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CASE NO. 547/87
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

P B NGIDI

APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN JA et VILJOEN, NICHOLAS AJJA

DATE HEARD: 23 AUGUST 1988

DATE DELIVERED: 22 SEPTEMBER 1988

J U D G M E N T

NICHOLAS, AJA:

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The appellant, Phillip Ngidi, was charged in the Witwatersrand Local Division on three counts: (1) murder; (2) robbery; and (3) malicious injury to property. The trial court (consisting of SPOELSTRA J and two assessors) found him (1) guilty of murder without extenuating circumstances; (2) guilty of theft of an R1 rifle; and (3) not guilty on the third count. He was sentenced to death on the first count, and to imprisonment for one year on the second. With the leave of the trial judge he now appeals against the finding that there were no extenuating circumstances and against the death sentence.

Before addressing the court on the merits, counsel for Ngidi moved an application in terms of s.22 of the Supreme Court Act 59 of 1959, for the hearing of further evidence, namely, that of Mr L Vogelmann, a clinical psychologist and lecturer on the staff of the division of applied psychology at the University of the Witwatersrand. This evidence related to a psychological assessment of Ngidi, who was about 18¹/₂

years old at the time of the commission of the crimes. Such an application is a competent one in terms of the majority judgment in the case of S v Swanepoel 1983(1) S A 434(A).

It is, however, only in an exceptional case that it will be granted, because it "is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified." (S v de Jager, 1965(2) S A 612 (A) at 613 B per HOLMES JA). The requirements for success in such an application were stated in de Jager's case (at 613 C - D) as follows:

"(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.

In the affidavits filed in support of the present application, there was no real explanation for omitting at the proper time to obtain the evidence of a witness such as Vogelmann, other

than that the legal representatives for the defence were content, at that time, to rely on the evidence of another psychologist, Prof Tyson. That explanation is not a reasonably sufficient one. Consequently the application must fail.

The victim of the murder was **Mpedi Mokhotlane**. He belonged to the South African Police force, and served in No. 3 riot squad, which was based in Soweto, and for this purpose he was equipped with an R1 rifle, a Beretta pistol and ammunition for these two weapons. His father, **Daniel Mokhotlane**, gave evidence for the State. He testified that on 25 April 1986 he was doing some work at **Mpedi's** house at Moletsane in Soweto. **Mpedi**, who was on duty at the time, looked in to see how the work was progressing. Upon his departure, **Daniel** accompanied him to his car. What followed is summarized in the following extract from the judgment

SPOELSTRA J:

"At that stage the deceased's car, which was parked in front of the house in the street, was surrounded by a large group of people. The deceased was carrying

his rifle on a sling over his shoulder and his pistol was in its holster at his side. As the deceased was about to open the door of the car, he enquired from the people what was wrong. A member of the crowd said: 'For a long time we have been looking for you and for this car which we have seen in Meadowlands', or words to this effect. The deceased then made an effort to get into the car, but before he could do so they attacked him with stones. He fired a shot in the air with his rifle. The attack then increased in violence and the deceased was struck down. He managed to get up and fled across the street into the yard of a house on the other side of the street which was more or less opposite his own. He was followed by the attacking mob. The last the witness saw of his son was when he disappeared behind a corner of the other house, still firing shots in the air. A police vehicle soon arrived on the scene. The police fired from the vehicle and the crowd dispersed. The deceased's father was unable to identify any of the persons in this mob. From his evidence it is also clear that there were a number of groups of persons consisting of school children of varying ages. One of the groups was in a yard adjoining the rear fence of the deceased's property. These people jumped the dividing fence or wall and joined the group in the street. Other people also passed the deceased's car while he was being attacked. After the deceased had disappeared behind the house across the street, Daniel heard no further shots. He also stated that the front windscreen of the deceased's car was smashed by one of the persons in the group coming from the rear of the deceased's erf. Knives were produced by some of the members

of the group after the first shot had been fired."

Evidence for the State was also given by Constable Lucas Matolo, who was at the time on patrol duty in a police vehicle in Soweto. His testimony, as summarized in the judgment, was this:

"Constable Matolo stated that he heard shots being fired and went to investigate the matter. He was accompanied by two other members of the Force. After the first of the three shots was fired he got out of his car in order to determine the direction of the shots. He could not establish this and then traversed a number of streets. He saw children running in the street and proceeded in the direction from which they had come. He noticed a group of persons attacking a car in the street and drove towards them. He fired reargas at them from his car. They drove some distance past this group and then did a U-turn. Upon returning, they stopped at the vehicle. They removed some paper burning in the car and extinguished the fire. The car had not yet caught fire. A woman then arrived on the scene and asked them to look for her father. They found an assortment of stones, shovels or spades, a pitchfork and a motor tyre. They immediately took the deceased, who was still alive, to their vehicle and drove to a hospital. After about a kilometre, he died and they took the body to the Jabulani Police Station nearby."

