

Exhibits.

9/87

Case nr 374/86
MC

ALPHEUS MPHATENI LUTHULI and

VICTUS AZMOKWAKHE GUMEDE

and

THE STATE

VIVIER JA.

Case nr 374/86

MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ALPHEUS MPHATENI LUTHULI

Appellant no 1
(Accused no 1 in Court a quo)

VICTUS AZMOKWAKHE GUMEDE

Appellant no 2
(Accused no 2 in Court a quo)

- and -

THE STATE

Respondent

Coram: Corbett, Nestadt et Vivier JJA.

Heard: 6 March 1987

Delivered: 12 March 1987

J U D G M E N T

VIVIER JA /

VIVIER JA:-

The two appellants, together with one Mcikiselwa Mfiselwa Myeza, to whom I shall refer as accused no 3, were convicted by THIRION J and two assessors in the Natal Provincial Division of the murder of Dick Mphikeleli Ngema, and the attempted murder of his brother Sibusiso Bonginkosi Ngema in a sugar cane field near Eston in the district of Richmond on Friday 16 August 1985. On the charge of murder no extenuating circumstances were found in respect of the two appellants, and they were both sentenced to death. On the charge of attempted murder the first appellant was sentenced to 6 years' imprisonment and the second appellant to 5 years' imprisonment. In the case of accused no 3 extenuating circumstances were found

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on the murder charge and he was sentenced to 8 years' imprisonment on that charge and to 3 years' imprisonment on the charge of attempted murder. These two sentences were ordered to run concurrently. There is no appeal by accused no 3. With the leave of the trial Court each appellant appeals to this Court against the finding that there were no extenuating circumstances and the sentence of death imposed upon him.

According to the facts found by the trial Court, the events which preceded the killing of the deceased and the assault on Sibusiso were as follows. Prior to Sunday 11 August 1985 the first appellant, his two girl friends Thuli Ndlovu and Pinkie Hlongwa as well as Sibusiso all lived in the first appellant's house on the outskirts of

Isipingo. The second appellant, accused no 3 and the latter's brother Linda Myeza lived in the house next door. The first appellant and Sibusiso worked for the same firm of security guards, the first appellant as a foreman, and a good relationship existed between them. Trouble, however, brewed between Thuli and Sibusiso, as a result of which Thuli caused Sibusiso to leave the house by telling him that the first appellant was planning to poison him. Sibusiso immediately moved out of the house on Sunday 11 August 1985, without telling the first appellant that he was doing so, and leaving his possessions behind. When Sibusiso went back to the first appellant's house the following day to collect his belongings he took his brother, the deceased, with him. They returned on the

Wednesday /

Wednesday to fetch the remainder of his belongings, by which time Thuli had managed to involve the second appellant in whatever she intended doing to Sibusiso. Thuli was throughout the trial described as a sangoma, by which, it would seem, was meant that she practised as a diviner and herbalist, claiming to possess supernatural powers. This explains Sibusiso's reaction to the news that the first appellant intended to poison him. Sibusiso believed that Thuli would supply the poison. She probably wanted to be rid of Sibusiso because she had previously unsuccessfully treated a girl he had brought to her and because she considered that his dissatisfaction with her services posed a threat to her professional reputation as a sangoma.

When /

When Sibusiso and the deceased arrived at the first appellant's house on the Wednesday immediately preceding the fateful Friday they found the second appellant there. Thuli had asked him to help her, telling him that there were people who wanted to kill her. He did not know either Sibusiso or the deceased.

He posed as a policeman, showing Sibusiso and the deceased a pair of handcuffs and asking them for their names and addresses which he wrote down in a book. He told them that he had received information that they intended killing Thuli, and that he needed their particulars so that he would know where to find them if something happened to Thuli. When the second appellant confronted the two brothers on this occasion with Thuli's allegation they

denied /

denied it and said that they had merely come to fetch Sibusiso's belongings. After saying that they would come back on the Friday to fetch two remaining articles Sibusiso and the deceased left the first appellant's house.

On Thursday, the day before the attack on the deceased and Sibusiso, Thuli took her plans one step further. Accompanied by Linda, she went by train to Umkomaas where the first appellant was spending the week with another girlfriend of his, completely unaware of what was happening at his home. Thuli told him that Sibusiso and another man had threatened to kill both her and the first appellant, and that they would return the next day. She asked him to come back and they returned home the same day in his car.

