

166/88
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NTSIKELELO SITO FIRST APPELLANT

XOLILE WILLIAMS SECOND APPELLANT

SIGNET THUNYISWA MBAMBO THIRD APPELLANT

ABRAHAM ZEYO FOURTH APPELLANT

MEMBER MGWADLENI FIFTH APPELLANT

and

THE STATE

CORAM: HEFER, NESTADT et KUMLEBEN JJA

HEARD: 20 MARCH 1989

DELIVERED: 30 MARCH 1989

J U D G M E N T

KUMLEBEN JA/....

KUMLEBEN JA

The five appellants, respectively accused nos 1, 3, 5, 7 and 13 in the court a quo, stood trial with nine other accused in the Eastern Cape Division of the Supreme Court on charges of murder, attempted murder and arson: twelve counts in all. The appellants were convicted on four of them: on count 1, of the murder of a woman, Elizabeth Klaas; on counts 2 and 3, of culpable homicide arising from the death of two young children Goodman Klaas and Sandla Livingstone Klaas respectively; and on count 12, of arson in that they set fire to and gutted the home of the Klaas family. Their co-accused were acquitted on all counts. In the case of fourth appellant no extenuating circumstances were found to be present in respect of the murder conviction and he was accordingly sentenced to death. The other appellants were sentenced to various terms of

imprisonment on the counts on which they were convicted. At the conclusion of the trial leave was granted to all the appellants to appeal against their convictions; to fourth appellant to appeal against his sentence on the murder charge, that is, against the finding on extenuation; and third appellant was granted leave to appeal against his "sentence" which, it was common cause, referred to the sentence of 20 years' imprisonment imposed on count 1.

The offences, with which the appellants were charged, were committed by a group of men during the night of 19/20 April 1985 at the home of the deceased, Elizabeth Klaas, (also known as "Mankomo") in Bontrug Township, Kirkwood. At the time the deceased and her three daughters, Pumla Klaas, Nomathemba Klaas and Nokuzola Klaas, were in the house together with another woman Xoliswa Ntshenge and a number of grandchildren of the deceased. The essential

facts giving rise to the charges are not in dispute.

They are thus succinctly set out by Erasmus AJ in his judgment:

"It appears that earlier the evening there were knockings on the door. Later that evening a group of men arrived and again knocked. Someone said: 'We are the Amacabani'. Nokuzola opened the front door; some of the group entered the house, while others remained outside. The estimate of the numbers in the house differ, but it would appear that there were about 10 to 20 in number."

"After the group entered, Nokuzola lit a paraffin lamp, which was on the dining room table. The group stood in the dining room, near the front door. Members of the group kept asking for one 'Jimmy' or 'Jimmy Klaassen'. Nokuzola said 'Jimmy is not here but you may look around', or words to such effect.

One of the intruders had with him a 5 litre plastic container, which contained some inflammable liquid, probably petrol. Nokuzola grabbed hold of the container and for some time she and the person who had hold of it struggled over it. They both had their hands on the bottle or container and were tugging it to and fro. Nokuzola told Pumla to fetch a membership card. (It appears that another sister had left this card at the house for the protection of the occupants. It was never quite established what this card

really was).

The group kept asking for this 'Jimmy'. Elizabeth Klaas called from the bedroom, whereupon someone said, according to Nokuzola: 'Good enough, here is Mankomo.' The evidence is that another member of the group also said 'let us do what we have come to do.' At this time Nokuzola and the intruder were still struggling over the container. One or more of the group threatened to stab Nokuzola or aimed blows at her and as a result she let go of the container and ran away. Thereafter the man with the bottle went into the room where Elizabeth Klaas was and brought her into the dining room, where petrol was poured over her body and she was set alight. Petrol also was thrown on the floor and this, too, started burning. The occupants, with the fateful exception of three of them, fled the house. The building was thereupon burnt to the ground. Three of the occupants were burnt to death, namely Elizabeth Klaas, Goodman Klaas and Livingstone Klaas."

