T.A 178/93

/CCC CASE NO 61/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KENNY MOTHOA FIRST APPELLANT

DAVID KHOZA SECOND APPELLANT

and

THE STATE RESPONDENT

CORAM: NESTADT, GOLDSTONE JJA et KRIEGLER AJA

DATE HEARD: 16 NOVEMBER 1993

DATE DELIVERED: 23 NOVEMBER 1993

J U D G M E N T

NESTADT, JA:

This is an appeal against death sentences imposed on the appellants consequent upon their

convictions for murder.

The crime took place in the early hours of the morning of 9 January 1991. The appellants entered the house of the deceased in Daveyton Extension, Benoni. Their purpose was to kill him. They had been hired to do this by the deceased's wife. The first appellant was armed with a dagger and the second appellant with a so-called okapi knife. They each stabbed the deceased a number of times as he lay in his bed. The cause of death is given in the post-mortem examination report as "haemorrage due to deep lacerations of the chest and neck".

In favour of the appellants to some extent is their comparative youth. First appellant was at the time of the murder aged 23; second appellant was 22. Also, it was the deceased's wife who proposed that he be

killed. But this is as far as mitigating factors go. The first appellant has a previous conviction (in 1983) for assault with intent to do grievous bodily harm (involving a knife) and one in 1991 for murder (also involving a knife and in respect whereof he was sentenced to seven years imprisonment of which two years were conditionally suspended). Second appellant has inter alia a previous conviction for assault with intent to do grievous bodily harm (dating from 1983). I also cannot agree with Mr Tee, who ably argued the appeal on behalf of the appellants, that appellants' moral blameworthiness was reduced by the sympathy it was said they felt for the deceased's wife. The trial court found in this regard that the deceased had treated her extremely harshly; he had often seriously assaulted her; he attempted to kill her; and he was blatantly

unfaithful to her. She had reported his behaviour to members of her family as well as the police, but to no avail. There was, however, no evidence that the appellants were influenced by any of these factors. On the contrary, it is plain that they undertook to kill the deceased in consideration of a promise of payment by the deceased's wife. According to the first appellant's confession the wife undertook that "sy vir ons 'n klomp geld gee wat ons vir die res van ons lewe sal hou". In his confession, the second appellant admitted that she promised "sy gaan ons R1 500 gee as ons werk heeltemal klaar is".

This brings me to the aggravating features of the crime. They are manifest. And clearly they outweigh what mitigating factors there are. The appellants (whose alibi defences were rejected) were

hired assassins. The murder was therefore planned. The way in which it was to be carried out was discussed by them with the deceased's wife in some detail. Their mission was cold-bloodedly, brutally and mercilessly performed. The deceased (whose estimated age was 55 years) was attacked in his own house. He was quite defenceless. It would seem that he was awake as the appellants entered his bedroom. According to the first appellant's statement he was told not to move. He was then stabbed about seven times. The one wound was an eight centimetre deep laceration across the anterior surface of the neck. It severed the trachea, oesophagus and carotid artery. Another was a laceration through the pectoral muscles into the upper lobe of the left lung. Obviously the appellants acted with dolus directus.

With these considerations in mind, I turn to the question of what a proper sentence is and in particular whether the death sentence is the only proper sentence. I shall accept that the appellants are capable of rehabilitation. However, as has often been emphasised by this Court, in a case such as the present the deterrent and retributive objects of punishment must predominate. This is because hired killings (in the words of GOLDSTONE JA in S v Mabaso and Others 1992(1) SACR 690(A) at 694 f) fill "any decent person with revulsion and loathing. No civilised society will tolerate such conduct." (See too S v Zondi 1992(2) SACR 706(A).) In consequence, so it has been held, "(h)ired killers must be made aware that, save possibly in exceptional circumstances, the Court will impose the ultimate sentence upon them" (S v Dlomo and Others

1991(2) SACR 473(A) at 477 j - 478 a). This, of course, does not mean and could not have been intended to mean that there is any onus on an accused to establish exceptional circumstances. It was simply a broad statement indicative of a general approach to sentence in matters of this kind, viz that the crime is so serious, so reprehensible, that the death sentence would normally (but not always) be the only proper sentence. In my opinion, however, there are no factors in casu that can avoid the conclusion that the ultimate penalty is imperatively called for. In particular I cannot accede to counsel's plea that life imprisonment would suffice. In saying this I do not overlook the fact that the deceased's wife, who was also (with appellants) convicted of the deceased's murder, did not receive the death sentence. She was sentenced to 25 years

imprisonment. Mr Tee fairly acknowledged that the appellants were deserving of a more severe sentence. He argued, however, that the wife's sentence was excessively heavy and that by imposing it, the trial judge had, so to speak, little room for the imposition on appellants of a (heavier) sentence short of the death sentence. I am unable to agree. Even assuming that the wife may properly have received a lesser sentence, I am convinced that as regards the appellants the only proper sentence is the death sentence.

The appeal is dismissed.

NESTADT, JA

GOLDSTONE, JA)
) CONCUR
KRIEGLER, AJA)