

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the case of:

EMMANUEL KHANYILE

First Appellant (Accused
No 1 in Court a quo)

BHEKANI WILFRED PHEWA

Second Appellant (Accused
No 3 in Court a quo)

LUCKY MTSHALI

Third Appellant (Accused
No 4 in Court a quo)

SIPHO DUBE

Fourth Appellant (Accused
No 5 in Court a quo)

THANI NDLOVU

Fifth Appellant (Accused
No 9 in Court a quo)

SIPHO LAWRENCE MAVUSO

Sixth Appellant (Accused
No 10 in Court a quo)

DENIS VICTOR MCHUNU

Seventh Appellant (Accused
No 11 in Court a quo)

and

THE STATE

Respondent

CORAM: HOEXTER, MILNE et NIENABER JJA

HEARD ON: 23 FEBRUARY 1991

DELIVERED ON: 15. MARCH 1991

JUDGMENT

NIENABER JA

NIENABER JA:

During 1987 and for several preceding years there existed, in the adjoining townships of Lindelani and KwaMashu near Durban, a state close to civil war. Lindelani, unlike KwaMashu, was a sprawling, informal squatter settlement referred to in the judgment of the Court a quo as "a shack-town comprising hundreds and thousands of shacks". There were no conventional streets, no schools, no police stations. Order was largely maintained by a group of community guards, sometimes referred to as "Amabutho", under the overall command of one Mandhla Shabalala. Lindelani was Inkatha territory. KwaMashu, or at any rate certain sections thereof, was loyal to the UDF. Sporadic clashes occurred, in which school children were conspicuous, between supporters of these rival organisations. Lives were lost, dwellings destroyed. Early in 1987, it was common cause, seven adults were "necklaced" and killed in J section of KwaMashu because of their connections with Lindelani, and shortly before 16 March 1987 a youth from Lindelani was similarly murdered. Feelings ran high. The atmosphere was charged.

On Monday 16 March 1987, in a series of separate incidents, several youths and a girl, ranging in ages between 15 and 17, were kidnapped in KwaMashu and abducted to Lindelani. The girl, Simangele Xaba, was later released. Eight boys were taken to a place

near a cemetery in the adjacent township of Ntuzuma where seven of them were butchered to death. The eighth, Duncan Mntambo, was left for dead. Miraculously he recovered. His evidence proved to be crucial at the subsequent trial in the Durban and Coast Local Division before BROOME J and two assessors, of the 11 accused, all of them from Lindelani, all of them associated, in one way or another, with Inkatha.

Each of the accused pleaded not guilty to 17 counts, nine of kidnapping (counts 1-9), seven of murder (counts 10-16), and one of attempted murder (count 17).

Four of them, accused 2, 6; 7 and 8, were acquitted for lack of adequate evidence.

Accused 1 and 3 were convicted on counts 2 - 17, i.e. all the counts save for the first count of kidnapping (relating to the girl, Simangele Xaba). Accused 4 was convicted on counts 1, 2, 4, 5, 6, 7, 8 and 9 i.e. all the kidnapping counts save for count 3. Accused 5 was convicted of being an accessory after the fact on all the murder counts but acquitted on the kidnapping charges. Accused 9, 10 and 11 were convicted, like accused 4, on all the kidnapping charges except for count 3.

Accused 1 and 3 were thus the only ones who were convicted on the seven murder counts (counts 10-16). In respect of those counts the Court a quo unanimously found that there were no extenuating

circumstances. In accordance with the law as it then stood, before the introduction of the Criminal Law Amendment Act 107 of 1990, accused 1 and 3 were sentenced to death on each of these counts. On the attempted murder charge (count 17, relating to Duncan Mntambo) accused 1 and 3 were sentenced to seven years imprisonment. In respect of the kidnapping charges, counts 2-9, the Court stated that it would only pass sentence "... if the sentence on the other counts is not put into operation".

An application by accused 1 and 3 for leave to appeal against their convictions and sentences generally was refused by the trial Judge but such leave, to appeal to this Court against all their convictions and the death sentences, was subsequently granted on petition to the Chief Justice.

Accused 4 was sentenced to two years imprisonment on each of the eight counts of kidnapping on which he was convicted, sixteen years in all, but with the qualification that the sentences were to run concurrently for a period of ten years i.e. an effective sentence of ten years imprisonment.

In a reserved judgment on an application for leave to appeal the trial Judge granted such leave to accused 4 in respect of counts 2 and 9. On a re-assessment of the evidence he recognised that the trial Court had erred in convicting accused 4 on these two counts. Leave was accordingly granted to appeal to

this Court on these counts, but was refused in respect of counts 1, 4, 5, 6, 7 and 8. There was no petition to the Chief Justice for relief in respect of the latter counts.

Accused 5 was convicted as an accessory after the fact on the seven murder counts. He was sentenced to eight years imprisonment. An application for leave to appeal against his convictions and sentence was refused by the trial Judge but such leave to appeal to this Court was subsequently granted to him on petition to the Chief Justice.

Accused 9 was convicted on eight of the nine counts of kidnapping and sentenced to one-and-a-half years imprisonment on each count - twelve years in all, but again with the rider that the sentences were to run concurrently for six years, i.e. an effective sentence of six years imprisonment. His application for leave to appeal was refused even in respect of counts 2 and 9. And because he did not petition the Chief Justice for such leave he is not properly before this Court as an appellant even though his name features in these proceedings as the fifth appellant.

Accused 10 was also sentenced to one-and-a-half years imprisonment on each of eight counts of kidnapping but with a similar rider that the sentences of twelve years imprisonment in all were to run concurrently for six years, an effective sentence, therefore, of six years imprisonment.

