CASE NO. 613/89
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WILSON MATSHILI	FIRST APPELLANT
PATRICK MOLEFE	SECOND APPELLANT
PHINEAS NETSHITUNGULWANE	THIRD APPELLANT
TAKALANI DAVID MAMPHAGA	FOURTH APPELLANT
GEORGE MAUNGEDZO	FIFTH APPELLANT

and

THE STATE	RESPONDENT

CORAM: NESTADT, KUMLEBEN et F H GROSSKOPF JJA

DATE HEARD: 4 MARCH 1991

DATE DELIVERED: 6 MAY 1991

J U D G M E N T

NESTADT, JA:

The five appellants, together with a number of other accused, were convicted by SPOELSTRA J, sitting with

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assessors, in the Witwatersrand Local Division on inter alia four counts of murder. In the cases of first, second, fourth and fifth appellants no extenuating circumstances were found and they were sentenced to death. In the case of third appellant extenuating circumstances were found and he was sentenced to 12 years' imprisonment (the four counts being taken together). This appeal, brought with the leave of the judge a quo, is against their sentences. I shall in the main refer to the respective appellants as accused 2, 5, 6, 7 and 9. This was their designation in the trial court.

The crimes were committed on the night of 28 April 1987. They took place against the background of a strike, which was then in progress on the Witwatersrand, of a large number of black employees of the South African Transport Services ("SATS"). Appellants were amongst those who were striking. The four deceased were workers who were not participating in the strike. On the day in

question they, together with a fifth person called Albert Phuluwa, were taken by strikers from the various places in Johannesburg where they were working to a building in the city called Cosatu House. Here hundreds of strikers were gathered. Cosatu House was the headquarters of the South African Railways Workers' Union, a trade union which though not recognised by SATS, was attempting to negotiate with SATS on behalf of the strikers. During the course of the afternoon a cry went up from members of the crowd that the five workers should be killed. At about 8 pm three of them, accompanied by a number of the strikers, were taken by car to a secluded spot outside Johannesburg called Prolecon. There one of the workers was repeatedly stabbed with a large bread knife. He fell to the ground. A rock weighing some 31 kg was thrown on his head several times. The other two, whose hands and feet had been bound, were then flung to the ground. They too were time and again

struck with the rock on their heads. In the meantime the car returned to Cosatu House to pick up the other two non-strikers. One of them was Phuluwa. They were taken in it by other strikers to the same place. As they all alighted, Phuluwa managed to escape. But the other person was escorted a short distance into the bush where the original group of strikers was waiting. His hands and feet were tied. He was stabbed with the knife. It broke. The rock was then dropped several times onto his head. Finally petrol was poured over the four bodies which were then set alight. By this time, however, the deceased had already died. In each case the cause of death is given by the district surgeon who performed the post-mortem examinations as "multiple injuries". These included a fractured skull and consequential brain damage.

Appellants initially pleaded not guilty to the five counts of murder. At the end of the State case,

however, they changed their pleas. Pleas of guilty were then tendered. At the same time they made certain admissions. These deal with the part each appellant played in the crimes. They were at Cosatu House on the afternoon of 28 April. It appears that they heard about the decision to kill the non-strikers and that they agreed with it. And thereafter they performed certain acts which, on the basis of common purpose, made them guilty of the four murders. In outline, the participation of each was the following. Accused 2 (first appellant) was one of those who went with the first three deceased to Prolecon. So too did accused 5 (second appellant), accused 6 (third appellant) and accused 9 (fifth appellant). It was accused 5 who stabbed (two of the deceased). Prior to this he had assisted in holding the deceased whilst they were bound. Accused 9 dropped the rock on the head of one of the first three deceased. Accused 6 did not actually take part in

the attack on any of the deceased. He left after the first one had been killed. Accused 7 arrived with the fourth deceased (and Phuluwa). When this deceased had been stabbed (by accused 5), accused 7 threw the rock several times on that deceased's head. He noticed the other three lying on the ground. He struck them several times on their heads with the rock. Finally accused 2 poured petrol over the corpses. He had purchased the petrol earlier that day.

