Case No 270/92
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MASHUDU SAMUEL MATALA — First Appellant

JOSIA DAVHANA MULAUDZI — Second Appellant

NORMAN RAMALATA — Third Appellant

and

THE STATE — Respondent

CORAM: E M Grosskopf, Milne, Nienaber JJA

DATE OF HEARING: 23 February 1993

DATE OF JUDGMENT: 16 March 1993

J U D G M E N T

/MILNE JA....

MILNE JA:

The three appellants and eleven others were charged in the Supreme Court of Venda with the murder of Emelinah Makulani, a 63 year old woman who was married to one Samuel Makulani. Makulani was an 81 year old priest of the New Apostolic Church of Zion who described himself as the bishop of the congregation in an area of Venda called Mathuli B.

The appellants were respectively Accused Nos 1, 2 and 5 in the court below and when I deal with them individually I shall refer to them as such in this judgment.

The appellants were found guilty of murder. After hearing evidence in extenuation, the trial court found that there were no extenuating circumstances and sentenced them to death. At that stage, the law in Venda

regarding the death sentence was the same as the law had been in the Republic before the amendments effected by Act 107 of 1990. It was however anticipated by the end of the trial that the law in Venda would, in the near future, be amended so as to make it accord with the law in the Republic and, for that reason, the trial court granted the appellants leave to appeal against the death sentence and against the finding that there were no extenuating circumstances. The contemplated amendments were duly effected by the Criminal Law Amendment Proclamation 16 of 1991 of Venda. The terms of section 19(1) of that Proclamation have the same effect as the provisions of section 20 of Act 107 of 1990. It follows that this appeal must be dealt with in accordance with the principles established in a number of decisions of this court, the effect of which is conveniently summarized in S v Mlumbi en 'n Ander 1991(1) SACR 235 (A) at 249b - 250j.

There was no dispute at the trial about the course of events on the day when the deceased met her death. This is set out in the judgment of the court a quo in the following passage:

> "During the evening of 21st March, 1990, the deceased and her husband retired to bed. They were alone in the house. They were awakened by the sound of objects thrown against the walls and through certain windows. There was also a loud knocking on the door. When the bishop opened the door he saw a crowd of people on the front stoep and in the lapa in front of the stoep. As it was dark he could not recognise anybody but he realised that there existed a danger. He fled back into the house, gained exit through a bedroom window and escaped into the darkness. He did not see what took place at his house but after what he estimates to be approximately 50 minutes, he heard the sound of gunshots and he then went back. He found the police on the scene and he also found his wife in the lapa. She was dead and had obviously been burnt to death.
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> There were some very unsatisfactory factors in the medical evidence regarding the exact cause of the deceased' s death, but we do not regard it as necessary to deal therewith. As counsel for all the accused conceded and, in our view, correctly so, all the evidence clearly showed that the deceased died as a result of the fact that after a tyre was placed around her neck she was doused with a certain amount of petrol, and set alight.
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> It is further common cause that during the late afternoon or early evening of the fateful day an action was set in motion by certain people to collect the male youths living in the Mathuli B area

to attend, a meeting in the veld near a water pump not very far from the church and the house of the deceased and her husband. Summons to the meeting took place by word of mouth and eventually a sizeable crowd estimated by some of the witnesses as 40 to 50 persons, assembled at the appointed place. At least some of these people had been rounded up individually from their homes in the vicinity.

At the meeting a chairman took control and informed those present that the purpose of the meeting was to discuss the problem of people who practised witchcraft and he further indicated that such people had to be burnt. He invited those present to name people whom they know to practise witchcraft. A few names were mentioned, amongst others that of the deceased. Also amongst others the name of one Leah was mentioned but it was said that the meeting was not looking for amateurs but was wanting the names of people who had been practising for a long time.

After the deceased had been clearly identified and her identification apparently received general agreement somebody raised the question as to where petrol and the tyre were to be found. According to the evidence there are no petrol stations in the vicinity. Two kraals were then suggested apparently because they were places where vehicles or other equipment like generators would be found to siphon petrol from. It was further suggested that a small group be detailed to fetch the petrol and the tyre and a party of 5 was then nominated for this purpose. The appointment or nomination took place by way of proposals from the crowd, confirmed by the chairman. The petrol party then left on their mission and it was arranged that after they obtained the necessary equipment they would give a sign by way of whistling for the crowd to join them.

Petrol in a plastic bucket sealed with a lid was obtained from the owner of a certain kraal from stock held for a generator. A tyre was also obtained from another kraal. Apparently after the pre-arranged sign was given the petrol party and the crowd then again met. The whole crowd then proceeded towards the deceased's house. At that stage a common intention to kill the deceased undoubtedly existed, at least among some of the members of the crowd, while everybody present was aware of such intention.

