

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

<u>JOHANNES SETHOGA</u>	<u>First Appellant</u>
<u>LAZARUS MOTSAMAI</u>	Second Appellant
<u>PHINEAS NDLOVU</u>	Third Appellant
<u>VUSI ABSALON KUBELA</u>	Fourth Appellant
<u>PATRIC MAHLANGU</u>	Fifth Appellant
<u>ELIASA RATONE</u>	Sixth Appellant

and

<u>THE STATE</u>	Respondent
------------------	------------

CORAM: SMALBERGER, NESTADT, VIVIER, KUMLEBEN, JJA,
et FRIEDMAN, AJA

Heard: 18 August 1989

Delivered: 12 September 1989

J U D G M E N T

SMALBERGER, JA :-

The six appellants appeared before DE KLERK, J,
and two assessors in the Transvaal Provincial Division on

four counts of murder (counts 1 to 4), four counts of attempted murder (counts 5 to 8) and one count of arson (count 9). The charges related to an occurrence which took place at approximately 9.15 p m on 2 July 1987 when the house of Mrs Elinah Masupa at 12743 Mocke Street, Daveyton, Benoni, was deliberately set on fire. The house was occupied by a number of people at the time. Four of them died from burn wounds sustained in the fire; yet another four suffered serious injuries, but survived the ordeal.

The appellants initially all pleaded not guilty to the charges against them. Certain formal admissions were made on their behalf in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the Act). These related mainly to the identity of the four deceased and their causes of death. The State then proceeded to call a number of witnesses. The salient features which emerge from their evidence are the following. At about 8 p m on the night in question the six

appellants, who were under the influence of intoxicating liquor in varying degrees, created a disturbance (inter alia by fighting amongst themselves) in a cafe in Daveyton. Hendrik Masupa (Mrs Elinah Masupa's son) was at the time temporarily employed at the cafe. Because of their behaviour the appellants were eventually refused service, and ordered by Hendrik to leave. They did so, but only after the fourth appellant had struck Hendrik a blow with his fist. They were apparently resentful of Hendrik's attitude towards them. They returned to the cafe a short while later, and the second and fifth appellants threatened to set the cafe and its occupants on fire. They then left the scene and proceeded to the house of one Sibisi. They borrowed a 25 litre container from him. At their demand Sibisi took them to a nearby garage where they purchased approximately R12-00's worth of petrol. The petrol was poured into the container. Sibisi then drove them to a spot about a kilometre from Mrs Masupa's

house, where he dropped them. For his trouble he was given approximately 5 litres of petrol. He was admonished to keep quiet about the events that had taken place.

At about 9.15 p m there were a number of people present in Mrs Masupa's house. The house is a relatively small one consisting of a kitchen, two bedrooms and a sitting/dining room. There are doors leading from the kitchen to the three other rooms. Both the kitchen and the sitting room have outside doors. The house has normal sized windows. The lights of the house were on. Four people were watching television in the sitting room. The other people in the house were in one or other, or both, of the bedrooms. Suddenly all the lights in the house went off. Shortly thereafter they went on again. Two men (identified by one witness as the third and fourth appellants) entered the kitchen from outside. They called one of the deceased, Christina Masupa, to the kitchen. She went there. At that

stage her mother was also in the kitchen. The lights went off again. Petrol was poured over the floor of the kitchen and a match was struck. The petrol caught alight, and very soon the whole house was engulfed in flames. Four of the occupants eventually succumbed from their burn wounds, while four others were seriously injured. Two babies in the house were miraculously saved from injury.

At the conclusion of Mrs Masupa's evidence the six appellants altered their pleas as follows:-

The first and sixth appellants pleaded guilty to arson (count 9).

The second appellant pleaded guilty to arson (count 9) and four counts of attempted murder (counts 5 to 8).

The third, fourth and fifth appellants pleaded guilty on all nine counts.

