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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

PHILLIP MATELA — FIRST APPELLANT

THAMI HLOBO — SECOND APPELLANT

and

THE STATE — RESPONDENT

CORAM : HOEXTER, MILNE et KUMLEBEN JJA

HEARD : 26 AUGUST 1993

DELIVERED : 4 NOVEMBER 1993-

JUDGMENT

KUMLEBEN JA/...

The two appellants and others were arraigned in the Orange Free State Provincial Division of the Supreme Court before Lombard J and assessors on four counts of murder, the deceased being Anthony Marc Casey, Johannes Petrus van Niekerk, Michael Frederick Belelie and Shelley Erica Basson. The accused were in addition charged with causing malicious damage to a Datsun motor car. The first and second appellant, accused nos 1 and 12 respectively, were two of twelve accused. They all pleaded not guilty. In their plea explanations in terms of s 115 of the Criminal Procedure Act 51 of 1977 the appellants denied any involvement in these offences and relied on an alibi. They, however, did not give evidence or call any witnesses in support of this defence. The first appellant was found guilty on all five counts and the second appellant on the four murder charges. They were sentenced to death on

each of the murder convictions. These, and the sentences in respect of them, are before us as of right in terms of s 316A of the Criminal Procedure Act. (Of the ten other accused, whose ages ranged from sixteen to eighteen years, six were found guilty on all four murder charges and sentenced to serve terms of imprisonment.)

It was common cause at the trial that at night in Mashongoville, Kutloanong, in the district of Odendaalsrus, the four deceased were fatally attacked and the Datsun motor car in which they were travelling was set alight. In the record Mashongoville is variously described as a squatter camp, an informal settlement and a village: I shall refer to it as the "township". The only dispute on the merits was whether the appellants were satisfactorily identified as two of the assailants. To this end, and to identify others as

well, the State called a number of witnesses, two of whom, Messrs Mosese and Maleme, were the main eye-witnesses. They deeply implicated both the appellants. The trial court found them to be truthful and reliable. It observed that they gave their evidence convincingly and that they did not attempt to implicate any participant unless certain of his identity and involvement. A reading of their evidence amply supports this conclusion. The evidence of certain other witnesses also implicated these two appellants. In his heads of argument Mr Naidoo, who appeared for the appellants at the trial and before us, contested the conclusion that the appellants had been properly identified. However, at the outset of his argument in this court he, prudently and quite correctly, decided against arguing the merits of the convictions. It is therefore unnecessary to say more about the manner

and circumstances in which they were identified.

Both the appellants were active members of the African National Congress. In that capacity they held positions of authority in the township and were known as "Comrades". The witness Mosese, a forty-seven year old man, was also a Comrade. Melame, who was at the time twenty-six years old, was not a member of the ANC.

At about 8 pm on the night of 29 September 1990, a Saturday night, the Datsun in which the four deceased were travelling, was pursued by a Ford truck referred to as a "bakkie". As the driver of the Datsun appeared to be changing gears, it came to an. abrupt - and need one add involuntary - standstill in the road. This was well within the township and close to the home of Mosese. The first appellant and accused nos 2, 3 and 13 jumped off the back of the Ford truck. These four men were armed with

knobsticks, pangas and other weapons. They rushed to the Datsun and struck and broke the rear window with their weapons in order to get at the occupants. At this time there were some "children", as Mosese described them, in the road ahead of both vehicles. They were singing ANC songs. At or near the Datsun someone blew a whistle. (Mosese noticed at some stage that the second appellant had a whistle.) This initial attack upon the Datsun attracted the group of children and no doubt others to the scene. Some of them said that the Datsun should be searched. At about this stage Mosese emerged from his house. He saw the Datsun surrounded- by people. He went towards the vehicle, wrested a sjambok from accused no 13 and struck at the crowd in front of them in order to disperse them and reach the Datsun. His primary intention was, as he put it, "to get the children away." (Bearing in mind the ages of the other

accused, the "children" may well have included some of the accused and perhaps others more or less their age.) People were still breaking the car windows to reach the occupants. Mosese managed to reach the car and saw three men and one woman inside. He was able to talk to the driver who said that they had come to the township in search of liquor and women. He went to the front of the car and saw the first and second appellant, together with accused no 13, all of whom were well known to him. He tried to persuade them to desist from this assault, saying to them that they had taken an "oath" and that they would regret what they were doing and about to do. (Mosese explained in court that the Comrades in the township were intended to act as an unofficial police force to maintain order, redress wrongs and protect the residents; the reference to an oath would seem to relate to these objectives.) This admonition was

ignored. The second appellant insisted that the occupants should be assaulted and instructed people near him to do so. Petrol was thrown onto the car from a container and it was set alight. Mosese tried to open the driver' s door but could not. He managed to open a back door to let the woman out and the man at the rear was also able to escape through that door. They were immediately set upon by people armed with sjamboks, pangas, axes and such-like weapons. Mosese went to the front door on the passenger side in an attempt to open it to enable the driver and the man seated next to him to escape. At this point the first appellant caught hold of the woman. She asked him to spare her life and offered him money, which he refused saying that he wanted to have intercourse with her. He, with others, dragged her around the corner of a nearby house. Both front-seat occupants managed to escape from the burning car. The driver