They gathered around and in front of the house and it was not disputed that the house was stoned and the front door banged upon. Eventually the deceased appeared at the front door and enquired why they wanted to kill her. There is some difference in the evidence as to what their immediate reaction was. One witness says she was told to pray while another says she was asked with whom she practises witchcraft and upon her denial that she did so, was accused of being a liar. What is however agreed upon is that she was pulled off the stoep, sjambokked and hit in the face.

The tyre was then placed over her shoulders, petrol poured over her body and obviously also over the tyre. She was then set alight. Whilst screaming and moving around she managed to throw off the tyre but her clothes and a blanket she had around her were ablaze and she fell down. Some of the crowd then started to run or move away but they were threatened and ordered back. While the deceased was still alive and mumbling or moaning, the burning tyre was replaced on her body. Only thereafter did she become still and died."

It was furthermore common cause that all the accused were present when the deceased was killed. What was in issue at the trial was the nature of the roles played by the various accused and the extent, if any, to which they were subjected to duress by others. The trial court in fact acquitted Accused Nos 8 to 14 on the basis of duress.

The appellants were however found to have played a leading role.

The court rejected Accused No 1's evidence that he played that role because of threats. These threats were uttered to other people to the effect that if they did not attend the meeting they might find that their houses would be burned. The trial court held that Accused No 1 had actively participated in the decision to kill the deceased, had actively participated in the preparations to do so and in the initial execution of the

plan and that he had associated himself with the common purpose to murder the deceased by proceeding to the scene. With regard to the alleged threats the court found that such threats had played no part in his actions. It was found that:

> "His status as a senior student who had some years teaching experience most probably made him fit for the role (of chairman of the meeting) in the eyes of the others. Apart from that he has got a forceful appearance and a composure that one can imagine would impose respect. He is well-built and from what we have observed from him in the witness box able to do his work well.
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> We are satisfied that Accused 1 actively participated in the scheme to kill the deceased, that he assisted and to a large extent instigated the plan to kill her and that he associated himself therewith up to the end." (My parenthesis).

In fact it appears from the judgment dealing with extenuating circumstances that his counsel conceded that Accused No 1's claim of coercion fell to be rejected.

It is relevant to refer at this stage to Accused No 1's own version of the events which preceded

the meeting at which the killing of the deceased was discussed. This may be summarised as follows: Because boycotts were in force at the school where he was teaching he took a taxi home and alighted at a cafe about four kilometres from his home where he lived with his parents (his home was next door to that of the deceased who was his aunt). He remained at this cafe until about 7 or 8 p.m. when a group of persons arrived in a motor vehicle. Accused No 4 and Accused No 5 (Appellant No 3) came to him and told him to accompany them on this vehicle because there was "work to be done". They drove to a store which was near the deceased's home and Accused No 5 then accompanied him to his, Accused No 1's, home to fetch a jacket. On the way Accused No 5 told him that the "work" referred to earlier was the work of holding a meeting at a certain water pump in the vicinity "to discuss about" people who practised witchcraft and that such people "must be burned". On arrival at the water pump they sat waiting for others to come. There were at

that stage only seven of them altogether. Others did not come and Accused No 5 then gave Accused No 1 a sjambok and they then rounded up "a group of boys". They met with other "boys" and eventually a meeting was held "the purpose of which would be to burn people who practised witchcraft". Accused No 1 was the chairman of the meeting and he then performed the actions described earlier.

It was submitted on behalf of Accused No 1 that the following were mitigating factors:

(a) He and the other members of the group were motivated by a belief in witchcraft.

(b) He was not a party to the original planning of the killing.

(c) He acted in response to threats that were uttered to others.

(d) His personal circumstances and in particular the absence of the previous convictions and his relatively young age established that there were good prospects of rehabilitation.

Accused No 1 stated quite unequivocally in his evidence that he did not believe in witchcraft. The fact that a particular accused person has denied a belief in witchcraft is not of course conclusive. The circumstances may indicate such a belief cf S v Motsepa en 'n Ander 1991(2) SACR 462 (A). There is not the slightest evidence that the deceased had ever behaved in any way which could have afforded grounds, reasonable or otherwise, for a belief that she was practising witchcraft or anything remotely akin to witchcraft. The only evidence that witchcraft was involved was the evidence already referred to viz, that it was stated at the meeting that witches must be burned and several persons including Accused No 2 said at that meeting that

various persons including the deceased were practising witchcraft. Each of the appellants denied any belief in witchcraft and there is simply no evidential basis upon which one could find as a reasonable possibility that any of them believed that the deceased had to be killed in the interests of the community; still less that any of them had a belief of the nature referred to in Motsepa's case at p 470g - i.

