Case No 428/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MAUBA DANIEL MALIMA	First Appellant
MUSOLIWA PATRIC SADIKI	Second Appellant
ALUWANI PIET MHLANGA	Third Appellant
MBOFHENI MICHAEL MUSHANDANA	Fourth Appellant

and

THE STATE	Respondent

CORAM: VAN HEERDEN, VIVIER et HOWIE JJA

HEARD: 29 August 1994

DELIVERED: 2 September 1994

J U D G M E N T

HOWIE, JA
.....

HOWIE, JA

With the leave of this Court the four appellants, all minors, appeal against the prison sentences imposed on them consequent upon their conviction in the Venda Supreme Court on a charge of murder.

First appellant was sentenced to 12 years' imprisonment, second appellant to 8 years' and each of the remaining appellants to 10 years, half of which was conditionally suspended.

Appellants' convictions followed upon proof that on 20 March 1990 they had participated, as members of a group of somewhere between 20 and 40 young men and youths, in the mob killing of an elderly woman who was suspected of being a witch. Her kitchen hut was set on fire, and she was forced into it and burnt alive. The whole murderous episode was organised, led and seen through to conclusion by an adult named Bobby Mpilo who was also indicted but

absconded before trial.

First appellant was 19 years of age at the time. In a statement (admitted in evidence) which he made to a magistrate after his arrest, he confessed to having ordered the deceased into the hut and, when she resisted, to throwing a stone which struck her, causing her to fall inside. He added that when she tried to get out he and others successfully prevented her escape by throwing stones at her.

I am not persuaded that the trial Court misdirected itself in the factual findings relative to this appellant's sentence or that any other circumstance exists which warrants interference in his case.

Second appellant was a mere 15 years old at the relevant time. When called upon to plead in a magistrate's court prior to the trial, he pleaded guilty. In support of that plea he admitted having killed the

deceased by causing the burning roof of the hut to collapse while the deceased was inside. Testifying in his defence, he said that Bobby Mpilo forced him to be present and to do what he did. That version was rejected by the trial Court for reasons which were not attacked on appeal. I am not satisfied that his sentence was vitiated by factual misdirection but the essential question is whether there were circumstances which warranted the period of imprisonment he was ordered to serve being materially longer than the term of direct imprisonment imposed on each of third and fourth appellants.

They were 17 and 16 years old respectively when the murder was committed. It was common cause that they set the hut on fire. Each gave evidence alleging that Bobby Mpilo had compelled them to do so by assaulting them. The trial Court rejected this evidence but, on the basis of certain State evidence which was found to be reliable,

stated that although they were not assaulted by Bobby Mpilo

> "....there is a slight possibility that it could be reasonably possibly true that (they) were to a certain extent pressurized by (him) to set the hut .....alight".

Later in its judgment the Court added

> "It is .... reasonably possibly true that they could have been threatened that they might be assaulted should they not comply with the instructions."

Quite how the trial Court reached these findings one is not able to determine. Be that as it may, it would seem that the possible "pressure" conceivably exerted by Bobby Mpilo was the sole ground upon which these appellants received shorter terms of direct imprisonment than second appellant.

There are two ways of looking at the matter. If the "slight possibility" favouring third and fourth appellants was justifiably found to exist there is, viewing the acceptable evidence as a whole, an equal possibility that second appellant, as one of the youngest in the crowd,

was just as susceptible to Bobby Mpilo's leadership, influence and persuasion as third and fourth appellants. They were after all, not very much older than second appellant. There is also a reasonable possibility, inherent in all the circumstances, that it would, typically, have been those at the youngest end of the spectrum who would have been singled out to do the dirty work.

The other approach is that, upon a careful analysis of the evidence, there was really no greater tenable basis for finding the possibility of pressure upon third and fourth appellants than there was in the case of second appellant. On either footing there were, in my view, inadequate reasons for sentencing second appellant more harshly than they were. Second appellant's appeal must therefore succeed.

It remains to say that I am not persuaded that

there is any ground to interfere with the sentences imposed on third and fourth appellants. The following order is made:

1. The appeals of first, third and fourth appellants are dismissed.

2. The appeal by second appellant is allowed. The sentence imposed upon him by the trial Court is set aside. Substituted therefor is the following:

> "10 years' imprisonment, of which 5 years' imprisonment is suspended for 5 years on condition that the accused is not convicted of any offence, committed during the period of suspension, of which violence upon the person of another is an element and in respect of which not less than 12 months' unsuspended imprisonment is imposed."

C T HOWIE, JA

Van Heerden JA) Concur
Vivier, JA)