

31/89

Case No 347/88
/MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

Between:

<u>ERIC BONGANI MVELASE</u>		FIRST APPELLANT
<u>JABULANE MSWANE</u>		SECOND APPELLANT

- and -

<u>THE STATE</u>		RESPONDENT
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CORAM: JOUBERT, VIVIER et STEYN JJA.

HEARD: 10 March 1989.

DELIVERED: 30 March 1989.

J U D G M E N T

VIVIER JA./...

VIVIER JA:

The two appellants, to whom I shall refer as accused no's 1 and 2 respectively, and one Vusumuzi Lucas Miya, to whom I shall refer as accused no 3, were convicted by THIRION J and two assessors in the Circuit Court at Ladysmith on one count of murder and one count of attempted murder. Accused no 1 was also found guilty of the theft of a motor vehicle. In respect of the count of murder no extenuating circumstances were found either in the case of accused no 1 or accused no 2 and they were both sentenced to death. In respect of the count of attempted murder accused no's 1 and 2 were each sentenced to 3 years' imprisonment. For the theft of the motor vehicle accused no 1 was sentenced to one year's imprisonment which was

ordered /

ordered to run concurrently with the sentence imposed for the attempted murder. Accused no 3, a youth of under 18 years of age, was sentenced to 9 years' imprisonment for the murder and the attempted murder, those counts taken together for the purposes of sentence. With the leave of the trial Judge accused no's 1 and 2 appeal to this Court against the findings that there were no extenuating circumstances and the consequent sentences of death imposed on them. There is no appeal by accused no 3.

According to the facts found by the trial Court the events which led to the murder and the attempted murder were the following. Cyril Zondi ("the deceased") was a taxi driver and was employed by one Bongani Malunga, who was assisted in

running/...

running the taxi business by his brother Eric Malunga.

During the afternoon of 25 November 1986 accused no 1 approached the deceased at a taxi rank in Durban and asked to be conveyed to Ladysmith. The deceased referred him to Eric Malunga and he told the latter that he required a taxi to convey wedding guests from Ladysmith to Ntuzuma at KwaMashu for his brother's wedding which was to take place the next day. After the wedding the guests would have to be taken back to Ladysmith. They agreed on a fare of R800-00 which was to be paid to the deceased after the completion of the journey. Later that afternoon the deceased and accused no 1 left for Ladysmith in the deceased's taxi, a Kombi, which was the vehicle subsequently stolen by accused no 1. They were accompanied by one Sithembiso Phewa, a friend of the deceased, who often used to accompany the

deceased/....

deceased on his journeys.

Late that evening they arrived in the Mziyonke rural area beyond Ladysmith where accused no 1 told the deceased to stop at a certain kraal. He left the other two waiting in the Kombi and returned after about an hour, accompanied by three men: accused no's 2 and 3 and one Mafotho Mkhonza ("Mkhonza"). The four of them were wearing balaclava caps which covered their faces. They boarded the taxi and accused no 1 told the deceased to drive to a certain place where, he said, they would pick up some girls. It was then about midnight.

After they had travelled for some distance, accused no 1 told the deceased to stop as he wanted to relieve himself. He also told the deceased to switch off the Kombi's engine.

The / ...

The three accused and Mkhonza got out of the Kombi and when Phewa looked back from his seat in the front of the Kombi he saw accused no 1 standing next to the Kombi with a gun in his hand. Phewa bent down to change a cassette in the cassette player and at that moment a shot was fired from behind which struck him a glancing blow at the back of his head. At the same time he saw the deceased slumped over the steering wheel. The next moment Phewa was pulled from the Kombi, dragged into a bush and left there. From what one of the others said he gathered that they thought that he was dead. From where he lay he heard several more gunshots being fired. The Kombi then drove off and after a while Phewa made his escape and eventually managed to notify the police.

At/....

At about ten o'clock the next morning accused no 1 reported to an unsuspecting Sergeant Mhlaba at the Ezakheni police station that he had earlier that morning come across the body of a dead man lying next to the road in the Mziyonke area. He told the policeman that it appeared as if the man had been killed in a fight. Sergeant Mhlaba took a statement from accused no 1 and then allowed him to go. Half an hour later Detective Constable Ndlela found the body of the deceased lying in a bush about 30 metres off the road between Ezakheni and Helpmekaar in the Mziyonke area. From blood and drag marks which he observed on the road it appeared to him as if the body had been dragged from the road to where it was found. The post mortem examination revealed that the deceased had been shot/....

shot in the head twice: one bullet struck him just above the right eye and one just above the left eye. The cause of death was a brain injury due to the first-mentioned wound.