Thus it was that Elizabeth Klaas died as a result of being set alight and the two young children suffered a similar fate when the house was razed to the ground. Before its destruction it comprised a living room, kitchen and three bedrooms, as depicted on a plan handed in as Exhibit B. The front door opened into a living

room at the back of which was a kitchen. To the left of the front door, as one faces it from outside, there were three bedrooms, with doors opening into the living room and into a short passage which leads from the living room, between the rear bedroom and the kitchen, to the back door.

The main enquiry in the court a quo was, and the first issue argued on appeal is, whether the appellants were proved to have been part of the band of men who attacked the house and were present when the offences were committed. The key State witnesses on this issue were those who purported to identify the appellants at the home of the deceased, namely, Nomathemba Klaas, Nokuzola Klaas, Pumla Klaas and Xoliswa Ntshenge. Each appellant in turn testified denying complicity and furnishing an alibi in support of his contention that he was not present or involved.

The court found Nokuzola Klaas to be a good witness, both honest and reliable. The eye witnesses, Nomathemba and Pumla, were held to be honest but, having regard to certain defects in their evidence, the court considered that the reliability of their observations was in a measure suspect. For this reason the court relied upon their evidence to the limited extent that it provided corroboration for the identificatory evidence of Nokuzola. Xoliswa was considered a good witness. (In point of fact first, second and fifth appellants were identified by Nokuzola and Pumla; third appellant by Nokuzola, Pumla and Nomathemba; and fourth appellant by all four eye witnesses.) As regards the defence case, the court rejected the alibis as false. On appeal appellants contended, as they did in the court a quo, that these State witnesses were dishonest or untrustworthy; that they discussed the matter amongst themselves before the

trial with the result that they influenced each other on the question of identification; and that it is reasonably possible that the alibis proffered were truthful.

It is appropriate to consider in the first place the evidence of Nokuzola.

She is a twenty-year-old woman who lived at Bontrug, a township near Kirkwood. She was at the time a scholar at a local school in form III, the equivalent of standard 8. She said that she was in bed that night when at about 2 am she heard people knocking at the door and on the windows of their home. She arose and opened the front door. A man called Mytanci pushed her back inside the house. The intruders told her to light a lamp which she did. They asked for Jimmy. A short discussion ensued, they insisting that he be produced, she explaining that he was not there. She noticed that

fourth appellant held a cannister, which - as she correctly assumed - contained petrol. She grabbed hold of it and attempted to wrest it from him. As she grappled with him, the deceased was heard to say from one of the bedrooms that Jimmy was not in the house. One of their members thereupon said "let us do what we have come for." At this point Mytanci threatened to stab Nokuzola with a knife causing her to flee through the back door. She hid in a partially demolished house nearby until the screams of the people trapped in the burning home prompted her to return to the house. She remained there until the police and fire brigade arrived. They were unable to extinguish the fire.

That same morning at about 11 am she was taken around the township by the police in search of the assailants. She identified first and second appellants and two other persons, who featured as

accused nos 2 and 4 at the trial. During July 1985 at the Kirkwood police station she pointed out these four persons and in addition third and fourth appellants together with another person (who for some or other reason was not one of the accused at this trial). On 13 May 1987 she again took part in an identification parade at the Uitenhage police cells at which she pointed out fifth appellant and another person (accused no 14 at the trial).

Reverting to what took place at her home that night, she explained that the paraffin lamp had a glass shade. It was placed on the table in the middle of the living room. It was during the period that she pleaded with them not to set fire to her home and grappled with the fourth appellant that she identified certain persons, including the appellants. Her evidence indicates that this took place over a reasonably

prolonged period of time. The lamp, she said, cast a bright light in the room. It was not suggested that it did not adequately illuminate it. The intruders were in a more or less concave line facing towards the table and standing between it and the front wall of the living room. They were therefore close to and facing her. Two of them, Mytanci and another carried a knife. The rest held stones in their hands.

She explained in some detail how she came to identify each appellant. First appellant was known to her as "Dombo". They were pupils at the same school. He was standing at the extreme left of the group. She noticed him as she tried to wrest the container from fourth appellant. The second, third and fifth appellants were also known to her. She had seen second appellant from time to time in the township and at the school on the Thursday before the incident. Third

appellant was a teacher at her school and had in fact visited her parents at her home. Fifth appellant, known to her as "Member", was also one of the scholars she had seen at her school. (As a matter of fact she said that she first identified this appellant before he entered the house.) As I have said, she was able to identify them while she was in the living room explaining that Jimmy was not there and whilst struggling with fourth appellant. She conceded that none of them had special distinguishing facial or other features. She was not able to describe what they wore.

