

Case no 348/88
/MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

Between

<u>SIPHO EMMANUEL NYIDE</u>	... First Appellant
<u>LUCKY CLERMENT LUTHULI</u>	 Second Appellant
<u>JEFFREY BONGANI BHENGU</u>	 Third Appellant

and

<u>THE STATE</u>	... Respondent
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CORAM: HEFER, KUMLEBEN JJA et NICHOLAS AJA.

HEARD: 16 March 1989.

DELIVERED: 23 March 1989.

J U D G M E N T

NICHOLAS AJA/...

NICHOLAS AJA: -

In 1987 the South Western corner of the intersection between Umgeni and Adrian Roads, Stamford Hill, Durban, was the nightly haunt of pimps and prostitutes. There 18-year old Gloria Gabela plied her trade. But her youthful attractions were a dangerous snare for the men who came there in their motor cars. She habitually engaged in a variant of what Americans call "the badger game". Her co-operators were her pimp, Lucky Luthuli (19), and his two friends, Sipho Nyide (22) and Bongani Bhengu (23). If she successfully concluded a deal with a white man whom she considered to be a likely victim, she would, on getting into the car, make a signal to Lucky Luthuli. She would then direct the driver to the deserted yard of vacant premises nearby, where the car would be parked. When Gloria and the man were engaged in what they had come to do, her co-operators would appear and confront the man and demand money. He would, for obvious reasons, ordinarily comply readily with their demands,

and he would not complain to the police. There was evidence that the game had been played almost nightly for about six months and there had been no police reaction.

At about 23h30 on 22 July 1987, Lucas Botha drove up to the place in his red Sierra motorcar. He called Gloria to him. They had a conversation, and agreed upon a fee of R10 for "a short time". She got into the car. As she did so, she made a hand signal to Lucky Luthuli, who was on a verandah on the other side of the road with his two friends. Botha drove off and, directed by Gloria, parked the Sierra in the yard of a vacant property not far away. The three co-operators came up to the car and opened a car door. Gloria got out and ran away. Botha also got out, and tried to make an escape. He did not succeed. He was brought down and the upper part of the tracksuit he was wearing was pulled off him. He was taken back to the premises where his car was parked. There was a struggle, in the course of which he was stabbed. Then he was dragged into the

property. There he was found, lying dead behind his car, some time later.

On post mortem examination he was found, in addition to incidental wounds, to have a clean cut wound of the chest penetrating to the apex of the left ventricle; clean cut wounds of the pupils of both eyes; fingernail-like abrasions on both sides of the throat; and a fracture of the left side of the hyoid bone. The forensic pathologist expressed the opinion that death was caused by the stab-wound into the heart, but he agreed in cross-examination that it could have been caused by strangulation, as evidenced by the fractured hyoid bone. He could not say which of the two injuries was the first one inflicted.

Arising out of this occurrence, four people appeared in the Supreme Court in Durban before WILSON J and two assessors on two charges: (1) murder, and (2) robbery with aggravating circumstances. They were Gloria Gabela as accused

No 1; Sipho Nyide as accused No 2; Lucky Luthuli as accused No 3; and Bongani Bhengu as accused No 4. All four of them pleaded not guilty on both counts.

In his judgment WILSON J summarized the findings of the trial court as follows :-

".....we find that the four accused were all party to a plot to rob any White client who appeared prosperous who engaged the services of accused No 1 and whom she could induce to go to the agreed spot. We accept that in furtherance of this scheme accused No 1 did induce the deceased to go to this spot and that accused Nos 2, 3 and 4 proceeded independently to it. We find that accused No 1 fled not from fear but to avoid embarrassment and the possibility that the client might subsequently seek revenge against her if she remained in the vicinity. We find that in the circumstances the male accused must have anticipated resistance and violence, but nevertheless proceed with their plan. At that time two of them at least were armed with knives. When the deceased endeavoured to escape they pursued him and grappled with him. To overcome this resistance and to enable the search of

the vehicle and the deceased to proceed and to enable them to carry out their aim of robbery, accused No 2 stabbed the deceased. In his wounded and bleeding state, which was obvious to all of them, he was dragged back behind the car where he collapsed. There one of the three, or more than one, we do not know precisely who played what part, finished him off by throttling him; thereafter his eyes were stabbed and his shoes removed. We are satisfied that this was done to ensure the safety of all three of them, that is of all of those who had participated in the previous assault and attempted robbery of the deceased with the tacit or express approval and support of each of them who was then present. Thereafter the three of them left the scene to complete the evening's business by apportioning out the goods they had stolen from the deceased's vehicle. Accused No 2 then returned to the place of business whilst 3 and 4 got rid of their bloodstained clothing."

Gloria Gabela was convicted of robbery with aggravating circumstances but found not guilty of murder. The other three accused were convicted on both counts. The trial court came to the unanimous conclusion that there were no extenuating

circumstances present in respect of any of the three male accused, and WILSON J imposed sentences as follows :-

Accused No 1. Count 1 - robbery with aggravating circumstances. 4 years' imprisonment. half of which was conditionally suspended.