The following day Detective Sergeant Collins and other members of the police force observed accused no 1 driving the Kombi on the road between Helpmekaar and Ladysmith.

A chase at high speed followed and after the police had opened fire on the Kombi it left the road and accused no 1 managed to escape into the bush. He was only arrested on 10 February 1987.

Mkhonza was arrested on the same day but he subsequently escaped and was still at large at the time of the trial. Accused no's 2 and 3 were arrested shortly afterwards. Two revolvers which had been used in the murder were recovered from accused no's 2 and 3 respectively.

At/...

At the trial all three accused gave evidence before they were convicted. Accused no 1 later again testified on the issue of extenuating circumstances, and he then gave a version of the events which was completely different from the one which he had previously given and which the trial Court had rejected. The trial Court accepted the later version for the purpose of extenuation. That version is as follows.

Accused no 1 said that his father was killed during 1984.

He subsequently heard from one Mgaga that a policeman, who was in love with his stepmother, had shot his father. Mgaga told him that he knew the identity of the policeman and he suggested that, since they could do nothing to him as he was always armed, they should kill his son, who was the deceased. Mgaga

suggested/....

suggested that they get Mkhonza to do the killing. Accused no 1 agreed. Mgaga then took accused no 1 to a taxi rank in Durban where he pointed out the deceased and he proceeded to make the necessary arrangements with Mkhonza. He also gave him money. Accused no 1 testified that when he arrived at Mkhonza's house on the evening in question the latter was expecting him. Mkhonza told him that his own gun had been confiscated by the police. They approached accused no's 2 and 3 who both had guns and they agreed to do the killing. Accused no 1 testified that before they boarded the taxi they arranged that after reaching a certain spot accused no 1 would ask the deceased to stop. Accused no's 2 and 3 would then shoot the deceased. Everything went according to plan

except/...

except that Phewa was accidentally shot.

Accused no 2 admitted in his evidence that he had shot the deceased. He said that he fired once and that when he pulled the trigger a second time the gun did not fire. He denied that he and accused no 3 were promised anything as a reward for killing the deceased. Accused no 2 said that he had picked up the revolver with which he shot the deceased a week or two before. On the evening in question he was already asleep at home when he was awakened by Mkhonza and accused no's 1 and 3, all of whom were well-known to him. Mkhonza told him that certain people from Durban, who had arrived with accused no 1, had to be killed since they had killed the latter's father. Accused no 2's evidence that Mkhonza forced him to

accompany /

accompany them and to shoot the deceased, was rejected by the trial Court. The Court held that he voluntarily participated in the perpetration of the murder. Accused no 2's evidence that Mkhonza supplied the ammunition for his revolver and that Mkhonza had to show him how to use the revolver, was rejected by the trial Court. As far as accused no 3 is concerned, he admitted that he fired twice at Phewa after accused no 2 had shot the deceased. His evidence that he had acted under duress was rejected by the trial Court.

In his judgment on extenuation the trial Judge said that accused no 1's desire for revenge could not be regarded as an extenuating circumstance. The learned Judge pointed out that accused no 1's father had been killed as long ago as 1984 and that accused no 1 had no firm evidence that the

deceased's father was responsible for the death of his own father. The learned Judge also emphasised that an innocent victim had been chosen simply because it was easier to kill him than his father.

Dealing with the submission made on behalf of accused no 1 that he had acted under the influence of Mgaga, the trial Judge said that Mgaga's influence did not appear to have been a strong one. He pointed out that accused no 1 was employed in Johannesburg and was no longer living in the tribal and family environment of his home. While it was true that Mgaga had first planted the seed in the mind of accused no 1, the latter had acted independently and with a will of his own in planning and executing the killing. He also had enough time

for /

for reflection and must have realised that the deceased's only sin was that his father was suspected of having killed accused no 1's father. In view of the fact that accused no 1 was employed and had shown that he could act independently and with a will of his own, his age (he was just under 21 years of age when the murder was committed) was not regarded as an extenuating circumstance by the trial Court.

