IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALOIS NGIDI	.....	First Appellant
SIPHO LILI NGCOBO	.....	Second Appellant
MUSA PHUKU MTHIYA	.....	Third Appellant
SIFISO WISEMAN DLAMINI	.....	Fourth Appellant

AND

THE STATE	.....	Respondent

Coram: HEFER, VIVIER et EKSTEEN, JJ.A.

Heard: 15 February 1991

Delivered: 22 March 1991

J U D G M E N T

EKSTEEN, J.A. :

The four appellants were charged before the Durban and Coast Local Division with four counts of murder and one of arson. All of them were convicted on all counts. They were each sentenced to two years' imprisonment on count 5, viz. that of arson. Extenuating circumstances were found to be present in the case of the third appellant in respect of each of the counts of murder, and he was sentenced to 15 years' imprisonment on each count; the sentences on all counts - including that of arson - to run concurrently. No extenuating circumstances were found in respect of the

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other three appellants and they were consequently all sentenced to death on each of the charges of murder. After an application to the trial Judge he granted the first, third and fourth appellants leave to appeal against their convictions. The first, second and fourth appellants were granted leave to appeal against the Court's finding that there were no extenuating circumstances in their cases, and against their sentences. It is on this basis, therefore, that the appeal comes before us.

All the charges arise from the burning down of the hut of one Busisiwe Cele on the night of 30 July 1988. Busisiwe Cele lived in a one-roomed hut in the Msunduze area in the district of Ndwedwe in

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Natal. On the night of 30 July 1988 Busisiwe was at home in her hut with her daughter, the 25 year old Sizakele Cele; her boyfriend Mandla Khumalo; and Sizakele's 4 year old daughter Duduzile Cele, and her 10 month old son Siphamandla. At about 11 or 11.30 that night her neighbour Khuzane Ngcobo, who lived about 100 metres away, noticed that Busisiwe's hut was on fire. He woke up another neighbour, Qaphele, and the two of them went to see what was happening. Outside the burning hut they found the body of Duduzile with little Siphamandla crawling over it. The fire was too intense for them to enter the hut and it was only the next day, after the police had arrived, that the charred bodies of Busisiwe, Mandla

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and Sizakele were recovered from the ashes inside the hut. All three had been charred to such an extent that the district surgeon was unable to determine the cause of death. The body of Duduzile also had first degree burns over the anterior aspect of the whole of the left leg and over the right ankle. Furthermore the district surgeon found an incised stabwound above the medial or inner end of the left clavicle. This wound incised the left subclavian artery and vein, and penetrated the left lung causing it to collapse. This, in the view of the district surgeon, was the fatal wound which led to the death of Duduzile. She also had a lesser incised wound below the chin, and a bruise on the right side of her forehead. The

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intercranial contents showed a small subdural haemorrage of the mid occipital area - i.e. at the back of the head.

The evidence connecting the appellants with the death of these four people and the burning of Busisiwe's hut, was primarily that of Thulani Ngcobo. He was 15 years old at the time of the offence and had reached Standard IV at school. He was also the nephew of the second appellant and they both lived with Thulani's grandmother.

Thulani deposed to having been in the company of the four appellants on the afternoon in question. While they were at the kraal of the fourth appellant, one Babs arrived and offered to buy them

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some beer. They therefore accompanied Babs to Dixon's Store where Babs bought a case of beer. From there they went to the home of Babs' parents-in-law where they consumed all the beer. Thulani, who was a mere boy in the company of the adults, was only given one quart of beer, and that was all he had to drink. Later that night, at about 7 p.m., they left the kraal. Babs and the appellants were all under the influence of liquor by that time. They hadn't gone too far when Babs picked a quarrel with the third appellant. Knives were produced and the second appellant, while attempting to intervene, sustained a cut to one of his fingers. This quarrel seems to have been settled, but shortly afterwards Babs and

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the fourth appellant were at loggerheads. Again knives were produced and the fourth appellant stabbed Babs on the forehead. Babs then turned back to the kraal of his parents-in-law while the four appellants and Thulani proceeded on their way. The road they were following passed close to an abandoned kraal where Busisiwe had formely lived. At this spot the second appellant began complaining that Busisiwe had caused him to be arrested, and that he had been "arrested for nothing". The first appellant expressed his agreement with this sentiment, whereupon second appellant reiterated that "Mamkazi (i.e. Busisiwe) had laid a charge against him for nothing". Again the first appellant concurred, and so did the rest.

