REPORT

Case number 400/93

/al IN THE SUPREME

COURT OF SOUTH AFRICA (APPELLATE DIVISION) In

the matter between:

MKHACANI DAVID BALOYI Appellant

and

THE STATE Respondent

CORAM : SMALBERGER, KUMLEBEN JJA

et KANNEMEYER AJA

DATE OF HEARING : 24 FEBRUARY 1994

DATE OF JUDGMENT : 21 MARCH 1994

J U D G M E N T

KANNEMEYER AJA/.....

KANNEMEYER AJA:

The appellant appeared before Curlewis DJP, sitting with assessors, in the Northern Circuit Local Division of the Transvaal Provincial Division of the Supreme Court charged with four counts of murder and one of arson.

The count of arson alleges that, on the night of 25 May 1991 and at Shitlhelane in the district of Malamulele, the appellant wrongfully, unlawfully and intentionally set fire to and set on fire a house, an immovable structure, the property of one Joel Maswanganyi, which was destroyed as a result.

The four counts of murder refer to the death of the inmates of these premises, a hut. They were Nkiyasi Maswanganyi, a seventy year old woman ("the deceased") and three children, namely Enock Mathebula, aged eight years. Lucky Mathebula, aged five years and Sithembile Mathebula, aged two years ("the children"). The deceased managed to

get out of the burning hut but died subsequently as a result of the burns she had suffered. The children were all burnt to death in the hut.

On arraignment the appellant pleaded not guilty on all five counts. After evidence had been led however, he was found guilty on all the counts. He was sentenced to death on each of the four murder counts. No sentence was imposed on the arson count in respect of which the learned Deputy Judge President postponed sentence pending the decision of the appeal to this Court in respect of the four murder counts. There is thus an appeal before us, in terms of section 316(A)(1) of Act No 51 of 1977, in respect of the convictions and sentences on the four murder counts, but there is no appeal against the conviction on the arson count.

At this stage it is appropriate to draw attention to the decision of this Court in S v

Mathebula and Another 1978 (2) SA 607 (A) in which it was held that where a murder count is joined with other counts and the death sentence is imposed on the murder count, the Court should also impose sentences on the other count and should not postpone sentence thereon sine die unless there are special circumstances requiring this to be done. This Court has no jurisdiction to impose a sentence on the arson count, as the trial Court ought to have done, as no appeal in respect of this count is before us: S v Cassidy 1978 (1) SA 687 (A) at 690F - 691B. The result is that, should the appeal against the death sentences be successful or should they be commuted by Executive action, the sentence on the arson count will have to be determined by the trial Court at a later stage with all the unsatisfactory features concomitant therewith, referred to by Trollip, JA in Mathebula's case (supra) at page 611 E - F.

5 The evidence in the present matter is that, on 25 May 1991 at about 22h00, the witness Joseph Makhubele drove a truck in the vicinity of the hut belonging to Joel Maswanganyi in which the deceased and the children were. He saw that the hut was on fire and went to investigate. He heard people screaming in the hut. He tried to approach the door, which was closed, but the heat generated by the fire prevented him from doing so. The door opened and the deceased ran out with her hair on fire. He extinguished the fire. He tried to reach the children whom he could hear screaming in the hut, but was unable to do so.

Makhubele was not able to throw any light on the origin of the fire. However in the section 119 proceedings the appellant initially pleaded guilty and he was questioned in terms of section 112(1)(b) of Act No 51 of 1977. He admitted setting fire to the hut and gave his reason for so doing as

follows:

"I did that because I was experiencing some hardship. My aunt, that is Nkiyasi Lizzy Mathebula in count 1 was frequently ill with no one to attend to her ill health. On 27 April 1991, for instance, I came to visit her. 1 found her and her children very ill. I had to give her and her children R120,00 for medication. When I set the hut on fire I therefore, intended intimidating her and her children to flee this place. 1 did not intend killing the people who may have been inside the hut but to intimidate them to leave this place for my place at Rotterdam where I could easily nurse or attend to her problems. I wanted her to part with the man with whom she stays as husband and wife. I intended that my aunt leaves this man with his two other wives to come and stay with me so that she could help me ..." As a result of the above explanation, pleas of not

guilty were recorded in respect of all four murder

counts.

