

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THEMBA NHLUMAYO ..... FIRST APPELLANT

and

FRANCIS XOLO ..... SECOND APPELLANT

vs

THE STATE ..... RESPONDENT

CORAM : VILJOEN, SMALBERGER, JJA et STEYN, AJA

HEARD : 15 MAY 1987

DELIVERED : 31 AUGUST 1987

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J U D G M E N T

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VILJOEN, JA

The two appellants were accused 1 and 2

in the/.....

in the Court a quo. With a third accused they were tried on two counts of murder and one count of attempted murder in the Port Shepstone Circuit Court by a Judge and two assessors. The third accused was found not guilty and was discharged but the two appellants were convicted on the two counts of murder and the second appellant was convicted of assault with intent to cause grievous bodily harm on the third count. The trial Court held that there were no extenuating circumstances and sentenced both appellants to death. With the leave of the Court a quo the appellants appeal against the failure to find extenuating circumstances and the death sentence imposed in consequence thereof.

The/.....

The finding of the Court a quo was assailed on a number of grounds. It was submitted that the Court should have found extenuation in one or more, either singly or cumulatively, of the following factors: firstly, as far as the second appellant is concerned, that he was under the influence of alcohol at the time of the commission of the offence; secondly, as far as both are concerned, that the killing of the two deceased was in revenge for the killing of one Papa Nhlumayo which was preceded by trouble and conflict in the area; thirdly, that the appellants were motivated by a fear of the second deceased planning to effect the release of her sons from custody. It was also contended on behalf of the appellants that the Court a quo committed an irregularity in allowing the appellants' previous convictions to be proved prior to the trial Court making a finding on extenuation.

The two deceased were husband and wife.

I shall refer to the husband as the first deceased and the wife as the second deceased. On the night  
of/.....

of 14 February 1986, the trial Court held, while the two deceased and their daughters Ntombi, Nomvula and Nhloboni were preparing to go to bed in a hut in their kraal, they were attacked by the two appellants and one Siteshi. After the two daughters Ntombi and Nhloboni had been allowed by the assailants to leave, the two appellants and Siteshi brutally murdered the two deceased and the second appellant stabbed the girl Nomvula, who had not fled with her sisters, in her leg with an assegai. The Court had a doubt as to whether the third accused, who had also been implicated, was a particeps. Siteshi did not stand trial with the others because he had fled and could not be traced.

On the Sunday prior to this Friday night

a young/.....

a young man of the area, Papa Nhlumayo, had been killed, allegedly by certain young men including two of the deceaseds' sons, Mbhanka and Magoni.

On the night their parents were murdered these two sons were in custody having been arrested for the murder of Papa.

At the trial the defence of appellant 1 (accused 1 in the Court a quo) was an alibi. He gave evidence that he was never near the deceased's kraal on that night. The defence of appellant 2 was that the second deceased used to sell beer at her place and that when he came from work that Friday afternoon he first consumed half of a bottle of Vodka and thereafter went to the second deceased's place/.....

place to buy and drink beer. While waiting to be served the first deceased accosted him in a threatening attitude with an assegai in his hand remarking that the second appellant's friend Papa was dead, and that he, the second appellant, was now also going to die. He, the second appellant, thereupon dispossessed the first deceased of the assegai, stabbed him and threw the spear at him and in the process, he implied, the assegai might have struck the second deceased.

The Court a quo rejected the defence of both appellants. While it could not find that the second appellant had not worked at all that Friday, as the State witnesses testified, and found that he might have/.....

have consumed liquor on the way from work, the Court rejected his version as to the events at the kraal of the deceased.

That he might have been under the influence when he and others attacked the deceased that night was relied upon by counsel as constituting an extenuating circumstance. A similar argument was addressed to the Court a quo which, however, was dismissed in the following words:

"The Accused also said that he had been drinking and that he had drunk half a bottle of Smirnoff on his way home. He may have had something to drink - we do not know. We are satisfied, however, that he knew what he was doing and that he was not under the influence of liquor and that it did not cloud his judgment in any way. We reject his evidence in this regard and the evidence that he

drank/.....

drank at the deceaseds' kraal after his  
return home at 6 o'clock. The murders  
were committed at about 8.30pm."