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Further along the road they came to a path-
way leading to the hut where Busisiwe then lived.
At this spot the first appellant said to his co-
appellants "Let us go now". He then turned to
Thulani and ordered him to carry on walking "be-
cause you are going to cause the police to arrest us".
All the appellants then produced knives and proceded
along the pathway leading to Busisiwe's kraal, while
Thulani continued walking along the road. A short
distance further on curiosity got the better of him
and he stopped to see what was going to happen at
Busisiwe's kraal, and whether the appellants were in-
deed going to stab "the people there" as they had
said they were going to do. He says he heard the

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sound as of doors being kicked down, and then he heard people from the hut screaming and crying out that "we are dying". When the screaming and crying stopped he saw that the hut was on fire. In the moonlight he saw the four appellants running down the pathway from the burning hut to the road, and heard the sound of their running feet. They laughed as they ran and he recognized their voices. Realizing that they were coming towards him, he also began to run, for fear that they might find him there and assault him for not going away from the scene as he was told to do. The last he saw of the appellants was while they were walking towards a kraal where they had said they were going in order to gamble. Thulani says that he ran

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home and went to bed. He did not see his uncle, the second appellant, again that night.

In fact the second appellant only got back home the next morning when he came looking for something to eat. Having had his breakfast he left again and returned at about 11 o'clock with the first appellant. They immediately set off for Mngomezulu's house where some sangomas were going to foregather and where a party was to ensue. Thulani says that he tagged along behind them, and saw the third appellant join the first and second appellants. They seemed to be in a good mood and began "praising" themselves. He heard the second appellant say "Gentlemen, do you realize that we might not have managed

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to catch hold of these people, and that we caught hold of them because I closed the door". Shortly after this self-commendatory remark the three appellants noticed Thulani following them, and they promptly chased him away.

Thulani's evidence did not stand entirely alone but received some corroboration from that of Manakazi Ngcobo, the sister of Khuzani Ngcobo. She told the court that late that night, after her brother Khuzani had returned home and gone to bed, she heard people talking outside. She says that whenever she hears the dogs barking or people talking outside her house, she looks out to see who they are as a pre-caution in case her cattle or goats are stolen. So

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when she heard the people talking this night she opened her door and looked out. There, in the moonlight, she saw the four appellants and Thulani passing in the road some 25 paces from where she stood. She knew them all well, - in fact the second, third and fourth appellants are all related to her. She also recognized their voices, and from the way in which they were talking she came to the conclusion that they were under the influence of liquor. Seeing that they were all local people whom she knew so well she paid no further attention to them.

Some short while later, her brother Khuzani got up and went outside to answer a call of nature and she heard him calling out "What is happening there at

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Mamthembu's (i.e. Busisiwe's) house? Is it burning there or what is happening?" She then also got up and went outside in time to see Khuzani and their neighbour Qaphela going up the hill to Busisiwe's hut. She followed them up, saw the hut burning, and heard Khuzani and Qaphela remarking that the child (Dudu-zile) was already dead. They picked up the baby Siphamandla, and took him home with them.

The motive which Thulani deposed to as having been advanced for the attack of Busisiwe's home, viz. that she had laid a charge against the second appellant and caused him to be arrested, finds confirmation in the evidence of Detective Sergeant Shabalala. He was the investigating officer in a case in which

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Busisiwe Cele was the complainant. He interviewed her on 30 December 1987 and she showed him certain fresh injuries to her face. He had her examined by a doctor and received a report in this regard. In May 1988 the second appellant was arrested in connection with this complaint and on 9 May he appeared in the magistrates court at Verulam on a charge of having assaulted Busisiwe Cele with the intention of doing her grievous bodily harm. The matter was then postponed on three occasions. On 30 July 1988, i.e. the day on which Busisiwe was killed, second appellant again appeared in court in connection with this charge, and the matter was again postponed to 8 August. The reason for all these postponements, says Sergeant

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Shabalala, was because he was still looking for two further suspects to charge with the same offence. One of these suspects was the first appellant. This latter fact tends to lend credence to Thulani's evidence that the first appellant was so ready to agree with the second appellant's expressed grievance against Busisiwe, and the leading role that he subsequently played in instigating the attack on Busisiwe's hut.