reached the front of the car where he fell and was assailed. Mosese tried to drag the other person from the scene. However, a group of people came towards him and said that he should be attacked for assisting a White person. Mosese was obliged to release him as stones were being thrown at both of them. He retired to a safe distance and for a short while did not see what was happening. When he again observed the scene, he noticed that the back-seat passenger was being attacked by the second appellant armed with a long-bladed knife or a panga. The woman was brought back to the scene and was struck with pangas and stabbed. Accused no 10 stabbed her in both eyes with a pocket knife, her cries of pain indicating that she was still alive. The first appellant, armed with what was described as a chopper, chopped at her genitals. She was without clothes apart from her denim trousers which had been pulled down to her

knees. After she had been killed one of her breasts was cut off and her body was thrown onto the burning car. The first appellant at some stage went to the Ford truck and returned armed with a panga. With this weapon he proceeded to assault the driver who was lying on his stomach in front of the Datsun: he turned him over and propped him up, so that he was more or less in a sitting position, and then "stabbed" him in the back with a panga. At this stage most of the people who had gathered there dispersed and Mosese also left. The first appellant, as he walked away from the person he had been assaulting with the panga, said to Mosese that he must be tracked down and killed because he was an informer. On their arrival the police found the injured, multilated and charred bodies of the four deceased and the gutted remains of the Datsun.

After leaving the scene Mosese, too

frightened to go straight home, went to another part of the township. Eventually he returned to his house, closed the front door and wrapped himself in a blanket. Later a group of men arrived at his house. The second appellant said: "manne, hierdie is die man na wie ons gekom het". Mosese complained that he had done nothing wrong. The second appellant accused him of not being a Comrade because he had not acted like one. The first appellant, armed with a knife, was standing in the doorway and struck him with his fist. As he fell the first appellant ordered that he be dragged away and killed "want [sy] maat is ook dood". He grabbed Mosese by his trouser leg to pull him outside and said that a rag must be found with which to gag him. It would seem that his loose blanket enabled him to ellude their grasp and run away. He remained in the veld until sunrise. He was convinced that had he not escaped, he too would

have been killed.

As appears from the above, the participation and involvement of the first appellant, differs in some respects from that of the second appellant. The former was one of the four initial assailants, who must have been armed when they first came upon the Datsun and decided to give chase. There is no suggestion that they were provoked or had any justifiable reason for pursuing its occupants. It is uncertain at what point within the township they first came upon the Datsun and for how long they chased after it. In the absence of any evidence to the contrary from any of the four persons initially involved, and bearing in mind their weapons and subsequent conduct, the inference is inescapable that their pursuit was with murderous intent. Furthermore, the attack was launched without regard to the identity or political affiliation of the

motorists and without any enquiry as to the reason for their being in the township. The extent to which the first appellant was thereafter involved in the murders and mutilation of the victims calls for no further comment. As to the second appellant, it is not clear how he came to be present. Though not proved, it is conceivable that he too arrived in or on the Ford truck. What is plain is that from an early stage he played a prominent part in instructing and encouraging others to persist in the attack and that he was directly involved in assaulting one of the deceased.

After conviction the appellants decided against giving evidence themselves but called two witnesses to testify in mitigation.

The first was Dr Sathasiven Cooper, a highly qualified academic, who is registered as a clinical psychologist with the South African Medical

and Dental Council and as an Advanced Clinical Hypnotherapist with the National Guild of Hypnotherapists, USA. He is trained, to quote from his curriculum vitae, "at Doctoral Level in the following substantive areas: Academic Psychology, Clinical Psychology, Community Psychology, Developmental Psychology, Family Psychology, Gerontology, Hypnotherapy, Personality Psychology, Social Psychology." At a later stage when considering his evidence,it will be necessary to examine the cogency and validity of his general propositions: to decide whether the evidence on record in any way justifies their application to the facts of this case; and, if so, to determine whether or to what extent they ought to be accepted as mitigating factors.

At the conclusion of his evidence Mr Naidoo proceeded to address the court in mitigation of

sentence. In the course of his argument counsel quoted from S v Mngomezulu 1991(2) SACR 212 (A) 212G in which the mitigatory factors found to be present were that:

> "The appellant had very humble origins. He was unwittingly drawn into the ranks of the ANC where he became enmeshed in its then culture of violence. He was indoctrinated with the belief that informers had to be killed. ... He was taught to obey orders, including orders to kill. It was impressed upon him that a failure to obey orders could place his own life in jeopardy. He genuinely believed that the deceased was an informer." (214 g - h)

The court a quo pointed out that there was no such evidence relating to the appellants in this case. At a later stage when counsel sought to rely on a situation of unrest and tension in the township, the absence of evidence in this regard was likewise stressed. This prompted counsel to apply to re-open his case on sentence and to lead further evidence.