In conjunction with their pleas of guilty the appellants each handed in a signed statement in terms of s 112(2) of the Act admitting all the material elements of the

crimes to which they pleaded guilty. The statement of the first appellant (which is identical to that of the sixth appellant) reads as follows:-

"I, the undersigned, Johannes Sethoga, do hereby plead guilty to the charge of arson. The statement herein sets out the facts which I admit and on which I plead guilty:

1. On the evening of the second of July 1987 I accompanied my co-accused in this case to house no 12743 Mocke Street, Daveyton.
2. The house is the property of and/or was in the lawful possession and occupation of Elinale Masupa.
3. The said house constitutes an immovable structure.
4. I, together with my co-accused proceeded to the said house in order to set fire to it.
5. On our arrival, the said house was set on fire with the use of petrol. Although I did not set fire to the house personally, I nevertheless identified myself with the actions of those who did set the house on fire.

6. I had formulated a common purpose with my co-accused to set the said house on fire.
7. I understood that my conduct aforesaid was unlawful.
8. I understood that by setting the house on fire it will result in damage and prejudice to the owner thereof."

The second appellant's statement is to the following effect:-

"I, the undersigned, Lazarus Motsamai, do hereby plead guilty to the following charges:

- (a) Arson.
- (b) Four counts of attempted murder.

The statement herein sets out the facts which I admit and on which I plead guilty:-

1. On the evening of 2nd July 1987, I accompanied my co-accused in this case to house number 12743 Mocke Street, Daveyton.
2. The house is the property of and/or was in the lawful occupation and possession of Elinale Masupa.
3. The said house constitutes an immovable structure.

4. I, together with my co-accused, proceeded to the said house in order to set fire to it.
5. On our arrival the said house was set on fire with the use of petrol. Although I did not personally set fire to the said house, I nevertheless identified myself with the actions of those who did set the house on fire.
6. I had formulated a common purpose with my co-accused to set the said house on fire.
7. I understood that my conduct aforesaid was unlawful.
8. I understood that by setting the house on fire it would result in damage and prejudice to the owner thereof.
9. At the time the house was set on fire, the following people were in occupation of the house; and at which time I realised that the house was occupied: Godfrey Masupa; Richard Mbatha; Trevor Cindi and Elinale Masupa.
10. At the time when the house was set on fire I foresaw the possibility that it may cause the death of the aforesaid occupants. Notwithstanding this, I

nevertheless, together with my co-accused, formulated the purpose to set the house on fire, and the house was indeed set on fire as set out herein.

11. At the time when the house was set on fire, I understood that my actions were unlawful.

12. In the fire that ensued, the abovenamed persons were burnt and sustained injuries."

The statements of the third, fourth and fifth appellants are in practically identical terms to that of the second appellant save that they also admit that on their arrival at the house they set the house on fire by pouring petrol on the kitchen floor and setting the petrol alight; that they were aware of the presence in the house of the four deceased; and that the latter died as a result of the injuries they sustained in the fire.

The pleas as tendered were accepted by counsel for the State. For the purposes of the present appeal I shall

assume that by accepting the pleas as tendered, the State impliedly purported to accept the pleas of not guilty by the first, second and sixth appellants on all the counts on which they did not plead guilty. It is common cause that the court thereafter adjourned, and that counsel for the State and the appellants were subsequently advised by the presiding judge in chambers that he considered there was sufficient evidence to justify the conviction of all the appellants on all counts. Counsel intimated that they were prepared to leave the matter in the hands of the court. On resumption the State closed its case whereupon the appellants did likewise.

In due course, after hearing argument, the trial court convicted the appellants on all nine counts. Because of their youth the first and fifth appellants were not subject to the mandatory death penalty and it was not necessary for the trial court to make a finding of

extenuating circumstances in their case. Nevertheless, in respect of both of them, ex abundanti cautela, as well as in the case of the second and sixth appellants, extenuating circumstances were found to be present in relation to the four murder counts. No extenuating circumstances were found to be present in the case of the third and fourth appellants.