These facts establish in my judgement that this witness had an adequate opportunity to make accurate observations. It is true that under cross-examination she was not able to say which appellants she identified before she tried to take the container from fourth appellant and which she noticed whilst

struggling with him. But in the circumstances such detailed recollection could hardly be expected of her. The fact that each appellant identified was known to her is significant. The trial court found her to be an intelligent and observant person and to my mind this assessment is fully borne out by her evidence on record. In the circumstances I consider that faulty identification as a reasonable possibility was rightly discounted by the court.

Can it be said that she dishonestly implicated the appellants? Initially Mr Naidu, who with Mr Soni appeared for the appellants, argued that she had, but later conceded, rightly in my view, that there were no valid grounds for questioning her honesty. It is therefore unnecessary to discuss the evidence and the various submissions in this regard. One aspect, however, ought to be mentioned since it was

at one stage strongly relied upon by Mr Naidu. In criticising her evidence he referred to the fact that in her initial statement to the police she did not mention the names of the two teachers, third appellant and one Fihla. This statement was taken down by W/O Oelofse on the Saturday morning after she had identified certain persons from the police vehicle. She admitted that she at that stage forgot to include these two men and attributed this to her shocked state of mind. This seems plausible having regard to what she had been through the previous night. Be that as it may, D/Sgt Thobile Bona confirmed that on that same day, that is, on Saturday 20 April, she told him that these two teachers were present. It is grossly unlikely that within such a short space of time she would have decided falsely to implicate these two men by mentioning their names to this policeman, particularly when one was a visitor to her home and a

person she bore no ill will.

Thus, though criticism can be levelled at the evidence of Nokuzola in certain minor respects, I consider that her evidence as a whole on the question of identification was, as the court found, both truthful and reliable. As I have indicated, the evidence of the other eye witnesses was regarded as no more than corroborative of her evidence and the court's decision to give it such limited value cannot, in my view, be faulted.

I turn now to examine the alibi evidence of each of the appellants. These are comprehensively discussed in the judgment. I need to do no more than refer to the salient grounds on which each was rejected (not all of which grounds, I may mention, were challenged in argument before us).

First appellant made a statement to the police on 22 April 1985 denying his presence at the house but without furnishing any details of an alibi, as one would have expected him to have done. Only during cross-examination was it put that he was with his girl friend Zoleka at the time. This, he said, he had told the policeman when making his statement, but the latter had omitted to record it. This was never put to the policeman concerned. It is highly improbable that he would have failed to record all that was said since the whole purpose of taking such a statement was to follow up any alibi furnished to see whether or not it could be substantiated. First appellant made no attempt to contact the people he subsequently said he was with that night apart from Zoleka. She too gave evidence. It was manifestly unsatisfactory and was rightly rejected.

On his arrest on Saturday 20 April second appellant told constable Fillis that there was another person present when the house was burnt down, thus implicitly admitting that he was there at the time. He thereupon took Fillis to a house where he pointed out accused no 4, who was also arrested. This evidence of Fillis was disputed by second appellant. But, if false, no feasible reason for the arrest of accused no 4 on that day in the presence of second appellant can be furnished. Thus the evidence of Fillis, which is supported by the probabilities, refutes his alibi which, in any event, on other grounds was shown to be an afterthought: it differed materially from what had been put by his counsel in cross-examination; he claimed to have been with his uncle and aunt but could not give their names; and the aunt, who was present in court at the trial, was not called as a witness.

