna die liggaam van die oorlede in die kattebak van die motor, ’n blou Nissan Sentra, gelaai. Beskuldigde 1 het gemeld dat ons die motor moet neem en die man moet gaan weggooi. Ek het die motor bestuur. Later het ons ’n ongeluk gemaak met die motor en dit net daar gelos. Ons is na ons moeder se woning waar ons toe oornag het.

Die volgende dag is ons (ek en my broer) na Hartbeesfontein waar ons moeder en ouma gebly het. Op 8 Februarie 1999 is ons toe weer na beskuldigde 1 se woning waar ons ene Bennet aangetref het. Die het gemeld dat beskuldigde 1 gearresteer is vir moord en dat die polisie nog twee verdagtes soek. Ons is toe weer terug na ons pa se woning en die volgende dag na Hartbeesfontein waar ons toe ook later gearresteer is.

Wat die moord betref, wil ek verder meld dat ek tydens die daad werkloos was en dat die belofte van ’n groot bedrag geld vir my baie aanloklik was.’

[49] The third appellant was 20 at the relevant time. He comes from a poor and broken home. He said the following in his plea statement:

'… No 2 killed the deceased, Cyril Parkman, by strangling him with [his] hands. I participated in the murder of the deceased, Cyril Parkman because I conspired and took part in the endeavour to kill him.

After killing of the deceased, Cyril Parkman, I together with accused no 1 and no 2 put the deceased inside a boot of a car. I and accused no 2 drove away with the car (deceased inside the boot) whereon the car we were driving collided with a tree.

I had intended killing the deceased Cyril Parkman because I was promised money by accused no 1 … I am remorseful about the killing of the deceased … I was enticed solely by money promised by accused no 1 vis-a-vis the negative economic circumstances I live under.'

[50] In passing it should be said that where the three appellants' plea explanations conflict the version of one cannot be used against either of the others. It is trite law that a contrary version by a co-accused can only be used against the other if the former gives evidence in the case and confirms that version.

[51] It is more than likely that, coming from impoverished backgrounds and being essentially uneducated, the second and third appellants were irresistibly attracted by the promise of what to them would have been an enormous sum of money. However it will almost always be persons in those straitened circumstances who are sought out to kill for money even if, like the two appellants, they are not yet members of the criminal class.

[52] Nothing on record suggests that the second and third appellants knew anything of the first appellant's motive or the history of her relationship with the deceased. The sum total of the mitigating features in their instance therefore amounts to their personal circumstances : their comparative youth, their having no previous convictions and their humble backgrounds. There was nothing mitigating in their case in the actual commission of the offence such as, for example, intoxication, intimidation or unjust treatment by the deceased.

[56] Having regard to the nature of the crime they committed – killing for money – and the limited extent of the mitigating factors referred to, the condemnation expressed in previous cases of contract killing applies unrestrictedly to them. There are, on the *Malgas* test, no substantial and compelling circumstances which justify a lesser sentence in their cases.

[54] If the question should arise in the minds of those not familiar with the administration of the criminal law how it can be that for the same crime one offender is treated so differently from the others, the answer is that the imposition of sentence is, broadly speaking, heavily influenced by each offender's motive and intention. If, for example, A is profoundly provoked by B and fatally stabs him and C observes this and for no mitigating reason joins in and also fatally stabs B, one would no doubt find a similar wide disparity between the respective punishments imposed on A and C. And if, in the same

example, A were of unsound mind at the time, he would very conceivably not be criminally liable at all while C could qualify for the extreme penalty.

[55] In conclusion I would remark as regards the result of the case against the first appellant, that it is based on the facts admitted by the prosecution, and on the expert opinions, that are peculiar to this matter. It aims to set no sentencing norm. What was called in the *Osland* case [15] 'unsanctioned homicide', if it involves intentionally and unlawfully depriving another of the right to life, remains murder; it remains the single most serious criminal invasion of that person's constitutional rights. Eligibility for a much ameliorated sentence for committing that offence will, in all cases, including those involving violation of the accused's own constitutional rights, essentially depend on the facts admitted or proved in each individual case. That is a self-evident proposition but it bears emphasis. The scourge of domestic violence [16] must be dealt with effectively by the State and society, and, if necessary by the courts. It would be contrary to the values of the Constitution to hold that that scourge provides a licence to abused partners to take the law into their own hands in the absence of grounds for lawful self-defence.