The following sentences were imposed:-

First appellant:-

10 years imprisonment on each of the four counts of murder.

5 years imprisonment on each of the four counts of attempted murder.

3 years imprisonment for arson.

Second appellant:-

18 years imprisonment on each of the four counts of murder.

9 years imprisonment on each of the four counts of attempted murder.

4 years imprisonment for arson.

Third and fourth appellants:-

Sentence of death on each of the four counts of murder.

9 years imprisonment on each of the four counts of attempted murder.

5 years imprisonment for arson.

Fifth appellant:-

16 years imprisonment on each of the four counts of murder.

8 years imprisonment on each of the four counts of attempted murder.

3 years imprisonment for arson.

Sixth appellant:-

12 years imprisonment on each of the four counts of murder.

6 years imprisonment on each of the four counts of attempted murder.

3 years imprisonment for arson.

In the case of the first, second, fifth and sixth appellants it was ordered that all their sentences should run concurrently. Accordingly the effective sentences imposed upon them were 10, 18, 16 and 12 years respectively. It would seem that the trial judge inadvertently omitted to direct that the periods of imprisonment imposed on the third and fourth appellants should also run concurrently (unless he

felt it was unnecessary to do so because of the death sentences imposed upon them).

The appellants were granted leave on petition to this Court to appeal against their convictions and sentences after such leave had been refused by the trial judge. On appeal only the convictions of the first and sixth appellants on counts 1 to 8, and those of the second appellant on counts 5 to 8 were challenged. The correctness of the convictions of the third, fourth and fifth appellants on all nine counts is not in issue.

The first point raised in argument was that the trial court was bound by the State's acceptance of the first, second and sixth appellants' pleas of not guilty on the counts in issue. Reliance in this regard was placed on a dictum of JANSEN, JA in S v Ngubane 1985(3) SA 677 (A) at 683 E where he stated that acceptance of a plea (as envisaged by s 112 of the Act) "must be seen as a sui generis act by the

prosecutor by which he limits the ambit of the lis between the State and the accused in accordance with the accused's plea". It was contended that the State's acceptance of the pleas of not guilty had a similar result, thereby causing the issues raised by the pleas of not guilty to no longer be justiciable by the trial court.

This contention cannot prevail. Ngubane's case is clearly distinguishable from the present. The court was there dealing with the acceptance of a plea of guilty to a lesser offence than that charged, at the plea stage before any evidence was led. At that stage of the proceedings the State was dominus litis and as such entitled, by its acceptance of a lesser plea, to limit the lis between itself and the accused in accordance with the accused's plea. The court hearing the matter was bound by such acceptance, subject to the provisions of s 112 of the Act being satisfied, as there was no issue for it to determine.

Ngubane's case did not deal with the situation where a plea to a lesser offence (and a fortiori a plea of not guilty) was purportedly accepted by the State after evidence had been led and the court was seized with the duty of determining all the issues raised by the initial plea of not guilty. S 112 of the Act applies not only where a plea of guilty is tendered before the commencement of a trial, but also when an accused changes his plea to one of guilty during the course of the trial. (S v Abrahams en Andere 1980(4) SA 665 (C) at 668 C; S v Mokhobo 1989(1) SA 939 (A) at 943 E.) But the acceptance by the prosecutor of a plea of guilty to a lesser offence at that stage does not have the same effect as the acceptance of such a plea before the commencement of the trial. This is so because once an accused pleads not guilty the court is seized with the duty of determining the issues between the State and the accused raised by the latter's original plea of not guilty. The prosecutor cannot interfere