In his case too the trial Judge concluded, in his reserved judgment on the application for leave to appeal, that the trial Court had earlier erred in convicting him on counts 2 and 9 (which related to a series of kidnappings by the occupants of a vehicle in which accused 10 was never a passenger); as well as on counts 5, 6 and 7 (which related to the kidnappings of those youths by the occupants of a vehicle in which he had been, but at the time of their capture no longer was, a passenger). Leave was, however, refused in respect of counts 1, 4 and 8. There was no petition to the Chief Justice for such leave.

Accused 11 was sentenced to two years imprisonment on each of eight counts of kidnapping, sixteen years in all, but with the rider that ten years thereof was to run concurrently - an effective sentence of ten years imprisonment. In his case, as in the case of accused 10, and for the same reasons, leave was granted to appeal against his convictions on counts 2 and 9, as well as on counts 5, 6 and 7, but not in respect of counts 1, 4 and 8. He too did not petition the Chief Justice for leave to appeal against these convictions.

I shall continue to refer to the appellants according to their numbering in the Court below.

It may be helpful, for a better understanding of events on that fateful day, to plot some of the movements of the various accused and their victims. I

use the word "victims" advisedly since it has never been contested that the children mentioned in the various counts had in fact been abducted and that seven of them were subsequently murdered.

Accused 1 was the "overseer" of the community guard or, as he chose to describe it, the community police. The overall command rested with Shabalala, who was ultimately responsible for collecting the levies from inhabitants of Lindelani by means of which the community guard was financed. During the morning of Monday 16 March 1987 accused 1 was summoned, so he told the Court a quo, to Shabalala's house. Shabalala informed him that his son, Bheki Shabalala, who attended school in KwaMashu, had been captured there and that he was about to be killed. A crowd had gathered, "saying that their children had been killed at KwaMashu". Many of them were armed with traditional sticks and sharpened "bokho" sticks. Shabalala, according to accused 1, thereupon instructed him to commandeer the taxi belonging to Shabalala's father-in-law, which was operated by one Thansanqa Hadebe. This he succeeded in doing. A fleet of taxis was eventually assembled. Besides Hadebe's taxi, a light green Datsun, a photograph of which was Exhibit A41 (by which number it was referred to in the proceedings before the Court a quo), there were: a blue Toyota Hi-Ace driven by one Msuthelwa Dlamini, similarly referred to as A36; a white and red Datsun

E20, driven by one Bernard Mthalane, and described as A37; and a yellow Toyota Hi-Ace, driven by one Ngubane, and bearing the distinctive slogan "Born to Move", A40.

Accused 1, according to his evidence, travelled in the kombi of Hadebe (A41). This taxi followed a Golf car in which Shabalala was a passenger. They headed for KwaMashu in search of Bheki Shabalala. The other taxis were also part of the convoy, at least initially. They drove to several places in KwaMashu in search of Bheki. News reached accused 1 and his group that Bheki had escaped and had safely reached his home. According to accused 1 all of them thereupon returned to Lindelani at about 12 o'clock where they quietly dispersed. Later that morning he was, however, again summoned to Shabalala's office and informed that accused 9, 10 and 11 had not returned and should be rescued from KwaMashu. He then commandeered the taxi of one Phungula. Along the way towards KwaMashu they encountered several other kombis returning from KwaMashu to Lindelani. Accused 11 was in one of them. They returned and joined the others at a place where all these kombis were parked. They then returned to Shabalala's office where he again saw accused 11. He denied that any of the complainants were kidnapped while he was a passenger in A41. Accused 1 thus placed himself in Hadebe's taxi during the course of the morning in question but not at the time when, according

to the state evidence, the actual kidnappings took place.

Thansanga Hadebe was a witness for the State. According to him accused 1 was accompanied by an armed group of about 20 men when his taxi was commandeered by them. This did not happen early in the morning, as accused 1 maintained, but between one and two o'clock in the afternoon. He testified that accused 1 was armed with a long-barrelled home-made gun whereas accused 1 insisted that he only carried a sjambok and a stick. Amongst accused 1's companions Hadebe recognised accused 3. On the orders of accused 1 Hadebe conveyed this posse to C and D sections of KwaMashu, where, so he said, they assaulted and "chased" several school children, inter alia, near the complex he referred to as Africa's Store. Also in the procession of vehicles were the blue Toyota of Dlamini (A36) and the red and white Datsun of Mthalane (A37).

Hadebe expressly denied that the men in his taxi captured anyone. In this denial he was not being truthful. Other evidence, especially that of Duncan Mntambo, the sole survivor of the massacre, established beyond a shadow of doubt that at least three children were captured, bundled into his taxi and assaulted, while his taxi was still patrolling in KwaMashu.

Mntambo (the complainant in counts 9 and 17) was 17 years old at the time. He was unemployed. He was strolling along a street in F section of KwaMashu

when a kombi approached from behind. He was unable to identify it by colour or description. It stopped near him, four men disembarked and overpowered him. He was assaulted, stabbed on the head and manhandled into the kombi. According to him the men inside the vehicle, like those who captured him, were also armed. One of the men remarked: "These are the people that killed Amabutho". Once inside the vehicle he was robbed and repeatedly assaulted but he was able to recognise another boy, known to him as Khanda, who was sitting on the floor of the vehicle. Khanda's real name was Siphwe Ndlovu. He is the youngster mentioned in counts 2 and 10. His brother was one Bhekikhayo Ndlovu. Bhekikhayo Ndlovu later testified that he saw how Khanda and another boy Nduduzi Mkhize (who is mentioned in counts 3 and 11) were overpowered and dragged into the light green vehicle which he identified as A41. Reading the evidence of Bhekekhayo Ndlovu and Duncan Mntambo together, it is therefore fair to infer, as the Court a quo did, that Mntambo was seized and placed in Hadebe's vehicle. (Why count 3 was singled out by the Court a quo, in the cases of accused 4, 9, 10 and 11, is by no means clear, since Mkhize, who is mentioned in that count, was captured alongside Ndlovu, mentioned in count 2, and shared his fate.) At L section in KwaMashu two other boys, whom Mntambo could not identify, were also thrust into the vehicle and assaulted.

