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Case no 18/93 and 281/92  
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

THABO BRIAN MASILO

1st Appellant

PAPAS M R MABASO

2nd Appellant

CANCEL KOTO

3rd Appellant

NKANYE JOHN NYUMBA

4th Appellant

- and -

THE STATE

Respondent

CORAM: JOUBERT, VIVIER et VAN DEN HEEVER JJA

HEARD: 20 August 1993

DELIVERED: 16 September 1993

J U D G M E N T

VIVIER JA.

VIVIER JA:

The four appellants, to whom I shall refer as accused Nos 1, 2, 3 and 4 respectively, appeared with one Daniel Fiesta Mosinyi before SUTEJ J in the Witwatersrand Local Division on one count each of rape and murder. At the commencement of the trial the charges were withdrawn against Mosinyi who subsequently testified on behalf of the State. All four accused were found guilty of rape and accused Nos 1, 2 and 3 were found guilty of murder. Each of the four accused was sentenced to 14 years' imprisonment on the rape charge and on the murder charge accused Nos 1 and 2 were sentenced to death and accused No 3 to 20 years' imprisonment. In the case of accused No 3 it was ordered that 9 years of the sentence imposed on the rape charge were to run concurrently with the sentence imposed on the murder charge. Accused Nos 1 and 2 appeal to this Court in terms of sec 316 A of Act 51 of

1977 against their sentences of death. With the necessary leave accused No 3 appeals to this Court against his convictions and sentences on both charges and accused No 4 appeals against his conviction and sentence on the rape charge.

The State case at the trial in short was that on Sunday evening 7 October 1990 the 17 year old Kefilwe Kesilwe ("the deceased") and her boyfriend Clive Loate ("Phule") were walking home in zone 7, Meadowlands near Johannesburg when they were set upon by the four accused who chased Phule away and dragged the deceased a distance of some 2km to the Kalekitso High School where they raped her and accused Nos 1, 2 and 3 stabbed her to death.

According to the medical evidence the deceased's death had been caused by multiple penetrating incised wounds. The post-mortem examination of the deceased's body revealed that she

had sustained no fewer than 41 stab wounds to the head, neck, shoulder, back, chest and both thighs. Of those, two penetrated the left lung and were described as fatal by the pathologist who conducted the post-mortem examination. In addition to the stab wounds the deceased had sustained three injuries to the head which, according to the pathologist, had been inflicted by a blunt instrument such as a kick with a shoe.

Phule told the trial Court that on the evening in question he and the deceased attended a party in a house at zone 2 in Meadowlands. He saw accused Nos 3 and 4, both of whom he knew by sight, at the party. At about eleven o'clock he left with the deceased and they started walking towards zone 7 where he lives. After a while they noticed that they were being followed by accused Nos 3 and 4 and he decided to seek shelter in the house where a friend of his stayed. They had just entered the premises of this house when

they were met by accused Nos 1 and 2 who had come from the direction of the house. Accused Nos 1 and 2 grabbed the deceased while accused Nos 3 and 4 came at him. Accused Nos 1 and 2 started fondling the deceased and a moment later he heard her say that she had been stabbed. He looked in her direction and saw accused No 1 holding a bloodstained knife, described as a hunting knife, in his hand. Phule said that he ran away and that accused Nos 3 and 4 threw bricks at him. He hid behind some trees and saw the four accused dragging the deceased away. After a while he followed them and saw that they had been joined by someone unknown to him. More bricks were thrown at him and he ran home. The group was moving in the direction of zone 9 when he last saw them. Phule said that the following day he came across accused Nos 1 and 2 when he was on his way to the police station to report that the deceased was missing. There were

bloodstains on accused No 1's jacket and on accused No 2's shoes. When he asked the former where the deceased was he said that they had killed her, that he should not talk about it and that they would give him money. Accused No 2 who heard what accused No 1 had said remained silent.