with the exercise of that duty and compel the court to enter a verdict of guilty on a lesser charge by seeking to limit the lis between the State and the accused. Any acceptance by the prosecutor of a plea of guilty to a lesser offence can accordingly only take place with the court's consent. This was first laid down in R v Komo 1947(2) SA 508 (N) at 511, and has been consistently followed since then. (See e.g. R v Seboko 1956(4) SA 618(0); S v Cordozo 1975(1) SA 635 (T); S v Mlangeni 1976(1) SA 528 (T).) In my view it represents the true position, which a fortiori applies to a case such as the present where there are several counts and the appellant, having initially entered pleas of not guilty to all counts, seek - after evidence has been led - to change their pleas to guilty on certain of the charges. Nothing in the provisions of s 112 detracts from the correctness of this conclusion. In any event s 112 only applies to the situation where an accused person pleads guilty and the prosecutor accepts such

plea. It has no application to pleas of not guilty and their acceptance. The only manner in which the State can compel a court to give effect to an accused person's plea of not guilty and acquit him is where the attorney-general stops the prosecution in terms of s 6(b) of the Act. There is nothing to suggest that this was ever intended in the present matter, apart from which the stringent provisions of s 6(b) were never complied with. It follows that the trial court was entitled to convict the first, second and sixth appellants on the counts on which they pleaded not guilty provided the evidence was sufficient to justify their convictions. There was no prejudice to the first, second and sixth appellants as they were aware before they closed their respective cases that the trial court did not consider itself bound by the State's purported acceptance of their pleas of not guilty.

It is apparent from their statements, to which

earlier reference has been made, that the first, second and sixth appellants formed a common purpose with their co-appellants to burn down Mrs Masupa's house. The question arises whether the State has proved beyond all reasonable doubt that they had the requisite intention to kill to justify the convictions of the first and sixth appellants on counts 1 to 8, and the second appellant on counts 1 to 4. In this respect it was incumbent upon the State to prove (in the absence of any evidence of a direct intention to kill on their part) that they had subjective foresight of the possibility, however remote, of their unlawful conduct causing death to others, and persisted in such conduct with a reckless disregard of the possible consequences thereof (dolus eventualis) (S v de Bruyn en n Ander 1968(4) SA 498 (A) at 510 G - H). In the context of the present matter this involves proof that the appellants concerned subjectively foresaw the possibility of Mrs Masupa's house

being occupied at the time it was set on fire, coupled with foresight of the possibility that the fire might cause death to the occupants thereof.

I shall deal firstly with the second appellant. In his s 112 statement he stated, inter alia, that he "realised that the house was occupied" by the persons named by him (the complainants on counts 5 to 8) and that "(a)t the time when the house was set on fire I foresaw the possibility that it may cause the death of the aforesaid occupants". In fact the house was occupied at the time by more persons than those mentioned by him. In the absence of any acceptable evidence by the second appellant that he entertained the reasonable belief that there were only four people in the house at the time, the inference is irresistible that he must have foreseen, and accordingly did foresee, the possibility of there being other occupants of the house as well. Once he foresaw such possibility, his admitted foresight of the fire

causing death inevitably extends to all the occupants of the house at the time. In this case, therefore, the requisite intention to kill in respect of counts 1 to 4 was established, and he was correctly convicted on those counts.

I turn now to consider the position of the first and sixth appellants. The admissions made by them in their s 112 statements do not go nearly as far as those of the other appellants. As previously mentioned, they admit to a common purpose with their co-appellants to set Mrs Masupa's house on fire. According to their statements they "proceeded to the said house in order to set fire to it". They further stated that "(o)n our arrival, the said house was set on fire with the use of petrol". It is accordingly apparent from their statements that they were present at, or in the immediate vicinity of, the house when it was set alight. The house is situated in a residential area. It was at a time of night when one would normally expect a house in that area to be occupied. The lights of the house

