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CASE NO. 197/88
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

SIFISO BHEKI MDLALOSE APPELLANT

and

THE STATE RESPONDENT

CORAM: VAN HEERDEN, EKSTEEN JJA et NICHOLAS AJA

DATE HEARD: 21 NOVEMBER 1988

DATE DELIVERED: 30 NOVEMBER 1988

J U D G M E N T

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NICHOLAS, AJA:

In 1986-1987 chaos ruled in the black township of Chesterville in Durban. Two gangs, the A-Team and the Comrades, each drawn from its own territory, clashed frequently and violently. There was burning of houses and motor cars, assaults and killing. Fearful for their own safety some inhabitants moved away.

On the evening of 8 January 1987, three houses in Road 8, Chesterville, which was in Comrades territory, were attacked by a group of 3 or 4 men. One of them was Siphiso Bheki Mdlalose, the present appellant, who was a member of the A-Team, and to whom I shall refer as "Bheki".

The first to be hit was House 532, which was in darkness, except for the television set which the three occupants were watching. They heard a report from a firearm outside, which was followed by the

sound of stones falling on the roof, and the noise of breaking windows at the back of the house. The rear bedroom was found to be on fire and there was a smell of petrol. Bheki was twice identified as being one of the attackers; first as one in a group of persons lurking in the front of the house, and again at the back, where he was seen trying to strike a match and to set fire to a shack there.

At about 11:30 it was the turn of House 539: windows were broken and petrol flamed in the rear bedroom. There, two women, Nompumelo Ndluli and Nokwezi Ndluli, together with three children (two of them babies), were sleeping. All of them were burnt - Nokwezi and the children so badly that they died. Nompumelo survived. The house and its contents were gutted.

House 539 and House 541 were adjoining semi-detached houses. House 541 was also attacked and set on fire. Bheki was seen breaking the windows of the dining room. Siza Mhlango, who was asleep in House 541, awoke to see a fire in the bedroom. He managed to get out of the house through the kitchen door. Outside he was confronted by Bheki, who was holding a bush-knife and a five-litre bucket. Siza asked Bheki what was happening. Without answering Bheki rushed at him with the bush-knife raised. They grappled. Bheki struck a blow with the bush-knife at Siza's head. Trying to ward it off, Siza was struck on the left hand, which was severely lacerated. Bheki struck a second blow at Siza, who managed to avoid it and to flee.

On 7 December 1987 Bheki was arraigned on sixteen counts in the Durban and Coast Local Division of the Supreme Court. Eight of the counts arose

from the incidents of 8 January 1987. Bheki was convicted by the trial court (**THIRION** J and two assessors) on the latter group of counts. They were:

Count 5, arson, arising out of the burning of House 532;

Counts 6, 7, 8 & 9, murder, arising respectively out of the deaths of Nokwezi Ndluli and the three children;

Count 10, attempted murder, arising out of the burning of Nompumelelo Ndluli;

Count 11, attempted murder, arising out of the assault on Siza Mhlongo; and

Count 12, arson, arising out of the burning of Houses 539 and 541.

The other counts on which Bheki was charged arose from incidents which occurred on 15 and 25 April 1986 and 30/31 December 1986. On these he was acquitted.

On counts 6, 7, 8 & 9 no extenuating

circumstances were found, and on each of them, Bheki was sentenced to death. On each of counts 5, 10, 11 & 12 he was sentenced to six years imprisonment, but it was directed that the sentences run concurrently.

THIRION J granted leave to appeal to this court against the sentence of death imposed on each of the four counts of murder.

The main submission on appeal was that Bheki was under the age of 18 years when the murders were committed, and that consequently the trial judge had a discretion under s.277(2) of the Criminal Procedure Act, 51 of 1977, to impose a sentence other than death. It was argued in the alternative that the trial court was wrong in finding that there were no extenuating circumstances.

At the trial the question of Bheki's age was investigated as fully as was possible in the

circumstances. No documentary evidence, such as a birth or baptismal certificate, was available, but oral evidence was given by Bheki's mother, and expert evidence was given by Drs Rubin and Botha.

The trial court rejected the evidence of Bheki's mother that he was born on 9 December 1970: she appeared to be illiterate; her evidence as to Bheki's age was unreliable - she did not know the age of her child born next after Bheki; and she was an untruthful witness.