Since the conclusion of the trial in the court a quo, the Criminal Law Amendment Act, 107 of 1990, has come into operation. Its effect has been dealt with in a number of recent decisions of this Court. In brief, our task is to consider sentence afresh. We have to decide whether, having due regard to the presence or absence of mitigating and aggravating factors, and bearing in mind the main purposes of punishment, the death sentence is the only proper sentence. So no longer is it necessary

for an accused to prove extenuating circumstances in order to avoid its imposition.

There are a number of aggravating factors. One is the nature of the crime and the manner of its commission. Four persons were killed. I cannot but agree with the trial court's description of the murders as "brutal... and gruesome". The deceased were babarically and ruthlessly slaughtered. Their suffering must have been extreme. They would have known for some time before that they were to be killed. They were quite defenceless. Appellants acted with dolus directus. They did not act impulsively. Quite a few hours passed between the time the decision to kill the deceased was made and its implementation. And (as far as accused 2, 5 and 9 are concerned) there was an interval of some twenty minutes before the fourth deceased was brought to the scene. So

there was time for reflection (though whether they did and if so to what extent is, as will be seen, another matter). As regards some of appellants, the murders were preceded by a degree of active preparation and planning. I have already referred to accused 2's purchase of the petrol which he took to the scene and poured over the bodies of the four deceased. Accused 5 during the afternoon went with one of his co-accused to fetch the car that was later used to convey the deceased to Prolecon. All five appellants helped to guard one or more of the deceased at Cosatu House during the afternoon or when they were forced into the car and driven away or when they were led into the bush after alighting from the car. Then there is the motive for the murders. The evidence establishes that it was not merely to punish the particular deceased for not participating in the strike, but also to coerce non-strikers to stop working and to compel SATS to come to

terms with the strikers. This explains why after the deceased were killed their bodies were burnt. It accentuated the message that appellants sought to convey, viz, that there had to be solidarity with the strike, lest it collapse. In short, the murders were an act of intimidation; indeed one of terror. And the unfortunate victims were innocent, law-abiding citizens who had simply been exercising their right to work and earn a living. They were given neither the opportunity of explaining their actions, nor the chance of ceasing their employment. They were shown no mercy.

What has been stated makes this a particularly serious case. On the other hand, there are certain factors which are strongly mitigating. They emerge from appellants' evidence read with certain lengthy expert testimony given on behalf of the defence. This consisted of the opinions of three psychologists and a professor of

anthropology. The pith of what they said was that appellants were subject to certain powerful, situational forces or influences which caused them to behave in an uncharacteristically violent manner.

I turn to a consideration of what those forces were. In doing so, I do not propose to deal with the detailed evidence (and argument) concerning how the strike started; what caused it to spread; the attempts between representatives of the strikers and SATS to negotiate a settlement; and whose fault it was that this was not achieved (before 28 April 1987). It seems to me that the relevance of these matters is somewhat tenuous. The same applies to the various grievances about their working conditions with SATS, to which appellants also testified. What is important is the situation as it existed on the day in question - and how it subjectively affected appellants. There was to begin with a sense of frustration. The strike

had now been going on for some weeks. Talks with SATS had become deadlocked. In the meantime appellants, and their co-strikers, were out of work. SATS had terminated their employment on 22 April. There was no question of them obtaining employment elsewhere. They therefore had no income. Dependants could not be supported. There was a shortage of food. There had been confrontations between strikers and the police. Some strikers had been killed. In these circumstances it is not surprising that emotions were running high. This is reflected in the attitude of the strikers towards those employees of SATS who had not joined the strike. A feeling of intense anger towards them developed. Their continued employment was regarded as enabling SATS to hold out against the strikers and thus prevent the termination of the strike on terms favourable to the strikers. They were seen as scabs or, in their words, as "verraaiers" or "mpimpis". Already some days

prior to 28 April, action was taken against them. Numbers of workers (a figure of about 240 was mentioned in the evidence) were forceably brought to Cosatu House. There they were beaten up by strikers and then allowed to leave. And on the fateful day the four deceased and Phuluwa were, shortly after their arrival at Cosatu House, also assaulted. It is clear that appellants approved of this conduct. This was because, for the reasons stated, they fully shared the feeling of hostility and sense of grievance towards these people. The following evidence of accused 6 typifies his and his co-accused's thinking:

> "(W)hen I found that these people were being punched, kicked, and I also agreed to that, that that was the proper thing.
> Why did you think that? --- So what I thought was seeing that these people had gone to work or they were not on strike, they are some of the people who caused the management or SATS not to come and discuss or talk with us, and I even thought within myself that seeing that the people were going back to work one by one the SATS or the railway would also think that we were also going to go back to work. But we the workers had

> thought that we would only go back after we had had the discussion with the management."

Indeed, accused 2 participated in the assault of one of the deceased. He twice hit him with a broomstick. He says he did this because "they were the people who were giving more power to the SATS or to our employers that our employers should not be able to come and solve this problem with us." Accused 9, describing how he felt at Prolecon, said:

> "I was still very much cross ... Personally I was cross because these people were working ... Well it affected me because at home people were suffering or dying of hunger and I did not have money."

This then was appellants' state of mind when the call for the five workers to be killed went up. They were regarded as having betrayed the cause of the strike. They were believed to be partly responsible for the strikers' predicament. This was not a reasonable outlook. But it does serve to explain appellants' willingness to

participate in what thereafter happened. It made them receptive, indeed easy prey, to the idea (which was not theirs) of killing the "mpimpis". In my view this is a mitigating factor.

But the issue of mitigation does not rest there. Of fundamental importance in assessing appellants' moral blameworthiness is the mood that prevailed at Cosatu House on the afternoon of 28 April and its influence on appellants. It will be remembered that hundreds of strikers had congregated there. Cosatu House had over the preceding days become their (and appellants') regular meeting place. SPOELSTRA J, in his careful judgment, describes conditions there as follows:

> "From 22 April onwards there was much noise, singing and dancing in the big hall which increased as time went by. It seems to have reached it's climax on the day of the murders. Conditions in the big hall were described in various ways. It was hot and dirty. The strikers ran out of money and could not buy food.

> They collected money from those who still had some and bought bread and Sweet-Aid which they shared between them. Some of the accused insisted that they sang only hymns and spirituals. We think the evidence of others on the probabilities justifies the conclcusion that many of the songs were clearly inflammatory and of a political nature. One must also assume that any speeches delivered to these meetings would have been of a similar nature.
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> One of the accused described how on the day of the murders the women made a high-pitched crying noise by fluttering their tongues, which is apparently known as ululation. The dances were wild."

One should add that at the gatherings at Cosatu House, it was the custom for strikers to publically air the complaints they had against their working conditions. This included allegations of harsh treatment by SATS. It can be accepted that this took place on 28 April as well.

The experts to whom I have referred deal in detail with the effect of these conditions (and other factors) on appellants. Reliance is placed on a number of psychological phenomena which they say are, in these

circumstances, likely to arise and which may result in what we know as mob behaviour or crowd violence. These principles have featured in two recently reported cases. They are S vs Safatsa and Others 1988(1) SA 868(A) and S vs Thabetha and Others 1988(4) SA 272(T). Both involved the issue of extenuating circumstances. A summary of the expert evidence in Thabetha's case is to be found in 1988 Annual Survey of South African Law at pp 417-8 in the chapter on Criminal Procedure (written by Professors Paizes and Skeen). It reads:

> "It is not uncommon for people without a violent predisposition to act differently in crowds and to engage in atypical violent behaviour. This is occasioned by a number of factors. First ... there are strong pressures on an individual in such circumstances to conform, both because the aggressive conduct of the crowd comes to be perceived as normative and appropriate and because of the fear of disapproval, rejection or even physical harm. There is, too, the question of obedience to authority figures which must be considered in these cases. A third factor is what is referred to by psychologists as 'modelling': a number of studies have shown that

> people who observe aggressive models are likely to be far more aggressive ... as people who observe non-aggressive models. Then, fourthly, there is the question of psychological arousal caused by shouting, singing, dancing or other kinds of physical exertion, which may deprive members of a crowd of rational thought and lead to heightened aggression.
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> Where all or some of these reactions occur, the result is frequently what is called 'deindividuation', in which a person loses his self-awareness and focuses all his attention on his environment. This state induces behaviour similar to that of people who are hypnotised or intoxicated. It interferes with one's cognitive abilities and hampers one's ability to regulate one's conduct. External cues replace internal standards of behavioral direction and one becomes emotional, impulsive and irrational. And, if additional factors such as provocation and endemic political frustration are added to this already combustible mix, the result may well be diminished responsibility."