were on. This would have been visible to anyone at or in the immediate vicinity of the house. That the lights were on must further have alerted the first and sixth appellants to the fact that the house was occupied. (The trial court also had regard to the fact that the television was on, but the evidence does not establish that someone outside the house would necessarily have been aware of that fact.) It was known to the first and the sixth appellants that a fairly substantial quantity of petrol had been acquired for the purpose of setting the house alight. It must be present to the mind of even the most dull-witted individual (to use a phrase from R v Lewis 1958(3) SA 107 (A) at 109 E) that where a substantial amount of petrol is used to set a house on fire, the inevitable conflagration that will follow must pose a threat to the lives of the occupants of the house - particularly so where the house is a small one with limited escape routes. While there always existed the possibility that the occupants might escape harm, there was at least the equal

possibility that some or all of the occupants might be unable, for whatever reason, to escape from the flames. In all the circumstances, and in the absence of any negating explanation from the first and sixth appellants, the only reasonable inference to be drawn is that when acting in concert with the other appellants to set fire to Mrs Masupa's house, the first and sixth appellants subjectively foresaw the possibility of the house being occupied, as well as the possibility that if it were set alight by the use of petrol death might result to the occupants thereof, but none the less persisted in their conduct with reckless disregard of the consequences. In the result they were correctly convicted on counts 1 to 8.

It follows, therefore, that the appeals of all the appellants against their convictions must be dismissed.

Because the trial court found that there were no extenuating circumstances present in respect of the third and fourth appellants on counts 1 to 4 they were sentenced to death

on each of these counts. S 112 (1)(b) provides for the conviction of an accused on his plea of guilty subject to compliance with the provisions of the subsection. Then follows the proviso "that the sentence of death shall not be imposed unless the guilt of the accused has been proved as if he had pleaded not guilty". Admissions in a statement made in terms of s 112(2) have to be left out of consideration in deciding whether an accused's guilt has been so proved (S v Mokhobo (supra) at 944 C). It was contended in argument that the same principle applies to formal admissions made in terms of s 220 of the Act prior to a plea of guilty being tendered, that they too have to be excluded from consideration and that only evidence dehors the plea and any admissions made would suffice to prove guilt. In the present instance, if the formal admissions made by the third and fourth appellants in terms of s 220 were excluded from consideration, their guilt would not have been proved as required by the proviso, and it would not have been competent to impose

death sentences on them. It is, however, unnecessary to decide the point as I have come to the conclusion, for reasons that follow, that the trial court should have found that extenuating circumstances were present also in the case of the third and fourth appellants and that sentences of imprisonment should be substituted for the death sentences.

The third appellant was 19 years and 3 months old when the offences were committed; the fourth appellant was approximately 20 years of age. They must both, because of their youth, be regarded as having been relatively immature at the time. According to the third appellant, who gave evidence on the question of extenuation, the six appellants had earlier that evening between them consumed one 750 ml bottle of cane spirits and twelve similarly sized bottles of beer. He claims that as a result they were under the influence of liquor. That this was so is confirmed by the evidence of Hendrik, and is borne out by their unruly and undisciplined behaviour at the cafe. The third

appellant, and probably the other appellants as well, felt resentment towards Hendrik because, rightly or wrongly, it was considered that he had insulted them at the cafe. While this does not constitute provocation, nor excuse their heinous conduct, it provides some explanation for their behaviour. That they acted as a group, thereby inciting and influencing each other to perform deeds they individually may have refrained from, is a further relevant consideration, as well as the fact that there was an absence of direct intent to kill on their part (cf. R v Van Rooi en Andere 1976(2) SA 580 (A)). The trial court in my view did not give adequate weight to the cumulative effect of the above considerations. Furthermore, in arriving at its conclusion that the nature of the offences, and the manner in which they were committed, indicated that the third and fourth appellants had acted out of "inherent wickedness" the trial court misdirected itself in at least two respects. It took into account that the third and fourth appellants acted as they did

despite the fact that they should have foreseen the presence of infants in the house, and also that one of the appellants held the kitchen door closed, while the house was on fire to prevent the occupants from escaping. There is no evidence from which it can be inferred that the third and fourth appellants should have known of the presence of infants in the house, nor is there evidence that either one of them held the kitchen door closed, or that they acquiesced in that being done. On a proper conspectus of the evidence I am satisfied that extenuating circumstances were present in respect of the four counts of murder on which the third and fourth appellants were convicted. In the circumstances it would be appropriate to set aside the sentences of death imposed on each of the said counts and substitute in their stead periods of imprisonment.