Hadebe's vehicle was not the only taxi on the prowl in KwaMashu. Dlamini, the driver of the blue kombi, A36, testified that he was parked at Lindelani when he was approached by a group of young men, armed with knob-sticks, assegais and home-made firearms, who told him, "Father Shabalala wants this vehicle". Fearing for his life he followed instructions and conveyed them to KwaMashu, more particularly to Africa's Store. He professed to be unable to identify any of the occupants of his vehicle. In D section of KwaMashu, near the store, they passed a boy and a girl. The occupants of his vehicle told him to stop, they jumped out and grabbed both of them. They were hauled aboard his kombi where they were assaulted. That girl was Simangele Xaba.

She is the complainant in count 1. She testified that she was intercepted in D section after shopping in Africa's Store. She was accompanied by the complainant in count 8 (the deceased mentioned in count 16). A blue kombi approached. She identified it, from its photograph, as A36. The kombi turned towards them. Its occupants were armed. One of them fired a shot at the two of them but it missed. She identified accused 10 as well as accused 1 as amongst the occupants of this taxi. She and her companion were grabbed. She was assaulted with a sjambok. The complainant in count 8 was assaulted with a hammer. The occupants, once she was inside the vehicle, asked her: "What were you

saying about Shabalala?". She was told they were going to die. She was questioned about her political allegiance.

Accused 10 and 11 both admitted, in their evidence, that they had been in the vehicle with Simangele Xaba. So, in effect, did accused 4 and 9.

Dlamini, in his evidence, described how they drove to A section, KwaMashu. There he was told to stop near a green Volkswagen Golf. They encountered several school children whom the occupants of his vehicle unsuccessfully tried to round up. They continued to patrol the streets. Eventually he was instructed to proceed to K section, KwaMashu. There they chanced upon some youths who were busy distributing pamphlets. Two of them came to the vehicle to hand out these pamphlets. What happened thereafter was described not only by Dlamini but also by Simangele Xaba as well as Ntoko Sihlangu and Mtuzani Thabethe. Sihlangu was a friend of Boy Mkhwanazi, the complainant in count 4 (the deceased mentioned in count 12). The two of had been invited to distribute advertising leaflets of a wholly non-political nature, which they were busy doing when the blue kombi, which Sihlangu identified as the vehicle depicted on photograph A36, appeared. Five men jumped out, armed with assegais, knob-sticks and knives, and confronted the two youths. When they were questioned they explained that the pamphlets were for the supply of

electricity. They were accused of lying, that the pamphlets were in fact UDF pamphlets. Thereupon they were chased by the men. Sihlangu was stabbed but nevertheless managed to escape. The complainant in count 4 was not so fortunate. He was captured and forced into the vehicle. All of this was also witnessed by Thabethe who confirmed the events described by Sihlangu. Neither of them was, however, able to identify any of the occupants of the vehicle.

This incident was also described in broadly similar terms by Dlamini and by Xaba. Both of them described how Dlamini then drove to a certain garage where they met up with the other kombis including A40, the yellow Toyota Hi-Ace with the motto "Born to Move", driven by Ngubane. According to Dlamini the Golf was also present. It was here that Simangele Xaba was transferred from Dlamini's blue kombi, A36, to Ngubane's yellow vehicle, A40. She was accompanied by accused 10 and accused 11. Both of them, in their evidence, admitted this. They were taken in this vehicle to one Vilakazi's house. Xaba described how the driver, Ngubane, paid accused 11 the sum of R10 so that he could be released from conveying them any further.

All of this was confirmed by Ngubane himself. According to him accused 11 was armed with a home-made gun - which accused 11 denied.

Xaba described how they were then taken in a

brown van to the community office where she was questioned. Accused 11 was present. An injured schoolboy was paraded with the threat that this is how they treated UDF supporters. The two of them, she and the schoolboy, were then conveyed in the brown van to a taxi rank where she was allowed to board a taxi and go home.

Inasmuch as she was accompanied to the community office by accused 10 and 11, it means that the latter two did not proceed to the cemetery where the children were later killed. Accused 10 and 11 could therefore at most be implicated in the kidnapping of Xaba (the complainant in count 1), Bheki Mgwaba (the complainant in count 8), who was captured with her, and Boy Mkhwanazi (the complainant in count 4), who was captured thereafter. This is the reason why the trial Judge in granting accused 10 and 11 leave to appeal indicated that the Court a quo had erred in convicting these accused on counts 2 and 9, on the one hand, and 5, 6 and 7, on the other: counts 2 and 9 because these complainants were abducted by the occupants of Hadebe's vehicle (A41) and there was no evidence that accused 10 and 11 ever occupied it; and counts 5, 6 and 7 because these complainants were kidnapped after accused 10 and 11 had left Dlamini's vehicle (A36).

The capture of these youths, the complainants in counts 5, 6 and 7, was described by various witnesses whose evidence was not seriously challenged,

but who were unable reliably to identify any of the occupants of the vehicle A 36.

All the complainants to the kidnapping charges are thus accounted for. So, too, are the accused. Accused 1 and 3 travelled in Hadebe's vehicle (A41) (which conveyed the complainants mentioned in counts 2, 3 and 9), whereas accused 4, 10 and 11, together with accused 9, formed part of the group in Dlamini's vehicle (A36), which conveyed the complainants mentioned in counts 1, 4, 5, 6, 7 and 8.