Mosinyi's evidence was that on the evening in question his brother Ronnie sent him to buy some meat. He did so and on his way home he came across the four accused and Phule, all of whom he knew well, and the deceased, who was unknown to him, on the edge of zone 7. There was an argument between accused No 3 and Phule and the latter ran away, chased by accused No 3. Accused No 2 took his meat from him, saying that he would give him the money later. Accused Nos 1 and 2 then started to drag the deceased in the direction of zone 9, followed by accused Nos 3 and 4. Mosinyi followed at a distance as he wanted his money for the

meat. On the way accused No 1 twice stabbed the deceased with a knife. Phule at one stage returned but accused Nos 3 and 4 again chased him away by throwing bricks at him. The deceased was dragged to a classroom of the Kalekitso High School where accused Nos 1 and 2 tore her clothes from her body until she was naked. All four accused proceeded to rape her after which accused No 1 told Mosinyi that he should also rape her. Mosinyi then simulated intercourse with her. Accused No 1 said that the deceased knew him and would have him arrested, whereupon accused Nos 1, 2 and 3 each stabbed the deceased a few times, using the same knife. Mosinyi said that apart from stabbing the deceased accused Nos 1 and 2 had also kicked her on the head while accused No 3 was raping her. Mosinyi then managed to escape through the window of the classroom and returned home where his brother Ronnie opened the door for him. Mosinyi

testified that accused Nos 3 and 4 came to his house early the next morning where accused No 3 warned him not to talk about what he had witnessed the previous night. He noticed that accused No 3's clothes were bloodstained.

The State also led the evidence of accused No 1's girlfriend, Martha Molata and his friend Papi Senne. Their evidence was to the effect that on the day following the murder accused No 1 told them separately, on both occasions in the presence of accused No 2 who showed no reaction, that he and accused No 2 had raped and killed a girl at the Kelikitso School.

The evidence of accused Nos 1 and 2 was to the effect that on their way home from a party on the evening in question they met the deceased and Phule. An argument ensued between Phule and accused No 2. Accused Nos 3 and 4 then arrived on the scene with

Mosinyi. Phule ran away, pursued by accused Nos 3 and 4 and Mosinyi, and accused Nos 1 and 2 proceeded on their way with the deceased. Near a hardware store in zone 9 accused No 1 left the other two who continued walking. Near the Kalekitso School a kombi suddenly appeared on the scene with Phule and five other persons in it. Accused No 2 ran away but the deceased was caught and carried off in the Kombi. The trial Court rejected as false the evidence of accused Nos 1 and 2 and since that finding was not challenged before us nothing further need be said about their evidence.

Accused Nos 3 and 4 testified to the effect that on the evening in question they went to a party in Vincent Street, zone 2, Meadowlands, accompanied by Mosinyi. Accused No 4 said that he saw both Phule and the deceased at the party. Accused Nos 3 and 4 later left the party with Mosinyi to go to the latter's house where they intended spending the night. On the way

they saw a group of people who turned out to be Phule, the deceased and accused Nos 1 and 2. Accused No 3 approached this group in order to ask for a match to light his cigarette, and he then noticed that one of the persons was Phule who owed him money. He asked for repayment and a fight ensued between him and Phule over this debt. The latter ran away, chased by accused No 3, and disappeared into a yard. Accused Nos 3 and 4 and Mosinyi then proceeded to the latter's house where Mosinyi's brother Ronnie opened the door for them. They went to bed and did not see the deceased again.

The trial Court rejected as false the evidence of accused Nos 3 and 4 and accepted the evidence of Mosinyi and Phule. The trial Court said that accused No 3 "was a master of untruths and his demeanour in the witness box was scandalous".

Mr van den Berg, on behalf of accused Nos 3

and 4, submitted that the trial Court erred in accepting the evidence of Phule and Mosinyi. He submitted that Phule contradicted himself in describing the attack on him by accused Nos 3 and 4 and that his version of the events also contradicted that of Mosinyi. Phule at first said that he was grabbed by accused Nos 3 and 4 but he later denied that there was any physical contact between himself and the other two or that there was any argument between himself and accused No 3. Mosinyi, on the other hand, said that there was a prior argument and fight between accused No 3 and Phule. Phule also said that both accused Nos 3 and 4 chased him down the road whereas Mosinyi said that only accused No 3 did so. I do not regard these contradictions as of any significance. Phule and the deceased were suddenly and violently attacked and when Phule wanted to come to the deceased's assistance his life was threatened by accused No 1.