I refer to this quotation because it accurately and usefully reflects the views of the expert witnesses in our case. They were, as SPOELSTRA J put it, that a member of such a group subject to these influences "becomes disinhibited and there is an increase in the probability

that his normally restrained behaviour will be abandoned if the context offers the opportunity to do so".

The court a quo accepted the evidence of the phenomena referred to. There is no problem about this. They accord with age-old descriptions of the mob as "our supreme governors" and "that great enemy of reason" (see Stevenson's Book of Quotations sv "The people"). And there is no dispute that this mob psychology was, in principle, capable of constituting a mitigating factor (as it did in Thabetha's case). Whether it does is in each case a question of fact, namely, did what I call the group influence result in the accused's responsibility being diminished to an extent sufficient to reduce his moral guilt? SPOELSTRA J, in the light of the test then applicable, concluded that extenuating circumstances had not been established. Though holding that "the accused were influenced to varying degrees by these factors" and

that "none ... was left completely unaffected by one or more of these influences" it would seem that the learned judge was not convinced that this was sufficient to diminish their moral responsibility for what they did.

It is necessary to deal with the evidence in some detail. Each appellant described how he was affected and what his state of mind was shortly before the murders. Thus accused 2 said that: "I was very very much angry in such a manner that I did not even understood that whatever I was doing. I was just confused. I did not even know if I was doing the right thing or not." According to accused 5, when he got into the car (to take the first three deceased to Prolecon) "dit het gelyk asof die werkers was nou mal ... ek (was) ook kwaad". Asked why he stabbed, he answered: "Ek sal dit nie kan eintlik sê nie maar al wat ek kan sê is dat dit het gelyk asof ons was mense wat getoor was". On hearing that the workers were to be killed

accused 7 said "I was fed up and I did not know what to do. I appeared to be a madman and I was not so certain of my whole thinking whether I was in my senses". Asked to describe his feelings at the scene of the crimes, he said: "Wel al wat ek kan sê is dat ek was nie in my volle gedagtes nie en verder wat daar gebeur het het dit gelyk asof dit is net 'n droom". The general tenor of accused 9's evidence is that he too was swept up by the atmosphere at Cosatu House.

The expert evidence regarding accused 2 was that though clearly de-individuated, the degree thereof was less than the other accused. Accused 5 was thought to have been intensely de-individuated; he "simply did not have the ability for self-reflection, he did not have adequate self-awareness to come to a reasoned decision about the moral propriety of his actions". Accused 5's evidence was that

at Prolecon he was given a knife and told to stab (the first deceased). Based mainly on this, the opinion was expressed that he had also been exposed to "fairly clear-cut obedience pressures. He is a man who appears to have been worked up by situational forces into a highly abnormal state of mind and then, once he was in that abnormal state of mind at the scene of the murder, ordered by someone to stab the victims, which he did in a frenzied, ineffectual manner quite unlike the cold-blooded, single-minded behaviour of somebody who is in full possession of his senses I think". Accused 7 was said to have been "clearly de-individuated". This would probably have "increased his vulnerability to powerful obedience pressures". These had reference to accused 7's evidence that, having realised that it was "wrong" to kill deceased, he had wanted, on seeing the four deceased being attacked, to flee the scene. But he was told to stay there. And he was instructed to

pick up the rock and strike the four deceased with it (which he then did). Accused 9, who because of his anger and frustration was said to be a "walking time-bomb" when he arrived at Cosatu House on 28 April, was "probably in a very high state of de-individuation" (during the events that followed); "his actions ... are ones that just defy any kind of rational person analysis". He displayed "an almost sheep-like conformity to the unanimous group pressure in Cosatu House... (He) presents a classic picture ... throughout his evidence of pure, unreflective conformity". With regard to all these accused, one of the psychologists, a Dr Colman, summed up as follows:

> "The fact that these men behaved in the manner that seems to have been quite out of character is itself a remarkable fact, one that leads me at least to the strong presumption that unusual and powerful causal factors must lie behind their uncharacteristic behaviour... I have no doubt in my own mind that these forces were very powerful in every case and that they go a long way towards explaining why the accused behaved in what, for all of them I think, was a wholly

> uncharacteristic manner. It is my honest opinion as an experienced social psychologist that these situational forces, taken together, were probably sufficiently compelling to induce most ordinary people to behave in a manner similar to the way the accused behaved, were they but to be exposed to the same psychological pressures. Although none of these situational forces is irresistible and that much is clear from the scientific evidence, their combined effects were in all cases so powerful, given the most unusual confluence of circumstances in Cosatu House, that it would have taken unusual personal qualities I believe to have resisted them altogether".

Counsel for the State launched a wide-ranging and comprehensive attack on the cogency of this evidence. In broad outline, it was the following. The experts took considerations into account which it was said were too far removed from the events of 28 April to give rise to any justifiable inferences. They did not interview appellants. They relied on their evidence as recorded. But the trial court had correctly found appellants to have been unsatisfactory witnesses and had with justification rejected certain parts of their evidence. In particular,

so the argument continued, accused 2, 5 and 7 dishonestly minimised the role they had played at Prolecon. There were strong indications that accused 2 was not as passive at the scene as he alleged. It was said that besides the petrol, he also had with him the knife and rope. And the veracity of the evidence that accused 5 and 7 were subject to obedience pressures was challenged. The experts conceded that in some other respects their opinions that appellants were de-individuated were based on false premises. They agreed there were facts which were inconsistent with certain of their conclusions. For instance, accused 9 conceded that even as early as the beginning of April, he would have been prepared to kill non-strikers. It was also pointed out that appellants had, prior to 28 April, gone to Cosatu House on an irregular basis. The contention was that they therefore would not have been much affected by the atmosphere there. Even on the

day in question, some had not been exposed to it for very long. This was because they had either arrived there late or because, as in the case of accused 5, he had left Cosatu House to fetch the car. So he in particular had time to reflect. And, even more significantly, the duration of the drive from Cosatu House to Prolecon would have dissipated the influence of conditions at Cosatu House on appellants. There was also the further interval between the first three murders and the fourth. In the result, so Mr Ferreira submitted, the influence of events at Cosatu House was, at the time of the murders, no longer operative to any meaningful degree; the actions of appellants were calculated and wicked.

The argument is not without merit. Nevertheless, I do not think it can prevail. We have to approach the matter on the basis that it was for the State to disprove the mitigating factors under consideration. In my view, it

has not discharged this onus. Though appellants' credibility is suspect, their evidence stands uncontradicted. So does that of the experts. Accordingly, whatever criticisms there are of the defence evidence, there exists in these circumstances the reasonable possibility that (i) the duration of appellants' presence at Cosatu House on 28 April was sufficient to affect them as the psychologists state (though not necessarily in each case to the extent they allege); (ii) the influence of the mob there did not suddenly cease when appellants departed with the workers; (iii) though it thereafter might (in respect of certain appellants) have waned, their actions at Prolecon continued, to a substantial degree, to be determined by the inflammatory environment at Cosatu House; (iv) even if by then there was time for reflection, the element of obedience to and solidarity with the group and the strong inclination to conform, played a role. In brief, appellants suffered

from a lack of self-restraint, which it is fair to assume they would otherwise have exercised. They therefore acted with diminished responsibility. This being so, their moral guilt must, despite the brutality of the crimes and however reprehensible their conduct, be regarded as having, for this reason too, been reduced.