Both Dlamini and Hadebe described how their taxis separately returned to Lindelani where, at a nearby gravel road, they halted. Men were standing about, some armed with firearms. Mntambo, who was in Hadebe's vehicle, recognised accused 1 as being one of them. Accused 3 was also present. Accused 3, according to Mntambo, boarded Hadebe's vehicle and asked the children for their names. He was armed with a knife, sticks and an assegai. He was accompanied by other similarly armed men.

It was here that the children in Dlamini's blue vehicle (A36) were transferred to Hadebe's green vehicle (A41). Dlamini then left. According to Hadebe five children, amongst them one girl, were escorted into his vehicle. In this he must again be mistaken. The only girl mentioned in the evidence was Xaba who had earlier been removed in Ngubane's yellow "Born to Move" vehicle.

According to Hadebe he then drove the children first to the Umgeni area which accused 1, who was directing operations, regarded as too populous, and then, again on the instructions of accused 1, to Ntuzuma. At that stage accused 1 and 3, according to him, were travelling in his vehicle, together with the captured children. At Ntuzuma, near a cemetery, he deposited his passengers, ostensibly because he had run out of petrol and had to return. Hadebe then left. Amongst those who remained behind with the children, he said, were accused 1 and 3.

According to Hadebe his was the only vehicle which proceeded to the cemetery. Accused 1 was a passenger in his vehicle. Mntambo, on the other hand, mentions two kombis which travelled in the direction of the cemetery. He did not notice accused 1 in Hadebe's taxi. According to Mntambo the children were told, after they had disembarked from Hadebe's vehicle, to walk in double file, holding hands. Accused 3 then announced to them that if they told the truth they would be released, while accused 1, armed with a firearm, threatened to shoot anyone who might try to escape. Accused 1 and 3, in evidence, both denied being present at all. At that very moment, so Mntambo testified, the children were attacked. Accused 3 struck at those walking directly ahead of him. This was at a water-hole which he identified from a photograph. All of them, including Khanda, were

plunged into the water where they were surrounded and repeatedly stabbed. Then he heard a voice saying, "Let's go, the dogs are dead". After a while he rose. He described how he managed to make his way to a shack where he collapsed and how, after some further adventures, incredible for the lack of common humanity which they revealed, he eventually landed up in hospital where he remained for three months.

What thus started, according to accused 1, as a rescue, degenerated into a raid and ended in a slaughter.

Some time later that day, at about 20:30, one Ndebele Maphanga, who owned a Toyota bakkie (A42), was summoned to Shabalala's house, which was opposite the community office. Along the way he was instructed to pick up a number of men, armed with sticks, assegais and shields. When they arrived at their destination he was told by one Mngadi to hand over the keys of his vehicle to a person he identified as accused 3. He reluctantly did so. After about an hour his vehicle was returned to him. When he washed it the next day he discovered wet soil in the back of the vehicle.

Accused 5, on the strength of what he said at the time of a pointing out to a police officer, duly recorded in Exhibit M, drove the vehicle, a light delivery van, in which the corpses were removed. On that basis he was convicted as an accessory after the fact to the murders. Apart from

the wet soil in the back of Maphanga's vehicle (which in itself is not conclusive), the evidence does not establish that it was Maphanga's bakkie which accused 5 was driving.

The seven bodies of the deceased were discovered the next morning in E section in Ntuzuma, where they had been dumped into a ditch, about 4 kilometers from the place where the massacre took place.

I proceed to consider the case against each of the accused.

ACCUSED 1:

According to Hadebe accused 1 was in the former's vehicle on the day in question. Accused 1 admitted this but he denied that he was in any way involved in either the kidnappings or the murders. The Court a quo disbelieved him. The Court found Mntambo to be a credible and reliable witness. To the extent that Hadebe's version departed from Mntambo's the Court preferred Mntambo's evidence. I agree with the assessment of the Court a quo of the various witnesses. In my view the trial Court was fully justified in relying on Mntambo's evidence that accused 1 was one of those who escorted all the kidnapped victims, except Xaba, to the cemetery, and that he participated in the killing of the seven deceased and the attack on Mntambo. That would explain the blood on the clothes of accused 1. Doris Nxumalo, his mistress, testified

that she noticed blood spots on the clothes of accused 1 when he returned home on the evening of the murders. Accused 1 then instructed her to burn them. She did so, a few days later. When, some time thereafter, she had left him, he threatened to kill her and promised that "she would be the eighth person he killed". Accused 1 denied all of this in his testimony. He suggested that Doris Nxumalo had a motive for implicating him falsely, namely, that he had accused her of pilfering money from his bar, of which she had been in charge during his absence.

Her credibility, like that of Mntambo and Hadebe, was attacked by counsel for the appellants. Some of the points of criticism levelled against the State witnesses are not without substance, especially the criticism aimed at Hadebe, but at the end of the day I remain unpersuaded that the trial Court erred in accepting the State evidence, in its cumulative effect, in preference to that of accused 1. Accused 1 performed poorly in the witness box. His efforts to discredit Hadebe and Doris Khumalo were unimpressive. His attempts to counter the evidence of Mntambo who identified him at an identification parade amongst 29 others were similarly unsuccessful. His diverse disclaimers were rejected by the Court a quo and rightly so, in my view.

On the strength of Mntambo's evidence it must be accepted that accused 1 accompanied the kidnapped

children, at least on the last part of their journey to their execution. There could have been no doubt in his or anyone else's mind that the children who were being escorted to their death had been apprehended against their will. Accused 1 was a party not only to depriving the children of their liberty but also to their murder. In my view he was rightly convicted, as in the Court below, on all the counts save for count 1. His appeal against these convictions must accordingly fail.