The trial court found that it had not been proved that Accused No 1 was a party to the original planning of the killing. This could, perhaps, more readily be described as the absence of an aggravating feature, but in any event the trial court's finding that once he was let into the secret he threw himself whole-heartedly into the role of one of the leaders in the execution of that plan is fully justified. I refer not only to his acting as a directing force at the meeting but also to the rounding up of youths prior to the

meeting without which this tragedy would never have occurred.

As already mentioned the trial court, rightly in my view, rejected the evidence that Accused No 1 was ! in any way coerced or unwilling to act as he did.

The personal circumstances of Accused No 1 are as follows. At the time he committed this offence he was 22 years old. He matriculated at the end of 1987 and during the years 1988 and 1989 he was a temporary primary school teacher. At the beginning of 1990 he enrolled as a student at the Teachers Training College and at the time of the trial was a second year student at that institution. He was a first offender. These are undoubtedly mitigating factors and counsel for the State fairly conceded that the first accused "is probably a good candidate for rehabilitation".

There are a number of aggravating features.

(1) The horrific nature of the crime. This woman of mature years was, for no apparent reason, violently dragged out of her home in the middle of the night, punched, sjamboked and burned to death. What is more, when in her agony she managed to throw off the burning tyre her assailants were not content to leave matters as they were but, with some difficulty, replaced the burning tyre until their aim of murdering her was finally and painfully accomplished.

(2) The fact that he played a leading role - this despite the fact that the deceased was not some faceless symbol of authority but his own aunt who lived next door to him.

(3) This was not an offence committed in the heat and smoke of a sudden mob violence, but a planned attack which was preceded by a certain amount of deliberate preparation in the form of the rounding up of

youths, the holding of a "meeting" and the searching for and obtaining of the petrol and the tyre with which to carry out their nefarious purpose.

It remains now to decide whether in the light of all the relevant circumstances and the well-known objects of punishment the death sentence is the only appropriate sentence. Before doing so it is necessary to consider the position of the other appellants.

The evidence of the State witnesses implicated Accused Nos 2 and 5 heavily in the actual commission of the offence. I shall at a later stage deal fully with the part played by Accused No 2. The evidence for the State against Accused No 5 was that he was the one who ordered one Joseph to close the cafe and come to the meeting and threatened that the cafe and the house would be burned if he did not do so. He was the one who suggested the fetching of the petrol, volunteered to be

one of the petrol detail and who suggested the place where petrol could be found. He took the lead when the small party went to fetch petrol, he approached the owner of the particular kraal and arranged for the petrol to be delivered; he with Accused No 2 placed the tyre over the head of the deceased and he, Accused No 5, struck the match and set the deceased alight. He was the person who, when the people wanted to leave after the deceased caught fire, turned them back, knife in hand. Neither Accused No 2 nor Accused No 5 gave evidence until the stage when extenuating circumstances were being considered. The comments of the trial court are as follows:

> "This led to a rather extraordinary situation. When they (Accused No 2 and 5) took the stand it appeared that their evidence was directed at showing the absence of guilt in all respects. They claimed only to have been present because of duress by Accused No 1 but not to have participated in any sense in the events that led to the deceased's death or in the killing itself." (My parenthesis).

The judgment on extenuating circumstances continues:

> "As far as both Accused No 2 and 5 are concerned we already found that they did not only take a leading role in the events that led up to and inspired the murder, but that they are in fact the persons who effectively executed the deed, No 2 by dousing the deceased with petrol and No 5 by setting her alight. The monstrosity of their act and the shocking immediate effect thereof did not deter them or bring them to their senses but when the deceased succeeded in throwing off the tyre in the first instance, they stopped the crowd from going away and ordered the replacing of the burning tyre on the deceased."

It was submitted on behalf of Accused Nos 2 and 5 that the following were mitigating factors:

(a) A number of similar instances occurred in Venda at this time.

(b) The two accused may have been 'deindividuated' or 'desensitised'.

(c) The murder was politically inspired.

(d) The personal circumstances of the two accused were such that there was a good prospect of rehabilitation.