The second appellant did not testify that  
he had been drinking at the deceased's kraal. He was  
waiting to be served, he said, when the first de-  
ceased appeared and threatened him but it is correct  
that, according to his evidence, he arrived at the  
deceased's kraal at about 18h00 and that the murders  
were committed at about 20h30. I am rather sceptical  
about the evidence given by the second appellant which  
received some vague and suspect support from the gen-  
tleman Flick who was called by the Court but who was,  
in effect, a defence witness. The Court below was in  
my view over-cautious, as the learned Judge himself

said,/.....

said, in accepting it as a possibility that he did go to work on that day. However, assuming it to be a fact that he had gone to work, there must have been some conspiracy between the two appellants and Sitieshi after his return. Quite apart from the fact that the actual attack took place much later than the hour he said he had returned from work, the careful planning and execution of the attack upon the two elderly people was not the doing of a drunk man. In my view the Court a quo correctly held that he had failed to discharge the onus that any intoxication on his part constituted an extenuating circumstance.

On behalf of both the appellants it was

argued/.....

argued that Papa was their friend and that this was a revenge killing and it was urged, on the authority of S v Ndwalane 1985(3) SA 222(A), that that constituted extenuation. It was pointed out that there was some evidence that when her two sons killed Papa Nhlumayo, the second deceased was present and the inference should be drawn that she was closely and directly involved with Papa's death, it was submitted. Reliance was further placed upon the fact that the second deceased was a herbalist and that they believed that she would prepare food (chicken meat) for her two sons which would cause them to be released from custody.

Evidence about the second deceased's involvement in the killing of Papa was given by the State witness Mbhanka

Mvundla, the son of the two deceased, who had been arrested for having killed Papa. When his father and mother were killed he was awaiting trial in prison. He testified, inter alia, that the first appellant was present when Papa was killed but that he ran away. About the involvement of his mother in the killing, he gave the following evidence:

"And your mother, the second deceased in this matter, was she present? --- Yes she was there.

And did she take part in the killing of Papa? --- No, we don't know whether she took any part in it or not. When we came there she was sitting down. She couldn't get up any more or walk and then we chased these people.

Why couldn't she get up or walk any more?

--- They had kicked her in the sides and in the ribs with their boots.

So is it correct that you wouldn't be able to dispute it if Accused No 1 said that

your/.....

your mother took part in the assault on Papa? --- Well we left my mother lying down there and we chased after them. My mother wasn't there then. Didn't she come along afterwards and help assault Papa? --- No, we came back to my mother and told her that we had already killed Papa, so we took Mother and took her home. Had Papa had any trouble with your mother? --- On a previous occasion he'd come to the house with two other boys and attacked our house."

About the second deceased's involvement

the first appellant testified as follows:

"Now you told the Court that you know about the death of Nhlumayo and that you in fact were present on the day that he was killed - of Papa Nhlumayo.

--- Yes, I was there.

Were you alone that day or in whose company were you on that day? --- I was accompanying Papa on that day, the two of us.

So was this Papa actually a friend of

yours?

yours? --- Well I would say he was my friend because we'd never had a quarrel and then we also had the same surname.

And you used to go with him to places, is that correct? --- If there was a necessity for us to go about together we would go about together. If there was no necessity then we would not.

Now why did you run away when this friend of yours was attacked? --- I saw a lot of people approaching. They were all armed. It was natural for me to run away.

Did they also try to attack you? --- Yes, they tried to.

There was one amongst them that was doing the talking.

And who tried to attack you? --- Bekiwe Mvundla was talking and said 'Today is you people's last day'.

In the summary of substantial facts supplied by the State the following appears:

"2. On/.....

"2. On 10 February 1986 the deceased in count 2 was assaulted by one Papa Nhlumayo, a relative or friend of the accused. After the said assault, two sons of the deceased attacked and killed the said Papa Mhlumayo. The two sons of the deceased were arrested in connection with the incident."

That the second deceased had been assaulted before Papa was killed appears from the evidence, referred to above, of Mbhanka Mvundla but there is a surprising dearth of evidence on the circumstances which surrounded the killing of Papa. The circumstances prevailing under which the second deceased said, if she did say it:

"To-day is you people's last day,"  
are shrouded in mystery. They were never properly investigated. The State never challenged

the/.....

the second appellant thereon. Be that as it may, the evidence in this regard is too sketchy for an inference to be drawn therefrom that the second deceased was the instigator of trouble on that Sunday when Papa was killed. The appellants chose not to give evidence in extenuation. Instead they intimated through their counsel that they adhered to their versions given during the trial before conviction.