The inference that appellants are not normally of violent disposition is strengthened by a consideration of their backgrounds. Though of mature years (at the time of the trial they were aged 28, 25 and 36 respectively) accused 5, 7 and 9 are first offenders. Accused 2 (33 years old) has two previous convictions. They date back to 1983. One was for assault with intent to do grievous bodily harm and the other for common assault. I do not think that these detract from the conclusion referred to. All four appellants had, prior to the strike, been in the employ of SATS for a number of years. Each seems to have had strong

family ties and a sense of responsibility towards their dependents. Each testified to having remorse for what they had done.

Those then are the mitigating factors. Weighing them against those which are aggravating and having regard to the main purposes of punishment, is the death sentence the only proper sentence? The sense of outrage that society would naturally have and the need in these circumstances to take account of the element of retribution, must count heavily in favour of an affirmative answer. As I have said, these murders can only be regarded as very serious. Normally they would have merited the utmost rigour of the law. I have come to the conclusion, however, that the cumulative effect of the mitigating factors is such that the death sentence is not imperatively called for. Appellants were subjected to psychological forces which caused them to act in an uncharacteristically violent manner towards persons against whom they had an intense resentment. So

these crimes were committed under abnormal circumstances. There is no reason to think that appellants cannot be rehabilitated. Nor would the deterrent aspect of punishment be inadequately catered for by the imposition of a period of imprisonment. In all the circumstances, the interests of society would in my view be adequately served by appellants' lives being spared.

The periods of imprisonment to be imposed in substitution of the death sentences will obviously have to be substantial. The mitigating factors cannot detract from this. The sentences must be much heavier than those of certain co-accused who were also found guilty of murder (with extenuating circumstances) but whose participation in the murders was less active. Should the sentences of accused 2, 5, 7 and 9 be the same? It will be recalled that their participation in the murders differed. But I do not think that in the case of accused 5, 7 and 9 this is sufficient to justify their punishment being different. A proper

sentence in my view is one of 21 years' imprisonment (in respect of all four counts). This takes into account that they (and accused 2) were, prior to the outcome of their trial, in gaol for about two years. Accused 2 must be sentenced on the basis that his actual participation was confined to bringing petrol to the scene and that after the murders he poured the petrol over the deceased bodies. He therefore played somewhat of a lesser role than the others. He will be sentenced to 18 years' imprisonment. Here too the four crimes will be treated as one. Appellants were sentenced to certain further periods of imprisonment in respect of other related crimes which they were found guilty of. It will be directed that these run concurrently with the sentence that is now being imposed.

The remaining issue is the appeal of accused 6 against his sentence of 12 years' imprisonment. He was aged 25. He too has no previous convictions. The trial court found that he was also to some extent de-individuated,

that he probably suffered from some frustration or aggression and that conformity and obedience also played a part. It was on this basis, coupled with the fact that "he was inactive and at most an approving bystander", that extenuating circumstances were found. It was submitted that his sentence was unduly severe; this was especially so if regard was had to the 8 years' sentence that was imposed on a co-accused (accused 8). I do not agree. Accused 8's role was a lesser one than that of accused 6. The trial judge was generous to accused 6 in describing him as a mere approving bystander. He associated himself with the decision to kill the deceased. He helped escourt the first three deceased to Prolecon. He guarded them there whilst two of them were tied up. It is to his credit that he left the scene after the one deceased had been stabbed and after his head was crushed with the rock. Nevertheless, there is in my view no justification for interference.

The following order is made:

1. (a) The appeals of first, second, fourth and fifth appellants (accused 2, 5, 7 and 9) succeed. Their sentences of death are set aside.

(b) In substitution, the following sentences in respect of counts 12, 13, 14 and 15 (being the four counts of murder of which they were found guilty) and which for the purposes of sentence are treated as one, are imposed:

(i) In the case of accused 5, 7 and 9, 21 years' imprisonment,

(ii) In the case of accused 2, 18 years' imprisonment.

(c) The sentences imposed on appellants by the judge a quo in respect of certain other counts on which they were convicted are to run concurrently with the sentences now imposed.

2. The appeal of third appellant (accused 6) is dismissed.

NESTADT, JA

KUMLEBEN, JA)
) CONCUR
F H GROSSKOPF, JA)