In regard to the expert evidence, **THIRION J** referred to the possibility, which counsel advanced on the basis of Dr Botha's evidence, that Bheki was only 17.8 years of age on the date when X-rays were taken, and said:

> "However we do not consider that we should approach the case by taking the lowest common denominator but that we should judge the accused's age on a conspectus of all the

> evidence. On a conspectus of all the evidence we are satisfied that as at the date of the commission of the offence the accused was over eighteen years of age and probably even as old as twenty. Physically the accused's appearance is that of a well developed young man. Little is known about the accused's mental development...
> Judging by his appearance in Court, the manner in which he gave his evidence and judging by his association with other men, we are of the view that his psychological development is that of a person who is associating with men rather than boys. His mental development has gone further than that of a juvenile."

A person's appearance in court, and his demeanour in the witness box, are unsafe guides in an assessment of his age or psychological or mental development. See the dictum of **MARAIS J** in S vs Seleke, 1976(1) S A 675(T) at 688 H:

> "Die voorkoms van die beskuldigde is vanselfsprekend die allerlaaste oorweging in die verskillende fases wat tot sekerheid oor die ouderdom kan lei, omdat dit, veral in grensgevalle, min of geen betroubare getuienis inhou nie. Dit moet as 'n nooduitweg behandel word."

Cf Van Rooi en Andere 1976(2) S A 580(A) at 585 E - F where **CORBETT JA** expressed doubt whether

> "'n jeugdige se graad van volwassenheid so geredelik aan sy optrede in die getuiebank gemeet kan word...."

See also S v M, 1988(2) S A 779(A) at 784 B per **HEFER JA:**

> "To assess an accused's age with any measure of accuracy by his appearance is neither easy nor satisfactory; in cases like the present one, where he appears to be near the prescribed age, it may indeed be impossible to say whether he is under or above it."

In fairness, I do not think that the circumstances referred to by **THIRION** J were relied on as anything more than a makeweight. But even so, it was an insubstantial one. Nor did the evidence, meagre as it was, which related to Bheki's associations, provide any real assistance.

The trial court was accordingly obliged to rely on the evidence of the experts.

Dr Rubin is a consultant radiologist.

On 14 December 1987, he carried out an X-ray examination of the hemi-skeleton in order to assess Bheki's skeletal age. Dr Botha, a forensic odontologist, examined the X-rays of Bheki's permanent mandibular lower left and lower right third molars (wisdom teeth).

After setting out in detail the results of his study of the X-rays, Dr Rubin commented as follows:

> "1. All the epiphyses X-rayed are fused making the estimated age 19 years.
>
> The third molar estimated age is 19 years with a standard deviation of 1,2 years i.e. between 17.8 and 20.2 years, but with the above findings the estimated age is between 17.8 and 21 years most likely 19 years.
>
> 2. Enclosed is a signed report by Dr C J Botha of Durban Westville University on the estimated age of the wisdom teeth."

Dr Botha's report was in the following terms:

> "The permanent mandibular third molar (Wisdom Tooth). The mesial and distal roots of the lower left and lower right third molar are

fully formed and the apices closed. Age estimation is 19 years with a standard deviation of 1.2 years.
Ref. The Permanent Mandibular Third Molar - Its Value in Age Determination. C J Nortje.
The Journal of Forensic Odontonology
Vol. 1. No. 1. June 1983."

Both doctors gave oral evidence confirming their reports.

Upon analysis, it does not appear that Dr Botha was able to make a definite estimate of Bheki's age. In his written report Dr Botha said that his age estimation was "19 years with a standard deviation of 1,2 years". In his oral evidence he emphasized that the 19 years was "a mean value" - "there is great variation". (A mean value is one equally far from two extremes; "standard deviation" is the measure, which is statistically calculated, of the spread of a series of values from their mean). What Dr Botha said in effect was that judging by the appearance of his

wisdom teeth presented by the X-rays, and applying the tables contained in C J Nortje's paper, Bheki belonged to the group of males whose average age is 19 years and whose individual ages vary between 17,8 and 20,2 years.

Dr Rubin did make an estimate. He said in his written report that, based on his findings as to fusion of the epiphyses and the X-ray appearances of the third molar, "the estimated age is between 17,8 years and 21 years most likely 19 years." In his oral evidence, he expressed himself more positively. He said that the patient was over 19 and under 25. His last word on the matter when he was recalled was,

> "With the third molar plus all the other fusions of all the other epiphyses in the body, I would say he is between nineteen... years and over. Probably twenty-three or twenty-four years."