ACCUSED 3

Like accused 1, he was implicated by both Mntambo and Hadebe. Hadebe testified that accused 3 was in his vehicle with accused 1 during the incursion into KwaMashu. This is not confirmed, although not specifically contradicted, by Mntambo. Mntambo saw him at the cemetery, escorting the children and initiating the final onslaught on them. If that evidence is accepted, as it must be, accused 3, like accused 1, was correctly convicted on all the counts save for count 1. In addition there is the evidence of Ndebele Maphanga, at least to the extent that accused 3 drove off in his vehicle that evening. The Court a quo, for sound reasons, found accused 3 to be an untruthful witness. His protestations of innocence cannot reasonably possibly be true. In my view the appeal against his convictions must, like that of accused 1, fail.

ACCUSED 4

It was conceded by the State, consequent upon the leave granted by the trial Judge, that accused 4 was wrongly convicted on counts 2 and 9. Leave to appeal was not sought in respect of the other counts on which he was convicted, namely, counts 1, 4, 8 and 5, 6, 7, nor did he petition for leave to appeal against these convictions.

His appeal accordingly succeeds with regard to counts 2 and 9.

ACCUSED 5

He was a clerk employed at Shabalala's community office. He was not implicated by any of the State witnesses. His conviction rested squarely on statements made by him to Lt. Francis, and which accompanied his pointing out of the places from where and to which he conveyed the corpses of the seven deceased in a bakkie on the night of the murder, as recorded in Exhibit M. On the basis of what is contained in Exhibit M accused 5 was convicted as an accessory after the fact to the seven murders. Although accused 5, in his evidence, repudiated his previous statements in Exhibit M, its admissibility was not challenged in this Court. His evidence was rightly disbelieved. In the statement he does not explain how it happened that he was chosen to remove the bodies from the place of execution to the place where the bodies were eventually dumped. In exhibit M accused 5

explained that when the corpses were being loaded he tried to look back and he was then sworn at by the others who were loading the bodies onto his bakkie. He also said that he was threatened that if anything should happen his house would be burnt down. These passages, so it was contended, tend to rebut either unlawfulness or mens rea on his part. I disagree. One cannot read exhibit M to mean that accused 5 was forced to drive the bakkie. The threat, such as it was, was not aimed at his actual conduct then but at his possible conduct later - should he ever be tempted to reveal to others later what happened to him then. He must have appreciated, firstly, that he was assisting in the removal of the corpses of children who had been murdered, secondly, that the purpose of the exercise, however inept, was to create a false scent in order to divert suspicion from the the true culprits and thus to hamper any investigation into the murders and, thirdly, that as such his conduct was nefarious.

In my view accused 5 was properly convicted and his appeal against his conviction must fail.

ACCUSED 10 and 11

As in the case of accused 4 there is no longer any real lis between the State and the defence. It is conceded by the State that accused 10 and 11 were wrongly convicted on counts 2 and 9 and 5, 6 and 7. There is no appeal against their convictions on counts 1, 4 and 8.

In the case of both accused 10 and 11 their appeals against their convictions on counts 2 and 9, and 5, 6 and 7 succeed.

I turn now to the issue of sentence.

ACCUSED 1 and 3

The Court a quo unanimously found that there were no extenuating circumstances. Accused 1 and 3 were accordingly sentenced to death on each of the seven murder counts. That was before section 4 of the Criminal Law Amendment Act, 107 of 1990, by amending section 277 of the Criminal Procedure Act, 51 of 1977, introduced an entirely new approach to the death penalty, making its imposition discretionary, even in matters such as this one which had been disposed of before its promulgation. The impact of the amendment has been considered in a succession of well known recent decisions of this Court. This case raises nothing which is especially novel or contentious. Consequently there is no need to review the earlier cases in this appeal.

The first step, now a statutory requirement (cf. section 277(2)(a) of the Criminal Procedure Act, 1977, as amended), is the identification and hence the evaluation and reconciliation of aggravating and mitigating factors.

The aggravating features in this case are glaring. Seven children, seemingly unaligned with either political cause (although some, ironically,

appear to have been supporters of Inkhata), who were apparently blameless of any acts of aggression, were indiscriminately rounded up, and, without investigation or enquiry, assaulted, terrorized, herded to their execution and ruthlessly slaughtered. Thereafter their bodies were dumped into a ditch, like so much garbage. One has only to look at the photographs of this scene, with stiffened bodies exposed in grotesque postures, to be sickened by the horror of it all. Why they were thus sacrificed one does not know. What one does know is that it all started as a mission of rescue, but once it was learned that Bheki Shabalala was safe and unharmed, the expedition was transformed into a motorised impi invading enemy territory.

The ruthlessness of the conduct of the raiders that morning is demonstrated by the capture of the complainant in count 4. He and his companion were busy distributing innocuous pamphlets when they had the misfortune of encountering the occupants of Dlamini's vehicle (A36). They were immediately accused of being supporters of the UDF. It would have been easy for the invaders to have glanced at the pamphlets which would have revealed that they had nothing to do with the UDF. Yet without even the semblance of an attempt by them to discover the truth his companion was stabbed and the complainant in count 4 was bundled into the vehicle. It is of course true that accused 1 and 3 were not occupants of Dlamini's vehicle. They were stationed in

Hadebe's vehicle. Nonetheless this incident illustrates the attitude of, and the methods employed by, the men from Lindelani.

According to the Court a quo, in its judgment on the question of extenuating circumstances, the various accused set out on that morning not necessarily to kill but certainly to capture children from KwaMashu. But, so the judgment proceeds,

"When they left on the last leg of the journey from the gravel road to the spot near the cemetery, there can be no doubt but that the intention was to kill these children at that spot ...This was an efficient, well organised, well-executed slaughter."