Third appellant claimed to have been with his wife that night. This he told the police at the time of his arrest on 22 July 1985, that is, some three months after the offences were committed. He explained that he was ill that Friday afternoon and went to bed when he returned home. There his wife found him when she arrived home from work. His wife was called as a witness. There are material contradictions in their evidence. For instance, he said that whilst he was in custody and was visited by his wife he did not tell her of the charge or ask her whether she recollected that on that night he was ill in bed at home. He also maintained that the alibi was not discussed by them. She, on the other hand, said that when she visited him in custody, she told him that she could confirm his alibi. Sgt Dicker, a State witness, said that he went to the school where appellant was teaching on a day when an identification parade had been arranged and told him that he was to report later that

same day to the charge office to attend an identification parade. At that stage this appellant had a normal crop of hair. However, when he arrived at the charge office his head was shaved. His wife confirmed that when he left for school that morning this was not the case. If one discounts the remote possibility, and somewhat startling co-incidence, that what appears to have been his annual haircut took place on that very day on his way to school, his wife's evidence corroborates that of Sgt Dicker. Counsel in argument pointed out that at the identification parade Dicker did not remark on his (third appellant's) change of appearance. But, since he was identified by the State witnesses concerned, there was no pressing need for Dicker to disclose this fact at that stage. It was also stressed in argument that, as he was known to the witnesses who subsequently identified him, shaving off his hair was really a pointless act on his

part. It may not have been a wise decision but possible reasons for his doing so do come to mind. He may have thought that shaving his hair might cause persons who knew him to doubt whether he was involved inasmuch as they had not observed a person with a shaven head at the scene of the crime. Another explanation may be that he could not have foreseen that only persons to whom he was known would be called upon to identify him. Be that as it may, Dicker's evidence on this issue was explicit, uncontroverted and accepted. It was given after the appellant had completed his evidence and closed his case. Mr Naidu submitted that the court was in the circumstances under a duty to recall the appellant to refute the evidence of Dicker and to explain why and when he had shaved his head. Had the appellant been unrepresented, the court would have been required to explain the position to him and give him the opportunity of rebutting such

evidence. But he was represented by counsel and the prima facie inference to be drawn from Dicker's evidence was an obvious one. Thus, if appellant was in a position to refute it, one would have expected his counsel to have made the necessary application to reopen his case.

It was the contention of fourth appellant that he was with his brother in Uitenhage that night. In his statement to the police on arrest he left out details which one would have expected to be disclosed had his alibi been genuine. In this regard, with reference to this appellant and others, Mr Naidu submitted that the court was wrong in drawing an adverse inference from the fact that no or insufficient particulars of their alibis were disclosed. Counsel pointed out that each appellant on arrest had been given the customary warning and told that he was not obliged to make any statement to the police. This is

so, and had they remained silent no adverse inference would have been justified. But having chosen to explain that they were not there, the court was entitled to comment on the fact that they did not expatiate. In any event this consideration, it is to be noted, was not one of the main grounds relied upon for the rejection of any of the alibis. Fourth appellant also contended that what he had told the police had been deliberately omitted from his recorded statement. He too was guilty of what the trial court termed "curious inactivity" in making no attempt to get in touch with his alibi witness, namely, his brother.

As regards the alibi of fifth appellant, certain of the unsatisfactory aspects of the alibi evidence of the other appellants, to which I have alluded, feature in his evidence as well: his false assertion that the police incorrectly recorded his

statement and his failure to contact his alibi witnesses promptly after having been released from custody.

Apart from the evidence relating to their alibis, there are a number of other unsatisfactory aspects of the evidence of each appellant which bear out the conclusion that they were not truthful witnesses. These are referred to in the judgment and there is no need to repeat them.

In the result I consider that their alibis were correctly rejected.

To revert to the evidence of Nokuzola, I should mention that she, in fact she alone, purported to identify two other accused, nos 2 and 4, who were acquitted. Considered independently the alibi of each

of these accused - so the court held - could not be rejected as false and there were grounds for concluding that Nokuzola's identification of these two persons could not be accepted with the same certainty as her identification of the appellants. Their acquittal therefore does not reflect in any way on the reliability of Nokuzola's evidence implicating the appellants. It rather endorses the fact that the court carefully assessed the weight of all the evidence and, quite correctly, considered the identificatory and alibi evidence conjunctively.