The four appellants each gave evidence in which they conceded having been together on that afternoon with Babs at Dixon's Store. They conceded that Babs had bought a case of beer, and that they had all gone to Babs' parents-in-law's home to consume

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the beer. Thulani, they agree, was with them. They also concede that later that night they left; that Babs picked a quarrel first with the third appellant and then with the fourth appellant, and that the fourth appellant stabbed Babs on his forehead. Thereafter they say Babs returned home, the fourth appellant went off on his own, while the other three appellants made their way to Mngomezulu's kraal by a route which did not take them anywhere near Busisiwe's hut. None of them know what happened to Thulani, but they say that after Babs had turned back Thulani was no longer in their company.

The trial court accepted the State's evidence that I have referred to, and rejected the evi-

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dence of each of the four appellants. They were therefore each found guilty on the four counts of murder and on the arson count. When it came to the consideration of extenuating circumstances the second appellant returned to the witness box. This time he told the court that after returning home from Mngomezulu's house on the night in question, he noticed - apparently for the first time - that Thulani was no longer with him. He therefore decided to go and look for him. On his way he passed Busisiwe's hut, and remembered that she had laid a charge against him. He therefore went to her hut and opened the door. The lamp was burning in the hut and all the occupants were alseep. He says he first looked around for a weapon to stab

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Busisiwe with, but, being unable to find one, he decided to set fire to the hut. This he did. He closed and locked the door; and went home. In cross-examination he continually shifted his ground, with the result that his evidence was rejected as being patently untruthful.

He also called his mother Alzina Ngcobo to give evidence. She told the court that when Thulani got home that night he was very drunk. She too appeared to the court to be unworthy of credence and her evidence was rejected.

In argument before us it was contended that the trial court ought not to have accepted the evidence of Thulani and that of Manakazi and that therefore

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the convictions of the first, third and fourth appellants could not stand. It was submitted that Thulani was a single witness; that because of his youthfulness the trial court ought to have treated his evidence with caution; and, relying on the evidence of Alzina Ngcobo, that Thulani was so drunk on the night in question that his evidence of events could not be accepted. This latter argument loses sight of the fact that Alzina's evidence was rejected by the trial court. On a mere reading of her evidence it is apparent that she is by no means an impressive witness and that there is no reason to differ from the trial court's rejection of her evidence. As far as the alleged youthfulness of Thulani is concerned, as though he

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were a child of tender years, suffice it to say that he was a boy of 15 years of age at the time of the offence, and 16 when he gave evidence. He cannot therefore be regarded as a young child of tender years in respect of whom the cautionary rule would apply (S. v. Artman and Another 1968 (3) SA 339 (A) at p 341). Despite this fact, however, the court a quo, in assessing the credibility and reliability of his evidence, did have regard to his youth and to the fact that he was, to a large extent, a single witness. It is clear from the judgment that the trial court went to great pains in analyzing and testing Thulani's evidence. It came to the conclusion that he had given his evidence well, in an unpretentious

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manner, without overstating facts and with an appearance of naturalness. It had no hesitation in accepting his evidence, and no good reasons have been advanced for us to differ from this conclusion.

The trial court also accepted the evidence of Manakazi and that of Sergeant Shabalala, and once again no sufficient reasons have been advanced to persuade us that it was wrong in the conclusion to which it came.

It was not seriously contended before us that the trial court was wrong in rejecting the evidence of the appellants. The learned Judge a quo has referred in his judgment to the unsatisfactory features in their evidence, and we see no reason to

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differ from him in this respect.

In the result therefore, the appeals of the first, third and fourth appellants against their convictions cannot be sustained. As I have indicated, the trial court found extenuating circumstances in the case of the third appellant, and sentenced him to a term of imprisonment. There is no appeal against this sentence. We are, however, called upon to consider the appeals against the sentences of the other three appellants.