For good measure another factor was relied upon by counsel for the appellants and that was that the killing of the deceased might have been motivated by a fear that the second deceased planned to effect the release of her sons from custody. She enjoyed the reputation in the area of being a herbalist and

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there was some suggestion that she planned to prepare meat for her sons which would secure their release. There was, however, no evidence from the appellants that they harboured this fear and that that motivated them, either alone or with other factors, to kill the deceased. The suggestion referred to by me is contained in the summary of substantial facts and reads as follows:

"3. During the afternoon of 14 February 1986 the three accused and one Sitieshi Makhanya (hereinafter referred to as the group) conspired to kill the deceased and the inhabitants of their kraal in revenge and in order to prevent them from obtaining medicine to secure the release of the two sons of the deceased from prison."

Where this came from is not certain.

A/.....

A fair inference is that the State derived this from affidavits (to which further reference will be made hereafter) made by the two appellants which were not admissible in evidence. In the Court's judgment on extenuation the learned Judge dealt as follows with the arguments advanced on behalf of the two appellants:

"Counsel for the two Accused submitted that there were extenuating circumstances present in this case and he relied for this submission on what was set out as the background to the case in the State's summary of substantial facts, that is that a few days earlier the second deceased was assaulted by one Papa Nhlumayo and after the assault two sons of the deceased attacked and killed Papa Nhlumayo and that thereafter the Accused conspired to kill the deceased in revenge and in order to prevent them from obtaining medicine to procure the release of the sons.

Mr Von Willich who appeared for the Accused,

fairly/.....

fairly as always, drew the Court's attention to the fact that the Accused had not in fact instructed him on that basis; that they had continued to deny all knowledge, but that he was relying on what was set out by the State and what was apparently contained in inadmissible confessions made by the Accused. We accept that this is so. We however, must have regard to the facts as they have been proved before us and the evidence that was given on oath before us by the Accused. These facts disclose that the initial deceased, Papa Nhlumayo, was a young man who was on friendly terms with the two Accused. He was not related to either of them nor was he a particularly close friend of Accused No 1. Accused No 1 in fact sought to distance himself from Papa and said that if it was necessary for them to go round together they would, otherwise not. Accused No 2 said that Papa was a friend of his. There is no suggestion that either of them were related to Papa. The evidence given by Accused No 1 would appear to indicate that the second deceased had been present on the scene at

the/.....

the time Papa was killed. Her two sons, one of whom gave evidence and who stated that they phoned the police and told them that they had killed Papa, were arrested and subsequently released. There is no suggestion that it was ever contemplated that steps be taken against the second deceased and the only evidence in this regard is that of Accused No 1. We have already rejected his evidence.

It appears to us that Accused Nos 1 and 2 having heard of the death of their friend Papa, and being aware that the two sons who were supposed to have done the killing were in custody, decided to take revenge on the parents of the two boys. Even were the Accused to have said that they thought that the parents were brewing medicine to obtain the release of their sons, we would not find that this constituted an extenuating circumstance. However, the Accused did not say so and in the course of his evidence Accused No 1 stated he did not believe in home remedies or witchcraft of any sort. ....

We are left with the position as to whether, because a friend of theirs had been

killed/.....

killed a few days earlier and the two Accused sought revenge for their friend's death by killing his assailant's parents, a Court can properly say that their moral blameworthiness for such killing is in any way reduced.

We have come to the conclusion that this is not so. We have not overlooked the fact that Accused No 1 allowed the children to leave the kraal before he commenced the slaughter of their parents. This shows a degree of compassion on his part but that compassion is not sufficient, in our view, to in any way reduce his blameworthiness for the two deliberate murders that took place immediately thereafter. They went there for the purpose of killing and they killed. They had a direct intention to bring about the death of the two deceased and the wounds make it clear that they were taking no chances in this regard.

There is no suggestion, I should have said earlier, that Accused No 1 was in any way under the influence of liquor.

It is unfortunately true that murder is only too prevalent in the area where these killings

took/.....

took place. These are far removed from the faction fights which took place in Natal in the past and continue to do so. What occur now are deliberate killings of persons or individuals and we do not feel that the fact that some friend or even relation has been killed in the past, can in any way excuse a retaliatory killing in these circumstances. I do not say that it never can. Where the relationship is a close one, where the killing takes place in the heat of the moment, there may be extenuating circumstances but it would, in our view, be giving the area over to anarchy if we were to adopt an attitude that extenuating circumstances were present merely because there had been a prior killing of some friend or acquaintance.