[56] In the result the following order is made:

[15] Para 165.
[16] *Van Eeden v Minister of Safety and Security* (*Women's Legal Centre Trust, as Amicus Curiae*) 2003 (1) SA 389 (SCA) paras 12, 13: *S v Roberts* 2000 (2) SACR 522 para 20.

1. The appeal of the first appellant is allowed and the sentence of life imprisonment imposed on her is set aside. Substituted for that sentence is the following:

> Six years' imprisonment commencing on 26 January 2001. That portion which has not yet been served as at the date of this order is suspended for three years on condition that the appellant is not convicted of any offence involving the infliction of serious bodily harm committed in the period of suspension for which imprisonment without the option of a fine is imposed.

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

_____

CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCURRED:

LEWIS JA
HEHER JA
VAN HEERDEN JA

MARAIS JA:

[57] I agree with the judgment of Howie P in so far as it relates to the second and third appellants. I am, with respect, unable to agree with it in so far as it relates to the first appellant.

[58] Domestic tyranny in all its manifestations, psychological, economic, emotional and physical, is nothing new. It has existed since man and woman began to cohabit. What is new is that those who are victims of domestic violence have become readier to say so, society has become more appreciative of their vulnerability, more receptive of their complaints, and has come to recognise that it is an evil which cannot be tolerated and needs to be rooted out. To that end, additional remedies have been evolved by the State. Civil society, through the medium of non-governmental organizations and other agencies, and with the help of the media, has publicised the prevalence of domestic abuse, provided succour and moral and material support for those who have experienced or are experiencing it, and ensured that it occupies the continuing attention of those in authority. All of which is to the good. Doubtless, there is yet more which can and should be done.

[59] There may be some judges who are unaware of these problems and of the feelings of desperation which the victims of such abuse feel. But they cannot be many. Exposure to the litany of domestic abuse in all its forms is the lot of any

lawyer who has been given privileged access by clients in literally hundreds of divorce cases to what goes on behind the closed doors of ostensibly respectable and law abiding households . And most judges, presiding as they have in countless divorce courts, cases of ‘date rape’, cases of domestic violence culminating in serious bodily injury or death, and cases in which interdicts against abusive domestic behaviour are sought, are also no strangers to these phenomena.

[60] We have been told by counsel for the appellant that those of us who are men are not capable of stepping into the shoes of battered women and of understanding the feelings of utter helplessness which they often experience and what drives them to desperate measures such as killing their partners. If that contention is sound, judges (whether male or female) will have to stop doing what they have been doing for generations, namely, attempting as best they can, to put themselves in the shoes of the persons who testify before them, whether they be the witnesses, the litigants themselves, or, in a criminal case, the accused. When assessing the credibility of witnesses, the subjective state of mind of an accused person, the honesty of a professed belief, or the probability or improbability of alleged conduct, courts have always had to take into account such matters as age, gender, stage of development, level of education, state of

health, life experience, temperament and personality of the person concerned. The list is not exhaustive.

[61] The law reports abound with cases in which recognition is given by judges to a subjective belief alleged to have been held by an accused person even although other persons who might have claimed to have had such a belief would not have been believed. The chief executive of a multi-national corporation who claims that he killed a person because he genuinely thought that he was a 'tokolosh' out to kill him is unlikely to be believed. An illiterate person living in a remote area of the country, unexposed to the trappings of modern life, unaware of science, and by tradition deeply superstitious, is likely to be believed. In each case the court has to put itself into the shoes of the individual concerned in assessing the truth of the allegation. That is what the law requires to be done and that is what is done. Imperfect the fit of the shoes may be but one's best effort must be made to stand in them.

[62] In the present case it is common cause that 'battered women' often feel trapped in a physically abusive relationship from which they feel they cannot escape for one or other reason and that in their despair, and in the belief that society will not help them, and that there is no other way out, they kill, or cause to be killed, their partners. In principle, the enquiry at a trial into whether the accused did in fact genuinely have that belief is no different from the enquiry

which takes place in the type of case in which the reason advanced for an assault or killing of a parent by a son or daughter is claimed to be a subjective belief that he or she felt trapped financially, emotionally, or psychologically by a domineering parent who reproached him or her daily for a lack of any talent or ability and whose claustrophobic effect upon the normal development and fulfilment of his or her life has condemned him or her to what he or she regards as a non-life. Here again the assessment of the subjective feelings of such a person is a court's common task.

