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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HENRY MASONDO First Appellant

SAMPIE MAJOLA Second Appellant

and

THE STATE Respondent

Coram: JOUBERT, KUMLEBEN JJA et NICHOLAS AJA

Heard: 10 November 1989

Delivered: 29 November 1989

J U D G M E N T

NICHOLAS, AJA:

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Andreas Madonsela lived with his "wife" Miya Madonsela in a hut on Vaalbank Farm near Vryheid. On the night of 26/27 September 1987, the two of them died from knife wounds: Andreas in the hut, and Miya in the veld.

Arising out of the events of that night, the two appellants appeared as accused No 1 and accused No 2 before BRISTOWE J and two assessors at a sitting of the Circuit Local Division for the Northern District of Natal. Both accused were convicted on

Count 1, murdering Andreas Madonsela, extenuating circumstances being found; and on

Count 2, murdering Miya Madonsela, without extenuating circumstances.

In addition accused No 1 was convicted on

Count 3, raping Miya Madonsela.

On count 1 each of the accused was sentenced to 10 years'

imprisonment. On count 3 No 1 was sentenced to 8 years'

imprisonment. On count 2 each of the accused was sentenced to death.

The trial judge granted leave to appeal against the sentence of death imposed on each of the accused in respect of count 2 because, he said, he appreciated that another court might well take a different view in regard to extenuating circumstances.

The main State witnesses were Constance Zungu, the "girlfriend" of No 2 and Thuluzi Sibiya, No 1's "girlfriend". The two women told much the same story. There were differences between them, but these were not significant. The trial court formed the clear view that they were basically honest witnesses.

The two couples lived at a place some distance from Vryheid. They had been drinking on the night

25/26 September 1987. Constance and No 2 were still in bed at about 8 a.m. when a girl named Sidudla Sibiya arrived. She bore a message from No 2's sister, who lived near Vryheid, not far from Madonsela's hut: Andreas Madonsela had informed the local white farmer that No 2 had been stealing his sheep. The sister said that No 2 should not come to her by day because the whites were looking for him and they were armed with guns; that money had been left with her by No 2's brothers, and No 2 should come at night and collect it, so that he could flee to his home district. No 1 was fetched from his room and told the story. The two accused were incensed and upset. No 2 "even stated that he had slaughtered white farmers' sheep and he was supporting Madonsela". No 1 said to No 2:

"Well, it's not going to help us in any way if we are going to sit down and not confront Madonsela with this. Madonsela is aware of our place of residence. He

might bring the police here and many things will be revealed."

At about 8 p.m. the two accused and their girl-friends took a taxi to Vryheid. From there they took another taxi to Mondlo and went to the house of No 2's sister. They drank there for a while and then No 2 said, "Let's go". The sister said to them, "Do not kill Madonsela. You must just hit him and take his money".

The four of them walked to Madonsela's house. Each of the accused was in possession of an Okapi knife. No 1 knocked at the door. He said "Please open the door. It's me, Mduduzi. I am injured." (This was a ruse. Mduduzi was a man who often stayed at Madonsela's). Madonsela replied, "Mduduzi, go to bed. I will see you in the morning." No 2 then picked up a cement building block which was lying a short distance from Madonsela's house. He struck the door with it: the bolt was bent and the door opened. No

1 went inside. There were screams from the room. A woman - it was Miya - came running out with No 1 in pursuit. He caught her and brought her back to the house. The four of them then left taking Miya with them. They reached what the witness called "the dirt road", when No 2 turned and went back to the house. He returned carrying a radio and a 20 litre plastic container full of liquor. No 2 poured half the contents onto the ground and instructed Miya to carry the container. No 1 told her to put it down and come to him. He walked with her to a point about 15 m away and then raped her in the view of the others. Afterwards No 2 asked Miya whether she was married to Madonsela. She replied that they were not yet married. No 2 said to her -

"Do you like to get married? I am going to cause you to be married. You are going to have the last marriage !"

And No 1 said -

"Did you see that your husband is dead?

He is dead. There is nothing you can do. I have killed your husband".

Then the five set out on a journey whose route it is not easy to follow from the evidence and the meagre sketch plan

which was put in. Miya, on instructions, was carrying the plastic container which was half-full of sorghum beer.

They walked along a footpath over the veld which led to a

tarred road. This they crossed. They got onto a dirt

road which runs beside a plantation and past a school. Near

there, No 1 said that the woman must be killed - he said

that he had already killed the man and that No 2 should kill

the woman. No 2 said:-

"I am not going to stab her. I have never stabbed a person in my life. But I will cut her throat because I am used to cut sheeps' throats."

When they got to a point where the dirt road meets the tarred road, No 2 ordered Miya to put down the plastic container. She did so and No 2 led her into the tall grass. He was away for a long time. When he came back he was carrying his open knife. The woman was not with him. He said that he had caused her to run away. He and No 1 spoke together and then asked their girl-friends; "If you are asked what you saw, what are you going to say?" They replied, "We will say we did not see anything."

Miya was later found dead. She had indeed had her throat cut like a slaughtered sheep. On post mortem examination it was found that she had sustained a deep wound, 14 cm by 5 cm, across her neck: the trachea, the oesophagus and both carotid arteries had all been severed. In addition she had several other wounds to the neck, shoulders, chest and wrist, (which was superficial), and one wound in

the rib-cage which penetrated to the lung and up to the superior venacava.

Next day Andreas was found dead on the floor of his house. He had sustained a single stab wound just above the right clavicle which penetrated to the apex of the lung and cut the sub-clavian artery.

In argument on appeal on behalf of accused No 1, it was submitted that the evidence was clear that both of the accused had consumed liquor at intervals throughout the day of 26 September and that the trial court erred in not holding that No 1's intoxication did not render his conduct less blameworthy. A similar submission was made in respect of No 2.

There was, it is true, abundant evidence that both the accused consumed intoxicating liquor from time to time during the course of the day, the last occasion being

at the house of No 2's sister. This was recognized by the trial court when finding extenuating circumstances in respect of count 1 : the report which had been conveyed to the accused through the medium of Sidudla obviously incensed them: the liquor they consumed had fanned the flame ignited by Sidudla's report. But the killing of Miya was on a different footing. Their decision in this regard was taken cold-bloodedly and callously. Their actions do not suggest that the effect of the alcohol was of any significant order.

They had no quarrel with Miya which the alcohol might have inflamed. She was simply an inconvenience who might testify against them and had therefore to be removed.

In my opinion there is no fault to be found with this view.

Then it was contended on behalf of No 2 that the killing of Miya was not pre-planned and that No

1 influenced him to kill her.

The probability is that the two accused envisaged the killing of Miya from the time they had her accompany their party after Andreas was killed. Why else did they take her with them ? What else could they do with an eye-witness to the killing of Andreas ? In her presence they discussed her killing and taunted her with the prospect of her imminent "marriage" to the dead Andreas.

In regard to the alleged influence of No 1, the trial court held that it was No 2 who either suggested or adopted the suggestion that Miya be killed, and that he do the killing. It is not likely that he could have been influenced by No 1 to kill her. He was 32 years old, compared to No 1's 22 years.

The trial court considered that he was as capable as No 1 of forming an independent view and he did so.

Finally it was argued that the trial court attached insufficient weight to the fact that No 2 is an unsophisticated person. The answer is that lack of sophistication does not itself explain savagery, or excuse it.

There is in my opinion no basis for interfering with the findings of the trial court in regard to extenuating circumstances.

Both appeals are dismissed.

H C NICHOLAS AJA

JOUBERT JA concur.
KUMLEBEN JA