I deal firstly with the question of "deindividuation" and "desensitisation". These psychological phenomena have frequently been referred to in the reported cases, see e.g. S v Matshili & Others 1991(3) SA 264 (A) at 270I - 271G. In most if not all of these cases there was expert evidence as to the nature of such phenomena and in some of them as to their effect upon the accused in those cases. It does not seem to me however that the absence of such expert evidence is necessarily a bar to the court considering what Nestadt JA in Matshili's case called "mob psychology". In fact Hiemstra: Suid-Afrikaanse strafproses 4th ed p 625 states, presumably on the basis of common judicial experience, that:

> "Mense wat in hul wese nie geweldenaars of moordenaars is nie, kan 'n ongewone geweldsneiging openbaar wanneer hulle 'n massa-psigose ontwikkel. Die een sweep die ander op, 'n skugtere siel word moedig wanneer hy andere geweld sien pleeg. Dit hoef nie 'n groot skare te wees nie. So min as vier of vyf kan ' n wedersydse opswepingseffek hê. In sulke omstandighede kan iemand wat in die hof se oordeel nie 'n gewelddadige natuur het nie, verskoon word van die hoogste vonnis. Die opbruising van

> gesamentlike aksie kan 'n versagtende omstandigheid wees."

As stated in Matshili's case it is a question of fact whether mob psychology resulted in the accused's responsibility being diminished to an extent sufficient to reduce his moral guilt. There are however several obstacles in the way of a finding that any of the appellants were so influenced. The first is that desensitisation did not, on the evidence, play any role since there is nothing to suggest that in this rural part of Venda the appellants were subjected to the desensitising influences so often experienced by dwellers in Black townships who are fed virtually a daily diet of violence. Secondly, each of them played an important role in the events which preceded the killing and, what is more important, in events which preceded the meeting. Such actions were performed therefore at a time when there were only a handful of youths present and when

there was nothing taking place which could result in the one inflaming the passions of the others. Thirdly, none of them said that he was so influenced.

This brings me to the question of the motive for the killing. The evidence left this uncertain. As already mentioned it was submitted on behalf of Accused No 1 that the motive for the killing was the belief that the deceased was a witch. This has no evidential basis nor is it reasonably possible on the facts. It was submitted on behalf of Accused Nos 2 and 5 that the killing was politically inspired. There is no evidence to support the notion that anyone believed that the deceased belonged to a party or group to which any other party or group was hostile. There is however evidence of a number of similar attacks taking place at about this time. Accused No 1 also seemed disposed to agree that the boycott of the schools was politically inspired. I shall call this the Venda unrest factor and I shall deal

with it more fully at a later stage. The question was raised of some animosity existing between the appellants and the deceased because the mother of Accused No 2 was the widow of the previous bishop during whose term of office the church was built. This was adverted to by the trial judge when delivering the judgment of the court on the guilt or otherwise of the accused, but having quite | properly explored this possibility at the stage when ' evidence in extenuation was led the court concluded that the evidence was confusing. It was found that there was | evidence that Accused No 2's mother did derive certain financial benefits from the fact that she was the widow of the previous bishop and that these benefits had declined or disappeared by the end of 1989. This factor was not however relied upon by any of the appellants and it remains a matter for speculation.

I deal now with what I have called the Venda unrest factor. Evidence was put before the trial court

through the investigating officer to the effect that the occurrence took place during a general time of unrest in Venda, and it was found that at the time when this offence was committed, several incidents of mob attacks had taken place on older persons. Counsel for the State, in a praiseworthy effort to assist this court and without objection from counsel for the appellants, expanded on this information. He stated that during the period January to April 1990 there had been no less than thirty attacks throughout Venda which followed a particular pattern. There were 247 accused persons involved in these attacks which had resulted in the death of 45 persons. The pattern in these cases was that a group of "youths" aged between 16 and 30 years attacked and in some instances killed a number of people in Venda, in all cases alleging that the persons attacked had been practising witchcraft. Later in 1990 there was a military coup in Venda and from that time up until the present time there had been only two such cases. In the

light of this information I consider it a reasonable possibility that some forces were at work which influenced young men in Venda to launch such attacks. As already mentioned they took place, so Mr Morrison informed us, throughout Venda. It would obviously have been desirable had such information been placed before the trial court. It was not, for the very good reason that this was one of the early trials and the full facts now put before us were not known at that time. Nevertheless there exists the reasonable possibility that this was not a case where the deceased was killed because of some unrevealed grudge held by the accused but one in which forces, possibly political, were at work which had as their object the breakdown of law and order in Venda. That was not the evidence of the accused at the trial but it is I consider a reasonable possibility on the information which has now been put before us. What is more it accords with the general probabilities. Young people are susceptible to influence and a brief study of

the Law Reports in the Republic over the last five years and in particular in the period since the beginning of 1990, reveals as a reality of life in South Africa that young people have with distressing frequency been influenced by one political force or another to commit numerous acts of violence against those perceived as political opponents. The degree of influence and its effect will of course depend on the particular circumstances of each case. All that can be said on the particular facts of this case is that it is reasonably possible that it supplies the motive here and that this is, generally speaking, somewhat less reprehensible than some other forms of killing e.g. for gain, to prevent detection of another crime.

