CASE NO 2/96

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

IN THE MATTER BETWEEN:

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| 1. | MUTSHUTSU SAMUEL MAGORO | 1ST APPELLANT |
| 2. | ROBERT THWALIMA RAMBAU | 2ND APPELLANT |
| 3. | PHILLEMON BALOYI | 3RD APPELLANT |
| 4. | ROGERS NTIMANE | 4TH APPELLANT |
| 5. | JOHN MASEBA | 5TH APPELLANT |

AND

THE STATE . RESPONDENT

CORAM: Eksteen, Howie et Olivier JJA HEARD ON: 27 August 1996

DELIVERED ON: 20 September 1996,

JUDGMENT

Olivier JA:

This is an appeal, with special leave of this Court, against the convictions in the Venda Supreme Court (Van der Bijl AJ) of the third and fourth appellants and against the sentences imposed on all

five appellants.

As a consequence of events on 21 March 1990 in the Tshitole district in Venda thirteen accused were
arraigned on the following charges:

6. The murder of an adult female, Nyamavholisa Maduwa.

7. Arson in respect of Maduwa's hut.

8. Arson in respect of one Petrus Maimela's house and hut. :

9. Arson in respect of one Andries Thovhala's hut.

10. The assault with the intention of causing grievous bodily harm on one David Sigwavhulima.

6. The assault on one Makwarela Thovhala by
threatening to burn her with petrol and a tyre.

The first appellant, who was accused no. 1 at the trial, was convicted as charged on counts 1, 2, 3, and 4 and on count 5 of common assault.

Though he was setenced to terms of imprisonment on all counts, he was only granted leave to appeal

against the sentence of life imprisonment imposed in respect of count 1.

The second appellant was convicted on count 4 and sentenced to eighteen months' imprisonment. He too was granted leave to appeal against the sentence only.

The third appellant was convicted on counts 1 and 2. On count 1 (murder) he was sentenced to fourteen years' imprisonment and on count 2 (arson in respect of the deceased's hut) to eighteen months' imprisonment, the sentences to run concurrently.

The fourth appellant was convicted on counts 1 and 2 and sentenced to eight years'.imprisonment on count 1 and eighteen months' imprisonment on count 2, the sentences to run concurrently.

The fifth appellant was convicted on counts 1, 2 and 3. On count 1 he was convicted and sentenced to ten years' imprisonment and on count 2 to eighteen months' imprisonment. Apparently he was not sentenced in respect of charge 3. He, too, is appealing only against his sentence.

In rough outline,. the relevant events were as follows. During the late afternoon a crowd of approximately a hundred people gathered under a tree

near the primary school in the area. One or more speakers addressed the meeting and it was decided to go and burn certain witches in the village. The crowd then left as a group along a road running between the kraals of the fifth appellant and the deceased. When the crowd passed the kraal of the fifth appellant, he broke away, entered his kraal and returned a short while later with a two-litre can containing a quantity of petrol. From there the crowd moved towards the kraal of Petrus Maimela, the complainant in count 3. On their way the crowd met the first appellant, who. asked them about their intentions. A member of the crowd told him that they were on their way to burn Maimela, or to burn someone at his place. The first appellant joined the crowd. On their arrival at the kraal of Petrus Maimela, it was established that he was not at home. A flat-roofed house and a cooking-hut situated in the kraal was doused with petrol and set alight. Appellant no 1 admitted that he was one of the persons responsible for setting the flat-roofed house alight.

From there the crowd moved to the kraal of Andries Thovhala, the complainant on count 4. Only his wife, Makwarela Thovhala, the complainant on count 6, was present at the time. A hut was set alight after petrol had been poured on its roof.

In the course of the march either to or from Thovhala's kraal (the evidence on this point is somewhat vague) the crowd came across David Sigwavhulimu, the complainant on count 5. He was slapped in the face and chased by some members of the crowd. The apparent reason for this conduct was that he was seen as a traitor for warning Petrus Maimela that the crowd intended to burn him.

> The crowd then moved to the kraal of the deceased where her hut was set alight and the fourth appellant, on his own admission, doused her with petrol. She was set alight by the first appellant. Still enveloped in flames she fled from her kraal and crawled through a fence and into a maize field where she apparently succeeded in extinguishing the flames by rolling on the ground. Whilst lying on the ground she was beaten with sticks and, according to one witness, had stones thrown at her. She was then doused with petrol once more, a tyre was placed on top of her and she was set alight. She died with a question to her attackers: 'My children, why are you killing me?'