(That the intention to kill had already been formed at the gravel road is amply demonstrated by the instruction issued by accused 1 to Hadebe not to proceed further in the Umgeni area because "there were too many houses".)

Why, then, the sudden change in strategy from kidnapping to killing? One reason, suggested in argument, was the presence, authority and influence of Shabalala. He did not testify at all. Nor, for that matter, did accused 1 and 3, at least not on the issue of extenuation. But there are many passages in the evidence and in the various statements made by several of the accused, that Shabalala was a man respected, feared and not to be denied. In the judgment on

conviction his role was summarized by the trial Court in these terms:

"The odd pieces of evidence relating to the role played by Mr Shabalala and the movements of the dark green Golf motor-car must now be examined. According to accused 1 Mr Shabalala set off that morning in his Golf motor-car driven by Sibiya to look for his son Bheki. He asked them to meet him at Thembelihle. They did meet at Thembelihle and then followed Shabalala's Golf around. The point here is that on accused 1's version Mr Shabalala and his Golf did enter KwaMashu. So, for that matter, did accused 1 himself in Thami Hadebe's Kombi, A41. But the weight of evidence is that Shabalala and accused 1 did not simply go to KwaMashu and return without being involved in a series of unlawful incidents. Msuthelwa Dlamini, the driver of A36, said that when he was stopped he was informed by members of this mob, "Father Shabalala wants this vehicle". After the first two children, the boy and the girl, were apprehended near Africa's Store people in the Kombi said, "What were you saying about Father Shabalala?". Later they came upon the green Golf at Thembelihle and somebody said "Father we have found some of

them." When this father saw the children he said "All right, we will talk up at home". The girl, Simangele Xaba, said that they were taken to Shabalala's office. Thami Hadebe also spoke of meeting the green Golf at Thembelihle and last saw it at the spot on the gravel where the people, including several deceased, trans-shipped from A36 to his A41. Msulthelwa Dlamini confirmed that the green Golf was there".

Throughout the evidence there are scattered references to Shabalala and the very real influence he wielded. Accused 1 and 3 were under his direct command. They were employed as security guards and obliged to execute his orders. In my view there was enough in the evidence led during the trial to support the hypothesis that it may have been Shabalala, and not accused 1 or 3, who, at a late stage in the proceedings, conceived the notion and issued the instruction that the children be killed; and that this was a sufficiently realistic foundation to oblige the State, in accordance with the approach decreed in S v Nkwanyana 1990 (4) SA 735 (A) at 744B-745A, to contradict or neutralise this suggestion - which the State admittedly failed to do. I think that the issue of sentence must therefore be approached on those lines.

The atmosphere, on that day, was charged.

Emotions ran high. These were not normal times. The mood amongst the residents of Lindelani was an ugly one. They felt that their children were under threat and they demanded action. The accused were security guards. They were paid and expected to protect the community of Lindelani. As such accused 1 and 3 were directly involved in the spiral of attack and counter-attack. Why it should have been thought desirable to retaliate against the children of KwaMashu one cannot say. What did appear from the evidence is that, in the past, the children from KwaMashu featured prominently in attacks on residents of Lindelani. There were enough such incidents to justify the belief amongst residents of Lindelani that the children of KwaMashu were aggressors and trouble makers. Children, as counsel for the appellants stressed, are easily motivated, manipulated and mobilised by unscrupulous adults - it is a pattern all too prevalent in this country of late that children are politicised and employed as pawns in the game of violence. It may be that the children from KwaMashu were identified by the parents of Lindelani, and more particularly by the accused, as belonging to "the enemy". Thus Duncan Mthambo, for instance, testified that one of his attackers in the vehicle A41 remarked: "You are one of the persons who kill Amabutho by necklacing". Others mentioned remarks of a similar nature. It may well be that Shabalala ordered this unhappy band of children to

be executed to serve as a lesson to others in KwaMashu not to trifle with the residents of Lindelani. And if that is what happened, as counsel for the State was constrained to concede, it would take this case, as far as accused 1 and 3 are concerned, out of the category of instances where the imposition of the death sentence is imperatively called for.

The Court a quo cannot be faulted, in my view, for having imposed the death sentence on the basis of the law as it stood before the amendment to section 277 of the Criminal Procedure Act, 1977, was introduced. But the approach has since changed. Given the setting in which these seven children were murdered, it cannot be said that the death sentence in respect of accused 1 and 3 is the only proper one. To that extent their appeals should succeed.

What sentence should then be imposed in its stead? Both counsel agree, and so do I, that there are no grounds for fearing that accused 1 and 3 are likely to repeat such crimes and that, for that reason, they should be removed permanently from society by means of sentences of life imprisonment. Accused 1 and 3 are 34 and 31 years old respectively. Both have clean records as far as crimes of violence are concerned. It could serve no legitimate purpose to incarcerate the two of them for life.

A severe sentence is nevertheless called for. To kill seven innocent children in cold blood, albeit

in retaliation for harm they believed had been done by supporters of the UDF, is conduct so abhorrent as to call for retribution by means of a sentence of the utmost severity.

No reasons were suggested for differentiating on sentence between accused 1 and 3.

There are seven counts of murder. Seven children were massacred in the course of a single episode. In those circumstances it would be warranted, in my view, to take the various counts as one for the purpose of sentence.

Having regard to all the circumstances mentioned, I believe that a sentence of 25 years imprisonment for each accused is appropriate in respect of counts 10 - 16.

The sentence in respect of count 17 (attempted murder) was seven years imprisonment. That sentence must stand since leave to appeal against it was not sought or granted.