I deal now with the personal circumstances of Accused No 5. He was a first offender and a young man. The evidence is uncertain as to his age but the court found that, giving him the benefit of the doubt, it had

not been established that he was older than 19 at the time of the commission of the offence.

I was initially inclined to think that the death sentence was the only proper sentence in the case of all three the appellants. This outrageous killing of an innocent woman by a barbarous gang of youths, the extreme cruelty of the manner in which she was killed and the determination that she should burn to death by the replacing of the burning tyre on her body are gravely aggravating features. I have, however, come to a different conclusion in the case of Accused No 1 and Accused No 5.

1 deal first with Accused No 5. The fact that an accused is only 19 years old and a first offender are usually strongly mitigating factors, but in exceptional circumstances the death sentence will be imposed notwithstanding the presence of those factors see e.g. S

v Mofokeng 1992(2) SACR 710 (A). After some hesitation I have come to the conclusion that in the case of Accused No 5 the circumstances are not so exceptional as to make it apparent that the death sentence is the only proper sentence. In coming to this conclusion I am influenced by what I have described above as the Venda unrest factor.

Nor do I think that sufficient grounds exist for imposing the death sentence on Accused No 1. Accused No 1 is older than Accused No 5 and he was in a position where he was able to and did exercise some authority, but, unlike Accused Nos 2 and 5, he was not physically involved in the actual assault upon the deceased.

In all the circumstances a very lengthy term of imprisonment is in my judgment an appropriate sentence in the case of Accused Nos 1 and 5. By reason of the factors referred to above I do not think there are valid

grounds for differentiating between them. I would have imposed a sentence of 25 years imprisonment on each of them, but as they have been in custody for very nearly 3 years I propose to reduce the sentence by that period.

The situation of Accused No 2 is different. He was the only fully mature person amongst all the youngsters who took part in the murder. He was 31 years old with a wife and three children. There was no evidence that he belonged to any political grouping, let alone one that was antagonistic towards the deceased or her husband. Indeed, he professed to be so naive about political matters as not to know what the ANC was. He assumed a prominent role at the meeting which preceded the murder. There was evidence that he was armed with a sjambok and prevented others from leaving the meeting. He opposed a suggestion that the meeting be postponed. He identified the source where petrol could be found, nominated members to the petrol patrol and threatened

them with violence should they fail to return. He was the one who identified the deceased as a supposed witch who should be burnt to death. (The deceased, incidentally, was the wife of the bishop who succeeded his father: his mother was the previous "juffrou".) It was also Accused No 2 who said, when Leah's name was mentioned as a witch, that they were not interested in burning "amateurs". He herded and accompanied the mob to the deceased's house. He opened the gate and there was evidence that he confronted the deceased and accused her of being a witch. Thereafter he struck the deceased with a sjambok, placed the tyre on the deceased with the help of Accused No 5, and poured petrol over her. Accused No 5 threw the burning match which set her alight. Accused Nos 2 and 5 were found by the trial court to have stopped the crowd from leaving the scene of the burning and to have ordered the replacement of the burning tyre on the deceased.

Accused No 2 was asked to explain why the youngsters included him in their group. This gave rise to the following exchange:

> "Wasn't it strange that they should go out of their way to include you (sic) accompany them?- - -It is strange.
>
> Can you think of any possible reason why they did this to include you?----Maybe they included me in order to protect themselves or to shield behind me. In what manner?----By the way by doing what they did, killing the deceased in this case."

This is not the answer of a man who was carried away by the mood of a mob.

Accused No 2 has a previous conviction for assault with intent to do grievous bodily harm which, since he was sentenced in 1983 to a fine of R60, is neither recent nor serious. In his case, too, it was conceded on behalf of the prosecution that he was reasonable material for rehabilitation. Nevertheless his maturity, compared to his two co-accused, puts him in a

different bracket. In my view his is one of those cases where the consideration of retribution outweighs the mitigating circumstances in his favour to such an extent that he is deserving of nothing less than the death sentence.

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In the result, in the case of Accused Nos 1 and 5 the appeal succeeds and the sentence of death is set aside, and a sentence of 22 years' imprisonment is substituted for the death sentence. In the case of Accused No 2 the appeal is dismissed.

A J MILNE Judge of Appeal

E M GROSSKOPF JA]
] CONCUR
NIENABER JA]