I shall first deal with the convictions of the third and fourth appellants.

The third appellant:

There can be no doubt of the third appellant's deep

and continuing involvement with the events from their very inception. That he was present at the initial meeting where it was decided to hunt down and burn witches is attested to by Michael Mudau, Jackson Mudau, John Ndlala, and John Masera. In fact there can be no doubt of the leading role he played at the meeting. According to the evidence of Ndlala and Masera the appellant not only actively encouraged, but in Masera's case even forced, attendance at the meeting. According to Michael Mudau the appellant was among those who addressed the meeting. According to Jackson Mudau he assisted in assaulting David Sigwavhulima because he was thought to have warned the intended victims. He was said by Ndlala to have been looking for petrol, and by Masera to have forced him to fetch petrol for the purpose of burning Petrus Maimela's hut. He was seen by the first appellant to pour petrol over Thovhala's hut and ignite it, and his presence at Thovhala's kraal was confirmed by the second appellant. On the evidence of Nditsheni Ramalte the appellant was among a large number of people that ran from the scene of Thovhala's burning hut. Also in Ramaite's evidence this appellant ordered him to join their hunt, and he .was present when one of the accused questioned him about Petrus Maimela's whereabouts (beyond doubt with a view to finding and harming him) and when some of the crowd demanded

petrol of him.

As far as the last atrocity, the murder of the deceased, is concerned, there are various witnesses implicating the appellant.

> Mashudu Ephraim Mudau, Michael Mudau, Jackson Mudau, and David Ndlala all mention the presence of the appellant at the killing of the deceased. All describe him striking lethal blows to her head with a stick as she lay burnt on the ground. Moreover, this detail as given in the evidence of Mashudu Mudau was uncontested. In addition Jackson Mudau describes the appellant pursuing the deceased as she fled burning. He adds that the appellant also threw stones at the deceased. David Ndlala describes the deceased asking why she was being killed, and the appellant aswering that it was because of her witchcraft that they could not obtain employment. He mentions, too, the appellant handing the first appellant a tyre which the latter placed on the deceased and set alight.

On the evidence set out above, the appellant was convicted of killing the deceased (count 1) and of setting her hut alight (count 2).

As far as the witnesses generally are concerned, the trial judge unreservedly accepted the evidence of

the witness Ephraim Mudau. He stated that he was prepared to rely on the evidence of Michael Mudau and Jackson Mudau only in so far as it was corroborated. He accepted the evidence of Thomas Matshivha and, except for one detail, also the evidence of Morris Ramaite.

In this respect the present appellant, in relation to count 1, is directly implicated by Ephraim Mudau (whose evidence, as previously stated, was accepted by the trial court) by Michael Mudau, by Jackson Mudau (both of whose evidence is corroborated by Ephraim Mudau) and by accused no 9, David Ndlala, whose evidence was accepted by the trial judge, having been corroborated by i.a, the reliable evidence of Ephraim Mudau. The appellant himself did not testify.

In argument in this Court, the submission on behalf of the appellant in respect of count 1 was that there must be reasonable doubt as to whether the deceased was still alive when the appellant hit her and participated in the final act of setting her alight. The submission loses sight of the evidence of David Ndlala that the deceased was still alive when the appellant assaulted her, asking her attackers why they were killing her, and the appellant actually giving her an answer. It also loses sight of the

evidence of Ndlala that the appellant then handed a tyre to the first appellant, who doused the deceased
with petrol and set her alight. It also loses sight of an admission that the appellant made that he had hit the deceased with a stick because that was what the crowd wanted. It is highly improbable that the crowd would have urged an assault on a woman already dead or inflicted the torture of burning on a corpse.

The only shred of evidence that the deceased was already dead when she was hit by the appellant is to be found in the testimony of Michael Mudau. Under cross-examination he contradicted his main evidence and agreed that the appellant had hit the deceased after the tyre had been placed on her and after she had been set alight. Prompted by counsel, he conceded that the deceased must have been dead at that stage. But. he then changed his evidence once again, saying that she was still alive when the appellant hit her. Finally he stated that he was not certain whether she had been alive or dead.

Mr Mancktelow, who appeared for the appellant, rightly conceded that he could not rely on such dubious evidence to present with conviction the argument that the deceased had already passed away when she was hit by the appellant.