On post mortem examination it was

ascertained that the cause of Mpedi's death was multiple penetrating incised and lacerated wounds. SPOELSTRA J said in the judgment that it was clear from the medical and photographic evidence that the assault on Mpedi was undoubtedly a vicious and serious one, and that the wounds were inflicted with deliberate cruelty and brutality.

"They displayed an intent, not only to kill the deceased, but also to make him suffer. This was a shocking and horrid killing."

There was no State witness who identified Ngidi as one of Mpedi's assailants. His conviction was based entirely on a statement which he made a few days after the murder to Major Eagar of the South African Police and which, despite challenge by the defence, was admitted in evidence. This statement, the learned trial judge said, placed Ngidi on the scene of the crime; it showed his participation in the attack on Mpedi; and it put beyond dispute his common purpose with the crowd who attacked the deceased.

The statement read as follows:

"Daar was n groep leerling kinders van agt skole wat bymekaar gekom het by Moletsani op Vrydag laas week. Ek was een van die groep wat bymekaar gekom het. Ons doel was om die Azama mense en die Kabasas aan te val op die rede dat hulle het n paar skool kinders doodgemaak. Naby n sekere groot huis by die hoek by Moletsane het n nie-blanke polisieman uitgekom voor ons kan by die huis verbygaan. Ons het aan die polisieman n verduideliking gegee dat ons kom nie by hom nie. Die polisieman het niks gesê nie maar het begin om te skiet. Hy het agter uit geloop en geskiet tot hy in n sekere perseel ingaan. Baie kinders het op die polisieman met klippe gegooi. Ek het ook klippe gegooi. Toe sien ek dat ek hom op sy regter skouer getref het. Die polisieman het geval. Hy was met die klippe gegooi tot hy dood was. Daar is die ander swart meisiekind wat die polisieman met n mes gesteek het. Ek ken hierdie swart vrou met die naam van Sheila maar ek ken nie waar sy bly nie. Daar was sekere goedere wat van die polisieman weggevatt was. Die ander swart vrou van Meadowlands het die kassette weggevatt. Swartman Silo Phillip Kwela wat bly by Emdeni het die 9 mm vuurwapen van die polisieman weggevatt. Dady het die R1 gevatt. Ek het ook daardie R1 met my hande gevatt maar Dady het dit weggevatt. So ek verstaan dat Dady en Silo is gearresteer. Ek kan nie sê of al die goed wat van die polisieman weggevatt is is teruggevind. Dit is al."

Ngidi gave evidence. He disavowed his statement, and denied that he was at the scene, saying that he was playing football at the time.

In the judgment the trial court rejected Ngidi's evidence and held that he had destroyed his own alibi. SPOELSTRA J said that although there were certain obvious flaws in his statement, it was clear that there was a persistent and continuous onslaught on the deceased; that Ngidi admitted that he had thrown stones at Mpedi and hit him on the right shoulder; and that he not only associated himself with the attack but actually participated in it to the bitter end. The Court was satisfied that the wounds sustained by Mpedi had all been inflicted by the mob who jointly attacked the deceased, with intent to kill him. A common purpose was clearly established, and accordingly Ngidi was liable not only for his own conduct but also for the conduct of the other participants.

Ngidi was accordingly found guilty of murder. On the robbery count, the trial court found that after his rifle had been taken from Mpedi; Ngidi had on his own admission handled it and associated himself with the theft

of it. He was accordingly found guilty of the theft of the rifle.

Evidence in extenuation was given by Ngidi himself; by Professor Tyson of the University of the Witwatersrand, whose field of specialisation is social psychology, and who read into the record a memorandum on mob violence which he had prepared; and Ngidi's grandmother, Evelyn Ngidi, who had brought him up after his mother had abandoned him when he was 18 months old.

