

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

N G MTSHALI

FIRST APPELLANT

V M MAGUBANE

SECOND APPELLANT

M S MAGUBANE

THIRD APPELLANT

S MAGUBANE

FOURTH APPELLANT

and

THE STATE

RESPONDENT

CORAM: MILLER JA GALGUT et ELOFF AJJA

HEARD: 23 AUGUST 1984

DELIVERED: 6 SEPTEMBER 1984

J U D G M E N T

ELOFF, /

ELOFF, AJA

In the Hlazakazi Reserve in the district of Ngutu, Natal, there were in the years 1979, 1980 and 1981, two factions, the Ohaleni and the Knayise factions. There was enmity between them which, in those years, at times resulted in unrest and a number of fights and killings. On Saturday 28 November 1981, at about 9 a.m., certain members of the one faction decided to attack three leading members of the other faction. It seems likely that the event which sparked off the attack was the news that a certain Billyam Magubane, a member of the Knayise faction, had been killed by members of the opposing faction to which the three intended victims belonged.

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The three persons were on that day together, close to a bus stop near their kraals, a few hundred meters from the road known as Hofzakozi Road in the Hlazakazi area. The attackers were about ten in number, and they were armed with loaded sticks, assegais and a few firearms. The first object of their attack was an induna named Mzwani Magubane. When the attackers arrived on the scene Magubane fled in the direction of the nearby hut of one Majola, but he was overtaken and clubbed and stabbed to death. The two other intended victims, Simawumawu Hadebe and Nason Mavundla ran to and sought refuge in the hut of one Sabelo, closely pursued by some of the attackers. The two locked themselves in

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the hut. The attackers hammered on the door, some fired shots in the air, and their leader gave an order to set the hut alight. That was done, whereupon Hadebe dashed out first and fled to a nearby donga, followed by some of the attackers. They quickly caught up with him, and as he turned to defend himself the leader of the attackers came up from behind and shot him in the back. He fell and died. Mavundla likewise was forced to leave the burning hut, and he ran into a hut in the kraal of one Magubane. Some of the attackers fired shots into the hut, and soon Mavundla was also killed. The leader of the attackers thereupon entered the hut, cut the eye of the dead man from its socket,

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and re-appeared brandishing it in his hand.

Some two years later the four appellants were found guilty in the Natal Provincial Division of the murder of the three deceased. The finding of the Court was that the first appellant was the leader of the attackers and, no extenuation being found, he was sentenced to death. The other three appellants were found to have been active participants in the attack, and were accordingly guilty of murder, but the Court concluded that there were extenuating circumstances. The three counts of murder were taken together, and the sentences imposed were 15 years in regard to appellants Nos. 3 and 4, and 12 years in

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respect of appellant No. 2. The first appellant was granted leave to appeal but only in regard to the question of possible extenuation, while the other appellants were accorded the right to appeal both against their convictions and the sentences imposed.

It will be convenient to deal firstly with the appeal by appellants 2, 3 and 4 against their convictions. The issue in that regard was whether they were amongst those who took part in the attack. The description by the State witnesses of the attack, its course and conclusion, as I briefly described it in the introduction of this judgment, was not challenged. The defence of the appellants referred to was that they were/

were elsewhere on the day in question. However, each of them was identified as having been present and to have been active participants in the fracas. The trial Court found the evidence of identification to be satisfactory, and rejected that of the appellants concerned. The criticisms directed to these findings now fall to be considered.

The witness first called to describe the events of the day and to identify the participants was a 29 year old woman, Zodwa Mavundla. She knew all of the deceased, the third being her father, Nason Mavundla. She lived in the same community as the deceased. According to her evidence the three deceased were/

were a few hundred metres from where she stood at her hut when the attackers arrived. When the first deceased ran away, followed by a number of men, she noticed - so she said - that appellants 2, 3 and 4 were amongst them. Once the first deceased was disposed of, the attention of the assailants was focused on the other two deceased. It will be recalled that they had run into a hut. She saw the appellants concerned amongst the persons who surrounded Sabelo's hut and who, on the orders of the first appellant, helped to set it alight. They were also in the group that pursued the second deceased when he emerged from the hut and against whom he tried to defend himself until he was shot by the

first/

first appellant. They were also amongst those who surrounded the hut in which the third deceased had sought refuge. She specifically mentioned that the fourth appellant fired some of the shots into the hut.

The witness claimed that she knew each of the appellants in question, all of whom had grown up in the area in which she lived. This part of her evidence was not challenged, nor was it denied by the appellants in question when they gave evidence. For that reason nothing seems to me to turn on the fact, pointed out in argument, that when she gave evidence she at one stage mistakenly referred to appellant No. 2 as M S Magubane, and to appellant No.

3 as V M Magubane.

In view of the fact that the witness knew the appellants, there was no real danger of a mistake in her identification; the real question was whether she was truthful.