This case is a borderline one, and Bheki's life may depend on whether he falls on one side

of the line or the other. The X-ray examination took place on 14 December 1987; the relevant date for the ascertainment of Bheki's age was 8 January 1987 - 3 weeks short of a year before the examination. That means that if Bheki was under 19 in December 1987, he was probably under 18 in the preceding January.

The question arises whether Dr Rubin's estimate of Bheki's age can be regarded as sufficiently accurate and reliable to exclude the reasonable possibility that he was under 18 on the date of the crime.

The procedure followed by Dr Rubin was this. He examined Bheki's X-rays in order to ascertain whether the epiphyses were fused. Having observed that all the epiphyses were fused, he then had regard to "certain tables" - apparently tables recognized by the medical profession as correctly showing the range of ages at which various epiphyses fuse. (It appears

from Dr Rubin's report that some of the ranges are wide, e.g. ages 14 - 21 years, and others are quite narrow, e.g. ages 15 - 17 years, or even a single year). If an epiphysis is fused, then the patient must be at least the lowest age shown for such fusion.

Now Dr Rubin found that all epiphyses were fused. These included the acromion process (fuses 25 years); the coracoid process (fuses at 25 years); the epiphyses on the sterno-clavicuclar joints (fused by 25 years); and symphysis pubis epiphyses (fused by 25 years). In answer to close questioning by **THIRION J**, Dr Rubin agreed that it is a medical fact that the "epiphyses are all fused by say twenty five, and if you find them all fused then you would say he's over twenty-five..." Consequently, he agreed, Bheki was, purely on radiological examination, probably over 25. But, he said, in the light of Dr Botha's report, he estimated the

patient's age to be 19 years.

This suggests that Dr Rubin could have had little confidence in the precision of the procedure; and Dr Rubin's opinion, in so far as it was based on the fusion of the epiphyses, comes into serious question. Moreover, it does not appear that Dr Rubin himself could have regarded his estimate that Bheki was over 19 as a reliable one, in the light of the fact that in his written report he gave the estimated age as "between 17,8 and 21 years most likely 19 years".)

There is no onus on an accused person in a case such as this to prove that he is under the age of 18 (nor for that matter is there any onus on the State). See S vs M, (supra) at 783 - 784. If the court is not presented with sufficiently reliable information to make a fairly accurate assessment possible, then the uncertainty must enure for the benefit

ofthe accused, not against him (ibid at 784 C - D). If on all the evidence there is a real doubt, public policy requires that it should be resolved in favorem vitae.

In the present case, there is, in my opinion, such a doubt and so Bheki should have been dealt with as if he was under 18 on 8 January 1987.

Counsel for the State was of the view, and appellant's counsel agreed, that if this was the conclusion reached, the case should not be remitted, but that this court should impose appropriate sentences. I agree. All the available information is in the record, and this court is in as good a position as the trial judge to determine proper sentences.

This was undoubtedly a cruel and heartless crime which most people would say cries out for retribution. On the other hand, the perpetrator is a youth, only on the threshold of manhood. In S v V,

1972(3) S A 611(A) **HOLMES JA** said at 614 F:

> "Sentence to the gallows is the incomparably utter extreme of punishment. In cases where it is not satutorily mandatory, it should rarely, if ever, be resorted to in the case of a youngster, if a long period of imprisonment, involving properly directed discipline and training might well result in reformation ... That applies in the present case. What this youth needs imperatively is a good long spell of discipline and training. Society does not require his extermination."

See also S vs Sampson, 1987(2) 620(A) at 624 G, 626 J - 627 A.

It does not seem that thus far Bheki can have been subject to much discipline. He said in his evidence that he left school after passing Std 5. He has never been in permanent employment, but has done only casual unskilled work. He was still living at his parent's home. The probability is that, as with many other children and youths living in the townships, parents who had daily to go out to work could exercise

little control over him, and he has been left to roam the streets. His case is like that of the appellant in S vs V (supra).

The following order is made:

"The appeal against sentence is upheld. The death sentences on counts 6, 7, 8 & 9 are set aside. There is substituted therefor the following:

> Counts 6, 7, 8 & 9 are treated as one for purposes of sentence. On these counts the accused is sentenced to 15 years' imprisonment. It is directed that the sentences imposed in respect of counts 5, 10, 11 & 12 shall run concurrently with the said sentence of 15 years' imprisonment."

NICHOLAS, AJA

VAN HEERDEN JA)
) CONCUR
EKSTEEN JA)