[63] Counsel for the appellant urged upon us that society had failed the first appellant in that it gave her no other way out and that she should be seen as the victim in the case. I deal with the latter point first. That she was a victim of the deceased's gross physical abuse of her and that she is fully deserving of both sympathy for that and effective remedies for it is plain. That she was also a victim of society's alleged failure to help her or provide her with another way out is not. To that I shall return. What is beyond dispute is that the deceased was no less a victim. He was tried, convicted, sentenced to death and caused to be executed in a brutal and callous way by the appellant. No options were given to him to enable him to escape his execution. He was not warned that he would suffer death or serious injury if he continued to molest her. The assassins employed to murder him could just as readily have been employed to threaten to

assault him or to actually assault him and warn him that worse would happen if he did not mend his ways. He was not a young man; his eyesight was deteriorating markedly. He would hardly have been a match for two young men intent upon roughing him up sufficiently to instil in him real fear of a return visit by them.

[64] As to society having failed the first appellant, that is a grave and generalised charge which is, in my opinion, extravagantly overstated. It is so that the police are often reluctant to act when complaints about domestic violence are made but that tends to happen when the nature of the complaint does not, in their estimation, seem serious enough to warrant their intervention in what appears to them to be a domestic argument. That they may often wrongly regard as not worthy of police intervention incidents which constitute criminal offences such as common assault, is to be deprecated. But I have yet to hear of the police refusing to act upon an allegation of rape or indecent assault of the kind which precipitated the first appellant's decision to have him murdered. She was not married to the deceased and there was, in my opinion, no reasonable ground for believing that the police would pay no attention to complaints of that kind. Indeed, there is no clear evidence that she did entertain that belief.

[65] The fact of the matter is that she did not, before deciding to have the deceased killed, give society a fair chance of helping her. She did not go to the

police; she did not look to friends who had been supportive of her for advice; she did not make use of the services and advice of either the Social Welfare Department or the well-publicised non-governmental organizations which offer assistance and advice to those who suffer from this kind of abuse; she did not consult a lawyer or any of the legal aid clinics which exist. She was obviously not so traumatised that she was incapable of rational and well-considered action. She carefully planned the death of the deceased. She set about locating assassins and found them. She negotiated a fee with them. She facilitated their entrance to the house while the deceased was in a drunken stupor. She remained in the house during the killing. She accompanied the assassins to the deceased's car and opened the boot for them so that they could place the deceased's body in it. She had also attempted unsuccessfully to procure her domestic servant's 'boyfriend' to shoot the deceased and provided him with a firearm to do it. All this at least two weeks after the last instance of abuse at his hands had taken place. The juristic form of her intention to kill was the most offensive known to the law: a premeditated and deliberate desire to kill.

[66] I accept, because it was admitted, that she believed she had no choice but to kill the deceased. But that does not mean that it was reasonable of her to think so or that the manner of his despatch is irrelevant to the question of an appropriate sentence. Counsel for the appellant argued that the reasonableness or

otherwise of her belief was irrelevant to sentence. Equally irrelevant, so he argued, was the fact that she had planned the murder of the deceased over a period of two weeks and instigated two other persons to commit the crime for reward. In my view, none of these submissions has any merit.

[67] To say that a bona fide belief that it was necessary to murder a person should be taken into account in mitigation of sentence but that it was objectively a grossly unreasonable belief should be entirely ignored is, in my view, quite wrong. It is not, as counsel contends, a neutral factor. Even if the appellant had been convicted of only culpable homicide, the degree of her culpability in unreasonably concluding that she had no other choice would obviously have had a bearing upon the assessment of her sentence. By what process of reasoning does it become irrelevant when the verdict is one of murder?

[68] Equally unacceptable is the submission that the premeditation involved in this murder, the time which elapsed before it was accomplished, and the procurement of two others to participate in it for reward are neutral factors. Those two men will spend much of the rest of their lives in prison at the taxpayers' expense. She instigated their participation in the crime. Had she not done so, that would not have happened. One cannot assume that they would have committed some other crime for which they would be incarcerated for most of their lives. The public is fully entitled to feel outraged when assassins are

contracted to kill a human being in cold blood, whatever the motive of their employer might be.

[69] The more time she had to reflect, the greater her moral obligation to explore other options and the more extensive the opportunity to avail herself of them. Here, I repeat, there was no explanation from the first appellant as to why she found it necessary to incite two other persons to commit a cold-blooded murder for money. To say that her exploitation of the poverty of two others and the enticement of them to commit a murder which would put them in jeopardy of arrest, conviction and lifelong imprisonment adds nothing to her moral guilt is, in my opinion, an insupportable proposition. There were many ways in which she herself could have brought about his end. She was relatively young and able-bodied. She had access to a gun. The deceased was often in a physically vulnerable state by reason of intoxication. On the night in question he was stuporose. She had succeeded in the past in adding a potion to a beverage which he drank. She was not so squeamish that she was unable to bear to assist in dumping his body in the boot of his car.