Finally, there is no suggestion of any immediate provocation by the unfortunate deceased. In these circumstances we find that there are no extenuating circumstances present."

The question arises whether the learned

Judge, when he emphasised the direct intention to

kill/.....

kill, did not misdirect himself in failing properly to distinguish between the intent which is a requisite in the crime of murder and the moral blameworthiness of the accused in the context of extenuating circumstances. A remark made during the argument would seem to justify such an inference. The remark was made when reference was made by counsel to the decision in S v Ndwalane supra.

"Stalked him for two weeks, driving around; saw him, went up to him and shot him. If ever there was a deliberate, calculated killing it was that one."

However, reading the learned Judge's remarks in the context in which they were made, I am satisfied that he did not misdirect himself. He distinguished

between/.....

between this case and Ndwalane's case supra by

adding to his reference to the deliberate killings:

"---- and we do not feel that the fact that some friend or even relation has been killed in the past, can in any way excuse a retaliatory killing in these circumstances. I do not say it never can."

The fact that there was no suggestion of any immediate provocation seemed to have weighed heavily with the learned Judge. This of course is a factor which the Court a quo correctly took into account. I have to point out though, in response to the veiled criticism of this Court's judgment in Ndwalane's case supra, that the absence of immediate provocation does not always, as the learned Judge seemed to imply, negative extenuating circumstances.

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The criterion as laid down in various decisions in this Court is whether the bearing which the facts had on the accused's state of mind was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did. I agree, however, that the facts in the present case were not such. The mere desire to take revenge is not extenuatory. See S v Namane 1977(4) SA 240(A). There was in the present case no deep sense of injustice, outrage and frustration as in Ndwalane's case. It may not be relevant but, as there was some doubt at the argument stage as to whether Mahlaba, the victim in the murder trial in Ndwalane's case, had actually been involved in the killing of Dube, the appellant's friend and

benefactor,/.....

benefactor, I refer to the report in 1985(3) SA 222 at 224 D - F. I have come to the conclusion, however, that on the whole the Court a quo correctly held that the circumstances surrounding this so-called revenge killing did not constitute extenuation.

There remains the question of the alleged irregularity in that the previous convictions were made known to the Court a quo before the inquiry on extenuation. There was, as it appears from the record and was also put in argument to us, a "misunderstanding" between counsel for the State and counsel for the defence. The misunderstanding, I deduce, arose from a belief on the part of counsel for the State that the appellants would, after conviction, deviate from their versions during the trial and/.....

and testify, in extenuation, in accordance with

certain statements made by them which the State

had in its possession but which were inadmissible.

The contents of the statements formed, apparently,

the basis of the State's summary of substantial facts.

Whether the State expected that the appellants would

adhere to those statements for the purpose of the

trial before conviction and make certain admissions,

is not clear but what can be inferred from the record

is that before the issue of extenuation was embarked

upon counsel for the State and counsel for the accused

agreed that if the latter were prepared to admit,

either in evidence or through their counsel, that the

facts as set out in their inadmissible statements

were/.....

were correct, the State was prepared to concede that  
extenuating circumstances were present. The two  
appellants let their counsel down, however, and were  
not prepared to admit those facts. Whether, if they  
did, it would have made any difference to the final  
outcome is not necessary for this court to decide.

It is well established in our law that a  
trial Court should first dispose of the issue of ex-  
tenuation before being apprised of the previous con-  
victions and if this is not done it constitutes an  
irregularity. See S v Shabalala 1966(2) SA 297(A)  
300 in fine. The test, however, is always whether,  
as a result of the irregularity, there was a failure of  
justice. See Shabalala's case supra 301 B - C; the proviso to

s 322(1) of the Criminal Procedure Act 51 of 1977.

The records of the two appellants were taken into account by the learned Judge, counsel pointed out, and submitted that it must have affected the mind of the learned Judge to the prejudice of the appellants. The passage referred to reads as follows:

"The Accused are not particularly young men. Accused No 1 is 30, Accused No 2 is 25. We do not find their age to constitute an extenuating circumstance. Neither of them are by any means first offenders."

It is clear, however, that the remarks were made merely to indicate that the two appellants were not inexperienced young men. I am not persuaded that/.....

that this single reference to their previous convictions in the judgment on extenuation constituted a failure of justice.

The appeals are dismissed.

JUDGE OF APPEAL

SMALBERGER JA)  
                  ) - CONCUR  
STEYN AJA)