The trial in this case took place prior to the promulgation of the Criminal Law Amendment Act 107 of 1990. This Act amended the law relating to the imposition of the death sentence in several

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important respects. The whole concept of extenuating circumstances as it existed under the previous section 277 of the Criminal Procedure Act has been done away with. A trial court is now enjoined to consider the presence or absence of mitigating or aggravating factors, before the presiding Judge is called upon to decide, having due regard to such finding by the court, whether the sentence of death is the proper sentence to pass. (See 4(2) of Act 107 of 1990.) Moreover in considering an appeal against the imposition of a death sentence this court exercises an independent discretion of its own, in the sense that if it is of the opinion that it would not itself have imposed the death sentence it may impose "such punishment as it considers to be proper".

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(Sec. 13(b) of Act 107 of 1990, and see S. v. Masina and Others 1990 (4) SA 709 (A) at p 712 I - 714 E; S. v. Senonohi 1990 (4) SA 727 (A) at p 732 H - 733 E; S. v. Nkwanyana and Others 1990 (4) SA 735 (A) at p 742 I - 745 G and S. v. Mdau 1991 (1) SA 169 (A) at p 173 H - 174 H.) We must therefore consider, in the exercise of our own discretion, having due regard to the findings of the court a quo, and to such mitigating or aggravating factors as appear from such findings, whether the sentence of death is the only proper sentence to pass.

In considering the circumstances of each of the appellants in turn it is perhaps convenient to start with the fourth appellant. He told the trial

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court that he was some 25 years of age at the time of the commission of the offence. He admitted one previous conviction when in 1981 he was convicted of having been in possession of a dangerous weapon and sentenced to corporal punishment. Like the third appellant the fourth appellant did not, on the evidence, have any personal grudge against Busisiwe, and would seem to have gone along with the other three appellants simply because he happened to be in their company at the time. The fact that they had been drinking that night and that they were, on Manakazi's evidence, obviously under the influence of liquor, tends to lend some substance to such an inference. The trial court, too, found that the appellants had consumed "a

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considerable quantity of liquor" that day. He would therefore seem to have been in very much the same position as the third appellant in this respect, with the only real distinction being that whereas the third appellant was some 19 or 20 years old at the time, the fourth appellant was 25. He ought therefore to have possessed a greater strength of character to resist the suggestions of the first and second appellants to go and kill Busisiwe, than the third appellant. Where essentially the same circumstances prompted the court to find that extenuating circumstances had been proved in the case of the third appellant, it seems to me that the mitigating factors present in the case of the fourth appellant weigh so strongly that it cannot

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be said that the death sentence is the only proper sentence in his case, and that a period of imprisonment would be a more appropriate sentence. Having regard to his age at the time, and the greater maturity that it brings, as well as to the gruesomeness of the murders committed, it seems to me that a sentence of 20 years' imprisonment on each of the four counts of murder would be appropriate. As in the case of the third appellant, however, the sentences on all the counts on which he was convicted will be ordered to run concurrently.

The first and second appellants were, on the evidence, the two that were primarily responsible not only for the conception of the plan to attack Busisiwe's

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home, but also for seeing it through to its gruesome conclusion. On the evidence it was the second appellant who first broached the subject when the four of them got to the place where Busisiwe had formely lived. The fact that he had had to appear in court that very day in connection with the charge she had laid against him, would seem to have rankled in his mind, and made him so readily susceptible to the insidious encouragement of the first appellant. That the second appellant also played a leading part in the actual killing of the occupants of Busisiwe's hut, is reflected in his boasting to the first and third appellants the next day when he commended his own initiative in preventing their victims from escaping from the hut.