The fourth appellant was directly responsible for the death of the deceased and was plainly guilty of murder. The question next to be considered is whether the other appellants were correctly convicted of this offence. (I shall for convenience refer to them simply as "the appellants".) Their convictions on this count

were based upon the application of the doctrine of common purpose, which has recently been closely examined by this court (per Botha JA) in two decisions: S v Safatsa and Others 1988(1) S.A. 868 and S v Mgedezi and Others 1989(1) S.A. 687. They confirm that, if the evidence in this case establishes that the appellants were party to a decision to kill the deceased taken by the group prior to their entering her house, there can be no doubt that this fact, coupled with their involvement in the fatal assault upon her, would make them guilty of murder. (If no such prior common agreement or acquiescence is proved, the prerequisites set out in Mgedezi's case 705 I - 706 C would have to be satisfied before such a conviction could be sustained.)

It is common cause that the group that evening proceeded from the house of one Jonas to that

of the deceased. The court a quo found as a fact that the decision to murder the deceased was taken by the group "in the vicinity of Jonas's house". The question is whether the evidence justifies this conclusion.

It is necessary in the first place to examine the relevant evidence of the State witness Mabuya. He said that he was apprehended and taken to a house where he was interrogated by members of the group, which later went to the home of the deceased. He was accused of having conveyed Jimmy and the deceased in his motor vehicle, which he denied. Notwithstanding his denial, on account of what was thought or known to be his association with these two persons, his accusers decided to kill him. They were on the point of doing so when a person called "Killer" - belying his sobriquet - intervened and saved his life. They then, so he said, forced him to accompany them to the house of the

deceased. In his evidence in chief he stated that before they set forth one of them said "Come along with us, let us go and set Mankomo's house on fire" and that someone had also said "Let us go and kill Mankomo." His statement to the police was to the same effect. The court painstakingly evaluated the evidence of this witness. It was found to be unsatisfactory in certain respects, particularly as to whether he had gone to the house of the deceased involuntarily and as to whom he had seen there. The court in the circumstances treated him as an accomplice and considered his evidence with the caution that such supposition warranted. However, adopting this cautious approach to his evidence, and after making due allowance for its flaws, there appear to be no grounds for rejecting the evidence of Mabuya to which I have referred, i.e., the reason why he was very nearly killed and what was said to him before they left for

the house of the deceased. There is no reason why he should have falsely said that he was told that the deceased was their intended victim if in fact the announced intention was to seek out Jimmy in order to kill him or for some other unlawful reason.

On arrival at her house, Nokuzola, as has been pointed out, was asked whether Jimmy was there. Had he been one of the occupants of the house he may well have shared the fate of Mankomo, but this is by the way. The important consideration is that no attempt was made by any member of the group to search the house and find out whether Nokuzola's denial of his presence in the house was correct. Had Jimmy been the primary or exclusive reason for their going to that house, it is inconceivable that they would have accepted the say-so of Nokuzola, who may well have wished to protect Jimmy by falsely denying his presence

at the house. They would have searched for him there. Their failure to do so, or to make any further enquiries, makes it clear that he was not the real or only reason for their intrusion and suggests - I put it no higher - that the "question" asked about Jimmy's whereabouts was more in the nature of an accusation arising from the fact or belief that he had been allowed to stay at that house or had been befriended in some other way. Nokuzola in her evidence in chief, said that she told them "Jimmy is not here at home, but you may go and look." There was, as I have stressed, no response to this invitation. Instead someone said, after a short discussion about the membership card, "let us do what we have come for." And one knows what that turned out to be. Under cross-examination the evidence of Nokuzola on the sequence of occurrences is, if anything, more explicit. The relevant passage reads as follows:

"What caused you to leave, let go of that container? --- At the time when my mother said from the room 'my children, Jimmy is not here.' One of them then said 'very well, here is Mamkomo'. And then the one said 'let us do what we had come for here'".

According to Nomathemba these words were uttered at a stage when the deceased was brought from the room (when, according to Nokuzola, at a time when she had already departed.) It is not improbable that this statement was repeated. Be that as it may, whether or not there is an element of contradiction as to the stage at which these words were spoken, their utterance, and the fact that the decision was implemented by their killing the deceased, strongly indicate that it was for such purpose that they had come to the house.

There is this further consideration. If the pre-arranged plan was directed at Jimmy and if the fourth appellant, and perhaps some others, had suddenly

acted contrary to it by assaulting the deceased, one would undoubtedly have expected some response from the other members of the group by way of questioning, protest, consternation or dissociation. There is no suggestion that there was any such reaction and, of course, no evidence from appellants to that effect.