Accused Nos 2, 3 & 4. In each case -
Count 1 - robbery with aggravating circumstances. 7 years' imprisonment.
Count 2 - murder. Sentence of death.

The learned judge granted leave to accused Nos 2, 3 and 4 to appeal to this court against the trial court's finding that there were no extenuating circumstances.

Discussing "the crime itself and the circumstances surrounding it", WILSON J said in the judgment on extenuating circumstances:-

".... that the male accused were part of a gang determined to rob clients of accused No 1, that in the present

instance when the client, that is the deceased, resisted, they grabbed and searched him. When he endeavoured to escape they pursued and grappled with him and tried to return him forcibly to the vicinity of his car. This can only have been done to ensure that they were able to complete their planned robbery without interference. By this stage all the accused were aware that violence had been used and each of them must (have foreseen) and did foresee the necessity for further violence if they continued. Despite this they did so and it was at this stage, whilst accused Nos 3 and 4 were struggling with the deceased, that accused No 2 stabbed him.

This was not something which could be laid at accused No 2's door alone. It was part and parcel of the combined attack on the deceased. There can be no suggestion that any of the other accused were unaware of what had been done by accused No 2. The stab-wound was in the centre of the chest above the heart in the direction of the heart, and the whole length of the blade of the Okapi knife was plunged into the chest of the deceased. All the accused must have appreciated, and we are satisfied did appreciate, the potentially lethal nature of the injury inflicted.

Thereafter, whilst the deceased's blood was splattering onto accused 3 and 4's clothing, and whilst

he was still alive and able to speak, they dragged him back into the shadows behind the car. When he collapsed to the ground, and at a time when it was obvious that he was grievously hurt, they ensured his silence by strangling him.

It is impossible, on the medical evidence, to say which of the two wounds caused by the accused was the proximate cause of death. Either of the injuries could have killed him. In all probability they both did. Having achieved their purpose they cut his eyes as a further safety device and then removed his shoes

Unperturbed by what they had done the accused continued their search of the deceased's car, gathered up the stolen goods and departed to a nearby house to share out their spoils. This is yet further proof that they expected no further interference from the deceased.

There is nothing in this terrible saga to provide any shred of extenuation in our opinion. It was argued that there was an absence of premeditation or a minimal participation by some of the accused. This may have been true up till the time they encountered the deceased standing outside his motor-car. Thereafter they pursued their aim, that is to rob the deceased with a coldblooded and single-minded ruthlessness. It was argued on their behalf in this regard that there

had been no trouble in the past. This is true. Had they allowed the deceased to flee on this occasion it is probable there would have been no trouble then. They were not prepared to do so. Even after the deceased had been stabbed they were not deterred. Nothing, including the life of the deceased, was to be allowed to stand in their way, nor did it.

We are satisfied that no extenuation can be found in the offence, the circumstances leading up to or surrounding it or the motives for it."

Counsel for the appellants criticized only two statements in this part of the judgment: that dealing with absence of premeditation; and the characterization of the aim of the accused as being "to rob the deceased with a coldblooded and single-minded ruthlessness."

They submitted that the trial court erred in not giving more weight to the absence of premeditation. I do not agree. It may well be that when the accused left the corner in Umgeni Road to go after Botha's car, it did not occur to any of them that events would not follow their normal course. But absence

of premeditation is a non-circumstance and is not in itself extenuating. The important question in such a case is, what was it that impelled the accused all of a sudden to resort to violence? The answer in this case is plain: it was a determination to prevent the escape of their prey and to crush his resistance in order that they might effectuate their purpose of robbery. That is not extenuating.

It was submitted that the trial court over-emphasized the brutality of the conduct of the accused and the gravity of the crime - that the circumstance do not necessarily indicate "a cold-blooded and single-minded ruthlessness". In my opinion this characterization was in no way inaccurate. Botha was helpless and defenceless and no doubt terrified. The three accused made a concerted attack upon him, and they persisted in it until he was dead.

The trial court experienced difficulty in dealing with the cases of the accused individually, because none of them

elected to give evidence in extenuation and the court had perforce to rely solely on the evidence already before it.

Dealing with the case of Sipho Nyide, accused No 2,

WILSON J said:-

Accused No 2, a man of twenty-one years of age at the time, appeared to us to be a vicious gangster. He was an active participant in the gang who made a living robbing the clients of prostitutes who plied their trade in the area. On his own evidence he had done so in the past and willingly joined in again on the evening in question. He stabbed the deceased deliberately at a time when there was no need to do so other than to ensure that the robbery could proceed.

He showed no sign of remorse in the witness box, nor did any emerge in the reading of his Section 119 statement to the Magistrate."

The word "gangster", with its emotional overtones, may be unduly pejorative, but of the fact that he was vicious his conduct left no doubt. When Botha's arms were being held by one of the accused on either side, accused No 2 walked up to him and

stabbed him in his naked chest.

