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Case no 635/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

PATRICK MOKGOMOLA Appellant

- and -

THE STATE Respondent

CORAM: VIVIER, VAN DEN HEEVER JJA et

KRIEGLER AJA.

HEARD: 20 August 1992.

DELIVERED: 1 September 1992.

J U D G M E N T

VIVIER JA./

VIVIER JA:

The appellant was convicted in the Witwatersrand Local Division by O'DONOVAN AJ and two assessors on two counts relating to the unlawful possession of a firearm and ammunition (counts 1 and 2); one count of malicious injury to property (count 3); two counts of murder (counts 4 and 5); one count of housebreaking with intent to rob and robbery with aggravating circumstances (count 6); one count of rape (count 7) and one count of attempted murder (count 8). The Court held that there were no extenuating circumstances in respect of the murder counts and under the then prevailing law the trial Judge imposed the death sentence on each of counts 4 and 5. In respect of the other convictions varying periods of imprisonment were imposed, leaving the appellant with an effective sentence of imprisonment of twenty-three

years and six months. The trial Judge refused an application for leave to appeal against the convictions and sentences imposed on counts 4 and 5.

Subsequent to the trial the Criminal Law Amendment Act 107 of 1990 ("the Act") was enacted and the appellant's case was considered by the panel constituted in terms of sec 19 of the Act. The panel decided that had sec 277 of the Criminal Procedure Act 51 of 1977, as substituted by sec 4 of the Act, been in operation at the time sentence was passed, the sentence of death would probably have been imposed by the trial Court. The appellant's case was accordingly referred to this Court, in terms of sec 19(12) of the Act, on the question of sentence.

The relevant facts relating to counts 4 and 5 are briefly the following. The two deceased, Andries Sithole ("Sithole") and Paulinah Manyathela

("Paulinah") lived together as man and wife in a room on certain premises near the Jukskei River at Halfway House. On Sunday evening 23 February 1986 the appellant visited the shebeen which Sithole was running in the room, and during the course of the visit offered a firearm for sale to Sithole. The latter summoned the police and when they arrived at the shebeen they found the appellant in possession of a 9 mm Parabellum pistol and some rounds of ammunition. The appellant was arrested and subsequently appeared with one Thomas Dlamini, from whom he had obtained the pistol, in the Magistrate's Court at Wynberg. The appellant was never tried as he obtained bail and then failed to appear when the trial resumed. Dlamini was duly convicted and sentenced.

On 31 August 1987, after Dlamini had served his sentence, he met the apellant near Glen

Austin at Halfway House. The appellant promptly tried to kill him by firing six shots at him with a firearm, two of which struck Dlamini in the stomach and arm (count 8). Earlier that month, on 12 August 1987, the appellant had broken into the house of a Mrs H. at Blue Hills, raped her and robbed her of her possessions (counts 6 and 7).

In a written confession made before a magistrate the appellant said that he thereafter thought about Sithole and Paulinah and what they had done to him. During the evening of 18 January 1988 he went to their room, and when they refused to open the door he broke the window and threatened to set the room alight. When the door was eventually opened he forced Paulinah at gunpoint to tie Sithole's hands behind his back with wire. He forced them out of the room and into Sithole's vehicle which was parked

outside. He drove them to a spot some 400 meters away and, after ordering them out of the vehicle, set it alight, saying that he was doing so because that was the vehicle Sithole had used when he had gone to fetch the police the night he was arrested, and that he did not want Sithole to dream of his vehicle when he was dead. He then marched his victims to a deserted and overgrown area on the banks of the Jukskei River where he told them that he was going to kill them for what they had done to him. He thereupon shot Paulinah twice in the back of the head, killing her instantly. Sithole was then informed that he would be killed at the place where he lived. He was taken back to a spot near the river some 500 meters from where he lived and more than a kilometre from where Paulinah had died, where the appellant killed him by shooting him in the back of the head. When Sithole's body was

subsequently discovered it was found that he had been gagged with a handkerchief which was held in place by a wire extending across the mouth and tied behind the neck.

In his evidence at the trial before his conviction the appellant denied any knowledge of the two murder charges. His evidence was rejected by the trial Court as totally false. The appellant did not again testify on the issue of extenuating circumstances.

I am unable to find any mitigating factor of substance in the present case. None can be gleaned from the appellant's personal circumstances: he was 36 years old when the crimes were committed; he had passed standard three at school; he worked as a painter and he was married with two schoolgoing children. In the written heads of argument filed on

behalf of the appellant it was suggested that additional evidence relating to his personal circumstances existed and that the Court should exercise its power of remittal under sec 19(12)(b)(iii) of the Act. No formal application on notice of motion with supporting affidavits for an order for remittal in terms of the subsection was, however, placed before the Court. The suggestion that the case be remitted for the hearing of further evidence was, rightly in my view, abandoned by counsel who appeared for the appellant at the hearing of the appeal. Furthermore, this is not an appropriate case for the Court to invite an application for an order for remittal in terms of sec 19(12)(b)(iii) of the Act. There is no reasonable chance that the proposed evidence, which is set out in a report to the panel, could lead to different sentences on the murder charges. See S v Tloome

1992(2) SACR 30(A) at 38e - 39d.

The aggravating factors are clear. The murders were well planned and executed. The sole motive was a desire for revenge. The two deceased were killed nearly two years after they had reported to the police that the appellant was in possession of a firearm and ammunition. What the deceased had done to the appellant was not morally wrong. The appellant deliberately effected vengeance without anger. It was a cruel, cold-blooded, merciless execution of innocent people whose persistent pleas for mercy over a considerable period of time on the fateful evening were ignored by the appellant. Another aggravating factor is the appellant's criminal record. He admitted six previous convictions: three for housebreaking with intent to steal and theft, one for theft, one for the unlawful possession of a firearm and

one for rape. All these convictions had been incurred some time before the murders were committed. The crimes which he committed during the previous year and which formed the subject of counts 6, 7 and 8 show, however, that he had not reformed and they reveal his real character. His prospects of rehabilitation must be regarded as very poor.

In all the circumstances, and not losing sight of the main objects of punishment namely deterrence, prevention, reformation and retribution, I am of the view that this is a case of such extreme seriousness that the death penalty is the only proper sentence in respect of counts 4 and 5.

In the result the appeal is dismissed and the death sentences imposed in respect of counts 4 and

5

are confirmed.

W. VIVIER JA.

VAN DEN HEEVER JA )
KRIEGLER AJA ) Concur.