The scene was a volatile and fast-moving one. At precisely what moment Mosinyi arrived on the scene is not clear. In the circumstances it is not surprising that Phule is uncertain about certain minor details and that his account does not in all respects coincide with that of Mosinyi. The same applies to the other contradictions relied upon by Mr Van den Berg such as that Mosinyi said that the deceased was only stabbed after Phule had left whereas the latter said that the deceased was stabbed before Mosinyi appeared on the scene. With regard to the essential events namely that the deceased and Phule were set upon by the four accused, that Phule was chased away and the deceased forcibly carried off by all four accused, there was no difference between the evidence of the two State witnesses. I furthermore cannot agree with Mr Van den Berg that Phule's evidence that the four accused reached him and the deceased at the same time, is

improbable. It was obviously a well orchestrated attack which had been planned in advance by all four accused.

The trial Court correctly regarded Mosinyi as a single witness concerning the events which followed Phule's departure from the scene. It found Mosinyi a truthful and honest witness whose evidence was corroborated in two material respects by the medical evidence. Firstly, his description of where on her body the deceased was stabbed was fully borne out by the post-mortem findings and, secondly, his evidence that the deceased was kicked on her head was proved correct by the evidence of the pathologist. There are, undeniably, blemishes in Mosinyi's evidence, such as the fact that in his statement to the police on 21 January 1991 he did not mention that accused No 3 had also stabbed the deceased. His explanation for this omission was unsatisfactory and contradictory. The rest of his statement to the police was, however,

substantially similar to his evidence, except that he did not mention to the police that accused Nos 1 and 2 had kicked the deceased.

Mosinyi had further made a previous inconsistent statement during the sec 119 proceedings when he told the magistrate that he had been with accused Nos 3 and 4 on the evening in question and was standing near accused No 4 when accused No 3 approached the others for matches. His explanation for this statement was that he had been asked by the other accused to say so.

Mr Van den Berg submitted that Mosinyi contradicted himself in his evidence by first stating that he left the group after the meat had been taken from him whereas his later evidence was to the effect that he at no stage left them before the deceased was killed. It is quite clear from Mosinyi's evidence, read as a whole, that he did not leave the group

before they reached the school where the deceased was killed so that it is difficult to understand what he meant when he at first said that he left the group, if in fact he did say that. According to what the interpreter told the trial Court when Mosinyi was being cross-examined on this aspect there would appear to have been some misunderstanding between him and Mosinyi.

Mr Van der Berg further submitted that it is highly improbable that Mosinyi would have accompanied the group only to collect his money which was a mere R5. I do not agree. The money meant an evening's meal for him and he had to account to his brother for it.

Mr Van der Berg next submitted that Mosinyi contradicted himself as to the events in the classroom by first saying that it was accused No 2 who had ordered the deceased to lie down and later that

accused No 2 did not do so but that it was accused No 1 who had ordered the deceased to lie down. Mosinyi was also criticised for not initially saying that accused No 2 twice had intercourse with the deceased. I do not regard these contradictions as of any significance.

Mr Van den Berg finally submitted that the trial Court erred in not drawing a negative inference from the State's failure to call Mosinyi's brother Ronnie in order to support Mosinyi's evidence. I do not agree. Ronnie was never a State witness and just happened to be present at the hearing. His evidence could have added little, if anything, to the State case. He was available to accused Nos 3 and 4 to testify in support of their alibis (cf *S v Motsepa en n Ander* 1991(2) SACR 462(A) at 468i - 469b).

Despite the blemishes in his evidence I am satisfied beyond any reasonable doubt that Mosinyi's account of the events in the classroom is a true one.

His evidence with regard to the earlier events was fully corroborated by that of Phule. At the same time the evidence of accused Nos 3 and 4 was highly improbable. In my view it has not been shown that the trial Court erred in accepting the evidence of the State witnesses and rejecting that of accused Nos 3 and 4. It follows that accused Nos 3 and 4 were correctly convicted.

