THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 645/98

In the matter between

AMYNA SHAHNAAZ FAKUDE	**First Appellant**
DUMILE ELLIOT NDUKI	**Second Appellant**
SIPHO THOMAS MLANDU	**Third Appellant**
MORRIS MASIKHISANE NTSHANTSHU	**Fourth Appellant**

and

THE STATE

Respondent

CORAM: MARAIS, STREICHER JJA *et* MPATI AJA

DATE HEARD: 12 November 1999

DATE DELIVERED: 19 November 1999

Sentence: Unjustified disparity as between co-accused.

JUDGMENT

MARAIS JA

MARAIS JA:

[1] The four appellants were convicted on 18 November 1996 in the Witwatersrand Local Division of the High Court by Mailula J and assessors of murder. They were sentenced to terms of imprisonment varying from 35 years to 23 years. With leave of the court *a quo* they appeal against the sentences imposed. The four appellants were respectively accused 1, 3, 4 and 5 at the trial. Accused 2 died after the trial had commenced. I shall refer to appellants as they were referred to at the trial.

[2] It was found that accused 1 was a party to a conspiracy to murder her husband and that the plan was executed by the remaining accused. Accused 2 was the brother of accused 1. Accused 3 drove accused 2, 4 and 5 and another person to a point near the home of the deceased and accused 1. While he waited for them at the car, they lay in wait for the deceased who was due to return to his home late that night. When he arrived accused 2, 4 and 5 attacked him and hacked and stabbed him to death in the street outside his home. The weapons used were pangas and assegais. Accused 1 remained in the house while this was taking place, left the deceased lying in the road after the attack upon him had ended, and

feigned shock the next morning when the deceased's body was found in the street.

[3] None of the four accused upon whom sentence was passed had previous convictions. Accused 1 was 41 years of age at the time of sentence. Accused 3 was 42 years of age. Accused 4 was 35 years of age. Accused 5 was 34 years of age. They had all been in custody since November 1995. All the accused had dependants of one kind or another. Their respective levels of education varied greatly. Accused 1 was a university graduate; accused 3 and 4 did not provide any information on that score but the former was employed as a driver and the latter in the cleansing department of the Kempton Park Municipality which suggests that their educational attainments were not high. Accused 5 attained standard one. Precisely why accused 1 was content to have her husband killed did not emerge entirely clearly at the trial. However, there had been marital discord and hostility between the members of accused 1's family and the members of the deceased's family. Both the deceased and accused 1 had children born of previous relationships and this too gave rise to problems. Accused 1 and the deceased had been separated for some time but had commenced living together again before the

deceased was killed.

[4] In sentencing the accused the trial judge took into account the relevant personal circumstances of each accused, the seriousness of the crime, and the interests of the public. Counsel for the appellants' attack upon the sentences was based upon a submission that the trial judge had emphasised unduly the seriousness of the crime and had not paid sufficient regard to the personal circumstances of the appellants and the desirability of imposing sentences which would leave scope for the rehabilitation of the appellants. It was also contended that there was an unjustifiable disparity between the sentence of 35 years imposed upon accused 1 and the sentences of 25 years and 23 years imposed upon the remaining accused.

[5] Save in one respect which enures only to the benefit of accused 5, I am unable to agree that the weight accorded by the trial judge to the relevant factors was inappropriate. She was criticised for failing to spell out in terms why the personal circumstances of the appellants were not assigned greater weight than they were. The answer seems relatively plain: the gravity of the crime, the endemic nature of violence in the East Rand, and the need to convey a clear

message to those who might be tempted to indulge in such violence that it would not be tolerated, had to be given priority. It was a case in which the need to impose sentences which would be seen to be sufficiently retributive and which would have a sufficiently deterrent effect overshadowed the lesser need to impose sentences which would facilitate rehabilitation.

[6] It was suggested that the absence of any sign of remorse had been taken into account as an aggravating factor and that, in doing so, the trial court erred. I cannot agree. Genuine remorse is a factor which may mitigate punishment. To remark upon its absence means no more than that it cannot operate as a mitigating factor. In my view there is no ground upon which it can be successfully argued that a sentence of 25 years was inappropriate. I shall return to the disparity between the sentence of 25 years and the sentence of 23 years after I have dealt with the position of accused 1.

[7] It has been laid down on a number of occasions in this court that unjustifiable disparities in sentences imposed for the same crime must be avoided. However, it has been emphasised in those cases that an inappropriately lenient sentence imposed upon one person convicted of the crime does not entitle another

to insist upon that inappropriate sentence being replicated. It is only where the former sentence is a sentence which cannot be said to be inappropriate that the sentence subsequently imposed should not differ markedly from it. It goes without saying of course, that truly significant distinctions between the roles played by, and the personal circumstances of, the accused persons whose positions are being compared with one another will obviate the need for parity and necessitate different treatment. See *S v Marx 1989 (1) SA 222 (A); S v Goldman 1990 (1) SACR 1 (A); S v Roman and Others 1994 (1) SACR 436 (A) at 443-444; S v Blank 1995 (1) SACR 62 (A) at 70-72 and S v Mhlahaza and Another 1997 (1) SACR 515 (A) at 524*.

[8] Moral philosophers may argue about whose conduct is to be more roundly condemned: that of a wife who conspires with others to kill her husband but who takes no physical part in the doing of the deed, or that of those who physically do the deed. Courts of law are less inclined to draw distinctions which will find no resonance in the community at large. If there is a distinction, it seems to me to be of insufficient moment to justify a disparity in sentence as great as that which exists here. The trial judge's comments in this regard were not entirely

harmonious. While regarding the appellants as "equally blameworthy" she described accused 1 as the instigator and mastermind of the plot to kill the deceased. The evidence falls short of establishing beyond reasonable doubt that such was indeed the case. Her brother, accused 2, may have played that role. Be that as it may, I am unable to see any good reason for sentencing accused 1 any differently from accused 3 and 4. She too should have been sentenced to 25 years imprisonment.

[9] I have considered whether, by parity of reasoning, all the appellants should not have been sentenced to 23 years imprisonment. I think not. The difference is this. The reason why the trial court sentenced accused 5 to 23 years and not 25 years imprisonment was because his counsel, albeit belatedly and during his address in mitigation of sentence, had stated that accused 5 had been offered some money and that he had yielded to temptation and become involved in the attack on the deceased. If that was the trial judge's reason for distinguishing between accused 5 and accused 3 and 4 it was not, in my view, a valid distinction. As the learned judge herself later said "It is of course an aggravating feature for any person to agree to kill another for financial gain. No civil society can tolerate

the use of hired assassins for any reason whatsoever". She may have regarded counsel's statement as carrying with it a tacit implication of remorse. If so, she did not say so. I am not satisfied therefore that the amelioration of the sentence imposed upon accused 5 was justified. Unless it was justified, it cannot be used as the touchstone in deciding whether or not the different sentences imposed upon the other accused were unjustifiably disparate.

[10] In the result the appeal of accused 1 (first appellant) against the sentence of 35 years imprisonment is upheld and her sentence is reduced to 25 years imprisonment. In so far as it may be necessary to do so the sentence is antedated to 13 February 1997. The appeals of accused 3 (second appellant), accused 4 (third appellant) and accused 5 (fourth appellant) are dismissed.

R M MARAIS
JUDGE OF APPEAL

STREICHER JA)
CONCUR
MPATI AJA)