In respect of counts 2 - 9 (the kidnapping charges) sentence was postponed and made dependent on the death sentences not being carried out. This Court, in S v Mathebula and another 1978 (2) SA 607 (A), disapproved of the practice of postponing a sentence sine die on one count simply because it happened to be conjoined with another on which the death sentence was imposed. In any event the appeals of accused 1 and 3 against their death sentences have now succeeded; they

must accordingly be sentenced on counts 2 - 9. To remit this matter which, in the context of the case as a whole is a relatively minor one, to the Court a quo, would cause unnecessary inconvenience and delay. This Court has the power to impose its own punishment (section 322(2) of the Criminal Procedure Act, 1977) and this would be an appropriate occasion to do so.

Apropos of these counts the Court a quo remarked:

"On counts 2 to 9, that is the eight counts of kidnapping, the finding of the Court in relation to accused 1 and accused 3 was that they became involved in the kidnapping at a very late stage, that was to say at the gravel road. The finding was that it was at that time, or very shortly after, that the decision was made to kill the deceased. There is therefore, in my judgment ... a substantial overlapping of these two offences, that is the proved kidnapping and the ultimate murder ..."

On this approach, which cannot be faulted (since Hadebe's evidence is not conclusive that they were involved in the actual earlier apprehension of the children), the kidnappings by accused 1 and 3 consisted of their taking charge of the kidnapped children at the gravel road and escorting them to the water-hole where they were killed. Viewed thus the

kidnappings were an immediate prelude to the murders. That being so it would be appropriate on appeal to take these counts together for the purpose of sentence. A sentence of two years imprisonment for these counts would in my view be adequate.

Having regard to the cumulative effect of the above sentences, the sentences of seven years imprisonment in respect of count 17 and two years imprisonment in respect of counts 2 - 9 should run concurrently with the sentence of 25 years imprisonment in respect of counts 10 - 16.

The two accused were sentenced on 9 February 1989 by the trial Court. Some two years have since elapsed during which they remained in custody. Pursuant to section 282 of the Criminal Procedure Act, 1977, it is hereby directed that the above sentence is antedated to the date upon which accused 1 and 3 were sentenced by the Court a quo.

ACCUSED 4

His appeal has succeeded to the limited extent that his convictions on two out of eight counts of kidnapping (i.e. counts 2 and 9) have been set aside. That must of necessity have an effect on his sentence. He was sentenced by the Court a quo to sixteen years imprisonment (two years in respect of each count) but with the qualification that the sentences were to run concurrently for ten years i.e. an effective sentence of ten years imprisonment.

In his judgment on the application for leave to appeal the trial Judge, recognising that the convictions on counts 2 and 9 could not be supported, observed:

"Finally, on the matter of sentence, had I convicted him on six counts instead of eight counts, I would have sentenced him to two years on each count, making a total of twelve years, but ordered that they run concurrently for a period of eight years."

Counsel for the appellant suggested an effective sentence of five years. It is true that accused 4 is a first offender; but on the other hand it was cruel to participate in the capture of unsuspecting children and to abduct them to what they must have realised was enemy territory, against a general background of violence and assassination. Accused 4 was part of the contingent travelling in Dlamini's vehicle (A36). I have described, a little earlier, the ruthlessness of their conduct in capturing the complainant in count 4; and in injuring his companion. There was ample evidence, in addition, that all the kidnappings were accompanied by threats and assaults directed against the children, although there is no evidence that accused 4 himself had any part in such conduct. The Court a quo, in my view, was right in remarking that the children must have been terrified

- even if they never appreciated that they were being conveyed to their death.

In my opinion, having regard to all the relevant circumstances, a sentence of six years' imprisonment on all six counts would be appropriate. As in the case of the other accused it is directed, pursuant to section 282 of the Criminal Procedure Act, 1977, that this sentence be antedated to the date upon which accused 4 was sentenced by the Court a quo.

ACCUSED 5

Accused 5, also a first offender, was correctly convicted as an accessory after the fact to seven counts of murder. He was sentenced to eight years imprisonment. His conviction rested essentially on his own utterances during a pointing out expedition, which were recorded in Exhibit M. In exhibit M he explained that he was driving a certain van in the company of a group of black males. He remained in the driver's seat when the corpses of the seven deceased were loaded onto the back of the vehicle. He said:

"When they loaded the corpses I tried to look back and they asked me what I was looking at and they called me by my mother's private parts."

He was then instructed to drive to another place (some 4 kilometers distant) where the corpses were eventually heaved from the vehicle. He was told that,

"If anything happens they would burn his

house as they knew that he is also staying here at Lindelani".

No evidence was produced in contradiction of this version, which is not so inherently improbable as to be unworthy of belief.

In imposing the sentence the trial Judge stated:

"I will deal first with the sentence on accused 5 who was convicted on seven counts of being an accessory after the fact to murder. I take into account the submissions made by your counsel, both those relating to the case in general and those into the circumstances personal to you. I am particularly mindful of the fact that you were badly assaulted by fellow prisoners. Notwithstanding all the features stressed by your counsel the fact remains that what you did amounts, on any reckoning, to a very serious offence. You willingly took part in the removal and disposal of these seven corpses. All counts will be treated as one for the purpose of sentence and I sentence you to eight (8) years' imprisonment."

Given the circumstances outlined above, in particular that accused 5 appeared to be a reluctant

participant, the sentence of eight years imprisonment is in my view far too harsh. Counsel for the appellant suggested a sentence of two years imprisonment coupled with a suspended sentence of imprisonment. I agree that such a sentence would be the most appropriate one.

Accused 5's appeal against his sentence succeeds. The following sentence is to be substituted:

1. Two years imprisonment, coupled with a further period of two years imprisonment which is suspended for five years on condition that the accused is not convicted of the offence of defeating or obstructing the course of justice, or any attempt to commit such offence, and which is committed during the period of suspension.