Ngidi said that he was born on 1 September 1967. He never knew his father and he was brought up by his grandmother. He had attended Sunday School and was a church-going person. He had finished Std VII at school. He was one of the "comrades" (which appears to be a group or gang which was in violent opposition to other groups called the Cabasas and Azazisms, to the Soweto Students Congress ("Sosco") and also to the police.) He said "I just fight with the police

at any time". At night comrades would come to his home and wake him up and say they must throw stones at the police. This happened many times. On 25 April 1986 he was at school. At about 11 am, the pupils were summoned to the assembly ground and told that there had been a telephone call: they were to go to Prudence School at Tladi. He explained why he went along: "I wanted to see because we are all students ... We were all students so I could not stay behind... I just went to see what happened". Students from many schools assembled there. They were told to go to Moletsane and look for the Cabasas: "I knew that we were going to kill Cabasas and do what they did to students". To his knowledge the Cabasas kill students. He knew there was going to be a killing, but when he went out he had no idea of trouble with the police.

At Moletsane, someone shouted, "Here is the car that we have been looking for in Meadowlands. Here is the policeman that must be assaulted". People picked up

stones. Ngidi also picked up a stone, "so that I must do what the others are doing". He said further:

"The policeman tried to get into the motor vehicle. The policeman fired into the air. We went backwards. Then we moved forward again. I also threw a stone. It hit him on the hand. I did it because the group was doing it ... The policeman then crossed the road and entered another yard. We stood and looked on. There were others with knives and they started stabbing him. We looked. He died. We did nothing. Then the other police arrived and threw teargas and we ran away."

He said that he followed the policeman into the yard "because everybody there wanted to go on ... I only did this because they were doing it". He said, "The Comrades, what they do, you must do".

Ngidi's grandmother, Evelyn Ngidi, said that she had looked after him from the age of 18 months. He was a very good boy, who loved school and church. He was not a fighter. He helped in the house. There came a time when he changed. People would come, sometimes by day and sometimes by night, and he would go away with them. Sometimes

he would stay away for as long as three days. When she asked him what he had been doing, he would just laugh. At the time of Ngidi's arrest, groups of children were going up and down in Soweto, She heard of people being attacked and burned.

Prof Tyson gave important evidence on the psychology of crowds and the behaviour of persons in a violent mob. In crowds people seem to act in irrational ways: they become barbarians, creatures of instinct. He discussed the probable effects on Ngidi of the mob with which he was involved: pressurization to follow the group; and conformity pressures; and heightened levels of arousal, leading to aggression.

Prof Tyson's impression of Ngidi was that "he seems very young..." "He certainly subjectively doesn't appear very mature ... he did seem very young for his age". Prof Tyson did not see him as a leader.

The trial court accepted that Ngidi was born on 1 September 1967, and that at the time of the commission

of the offence he was 18 years and 7 or 8 months old. It also accepted that, according to the authorities, youthfulness connotes immaturity (as in the case of a teenager), a lack of experience and insight, and a greater susceptibility to external influences. Youthfulness is, accordingly, prima facie an extenuating circumstance.

Nevertheless, the court found, by a majority, that there were in this case no extenuating circumstances.

Counsel for Ngidi submitted that the majority of the trial court misdirected themselves in a number of important respects. It is unnecessary for the purposes of this judgment to deal with all the criticisms made. It will be sufficient to refer to some passages in the judgment which, in my opinion, reveal misdirections.

On the aspect of youthfulness, SPOELSTRA

J said:

"As I read the law, youthfulness prima facie constitutes an extenuating circumstance, provided that the age of the accused has not been shown to have been

irrelevant to the decisions he took, or that it does not appear that the accused acted from an inherent wickedness or vice.

The accused's age must be related to the commission of the crime and it must have a bearing on his moral blameworthiness in committing it. We all agree in this case that the decision of this question is not an easy one."

In regard to Ngidi's level of maturity, the learned judge said:

"Prof. Tyson has formed an opinion that the accused looks younger than his age and that he does not appear to possess the qualities of leadership. Speaking for myself I do not share Prof. Tyson's impressions. My own impression is that the accused may not be a particularly intelligent person, but he is certainly no weakling. He is well-built and seems physically strong, though perhaps slightly under average height. He has no boyish features. To me he presents himself as a young man and certainly not as a boy of sixteen years. Personally I would have estimated his age at approximately twenty. He is obviously a keen sportsman and a soccer player.

As far as one is able to form an opinion, after having observed him in the witness box and in the dock for a number of days, I fail to see any reason why he cannot qualify as a leader of others, rather than being led himself or being coerced into committing acts against his own will."

There are several observations to be made about this passage.