10 In any event it is clear that the appellant quite actively associated himself with the intention of the mob, i.e. to kill the victim. Apart from hitting the deceased, he was also observed chasing her into the maize field after she had been set alight the first time. On this basis alone a conviction on count 1 would have been justified.

In the result, the appellant was rightly convicted on count 1.

As far as the conviction on count 2 is concerned (i.e. setting the deceased's hut alight prior to the assault upon her) the trial judge pointed out that the appellant was involved in the witch hunt from an early stage, that he had been actively involved in the search for Petrus Maimela, and that he was present when the burning' of the deceased's hut took place. On the basis of common purpose he was convicted.

On behalf of the appellant it was argued that there was no evidence to link him to the offence. This argument questions the correctness of a conviction based on common purpose. In the light of the totality of evidence against the appellant, I am of the view that the only reasonable inference from all the facts is that the appellant, even if not actively participating in setting alight the deceased's hut,

made common cause with the mob well knowing the object of their activities. On that basis he was rightly convicted.

- In. the result, the conviction of the third appellant on counts 1 and 2 is unassailable.

The fourth appellant:

The evidence against this appellant can be summarized as follows.

Ephraim, Mudau, Michael Mudau, Jackson Mudau, Thomas Matshivha, Saul Ndou and David Ndlala all saw the appellant pour petrol over the deceased at her kraal for the first appellant to set her alight. Michael Mudau testified to the appellant dousing her a second time after she had fallen down. John Ndlala did not actually see the petrol being poured, but he '. heard the crowd chanting, 'Rogers, petrol,' Rogers being the appellant's first name.

Other details in evidence connect the appellant with the events of that day. Michael Mudau saw this appellant pour petrol over huts at Maimela's and Thovhala's kraals for the first appellant to torch. . In fact, according to Michael Mudau, this appellant

together with the first and fifth appellants, was a leader in the proceedings.

The appellant testified under oath. He denied having attended the meeting, but said that after the meeting a friend, one Freddie, came to him and said that they should join the people who were going to" burn witches. He admitted pouring petrol over the deceased but said that he was forced to do so because one Patrick Maduwa stated that he, the appellant, had not attended the meeting, and the first appellant threatened to assault him after he had refused to pour petrol over the deceased. He then doused her with petrol, saw first appellant set her alight, and then ran away from the scene. He admitted that he knew of the intention of the group to burn and kill the deceased.

The trial judge rejected the appellant's evidence as totally untruthful and unacceptable. His evidence, so it was held, was in conflict with his explanation recorded in the proceedings conducted in terms of sec 119 of the Criminal Procedure Act 1977, and with his plea explanation, which were both to the effect that he had poured petrol over the deceased because, at the instigation of the first appellant, some youths had attacked and assaulted him. He succumbed, took

the container and threw petrol in the direction of the deceased.

In my view, the appellant's version was rightly rejected, not only in the light of his conflicting statements but also because it was in conflict with the evidence of Ephraim Mudau, who did not testify to any threats to or assaults on the appellant. No witness substantiated the appellant's version. On the contrary, the first appellant denied that he had threatened the appellant. Furthermore, his version of having been threatened is far-fetched. He was a willing participant in the events leading up to the confrontation at the deceased's kraal. There was no reason for the crowd to threaten him to douse the deceased with petrol.

Nor is there any substance in the argument, put forward in this Court, that the appellant had dissociated himself from the proceedings by running away. This argument was based solely on the appellant's own evidence, which had been rightly rejected by the trial judge. In any event, his evidence is that after he had poured petrol on the deceased, he saw her running away. The first appellant struck a match and set her alight. He, the present appellant, then ran away. If there had been any dissociation at that stage, on the appellant's

own evidence, it took place after the fatal assault had already begun, an assault in which he participated. There is also Michael Mudau's uncorroborated evidence that the appellant doused the deceased a second time after she had fallen down. Dissociation at that stage was ineffectual. The conviction on count 1 must be upheld.

As far as the conviction on count 2 is concerned, it is true that there is no evidence that this appellant actually set the deceased's hut alight. However, as in the case of the third appellant, he had made common cause with the mob, well knowing their intentions. He was, in my view, rightly convicted on the basis of common purpose.

In the result, in the case of the fourth appellant, the convictions on counts 1 and 2 are confirmed.