On Friday 16 August 1985 Sibusiso and the deceased again went to the first appellant's house. The latter invited them in, left them inside the house, went out again and returned shortly afterwards, accompanied by accused no 3 and Linda. The second appellant had, in the meantime, emerged from an adjoining room. The first appellant accused Sibusiso and the deceased of wanting to kill Thuli, which they denied. He then searched them, found no weapons on them and was satisfied that they were innocent. He called Thuli who stated that her ancestral spirits had told her that Sibusiso wanted to kill her. On the strength of this statement Sibusiso and the deceased were overpowered and handcuffed to each other by the four men, who told them that they would be taken to the police station. They were locked up in the room for about 15 minutes while the two appellants, Thuli and Pinkie conferred in another room. Thereafter the two captives were put in the

first /

first appellant's car and driven to a sugar cane plantation some 38 km away. The first appellant was the driver and the second appellant, accused no 3 and Linda were the other passengers. On the way they passed the police station, stopped for petrol at a filling station, and carried on despite pleas for mercy and forgiveness by the captives.

Upon their arrival in the sugar cane field the two prisoners managed to jump out of the car and run away, but they were overtaken and caught by the second appellant, who forced them back to the car at knife point. They were then driven to another spot in the cane field where everyone got out of the car. On the instructions of the first appellant, Linda took a parcel from the boot of the car /

car which he handed to the first appellant, from which the latter took two bush knives, handing one to accused no 3. At this stage the first appellant demanded money for petrol from Sibusiso who gave him a R5,00 note. The first appellant then said: "Let us start the job now", whereupon the second appellant stabbed Sibusiso in the chest with a knife he had taken from his pocket, followed by the first appellant who struck Sibusiso at the back of the neck with the bush knife. Accused no 3 struck the deceased at the back of the neck with a bush knife and both victims fell to the ground. They were both thereafter repeatedly stabbed and struck with bush knives by their attackers. The trial Court's finding that the two appellants and accused no 3 acted in concert and /

and with a common purpose in killing the deceased and attempting to kill Sibusiso, is not in issue.

While they were being assaulted, Sibusiso pretended to be dead, and this saved his life. At some stage he heard the first appellant say to the others that they should look for petrol money, upon which the first appellant removed the handcuffs, searched Sibusiso's body and took another R5,00 from him. The first appellant then said: "Now we have finished with the dogs. Let us go", whereupon the attackers drove off in the first appellant's car. From the cane field they travelled to a river where the second appellant picked some leaves from a tree, which he ground and used to prepare a muti. They all drank the muti and vomited. Afterwards they washed the blood=

stained /

stained bush knives, the knife, the handcuffs and the towel in which these articles had been wrapped and then went home.

In the meantime Sibusiso had managed to get up. He found his brother dead. Sibusiso was eventually found by a farm worker and taken to hospital. The post-mortem examination of the deceased's body showed the cause of death as extensive bleeding from five stab and chop wounds: two stab wounds and one chop wound on the back of the neck, one chop wound on the right forearm and one stab wound on the right elbow. According to the medical evidence the chop wounds were inflicted by a weapon such as a bush knife. Sibusiso sustained multiple cut and stab wounds, in particular a deep cut on the back

of the neck and stab wounds of the chest.

There can be little doubt that Thuli was the originator of the plan to kill Sibusiso and the deceased, and that her real motive was to protect her reputation as a sangoma and retain her livelihood. The trial Court found that, although neither Sibusiso nor the deceased ever threatened to kill the first appellant or herself, she told the two appellants not only that Sibusiso had said that they would do so, but that her ancestral spirits had confirmed this. The trial Court found that Thuli did so in order to involve the two appellants in her plans. The

trial /.....

trial Court rejected the second appellant's evidence that Sibusiso himself told him on the Wednesday that he intended killing Thuli and the first appellant and also rejected his evidence that he heard from Pinkie that Sibusiso had said that he would kill Thuli and the first appellant.

Thuli was described by the trial Court as a devious and scheming person, although not possessed of a forceful personality. The first appellant, on the other hand, appeared to the trial Court to be a forceful personality whose conduct throughout the events was not that of a timid person or someone acting subject to the directions or influence of Thuli or the second appellant.

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The majority of the trial Court found that, although the first appellant was probably influenced by Thuli, he was not afraid of her or of any supernatural powers which he might have believed her to possess. The majority found that Thuli's influence was not of such a nature as to reduce the moral blameworthiness of the first appellant. One member of the trial Court, however, held that the first appellant feared Thuli's contact with the ancestral spirits in the sense that she would be notified should he deviate from the conspiracy, and have him killed in reprisal. This fear, according to the minority of the trial Court, justified a finding that extenuating circumstances existed in the case of the first appellant.

The second appellant did not in his evidence

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at the trial, raise a belief in the supernatural powers of Thuli and the trial Court found that he did not entertain such a belief. In his case, the unanimous finding of the trial Court was that he was probably somewhat influenced by Thuli but that this influence did not serve to reduce his moral blameworthiness. The trial Court also found that the evidence did not show that he was acting under the influence of the first appellant, and referred to his conduct at the sugar cane field when he brought the captives back at knife point after they had tried to escape. The trial Court regarded this conduct as that of a man acting on his own initiative.