In the case of accused no 2 the trial judge said the following in his judgment on extenuation:-

"In considering the case against Accused No 2, the Court has to bear in mind his youthfulness, the fact that at the time of the commission of the crime he was not yet 20. Counsel stressed this consideration and also the fact that as he has submitted, Accused No 2 was probably influenced by the older man Mafotho Mkhonza. Now Accused No 2 was the best person to have

told/....

told us the strength of the influence, if any, which Mafotho exercised over him but he has chosen not to take the Court into his confidence. His youthfulness is no doubt an important consideration. It is, however, also relevant to consider Accused No 2's conduct during the commission of the offence. The manner in which he participated indicates that he was able to play in a forceful manner the role allotted to him. He was at least sufficiently mature to consider the seriousness of the undertaking.

There is no evidence of any period of employment but it seems as if Accused No 2 has moved around. He has been to Johannesburg. Accused No 2 also was not emotionally affected at all. The probabilities are that he was influenced by the expectation of a monetary award."

It is well settled that this Court will not interfere with a trial Court's finding that no extenuating circumstances exist, unless such finding is vitiated by misdirection or irregularity, or is one to which no reasonable court could

have/.....

have come. See S v Ndlovu 1970(1) SA 430 (A) at 433 .

in fine and S v Mongesi en Andere 1981(3) SA 204 (A) at 207 H -
208 A.

Counsel for accused no 1 submitted before this Court
that the trial Court misdirected itself in over-emphasising
the fact that accused no 1's father had been killed some years
before the deceased was killed. I do not agree. In consi=
dering how strong the sense of grievance was which accused no 1
harboured against the deceased's father, the trial Court was
perfectly entitled, in my view, to have regard to aspects such
as the time which had elapsed since the death of accused no
1's father and how certain he was that the deceased's father
was the man responsible. In my view the trial Court did not
over-emphasise /....

over-emphasise these aspects. In any event, however strong accused no 1's sense of grievance was, it did not, in my view, reduce his moral blameworthiness in killing an innocent man who had done him no harm and who was killed merely because he was an easy target.

It was further submitted that the trial Court did not attach sufficient weight to Mgaga's influence over accused no 1. Although, as the trial Judge has pointed out, the idea was first mooted by Mgaga, accused no 1 needed no persuasion. He readily and fully accepted the idea and acted entirely on his own in carrying out the plan to kill the deceased. He alone was responsible for luring the deceased to the deserted spot where he was killed. There was no evidence to the effect

that / ...

that accused no 1 held Mgaga in awe or that he revered him.

Nor was Mgaga present during the fateful journey.

Accused no 1 alone made the final arrangements with Mkhonza

and saw to it that the hired killers did what was expected

of them. In my view the trial Court's assessment of accused

no 1 as an intelligent person who could act independently and

with a will of his own, seems entirely justified on the

evidence. It was submitted that accused no 1 was immature

at the time of the murder. In my view his conduct throughout

the events shows the opposite.

On behalf of accused no 2 it was submitted before.

this Court that he was influenced by Mkhonza and by his

feelings of sympathy for accused no 1. There is no factual

basis/....

basis for this submission. In his evidence before he was convicted accused no 2 said that he had acted under duress, but this evidence was rejected by the trial Court. He did not use the opportunity to testify on the question of extenuation in order to explain why he participated in the murder or whether he was in any way influenced thereto. Although he denied in his evidence before his conviction that he had been promised any payment for his part in the killing, his statement to the police does indicate that he expected to be paid. Whatever his reason or motive for the killing, the calculated, cold-blooded way in which he shot the deceased who was a total stranger to him, showed such callousness and total disregard of human life that his moral blameworthiness was not lessened.

Reliance/....

Reliance was placed on the fact that accused no 2 was roused from his sleep as indicating an absence of prior planning. On all the evidence it is quite clear, however, that the murder had been planned some time before the evening in question. Obviously accused no 2 could not have known of the exact time of arrival of accused no 1. The fact that he went to bed is therefore no indication that he was not expecting the others.

It was finally submitted that the youthfulness of accused no 2 should be regarded as an extenuating circumstance. The trial Court carefully considered this aspect and concluded that accused no 2 was not immature. The trial Court did not misdirect itself in arriving at this finding nor is it a finding

to /

to which no reasonable Court could have come.

In the result the appeals of both accused no's
1 and 2 against the findings that there were no extenuating
circumstances and the consequent sentences of death are
dismissed.

W. VIVIER JA.

JOUBERT JA)
STEYN JA) Concur.