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In his evidence the second appellant told the court that he was 18 years old having been born on 26 May 1971. His mother, in her evidence said that he was 20 years old - and then added that he was born in 1966. If this were so then he would have been 23 years old at the time of the trial. By agreement between the prosecutor and the second appellant's counsel a report by a senior radiologist in the Natal Department of Hospital Services of the results of an X-ray examination of second appellant for the purpose of a bone age assessment was handed in. From the report it appears that all the epiphyses, except those of the sterno-clavicular joints which fuse at 25 years of age, had already fused. These included the

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epiphysis of the pelvis and hips which, according to the report, fuse between the ages of 22 and 25 years. In the result, it was conceded that the report indicated that second appellant's age must be between 22 and 25 years. This would accord with his mother's evidence that he was born in 1966. He must therefore have been about 22 years of age at the time of the commission of the offence.

The second appellant admitted one previous conviction viz. of assault with intent to do grievous bodily harm incurred on 25 April 1988 - i.e. shortly before the commission of the present offence.

The aggravating factors that I have mentioned

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above - and particularly the brutal mercilessness of the killings and the levity with which the second appellant seems to have treated the whole matter, must weigh very heavily against him.

The only mitigating factors to be taken into account seem to me to be the degree of intoxication under which he happened to be at the time, and the insidious incitement of the first appellant who was a good deal older than he was. To a lesser extent his comparative youthfulness may also be borne in mind. After very careful consideration of all these features I find myself unable to say that the death sentence is the only proper sentence in the case of this appellant. A sentence of 25 years' imprisonment seems to

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be an equally appropriate sentence.

The first appellant however seems to fall into an entirely different category. He too, was a suspect in the assault of Busisiwe of which she had complained to the police, and he was quick to stir up the fires of the second appellant's discontent on the night in question. It was he who drew his knife and raised the final cry of "Let us go now" when they got to the pathway leading to Busisiwe's home. The next day he was again seen in the company of the second and third appellants, and Thulani heard them "praising" themselves on the way in which they had accomplished the murders.

In his address to the court on extenuation

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the first appellant's counsel told the court that first appellant had been 24 years of age at the time of the commission of the offence. However, when his previous convictions were put to him he admitted that on 23 September 1977 he had been sentenced to 12 months' imprisonment for an assault with intent to do grievous bodily harm and to a further 6 months' imprisonment for robbery. If he was only 24 years old at the commission of the present offence, then this would have made him no more that 13 years old in 1977 when he was sentenced to 18 months' imprisonment. This seems to me to be so highly improbable as not to be reasonably possible. He must at least have been some 5 or 6 years older in order to have had

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such a long term of imprisonment imposed on him. On this basis it seems to me to be safe to assume that first appellant must have been more or less 30 years of age at the time of the commission of the offences in question.

The two previous convictions I have referred to above were by no means the only ones that first appellant admitted to. In 1981 he was sentenced to 2 years' imprisonment for theft, and in 1983 he was sentenced to 3 years' imprisonment for robbery. Then on 23 August 1989 - i.e. after the commission of the present offences - he was sentenced to 20 years' imprisonment for murder with extenuating circumstances. Although this latter conviction was

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one which was incurred after the commission of the present offences, it is nevertheless a relevant aggravating factor to be taken into account in the determination of a proper sentence (R. v. Zonele and Others 1959 (3) SA 319 A at 330 D - 331 A).

Despite the degree of intoxication to which the first appellant together with his co-appellants was subject, the aggravating factors which I have mentioned weigh so heavily that I have come to the conclusion that the death sentence is the only proper sentence to be imposed in his case for so heinous a crime.

In the result:

(a) the appeals of the first, third and fourth

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appellants against their convictions are dismissed;

(b) the first appellant's appeal against the sentences imposed on him is dismissed;

(c) the second appellant's appeal against the sentence on count 5 is dismissed. His appeal against the sentences on counts 1, 2, 3 and 4 succeeds and for the death sentence is substituted a sentence of 25 years' imprisonment on each count. It is further ordered that the sentences on all five counts will run concurrently;

(d) the fourth appellant's appeal against the sentence on count 5 is dismissed, but his

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appeal against the sentences on counts 1, 2, 3 and 4 succeeds and for the death sentence a sentence of 20 years' imprisonment on each of these counts is substituted.

It is further ordered that the sentences on all five counts will run concurrently.

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J.P.G. EKSTEEN, J.A.

HEFER, J.A.)
VIVIER, J.A.) concur