It is well established that this Court will not interfere with a trial Court's finding that no extenuating

circumstances /

circumstances exist, unless such finding is vitiated by misdirection or irregularity or is one to which no reasonable court could have come. See S v Ndlovu 1970(1) SA 430(A) at 434 A and S v Mongesi en Andere 1981(3) SA 204(A) at 207 H - 208 A.

The determination of the question of extenuating circumstances involves a three-fold enquiry. In one of the more recent decisions of this Court on the subject, CORBETT JA restated the nature of the enquiry thus in S v Ngoma 1984(3) SA 666(A) at 673 G - I:

"The determination of the presence or absence of extenuating circumstances involves a three-fold enquiry: (1) whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute

extenuation; /

extenuation; (2) whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what he did; and (3) whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding (3) the trial Court passes a moral judgment."

In the present case it was submitted on behalf of the first appellant that the majority of the trial Court misdirected itself in holding that the first appellant did not act in fear of what he believed to be Thuli's supernatural powers. It was submitted that the first appellant's evidence in this regard should have been accepted by the trial Court, and that his forceful personality and his lack of physical fear of Thuli were insufficient reasons for the majority finding. His

evidence /

evidence was that although he did not in the slightest degree believe that Sibusiso would either kill Thuli or himself, and he had no quarrel with Sibusiso or the deceased, he was forced into the conspiracy to kill them because of his fear of Thuli's supernatural powers.

What he feared was that if he did not go along with Thuli and the second appellant, the former would learn about it from her ancestors and have him killed by a gang. There is little evidence of any such fear to be found in the conduct of the first appellant on the day in question.

On his own evidence he was not dominated by her and was not prepared to accept her word for the alleged threats from Sibusiso or the deceased. Acting on his own initiative he spoke to both of them, heard their denial

of Thuli's accusations, searched them and thereafter declared their innocence to Thuli and the second appellant. It is not clear what was discussed during the meeting between the girls and the two appellants while the two captives were locked up in the room. The trial Court found that the evidence of the two appellants and Thuli was so contradictory that no finding could be made as to what transpired at that meeting. The impression one gains from the subsequent conduct of the first appellant is not that of a reluctant, fearful participant who has been coerced into taking part in the conspiracy, but rather that of one who was "heart and soul in the undertaking" as the trial Court put it. The first appellant drove the car, he called for the knives,

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he gave the order for the assault to begin, he struck one of the first blows, he took money for petrol from Sibusiso and he gave the instructions to the others to leave the scene. Although he has tribal roots, the first appellant is not an ignorant, unsophisticated rural person. The evidence was that he had been employed as a security guard for a considerable time and that he had attained the rank of sergeant in the organisation he worked for. The trial Court found the first appellant to be an untruthful witness in many respects and the majority did not accept his evidence that he feared Thuli or her supernatural powers. In my view the majority of the trial Court did not misdirect itself in arriving at this finding, nor is it a finding to which no reasonable Court could have come.

It was submitted on behalf of both appellants that the fact that they acted under Thuli's influence served as extenuating. In this regard it is clear that it was Thuli who first wanted to kill Sibusiso for reasons of her own, and that she manipulated the two appellants into assisting her. It is equally clear, however, that at least at the stage when the two victims were taken from the house, both appellants had made Thuli's plan their own and were acting on their own initiative. Throughout the journey to the sugar cane plantation and at the scene of the killing the two appellants were removed from Thuli's influence and had ample opportunity for reflection and reconsideration, particularly in view of the pathetic pleas for mercy from the victims. That they, nevertheless, carried out the

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plan to kill, shows such callousness and total disregard of human life, that it would seem that they acted out of their own, cold-blooded desire to kill, and not because of any influence Thuli might have had on them, whatever its nature.

On behalf of the second appellant it was next submitted that the trial Court misdirected itself in finding that the second appellant did not act under the influence of the first appellant. In my view the conduct of the second appellant on the Wednesday before the murder, when he had not even met the first appellant, shows that he was quite capable and willing to become involved in the affairs of Thuli without being influenced thereto by the first appellant. His conduct throughout the day of the murder, particularly when he chased after

the two victims when they tried to escape, and brought them back at knife point, shows no sign of any influence by the first appellant. In my view his claim that he acted under the influence of the first appellant was rightly rejected by the trial Court.

Counsel for second appellant also submitted that the trial Court wrongly held that second appellant was not affected by the liquor which he had consumed earlier on the day in question. In his evidence the second appellant did not claim that the liquor influenced his conduct in any way, and the passages in the evidence of Sibusiso to which we were referred, show that all that was wrong with him was that his breath smelled of liquor. There is, furthermore, no indication in the

second appellant's conduct that he was under the influence of alcohol. In my view the trial Court correctly held that the second appellant's conduct was not influenced by liquor.

In the result the appeals are dismissed.

W. VIVIER JA.

CORBETT JA) Concur.
 NESTADT JA)