I now turn to the appeals against the sentences.

The first appellant

The first appellant was sentenced to life imprisonment in respect of the murder charge and leave to appeal was granted only in respect of this sentence.

In sentencing all the appellants, the trial judge considered, as aggravating factors, the horrifying nature of the crime and the manner of its commission; that it was committed against a defenceless woman who was mercilessly killed without any reason; that none of the accused had shown remorse; that the appellants acted with dolus directus; and that their deed was of a singularly violent nature.

In respect of the first appellant it was also taken into account, in aggravation, that he had attempted to put the blame on someone else and that he was not a first offender - in 1983 he had been convicted of assault with intent to do grievous bodily harm.

On the other hand, the ' court took into consideration that the crimes were committed as a consequence of the accused's belief in witchcraft and under the influence of mob hysteria.

In respect of the first appellant it was further held that he was not involved in the initial planning of the crimes and that he was heavily intoxicated.

The accused was 35 years old at the time. The trial judge also found, in my view correctly so, that having joined the crowd, he took over the leadership and played a prominent role in the commission of the

crimes. In respect of the murder of the deceased, the trial court correctly remarked that the appellant had killed her amidst her pleas to be spared and with shocking callousness and savagery.

On behalf of the appellant it was argued that the sentence of life imprisonment was severe to such a degree that it induced a sense of shock, taking all the aggravating and mitigating circumstances into consideration.

On behalf of the respondent it was argued that the sentence was not unbalanced or harsh and that it was not shockingly inappropriate.

There is much to be said "for the appellant's contentions. I am not convinced that due weight has been given to the fact that the appellant was heavily inebriated, or that he has a relatively good record. This is not a case where the heaviest sentence now permissible should be confirmed. In my view, a prison sentence of twenty years will accord with present day notions of fairness and equity.

In the result, the first appellant's appeal against the sentence imposed in respect of count 1 is upheld. The sentence of life imprisonment is set aside and replaced by a sentence of twenty years' imprisonment.

The second appellant

This appellant was convicted only on count 4, i.e. the setting alight of the hut of Andries Thovhala. He was sentenced to eighteen months imprisonment.

In sentencing the second appellant, the trial judge stated that he was not prepared to treat the appellant as a juvenile, adding that his actions evidenced a total disregard for the property of others. From the available data it appears that the appellant was 20 years old at the time of the commission of the crime.

On behalf of the appellant it was submitted that the trial judge failed to consider adequately or at all that the appellant had been convicted of a lesser offence, and that the court grossly under-emphasized the element of youth. There is no merit in these submissions. It is clear that the court had before it the full background of the relevant incidents as well as the age of the appellant. The mere fact that they are not mentioned in the judgment on sentence does not imply that these factors were ignored.

The question is whether the sentence is shockingly inappropriate. I am not convinced that the question must be answered in the affirmative. In fact, the appellant received a rather light sentence, taking

all factors into consideration.

The appeal of the second appellant against the sentence must be dismissed.

The third appellant

First it is necessary to consider the appeal against the sentence of fourteen years' imprisonment in respect of the conviction on the count of murder.

The trial judge found that the appellant's actions were less blameworthy than those of the first appellant.

On behalf of the appellant it was argued in this court that the trial judge paid undue attention to a previous conviction which was not really relevant, that not sufficient weight had been paid to the community's paranoia about witchcraft, that the personal circumstances of the appellant had been ignored, that insufficient weight had been placed on the mitigatory circumstances, and that there was no factual basis for the finding that the appellant had failed to show remorse merely because he had not testified.

From the charge sheet it appears that this appellant was 29 years old at the time when the crimes were

committed. There is no evidence of remorse. The witchhunt background was explicitly taken into account. No mention was made by the trial judge of the appellant's previous conviction. There is, therefore, no factual basis for the arguments raised by counsel for the appellant.

The question is whether the sentence is shockingly inappropriate. In my view, the answer must be in the negative, especially in the light of the appellant's age and his participation in the commission of the crime.

The same must be said in respect of the sentence of eighteen months' imprisonment as regards the conviction on count 2.

In the result, the appeals against the sentences on counts 1 and 2 must fail.

The fourth appellant

In respect of the sentence of eight years' imprisonment as regards the murder charge the trial judge stated that the appellant was sixteen years old at the time when the crimes were committed and that he played a minor role. Nevertheless, the court declined to treat him as a juvenile in view of the

nature of his deeds.