I have given anxious consideration to the question of what would be a fitting sentence of imprisonment for the third and fourth appellants on the four murder counts. A

consideration of their respective circumstances suggests no cogent reason to distinguish between the sentences to be imposed on them, despite the fact that the third appellant has a previous conviction for assault whereas the fourth appellant has a clean record. Their callous and contemptible conduct which led to the death of four innocent persons calls for severe punishment. In my view a sentence of 18 years imprisonment on each count would be appropriate - I do not consider a longer sentence to be justified. The sentences will be ordered to run concurrently. This amounts to an equivalent sentence to that imposed by the trial judge on the second appellant. The third and fourth appellants played a far more prominent role in the events that occurred than the second appellant. It was they who together with the fifth appellant actually entered the house, and it was they who doused the kitchen floor with petrol before the petrol was set alight by the fifth appellant. The second appellant does not merit the same sentence as the third and fourth

appellants, and some recognition of the lesser role played by him should be reflected in his sentence. In his case it would be appropriate to reduce his sentence on each of the murder counts to 15 years imprisonment. There is no basis for interfering with the sentence of the sixth appellant.

This brings me to the sentences of the first and fifth appellants. Both were only fifteen years of age when the offences were committed. At the time of sentence they were a year older. The first appellant has no previous convictions; the fifth appellant has a previous conviction for assault. The first appellant was a standard 5 pupil; the fifth appellant was a standard 7 pupil. The probation officer, whose reports were handed in by consent at the trial, recommended that the first appellant be committed to a reformatory and that the fifth appellant be referred to the Leeukop Prison for juveniles. It is, generally speaking, undesirable to send young people of their age to prison, and a court will not lightly do so if it can

properly be avoided. In the present instance, however, the offences committed by the first and fifth appellants were so serious that sentences of imprisonment - and relatively substantial sentences at that - are unavoidable. However, 16 years effective imprisonment for the fifth appellant must, in the light of his age, be regarded as excessive and creates a sense of shock, notwithstanding the prominent role he played. To my mind an effective sentence of 10 years imprisonment would be more appropriate. As the first appellant's moral guilt was substantially less than that of the fifth appellant there should be a corresponding reduction in his sentence to 7 years imprisonment.

In the result the following order is made:-

1. The appeals of all the appellants against their convictions are dismissed.
2. The appeal of the sixth appellant against his sentences is dismissed.
3. The appeals of the first to fifth appellants against their sentences on counts 1 to 4 are allowed. The

sentences of death imposed on the third and fourth appellants are set aside. The following sentences are substituted in respect of counts 1 to 4:-

- (a) First appellant : 7 years imprisonment on each count.
- (b) Second appellant : 15 years imprisonment on each count.
- (c) Third and fourth appellants : 18 years imprisonment on each count.
- (d) Fifth appellant : 10 years imprisonment on each count.

- 4. The appeals of all the appellants against their sentences on counts 5 to 9 are dismissed.
- 5. It is ordered that in respect of each of the appellants the sentences on all nine counts are to run concurrently.

It is recommended to the prison authorities that the first and fifth appellants be committed to the juvenile section of the Leeukop Prison, if feasible, for as long as the Commissioner of Prisons considers appropriate. The Registrar is directed to draw the Commissioner's attention to this recommendation.

JUDGE OF APPEAL

J W SMALBERGER

NESTADT, JA)
 VIVIER, JA) CONCUR
 KUMLEBEN, JA)
 FRIEDMAN, AJA)