2. Pursuant to section 282 of the Criminal Procedure Act, 1977, it is directed that this sentence is antedated to the date upon which the sentence was imposed by the Court below."

ACCUSED 10 and 11

Like accused 4 they were wrongly convicted on counts 2 and 9. In addition they were wrongly convicted on counts 5, 6 and 7. They should only have been convicted on counts 1, 4 and 8. The Court a quo said:

"As regards sentence, had I convicted them only on counts 1, 4 and 8, I would have

sentenced accused 10 to 1½ years' imprisonment on each count, making a total of 4½ years, and ordered them to run concurrently for 3 years. As regards accused 11, I would have sentenced him to 2 years' imprisonment on each of the three counts, making a total of 6 years in all, but I would have ordered them to run concurrently for four years."

Counsel for the appellant suggested that in respect of the three counts on which they were properly convicted, and taking them as one for the purpose of sentence, each accused should have been sentenced to no more than two years' imprisonment in all. Neither has any previous convictions. According to Simangele Xaba accused 11 tried to protect her when she was being harassed by the other occupants of Dlamini's kombi and he showed her some kindness thereafter. That must be taken into account in his favour. Accused 10 was only 17 years old at the time of these incidents. It is that factor, in particular, which caused the Court a quo to differentiate between the sentences of the two accused.

In the light of the aggravating circumstances mentioned earlier when accused 4's sentence was discussed, I believe that a sentence of two years' imprisonment would be inadequate. Both of them,

according to the evidence, were armed. Accused 10 fired a shot at Xaba through the window of the vehicle at the place where she was apprehended. Both of them were in the vehicle when the complainant in count 4 was captured where he and a companion were innocently distributing pamphlets. On the other hand, neither accused has any previous convictions and the trial Court rightly took into account that accused 11 had been assaulted in gaol by fellow prisoners in retaliation for his part in the abduction of the children.

All things considered I do not think that there is cause to differentiate between the two accused; and I believe that a sentence of three years' imprisonment would be appropriate in respect of each of them. As in the other cases it should also be directed that these sentences are to be antedated to the date upon which the two accused were sentenced in the Court below.

I accordingly make the following orders:

1.1 The first appellant's (accused 1's) appeal against his convictions in respect of counts 2 - 17 is dismissed.

1.2 The first appellant's appeal against the imposition of the death sentences in respect of counts 10 - 16 is upheld. The sentences of death are set aside and there is substituted, in respect of counts 10 - 16, taken together, a sentence of 25 years

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imprisonment.

1.3 In respect of counts 2 - 9, taken together, the first appellant is sentenced to two years imprisonment.

1.4 It is directed that the sentences of two years imprisonment in respect of counts 2 - 9 and seven years imprisonment in respect of count 17 are to run concurrently with the sentence of 25 years imprisonment imposed in respect of counts 10 - 16.

1.5 In terms of section 282 of the Criminal Procedure Act, 1977, the sentence of 25 years imprisonment is antedated to the date upon which the first appellant was sentenced by the Court below.

2.1 The second appellant's (accused 3's) appeal against his convictions on counts 2 - 17 is dismissed.

2.2 The second appellant's appeal against the imposition of the death sentences in respect of counts 10 - 16 is upheld. The sentences of death are set aside and there is substituted, in respect of counts 10 - 16, taken together, a sentence of 25 years imprisonment.

2.3 In respect of counts 2 - 9, taken together, the second appellant is sentenced to two years imprisonment.

2.4 It is directed that the sentences of two years imprisonment in respect of counts 2 - 9 and seven years imprisonment in respect of count 17 are to run

concurrently with the sentence of 25 years imprisonment imposed in respect of counts 10 - 16.

2.5 In terms of section 282 of the Criminal Procedure Act, 1977, the sentence of 25 years imprisonment is antedated to the date upon which the second appellant was sentenced by the Court below.

3.1 The third appellant's (accused 4's) appeal against his conviction in respect of counts 2 and 9 is upheld.

3.2 On the remaining six counts of kidnapping, taken together, the third appellant is sentenced to six years imprisonment.

3.3 In terms of section 282 of the Criminal Procedure Act, 1977, the above sentence is antedated to the date upon which the third appellant was sentenced by the Court below.

4.1 The fourth appellant's (accused 5's) appeal against his convictions as an accessory after the fact in respect of counts 10 - 16 is dismissed.

4.2 The fourth appellant's appeal against his sentence of eight years imprisonment is upheld. The sentence of eight years imprisonment is set aside and the following sentence is substituted therefor:

Two years imprisonment coupled with a further period of two years imprisonment which is suspended for five years on condition that the accused is not convicted of the offence of defeating or obstructing the course of

justice, or any attempt to commit such offence, and which is committed during the period of suspension.

4.3 In terms of section 282 of the Criminal Procedure Act, 1977, the above sentence is antedated to the date upon which the fourth appellant was sentenced by the Court below.

5.1 The sixth appellant's (accused 10's) appeal against his convictions in respect of counts 2, 5, 6, 7 and 9, is upheld.

5.2 On the remaining three counts of kidnapping, taken together, the sixth appellant is sentenced to three years imprisonment.

5.3 In terms of section 282 of the Criminal Procedure Act, 1977, the above sentence is antedated to the date upon which the sixth appellant was sentenced by the Court below.

6.1 The seventh appellant's (accused 11's) appeal against his conviction in respect of counts 2, 5, 6, 7 and 9, is upheld.

6.2 On the remaining three counts of kidnapping, taken together, the seventh appellant is sentenced to three years imprisonment.

6.3 In terms of section 282 of the Criminal Procedure Act, 1977, the above sentence is antedated to

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the date upon which the seventh appellant was sentenced
by the Court below.

CONCUR:

HOEXTER JA

MILNE JA



P M NIENABER JA