Apart from a number of legal generalities, very little of substance was put before us as regards the sentence imposed by the court upon the appellant. His excuse for pouring petrol over the deceased was rightly rejected as untruthful. Nothing was placed before the court as regards the personal circumstances of the appellant. No previous convictions were proved against him.

Having regard to the sentences in respect of the murder charge imposed on the first and third appellants, the sentence in the case under consideration appears to be fair and just and not shockingly inappropriate at all. The same conclusion applies to the sentence imposed in respect of count 2.

In the result, the appellant's appeals against the sentences in respect of counts 1 and 2 must be dismissed.

The fifth appellant

The sentence under consideration is one of ten years' imprisonment in respect of the murder of the deceased, and eighteen months' imprisonment on count 2 (setting alight the deceased's hut).

The trial judge stated that the appellant was fourteen years, almost fifteen years old at the time of the commission of the offences. He was the youngest of all the accused. The judge remarked that "though it was undesirable to send a young person to prison, he nevertheless perceived it as his duty towards society to impose the sentence just mentioned. He stated that the appellant, despite his youth, had played a leading role in the planning and execution of the said crimes, being an intelligent person whose leadership was accepted by the majority of the crowd.

On behalf of this appellant it was submitted that because the deceased was related to him, he must presumably have been motivated by fear of witches and that this should have been considered as a mitigatory factor. There was no evidence of such fear. In my view, the contrary position could be argued with more force: the fact that the appellant knew the deceased very well and frequently visited her, casts his actions in a more reprehensible light.

It was also argued that the appellant (like the other accused) should not be reproached for not having shown remorse: after all, it was submitted, they believed in witchcraft and believed that they had rid the community of witches. There is no evidence to this effect and this explanation was never put forward

at the trial.

Finally it was submitted that there was a plethora of witchcraft cases in Venda during 1989 and 1990, but since then the number of cases has abated. The trial judge should, so it was argued, not have taken account of the prevalence of these cases as a factor justifying heavier sentences. Once again, however, the fact is that the crimes now under discussion were committed in March 1990, i.e. before the abatement of these cases alleged by counsel for the appellant. The trial judge, so. it seems, was justified in relying on the position as it was at the time.

The only question is whether the sentence of ten years' imprisonment for the murder charge is not shockingly inappropriate. Relying on S v Machasa en Andere 1991 (2) SACR 308 (A), counsel for the respondent argued that it was not.

However, in the case just mentioned this Court (at 318 h - i) remarked as follows:

> 'By die oplegging van gevangenisstraf aan so 'n jeugdige moet dan ook daarteen gewaak word dat sy waarskynlike of selfs moontlike gesonde ontplooiing as 'n volwassene nie geknak word deur die onvermydelike negatiewe uitwerking van 'n

bale lang termyn gevangenisstraf nie.'

Bearing this salutory approach in mind, I consider the sentence of ten years' imprisonment in the case of the fifth appellant to be inappropriate to such an extent that this Court may justifiably interfere. Taking everything into consideration, a sentence of seven years' imprisonment would appear appropriate.

There is, on the other hand, no justification to interfere with the sentence of eighteen months' imprisonment in respect of count 2.

In the result, in the case of the fifth appellant, the appeal against the sentence of ten years' imprisonment in respect of count 1 succeeds. The sentence is set aside and for it is substituted a sentence of seven years' imprisonment.

The appeal against the sentence imposed in respect of count 2 is dismissed.

The following orders are made:

1. As regards the first appellant

   The appeal against the sentence of life imprisonment in respect of count 1 succeeds. The

said sentence is set aside and replaced by a sentence of twenty years' imprisonment.

2. In respect of the second appellant

The appeal against the sentence is dismissed.

3. In respect of the third appellant

The appeal against the convictions on counts 1 and 2 and the appeal against the sentences imposed in respect of these counts are dismissed.

4. In respect of the fourth appellant

The appeal against the convictions on counts 1 and 2 and the appeal against the sentences imposed in respect of these counts are dismissed.

5. In respect of the fifth appellant

The appeal against the sentence of ten years' imprisonment in respect of count one is upheld. The sentence is set aside and replaced by a sentence of seven years' imprisonment. The appeal against the sentence imposed in respect of

count 2 is dismissed.

I concur
J A EKSTEEN JA

C HOWIE JA