No 2's counsel submitted that his age (21) (having regard to his low level of education (Std IV) and the fact that force had not previously been used) required careful consideration. It is true that the accused was a young man, but there is no indication that immaturity had any influence in the perpetration of the offence. Neither his standard of education, nor the fact that he had not previously used violence (another non-circumstance) can serve to reduce his moral guilt.

Nor was it relevant that he "was only casually employed, and his lifestyle was extremely basic" or that "he had only one previous conviction".

In regard to Lucky Luthuli, accused No 3, WILSON J said :-

"Accused No 3, despite his age, appeared to us to be a street-wise, amoral thug. He was pimp to accused No 1, took her earnings from her and preyed upon her clients. He was, in addition, a gambler who visited

the railway workers after pay day on each month to gamble with them. He was anything but the immature, unsophisticated young man his counsel tried to make him out. On the evidence it appears that he was probably the leader of the gang. Accused No 4 certainly regarded him as such and after the crime he sent accused No 2 to carry a message to his girlfriend, accused No 1, at her place of business whilst he changed his bloodstained clothes. We are satisfied that his youth played no part in the commission of the offence. He showed no signs of immaturity nor did the evidence as to his behaviour disclose any. If he was influenced by any other factor it was by his own innate viciousness. He was eighteen years ten months old when the offence was committed. In most cases this, in itself, would provide extenuating circumstances. However in this case the personality of the accused, as it emerges from the evidence I have already dealt with, and his behaviour are such that we are unable to come to this conclusion. Although his mother was called as a witness as to his age, and we accept her evidence that he was born on the 29th of September 1968, she was not asked to give any evidence as to his past behaviour, conduct or personality. I drew his counsel's attention to the fact that there was no evidence in this regard before us and he stated he was

aware of the fact and made no attempt to elucidate anything further from her. In these circumstances, and in the light of the evidence that accused No 2 had given about accused No 3's past, I judged it wiser to be guided by counsel and myself asked no further questions. Counsel was, after all, aware of what evidence the witness could have given and I certainly did not want to elucidate anything from her that might have prejudiced the accused."

Apart from the fact that I do not think that it is helpful to use a word like "thug", I do not consider that this assessment of No 3 is to be faulted.

It was argued that the trial court did not pay sufficient regard to the youthfulness and immaturity of this accused, but it is apparent from the judgment that the trial court had careful regard to his age.

Counsel for this accused made a submission in regard to the onus of proof in regard to age which I did not understand. The fact is that his age was proved by his mother and her

evidence was not challenged and it was accepted by the court.

It was also submitted that the trial judge should have called for the report of a probation officer. On the issue of extenuating circumstances the onus was on the accused, and there was no suggestion by his counsel at the trial that such a report would have been useful.

Two other arguments were advanced on behalf of this accused. Neither bears examination. The first was that the accused held the superstitious belief that the police are able to photograph the eyes of a dead man to discover the identity of his murderer - this indicated subnormal intelligence. There is no warrant for this conclusion. The other was that

"The deceased had placed himself in disgraceful circumstances of having to procure prostitutes thus falling prey of the appellants who wanted to capitalise on the helpless situation of clients who did not want to be publicised by having to lay charges against the assailants."

That may be so, but it does not provide extenuation for the conduct of those who exploited his weakness.

In regard to Bongani Bhengu, accused No 4, WILSON J said in the judgment on extenuating circumstances:

"Accused No 4, on the face of it, played in some ways a lesser role than that of the other two accused. There is, for example, no evidence that he was armed. Nevertheless he joined the others in the attack on the deceased and played his part in it. This included searching the deceased, pursuing him and holding him. We are satisfied he played an active part throughout the attack or attacks on the deceased. Afterwards he provided accused No 3 with clean clothing and took custody of his bloodstained clothes. It is true he was perhaps a clumsy, stupid and inept liar. This, however, does not show that he was either immature or of a low average intelligence. An ability to lie readily or consistently is neither a sign of maturity nor intelligence. It may be that he was persuaded to join the planned robbery and did so reluctantly. He unfortunately, however, did not tell us so after his attempts to exculpate himself at the scene had been rejected by us as untrue. It was open to him to give

evidence in extenuation. He did not do so."

Counsel urged that in the case of No 4 the following constituted extenuating circumstances:-

- (a) The lesser role which he played.
- (b) Absence of premeditation.
- (c) Dolus eventualis.
- (d) Youthfulness and immaturity - he is 23 years of age.
- (e) Possibly he was influenced by No 3, whom he regarded as the leader.

The trial court dealt with his lesser role. An age of 23 is in itself not evidence of immaturity. Possible influence by others was not shown. In the circumstances of this case the fact that he may not have had a direct intention to kill is not relevant to extenuation.

The conclusion is that it has not been shown in the case of any of the accused that there is any ground for

interfering with the findings of the trial court.

The appeals are dismissed.

H.C. NICHOLAS AJA.

HEFER JA)
KUMLEBEN JA) Concur.