[70] It is of course so that the motives which prompt the hiring of contract killers may vary from those which are undeserving of any sympathy whatsoever to those which evoke a great deal of sympathy. And these variations in motive are equally obviously highly relevant to the sentence to be imposed. But after all

is said and done, a contract killing for reward is involved. That is, I believe, in the eyes of most reasonable people, an abomination which is corrosive of the very foundations of justice and its administration. While there is clearly room for differentiation of sentences in even contract killings because the degree of repugnancy of the motive in one case may be less than that in another, a court must face the fact that, whatever the motive, a remedy which society rightly regards as an abomination has been unlawfully resorted to by the accused. If no greater sanction for that than a non-custodial sentence is said by this court to be an appropriate response to a contract killing, I believe it will undermine public confidence in the courts, encourage a belief that those who instigate contract killings will not necessarily be visited with incarceration, foster a perception that, provided one's motives are subjectively pure and no matter how unreasonable and culpable one's failure to explore or make use of other or less drastic options may be, society will not be greatly offended by one's engagement of killers to do away with another human being. It is similar to the kind of reasoning to which vigilante lynch mobs resort to excuse their actions: a noble motive and a genuine lack of faith in the ability of the law to deal effectively with the victim and protect the public from his/her violence.

[71] In my view, if there is a 'pattern' of behaviour by women who feel driven to murder their partners to put an end to domestic violence then the remedy is

not to tolerate it or visit it with a slap on the wrist but to bring home to women that it is not an answer that a civilised society finds acceptable or undeserving of serious sanction. The answer is to make women aware of their rights and of their remedies, to insist that they use them, to sensitise officialdom to their plight and compel responsiveness to it. It goes without saying that it is also the duty of courts to view domestic violence in a most serious light and impose sufficiently rigorous sentences upon offenders to put paid to any perception that courts and the authorities are soft on domestic violence. (I may add that in an unreported judgment of Bosielo J in *State v Hoare* in the Transvaal Provincial Division, delivered on 23 March 2001, reference was made by the court when sentencing the accused for assisting his mother to arrange a contract killing of her husband, to no less than three other recent contract murders in which women had hired assassins to kill their husbands.)

[72] We live in a land in which the ethos of a constitutionally entrenched right to life means that the continued existence of even the most psychopathic of serial killers has to be tolerated despite the daily threat to the lives and limbs of wardens and other prisoners that may pose. Yet we are asked to say that the appellant, convicted of a coolly plotted murder of her partner, a murder accomplished by the hiring for reward of two assassins who were then aided and abetted by her in their task by her giving them access to her stuporose partner and assisting them in disposing of the body, was deserving of no more than a non-custodial sentence. No matter how carefully explained the reasons are for thinking that to be an appropriate sentence and no matter how carefully distinctions are drawn to explain the disparity between the fate of the two assassins (life imprisonment) and the suggested fate of their employer (a non-custodial sentence), I make bold to say that I believe that even the more discerning members of the public will look at a disparity of that order with great unease. I cannot accept the submission.

[73] I should also record that I cannot agree with the approach to the absence of evidence set out in para [28] of the judgment of Howie P. The onus of proof of mitigatory circumstances is upon an accused. It was for the first appellant to explain where she got the money with which she paid the

assassins. Speculation favourable to her in that regard in the absence of any explanation from her is, in my opinion, not justified.

[74] Despite what I have said, it is still clear to me that the deceased's gross physical and psychological abuse of the first appellant, coupled with her clean record and other personal circumstances, did constitute substantial and compelling circumstances so that the imposition of a sentence of life imprisonment was not mandatory. This court is therefore at large to impose whatever sentence it considers appropriate. Making full allowance for the bestial treatment to which the appellant was subjected by the deceased and her subjective belief that ending his life was the only way out, I cannot bring myself to concur in the notion that a wholly suspended sentence of six years is the sentence which the trial court should have imposed or that it is the sentence which should now be imposed. In my opinion, it trivialises the crime of murder in general and contract killing in particular. In my view, nothing less than eight years' imprisonment would be appropriate.

_____

R M MARAIS

JUDGE OF APPEAL