That leaves the appeals against the sentences. I shall first deal with the appeals of accused Nos 1 and 2 against the death sentences imposed upon them. The aggravating factors are self-evident and of an extremely serious nature. The motive for the murder was to avoid being identified and brought to justice - to escape retribution which must inevitably have been severe for the vicious, callous, prolonged attack on a defenceless young girl in the course of abducting and then raping her, despite her

pleas for mercy which fell on deaf ears. That conduct, pertaining to the rape charge, was well-planned and was not committed on the spur of the moment. But it cannot be found as proved beyond doubt that accused Nos 1 and 2 had murder in mind already when they dragged her off to rape her. Phule did not get the impression that that was their intent :

"Het u die indruk gekry dat daar 'n gevaar was met betrekking tot die oorledene? -- Ja.

Wat het u gedink sal met haar gebeur? -- Ek het gedink hulle gaan haar verkrag en haar laat loop.

HOF: En laat loop? -- Ja edele."

According to the post-mortem report most of the many wounds she received were inflicted posteriorly and were comparatively superficial, probably as the girl was driven to the school. The impression left by Mosinyi's evidence is not that she was in extremis

when, with accused No 1 setting the terrible example, she was stabbed fatally as she lay on her back after being again raped by accused No 2. But there can be no doubt that she was killed with **dolus directus** once accused No 1 decided that she had to be eradicated, cold bloodedly; and there is no indication that appellants have any conscience, let alone feel remorse.

The mitigating factors are their youthfulness and the absence of relevant previous convictions, both of which are usually regarded as strongly mitigating factors so that the death sentence will only be imposed in exceptional circumstances when those factors are present. See *S v Matala and Others* 1993(1) SACR 531(A) at 539 c-d. Accused No 1 was 18<sup>1</sup>/<sub>2</sub> years old and accused No 2 was 20 years old at the time the crimes were committed. Accused No 1 has no previous convictions and accused No 2 has only one previous conviction for theft. Accused No 1 only

attended school up to standard one and accused No 2 was still at school at the time the offences were committed. Though the somewhat more mature age of accused No 2 does not qualify him for the same amount of consideration the Courts would usually accord an 18-year-old, it would be inappropriate to distinguish between him and accused No 1 here, since accused No 1 on all the evidence took the lead that night.

In deciding whether the death sentence is the proper sentence in this case, the main purposes of punishment, namely deterrence, prevention, reformation and retribution as well as the triad consisting of the crime, the offender and the interests of society must be considered. In the present case there is clearly a strong need to deter others from committing crimes of this nature. Society cannot countenance its members being brutally murdered to cover up heinous offences perpetrated against those

going about their business in public places. For the same reason the retributive effect of sentence also requires emphasis in the present case. It may well be said that the deterrent and retributive aspects should override all other considerations and that the death penalty is the only suitable punishment. After careful consideration I have, however, come to the conclusion that a sentence of life imprisonment would be sufficient to express society's repugnance at the murder and to deter others from committing similar ones, while accused Nos 1 and 2 would not be entirely denied the possibility of rehabilitation.

That leaves the appeals of accused Nos 3 and 4 against their sentences. Both were only 17 at the time the offences were committed. It was not submitted that the trial Judge misdirected himself in any way in sentencing accused Nos 3 and 4 and the sole question is thus whether the sentences are so severe

as to justify interference by this Court. Considering accused No 3's age I think that his effective sentence of 25 years' imprisonment is excessive. An effective sentence of 20 years' imprisonment is in my view appropriate in his case. In the case of accused No 4 I do not regard his sentence on the rape charge as too harsh.

In the result the following order is made.

- (1) The appeals of accused Nos 1 and 2 against the death sentences imposed in respect of the murder charge succeed. The death sentences imposed upon them are set aside and in each case a sentence of life imprisonment is substituted.
- (2) The appeals of accused Nos 3 and 4 against their convictions are dismissed.
- (3) The appeal of accused No 3 against his sentence in respect of the murder

charge is dismissed. His appeal against his sentence on the rape charge succeeds to the extent that it is ordered that the full sentence of 14 years' imprisonment imposed in respect of this charge is to run concurrently with the sentence of 20 years' imprisonment imposed in respect of the murder charge.

- (4) The appeal of accused No 4 against his sentence on the rape charge is dismissed."

W. VIVIER JA.

JOUBERT JA )

Concur.

VAN DEN HEEVER JA)