Her evidence was corroborated by that of other witnesses. I will discuss only those strongly relied on by the Court a quo. The first of these is Bhekisigcimo Majola, who particularly impressed the trial Court. He knew the appellants well. That much of his evidence was also not denied by any of them. He was present at the scene of the attack, and his description of the main events of the day tallied with

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that given by Zodwa Mavundla. He not only testified that appellants 2, 3 and 4 were among the attackers, but he gave fair detail of what they each did. He too, when initially asked in the witness box to point out which of the accused before the Court were amongst the attackers, mistakenly said that the name of appellant No. 4 was Phiwayinkosi. It is however significant that when he gave further evidence a few minutes later he correctly described appellant No. 4 by name without his attention having been directed to his error. In certain respects the evidence of the witness differed from that given by Zodwa Mavundla. He said, for example, that appellants No. 2 and 4 chased the first deceased, while

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she said that that was done by appellant No. 2 and another person. Discrepancies of that sort are, however, understandable and to be expected when different witnesses relate their individual impressions of an action-laden *mélee*. Their existence does not necessarily redound to the discredit of the witnesses concerned.

Further corroborative evidence was given by the witness Ngakanani Magubane, the widow of the first deceased. Her evidence that she had known the appellants for years, and that they had lived not far from her house, was also not denied. She testified that appellants 2, 3 and 4 were on the scene and took part in the attack. In broad outline her description

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of the events of the day accorded with that of Zodwa Mavundla and Bhekisigcimo Majola.

In regard to the evidence of these witnesses on whom the trial Court relied, Counsel for the appellant contended that the Court did not appear to have taken sufficient account of the possibility that the witnesses may have been inspired by bitter factional feelings, to harm possibly innocent members of an opposing faction. I think however that it can be taken that the trial Court realised this possibility. In any event, I do not discern any indications in the evidence of Zodwa Mavundla, Bhekisigcimo Majola or Ngakanani Magubane that they were trying to implicate as many members of the opposing/

opposing faction as they could. In actual fact one finds in the testimony of each of these witnesses indications of their attributing relatively innocent roles to some of the members of the opposing faction who were present. In my judgment no valid criticism can be directed to the view taken by the trial Court of the quality of the evidence under discussion.

The evidence of appellants 2, 3 and 4 was in the nature of an alibi; they each said that on the day in question they were all on the Witwatersrand at their working sites. The trial Court rejected their evidence, as also that of a man Muntunzwe Magubane who was called to support the defence version. Counsel

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argued that their evidence "was not so patently false as to justify its rejection." I think however that the conclusion of the trial Court should be supported. The learned Judge correctly remarked that if appellants Nos. 2, 3 and 4 were in fixed employment at the Witwatersrand at the time, it is odd that they did not resume employment on the Monday following the weekend of the fight. They were in hiding from that weekend until their arrest. For good reason the Court rejected the explanations that they feared that they might suffer the same fate as the Billyam, previously referred to. Save possibly for appellant No. 4 the trial Court was unfavourably impressed by the demeanour/

demeanour of the three appellants and their witness.

I find no sufficient reason to differ from it.

I am not persuaded that there is
any merit in the attack on the conviction of appellants
Nos. 2, 3 and 4.

That brings me to the question of
extenuation in regard to the first appellant. Firstly
it is necessary to return to and restate some of the facts
found by the trial Court. The appellant was not only
older than the other attackers, but he was the faction
leader. He and the other members of the attacking
faction were all armed with lethal weapons. The
weapon used by him was a revolver, and it will be re-
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membered that he was the one who shot the second deceased in the back when he was endeavouring to protect himself from the other assailants. The victims of the attack were all unarmed and were seated in the veld when the violence commenced. The deceased were all vigorously pursued, and were relentlessly and cruelly murdered.

It was plain that appellant No. 1 decided in advance of the attack that the three victims would be killed. The cold-blooded intent displayed by the appellant in the whole operation is well illustrated by his act of cutting out the eye of the third deceased after he was killed. It is against the background of these circumstances that the arguments concerning mitigatory factors have to be

considered/

considered.

Counsel for the first appellant argued that in the light of his cultural background, his uncontrollable desire for revenge was understandable.

The first difficulty in the way of this contention is that the first appellant, on whom the onus rested of proving the existence of extenuating circumstances, did not give evidence as to what inspired him to commit the deeds of which he was found guilty. His testimony was confined to an exculpatory account - rejected as false - of his participation in the events of the day in question.

Even however if one assumes that

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there was material before the Court to support the view that the first appellant was motivated by a bizarre desire to retaliate to the killing of Billyam, that cannot in the circumstances of this case be considered to be a factor tending to reduce his moral blameworthiness. To his knowledge none of his victims were guilty of killing Billyam. Counsel's reliance on the suggestion in the judgment in S v Ndodla 1980(1) 149 A at 151 that a desire for revenge can

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hede as 'n verskonende, reaksie en
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does not assist, for the present was not a true case of seeking revenge on a person considered to be the author

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of a wrong.

Counsel also contended that it is reasonable to suppose that appellant No. 1 considered that it was expected of him by his followers to react vigorously to the killing of Billyam. That might be, but to have led his supporters in such a cold-blooded and relentless onslaught on innocent persons was inexcusable.

It remains to deal with the sentences imposed in regard to the other appellants. It will be remembered that imprisonment of 15 years was imposed in regard to appellants No. 3 and 4 and 12 years in regard to appellant No. 2. The mitigatory factors mentioned by

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Counsel for the appellant, that they were probably incited to join the members of the attacking impi, were properly taken into account by the trial Judge. I do not think that he left any relevant factor out of consideration and there does not seem to me to be any ground for interfering.

The appeals are dismissed.

ELOFF, AJA

MILLER JA)
) CONCUR
GALGUT AJA)