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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 554/91

In the appeal of

MBUYISENI NGUBANE APPELLANT

v

THE STATE RESPONDENT

Coram: BOTHA, KUMLEBEN JJA et VAN COLLER AJA.

Date heard: 11 May 1992

Date delivered: 22 May 1992

J U D G M E N T

VAN COLLER AJA:

On 26 September 1991 appellant was convicted on two counts of murder in the Natal Provincial Division. He was sentenced to 20 years' imprisonment in respect of count 1. After the court had considered the mitigating and aggravating factors, the trial judge, Levensohn J, came to the conclusion that in respect of count 2, the death sentence was the only proper sentence. This appeal is only against the death sentence imposed in respect of the second count.

Appellant's co-accused in this case, to whom I shall refer as accused no 1, was convicted on count 1 but he was acquitted on count 2. He was also sentenced to 20 years' imprisonment.

The events that gave rise to the charges against accused no.1 and appellant took place during the evening of 27 August 1990. Thoko Ndlovu, a 41 year old married woman, and her 6 year old son, Sifiso Ndlovu, were brutally murdered at their home at the Maswazini area in the district of Pietermaritzburg. Not only were numerous stab wounds inflicted, but both deceased were decapitated. The body of Thoko Ndlovu was also severely mutilated and some of the organs were removed.

Accused no.1 and appellant pleaded guilty to the killing of Thoko Ndlovu, to whom I shall refer as the first deceased. The second count relates to her 6 year old son, the second

deceased. On this count appellant also pleaded guilty but accused no. 1 pleaded not guilty. Apart from certain admissions made by accused no. 1 and appellant at the beginning of the trial, the State also proved and relied on statements made by them. There were no eye witnesses with regard to what actually took place. Appellant adduced no evidence but accused no.1 gave evidence. His evidence can be summarised as follows. After the death of his brother, who had been murdered, his parents consulted a witch-doctor. The witch-doctor advised that the first deceased was responsible for the death of accused no. 1's brother. Shortly before she was murdered, accused no.1 saw the first deceased sprinkling muti at his home. He confronted her and she threatened him, saying that he would follow his late brother. The next day, accused no.1 asked appellant, who was a good friend of his, and whom he regarded as a cousin, to help him to kill the first deceased. He promised appellant a reward of R100. He gave him R50 and

the balance would be paid after the work had been done. They went to the home of first deceased during the evening of 27 August 1990 and they attacked her in the kitchen. While accused no. 1 was holding the first deceased, appellant stabbed her. The second deceased appeared from the bedroom, screaming. Accused no. 1 requested appellant to take the child back into the bedroom and to tell him to stop making a noise. Accused no. 1 then stabbed the deceased and decapitated her. He went to the bedroom and discovered that appellant had killed the second deceased. Appellant told him that he had understood from accused no. 1 that the child had to be killed. It was put to accused no. 1 during cross-examination by counsel acting on behalf of appellant, that there was in fact no reward offered. This was denied by accused no. 1. He also denied that he had wanted to silence second deceased permanently so that he would not be able to identify him as his mother's murderer. It also emerged from his evidence that it was

appellant who had decapitated the second deceased, but accused no. 1 denied that this had been agreed upon beforehand.

The trial court found that the it was reasonably possible that accused no. 1 did genuinely entertain the belief that first deceased practised witchcraft. It found that that this belief in the first deceased's supernatural powers constituted a mitigating factor. The trial court was prepared to find, although with some hesitation, that appellant's belief in witchcraft contributed to his participation in the elimination of the first deceased. This was accepted as a mitigating factor in his favour. Accused no. 1 was acquitted on the second count because the trial court found that his version could reasonably possibly be true, namely, that he had not given instructions that the child should be killed and that he had not foreseen the possibility that this would happen.

The trial judge came to the conclusion that the death sentence should not be imposed in respect of count 1. With regard to count 2, however, he concluded, as I have already pointed out, that the death sentence was the only proper sentence.

The effect of the Criminal Law Amendment Act 107 of 1990 has been considered in a number of decisions of this Court. In S v Matshili and Others 1991 (3) SA 264 (A) at 268 C - D Nestadt JA summarised the new approach and task of this Court as follows:

> "In brief, our task is to consider the 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 purpose of punishment, the death sentence is the only proper sentence."

There are very few mitigating factors in this case. It was contended on behalf of appellant that the two killings were

inextricably connected and that the belief in witchcraft influenced his actions in murdering the second deceased. Reliance was in this regard also placed on the fact that second deceased received 17 stab wounds and that he was decapitated. This argument was also advanced at the trial, but it was rejected by the trial court. It was found that there was no factual basis for this contention. I am in agreement with this finding. There is no evidence to justify a conclusion that appellant regarded the killing of the second deceased as part and parcel of the elimination of the sorcerer. Such a conclusion would be pure speculation. I may add that although the reason for the decapitation of the second deceased remains a mystery, it is not necessary to find an explanation for this gruesome deed.

It is clear from the evidence that the motive for the killing of the second deceased was to silence him. He was

killed so that people would not be attracted to the scene by his screams. It is indeed very probable that the motive was twofold and that it was also considered necessary to kill the second deceased in order to eliminate him as a person who witnessed the murder of the first deceased. The motive for the killing of the second deceased is a very serious aggravating factor. The other aggravating factors in this case are obvious and need not be detailed. It is, however, necessary to refer briefly to the reward that was offered to the appellant, and to his previous conviction.

It was contended on behalf of the State that the fact that appellant was motivated by reward should be regarded as an aggravating factor. It seems to me, however, that the reward relates mainly to the killing of the first deceased. It can only be relevant to the second count, and then as an aggravating factor, if appellant had in fact acted on and misunderstood the instruction from accused no. 1. Should

this be accepted as reasonably possibly true, it does not detract from the motive referred to above, and can in any event not be a mitigating factor.

Appellant was 30 years old at the time when the offence was committed. He has an unsophisticated background and only reached std 2 at school. In November 1980 appellant was convicted of rape and sentenced to 7 years imprisonment and 6 cuts. According to the SAP 69 form, a piece of iron was involved. Although approximately 10 years have elapsed since this crime was committed, it is an aggravating factor, and it indicates that appellant has shown an inclination to violence in the past.

I now turn to the question whether, in all the circumstances of this case, the death sentence is the only proper sentence. The possibility of rehabilitation cannot, despite the previous conviction, be ruled out. However,

the other dictates of punishment, particularly the retributive element, far outweigh this possibility. Taking all the circumstances into account, this is, in my judgment, a case where society demands the supreme penalty and where the death sentence is imperatively called for.

The appeal is dismissed.

A.P. Van Coller

VAN COLLER AJA

BOTHA JA)

KUMLEBEN JA) concur