When he gave evidence before the Court a quo

the appellant, who worked and lived in Soweto, said

that he had gone to Malamulele because the

deceased, who is his aunt, had telephoned him to

say that she wanted to leave the hut in which she

was living but Joel Naswanganyi was preventing her from doing so. This telephone call was, he thinks, on 23rd May 1991. The deceased said, so he testified, that he must go to her house on Saturday and set it alight. She would not be there; she would be in Soweto. He complied with her request. He says that he did not knock on the door of the hut before setting it alight because he knew what no one would be there as she would have taken the children, who he knew lived with her, to Soweto. He bought petrol at a nearby garage and doused the hut with it and then set it alight. He heard no screams coming from the hut and, having set it alight, he left.

Mr Klein, who appeared before us on behalf of the appellant, but who did not represent him in the Court a quo, did not abandon the heads of argument filed on behalf of the appellant, which he had not drawn. However, having referred us to them, he did

not address us further on the merits.

The appellant's evidence, apart from the fact that it differs radically from the answers he gave in the proceedings before the Magistrate, is patently false. If the deceased could have gone, without hinderance, to Soweto with the children, one asks why it was necessary for her to have the hut burnt to enable her to get away from Joel? In any event, who, having arranged to have the house burnt, would have gone to sleep in it with the children, two of them her grandchildren? Again, who would set alight to a hut on the assumption that it had been vacated in terms of an alleged arrangement without first satisfying himself that it was indeed unoccupied?

The reason that the appellant set fire to the hut appears from the evidence of Namaila Joyce Nkula, the granddaughter of the deceased, the mother of two of the children and the cousin of the

third. She lived in a house in Soweto which was owned by the deceased. The appellant also lived in this house and he ejected Mrs Nkula from it at a certain stage. She went to live in another house. The appellant told her that he was going to Malamulele to see the deceased. He returned on 11 May 1991 and told her that her children were sick and that she should go to them as it was a matter of life or death. She went to Malamulele and found that there was nothing wrong with them. She returned to Soweto and the appellant told her that he was going to Morea but in fact this was the occasion on which he went to Malamulele to burn down the hut. Prior to this the appellant had received a letter from the deceased in which she ordered him to leave her house in Soweto because he was not willing to allow Mrs Nkula to live there with him. The appellant, she says, was unhappy about the deceased's instructions contained in this

letter, which she says she brought to the appellant when she returned from the wild goose chase caused by him telling her that her children were ill.

The Court a quo, in convicting the appellant, found that he was a "hopeless witness" and stigmatized his evidence as "a pack of lies". Mrs Nkula was found to be a good witness and her evidence was accepted. Her evidence is important because from it, it can be inferred that the appellant was motivated either by anger at being told to leave the house in Soweto or greed, intending, after he had killed the deceased, to claim her Soweto house as his own, or a combination of both. There can be no doubt that he deliberately set the hut on fire intending to kill the deceased. He knew that young children lived with her and must have appreciated that, if his plan succeeded, they too would probably die. The conviction of the appellant on the four counts of

murder was entirely justified and the appeal in this regard must accordingly be dismissed.

In terms of section 277(2) of Act No 51 of 1977 as substituted by section 4 of Act No 107 of 1990, before a death sentence is passed the trial Court is required to make a finding as to the presence or absence of any mitigating or aggravating factors, whereafter the presiding Judge will pass a sentence of death if he is satisfied that, in the circumstances, it is the only proper one. Unfortunately the learned Judge in the Court a quo did not specifically record its findings as to mitigating and aggravating factors found to be present. He mentioned the appellant's personal circumstances but did not say whether they were found to be mitigating or not. There is no finding as to remorse although it was mentioned. It is stated that the appellant acted with dolus directus which indeed he did. He then said:

> "She [counsel for the appellant] points out that he is not a danger to the community and can be rehabilitated, whatever that may mean. The facts speak for themselves ..."