One can thus confidently conclude that the group set out with the settled intention of killing the deceased and setting fire to her house. I should add that, in my view, this inference is justified even if what Mabuya said he was told before they left Jonas's house is left out of account.

The evidence does not establish that all the appellants were present and were party to this decision when it was initially taken. This, however, is immaterial. Those who were not must have armed

themselves with stones and joined the group at some stage before it reached the house of the deceased. One must obviously conclude, in the absence of any explanation to the contrary from the appellants, that before doing so they would have ascertained the purpose of the expedition and decided to take part in it.

The conclusion reached on the application of the doctrine of common purpose to the murder count applies a fortiori to the other counts on which the appellants were found guilty. As to the convictions of culpable homicide, the appellants ought reasonably to have foreseen that the burning down of the house might result in the death of some of its occupants - see S v Nkwenja en h Ander 1985(2) SA 560 (AA) 572 I - 573 D.

Turning to the appeal of fourth appellant against the finding that there were no extenuating

circumstances, the correct approach to this question has been stated in a number of decisions of this court. In S v Ngoma 1984(3) SA 666 (AD) 673 it was put thus:

"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; (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."

Recently in S v McBride 1988(4) SA 10 (AD) this court, after a detailed examination of previous decisions relating to extenuation, explained the significance of the nature of the offence, and the role played by the accused in its commission, in the context of

extenuation thus:

"I shall now endeavour to sum up the present state of the law on this aspect of extenuating circumstances. The nature of the murder (and here I would include the identity of the deceased and the relationship, if any, between the accused and the deceased) and the manner of its commission are factors which, while they cannot be regarded as per se excluding extenuation, are nevertheless relevant to the general enquiry as to extenuation. They may be relevant to the factual enquiry as to whether an alleged extenuating circumstance in truth existed or as to whether it actually influenced the accused; or they may be relevant as part of the web of circumstances associated with the crime which must be considered by the Court when it passes its moral judgment and decides whether there exist circumstances which in the minds of reasonable men diminish the accused's moral blameworthiness."

The court a quo correctly considered the question of extenuation in the light of these principles. It found that there were extenuating factors present viz. some degree of immaturity, the emotional circumstances prevailing at the time and what the court described as the "group activity". Nevertheless it

considered that, having regard to the active role played by this appellant in what can only be described as a particularly brutal murder, these factors did not reduce his moral blameworthiness. In reaching this conclusion the trial court did not misdirect itself in any respect. On the contrary, every possible extenuating factor was carefully considered and evaluated. In my judgment it cannot be said that the conclusion reached was not correct.

The remaining issue is the sentence of twenty years' imprisonment imposed on third appellant in respect of count 1. It is to be noted that his direct involvement in the killing of the deceased was no greater than that of the other appellants, apart from fourth appellant. In the case of each of them a sentence of ten years' imprisonment on this count was imposed. This indicates that Erasmus

AJ. was mindful of the requirement that there should be consistency in the imposition of sentences on co-accused unless special circumstances call for different treatment of a particular offender. Such circumstances were held to be present in the case of third appellant because he was an adult and a school teacher. This appears from the following comment in the judgment on sentence:

"Accused no. 5, you have turned literally at death's door. The Court takes into account that you were a school teacher at the time and that your presence must necessarily have influenced the others present, especially the youths, scholars, in the group. The sentence called for has to be severe."

There can be no doubt that these two distinguishing features are pertinent and important and do, as was said, call for a severe sentence. However, in the absence of more information on the extent to which the

other appellants would have been amenable to his discipline and thus on his capacity to influence them against committing those crimes, a sentence twice as severe as that imposed in the case of the others is, in my judgment, unjustifiably disparate and ought to be reduced.

The appeal succeeds in part. The sentence imposed on third appellant (accused no 5 in the court a quo) on count 1 is altered to one of 15 years' imprisonment. In all other respects in the case of all the appellants their appeals fail.

M E Kumleben

M E KUMLEBEN
JUDGE OF APPEAL

HEFER JA)
NESTADT JA) - Agree