In the first place it is manifest that the learned judge was concerned to emphasize that he was expressing a personal opinion, and not that of the trial court. As a result, it does not appear that the court as such did not accept Prof Tyson's evidence. Moreover, the fact that Ngidi is no weakling, that he is well-built and seems physically strong, has no bearing on the question of his intellectual or emotional maturity or his powers of judgment, which were the matters of importance in the context of extenuating circumstances. Nor does the fact that he is obviously a keen sportsman and a soccer player bear on these matters. In addition, it does not appear from the record that any of this was put to Prof Tyson, or that the defence was otherwise alerted to the fact that this was the learned judge's line of thinking. As a result the defence was not in a position to attempt to meet it.

The trial court did not accept that Ngidi played a minor role in the proceedings. Apart from that

of Ngidi himself, there was no "direct evidence on the extent of his participation and involvement in the commission of the crime". "He was a very unsatisfactory witness". "We all agree that the accused has minimised his role in the group and the part he played in the activities of that day". In my opinion, the trial court was entitled to reject Ngidi's evidence as to the part he played, but there was no basis for a finding which was implicit in the judgment, that he played a greater role than he admitted.

SPOELSTRA J said again:

"We have concluded that the accused willingly joined the bloodthirsty group, that they left with the intention to kill and that their conduct as a whole shows that they were activated by inner vice or wickedness and that they did not commit indiscretions which may be attributed to youthfulness, lack of experience or immaturity."

This observation is wide of the mark. What was important was the psychological make-up and characteristics, and the conduct and state of mind of Ngidi. It was impermissible to attribute to one individual the characteristics of an

anonymous "they".

The learned judge said too:

"The probabilities show that this sort of conduct was a way of life with which the accused freely and voluntarily associated himself. In our view a person choosing to lead a life of violence and murder cannot rely on his age for extenuation."

I do not think that it could fairly be said on the evidence

that Ngidi chose to lead a life of violence or murder.

Certainly there was no evidence of his leading a life of murder.

VAN DEN HEEVER J observed in Erasmus v R 1945 OPD 50 at 75:

"Unless we affect a judicial seclusion which may lead us into asking, like the Judge in Punch: 'What is a doodlebug?', I consider that we may take judicial cognisance of the times in which we live."

For years there has prevailed in Soweto and other black townships in South Africa a climate of violence and a breakdown of law and order. There has ruled a sub-culture of violence, characterized by armed clashes between rival gangs and attacks on the police. Inevitably the young must have been influenced by the prevailing climate and by the example which they find

all about them. There is no reason why in their case age should not be an extenuation.

In view of these misdirections, it is open to this Court to reconsider the question of extenuating circumstances unfettered by the finding of the trial Court.

In my opinion there were extenuating circumstances present in this case, having regard to the cumulative effect of the following. At the time of the commission of the crime, Ngidi was 18 years and some months old. Prima facie he was immature and probably lacking in experience and insight. The only evidence as to his appearance was that of Prof Tyson, which supported the prima facie position. There was no contrary finding by the trial court as such.

As a teenager, Ngidi was probably more susceptible to external influences, such as the prevailing climate of violence and lawlessness in Soweto, and the psychology of a violent mob, with its pressures and stimuli to aggression.

There was an absence of aggravating features

such as the playing of a leading or prominent part. There was no evidence that he did any more than throw a few stones at Mpedi. There was no plan to kill a policeman; the attack on Mpedi arose spontaneously from a sortie against a rival gang.

Then there was the evidence from Evelyn, Ngidi's grandmother, that until the year before the trial, he was well-behaved and helpful with the cooking, cleaning and washing. Then boys would come and fetch him and he would go away with them and stay away, sometimes for a few days, during which, he, on his own admission, would go out on expeditions against the police and the Cabasas and the Azazisms. The picture one gets is of a youth being initiated into a game which, though brutal and dangerous, could be fascinating to a young person growing up in the prevailing climate.

In my opinion this was not a case in which Ngidi should be sentenced to death, and this court should impose what it conceives to be an appropriate sentence.

Having regard to Ngidi's age and the circumstances generally,
I think that the sentence should be one of 10 years'
imprisonment.

The appeal is upheld. The death sentence is set aside, and there is substituted therefor a sentence of imprisonment for 10 years. It is directed that the sentences on count 1 and count ²/₃ shall run concurrently.

NICHOLAS, AJA

VAN HEERDEN, JA)
) CONCUR
VILJOEN, AJA)