It thus becomes necessary for this Court to identify the mitigating and aggravating factors, which it can do as, under the present legislation, it has an independent discretion and is not fettered by the findings of the trial Court.

It was argued on the appellant's behalf that the following mitigating factors were present: The appellant was 24 years old when he committed the offences; he was a first offender; he admitted having burnt the hut; he showed remorse; he is an unsophisticated man who grew up in a rural environment and only passed standard 1 at school; notwithstanding his disadvantaged background he showed that he could be a useful citizen in that he had a good work record and had supported his wife and two children satisfactorily; his work record

and his responsible attitude towards his domestic obligations show that he can be rehabilitated.

Mr Huygens, for the State, conceded that the comparative youthfulness of the appellant and his clean record were mitigating factors. As far as contrition is concerned, he referred to a remark that the learned Judge in the Court a quo was constrained to make while Nkula was giving evidence, namely:

> "The accused better behave himself. He must keep silent, stop sniggering and making movements which will upset the witness ..."

I agree that conduct of that sort is hardly compatible with the demonstration of remorse. The appellant's social background is a neutral factor since there is no suggestion that it in any way influenced him to commit the offences. As Smalberger JA said in the judgment of this Court in the unreported case of Khoza and Another v The State, case number 163/91, delivered on 27 May

1992:

> "Hulle klaarblyklike minderbevoorregte agtergrond, betreklike laë intelligensie en ontoereikende opvoeding hou nie direk verband met hulle optrede nie. Daardie faktore is in alle geval eerder neutraal as versagtend."

Mr Huygens submitted that the appellant's good work record was irrelevant as even if the death sentences were to be set aside, lengthy periods of imprisonment would be substituted and he would, thus, in any event loose his employment. This may be so, but the submission overlooks the real importance of this fact, namely that the appellant, until his present lapse had been a useful member of society who probably could be rehabilitated.

The mitigating factors can thus, in my view, be identified as:

i) the comparative youth and

ii) the clean record of the appellant;

iii) the fact that he has a good work record and is a good husband and father, showing

that he has been a responsible citizen and is probably capable of rehabilitation should he be required to serve a lengthy period of imprisonment.

The aggravating factors are:

i) The murders were premeditated. The appellant travelled a considerable distance to reach the hut in which the deceased lived and arrived there with petrol he had bought to enable him to carry out his plan;

ii) he acted with dolus directus;

iii) The murder was a brutal one;

iv) His real aim was to kill the deceased but he carried out his plan knowing that, if he was successful, innocent young children would also probably be killed.

v) His motive was either greed or a desire for vengeance because of his unjustified

 grudge

against the deceased, or both. Thus the aggravating factors considerably outweigh the mitigating ones. This, of course, does not necessarily mean that the death sentence is the only proper one in the circumstances. However when one considers the factors personal to the appellant, the nature of the crime and the interests of society, one is forced to the conclusion that the factors personal and favourable to the appellant pale into insignificance when viewed against the brutality of the crime, the motive which led to its commission and the callous disregard of the fact that three young childrens' lives would be sacrified in order to kill an old woman who had done him no wrong. This is a type of crime that members of the community in which it was committed and of society as a whole view with abhorrence and which they expect the Courts to punish in such a way that others will be deterred

from similar action and that their understandable desire for retribution will be satisfied.

I am satisfied that in respect of the four counts of murder on which the appellant has been found guilty, the death sentence, in all the circumstances, is the only proper one.

The appeal against the convictions in respect of counts number 1, 2, 3 and 4 and against the imposition of the death sentence in respect of each of the said counts is dismissed.

D D V KANNEMEYER ACTING

JUDGE OF APPEAL

SMALBERGER JA]

KUMLEBEN JA] CONCUR