16 The application was granted and a second witness was called. He was Mr Simon Menong, who lived in Kutloanong, of which Mashongoville formed part. He was a committee member of the local civic organisation of that community and the local chairman of the ANC branch there. His evidence was discursive and largely hearsay. In sum it amounted to this. There was at the time of the attack friction between two rival taxi associations in this greater township area. On the Friday night he was told that people in the township feared an attack from members of one group of taxi owners and that some of the residents had decided for safety sake not to sleep in their homes that night: it was said that people had entered some part of the township kicking and knocking at doors. This led to some form of patrol system being established in certain areas and it would seem that they were operating on the Saturday,

the day of the attack upon the deceased. In the result the friction or rivalry between the two taxi organisations did not lead to violence but, according to Menong, only to "sporadic incidents", which were "minor ones". The witness was unable to say whether the appellants, or for that matter any of the accused, were aware of the "sporadic incidents" or were in any way involved in them. The trial court with good reason was unimpressed with his evidence. But even taken at face value it failed in its intended purpose of proving that on the Saturday night there was any special cause for unrest or tension.

Turning to the mitigating circumstances raised by counsel in argument, they were the following: (i) Both appellants were first offenders; (ii) the offences were not premeditated or "alternatively the degree of planning was

premeditated only in a very cursory manner and at the scene of the offences"; (iii) "Deindividuation" was responsible for, or contributed towards, their decision to act unlawfully; and (iv) The state of unrest in the township.

It is true that each appellant had a clean record. This is an important consideration to which due weight should be attached. Ordinarily this would indicate that neither was of an inherently vicious disposition. However, in the present case, any such inference is to my mind largely, if not entirely, offset by other facts: I refer to the indescribably brutal manner in which four defenceless persons were without cause attacked and killed. And the fact that the appellants, having had time to reflect on what they had done, thereafter sought out an eye-witness, who was a fellow-Comrade and a person about twice their age, with the view to killing him as well.

The second submission is without merit. To qualify as a mitigatory factor the absence of premeditation must have reference to impulsive conduct, that is, an unlawful act committed in the heat of the moment. As I have said, there is no evidence as to when or where the chase began, why the appellants were armed that night, for what reason the deceased were pursued or precisely when and why the appellants decided to become involved. On the evidence before us the first appellant had ample time to dissociate himself from the attack. Nor is there any suggestion that the second appellant's participation was on impulse. Furthermore, had they acted impulsively, their subsequent conduct, to which I have just referred, is certainly not what one would have expected.

In the court a quo "deindividuation" was strongly relied upon. The circumstances in which,

and the extent to which, this consideration can serve as mitigation were closely examined by this court in the decision of S v Matshili and Others 1991(3) SA 264. In it the description of this phenomenon in the 1988 Annual Survey of South African Law 417 - 418 is cited at 271 of the judgment with approval. The quoted passage from this publication reads as follows:

> "It is not uncommon for people without a violent predisposition to act differently in crowds and to engage in atypical violent behaviour. This is occasioned by a number of factors. First ... there are strong pressures on an individual in such circumstances to conform, both because the aggressive conduct of the crowd comes to be perceived as normative and appropriate and because of the fear of disapproval, rejection or even physical harm. There is, too, the question of obedience to authority figures which must be considered in these cases. A third factor is what is referred to by psychologists as 'modelling': a number of studies have shown that people who observe aggressive models are likely to be far more aggressive ... as people who observe non-aggressive models. Then, fourthly, there is the question of psychological arousal caused by shouting, singing, dancing or other

> kinds of physical exertion, which may deprive members of the crowd of rational thought and lead to heightened aggression.
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> Where all or some of these reactions occur, the result is frequently what is called 'deindividuation', in which a person loses his self-awareness and focuses all his attention on his environment. This state induces behaviour similar to that of people who are hypnotised or intoxicated. It interferes with one's cognitive abilities and hampers one's ability to regulate one's conduct. External cues replace internal standards of behavioural direction and one becomes emotional, impulsive and irrational. And, if additional factors such as provocation and endemic political frustration are added to this already combustible mix, the result may well be diminished responsibility."

(See too S v Khumalo en Andere 1991(4) SA 310(A) 360I - 361B in which it is said that "Dit [the effect of deindividuation] wissel van persoon tot persoon. As 'n kwessie van graad is dit 'n kwessie van feite".) Thus "deindividuation" is in essence a new word for an old truth, namely, that mob or crowd influence can diminish the restraint and self-discipline that a

person as an individual would ordinarily exercise. As Dr Cooper put it in plain terms: "they become hypersensitive to a point that they do things that otherwise they would not do". But the facts of any particular case must lay the foundation for such a conclusion, as the facts of Mashili's case amply did. (See S v Nkwanyana and Others 1990(4) SA 738(A) 744 A - B.) In the instant case there is no evidence from the appellants to show or suggest that they were "deindividuated". And this question was not canvassed with any of the State witnesses. What evidence there is, does not support any such conclusion. The appellants were "authority figures" and considerably older than the "children" involved. The first appellant was one of the four who initiated the attack and the second appellant encouraged its continuation. If anything, their conduct might have "deindividualised" others.

Moreover, it is to be borne in mind that the evidence does not depict a scene in which the appellants were goaded on by a universally supportive crowd. On the contrary, Mosese, one knows, attempted to restrain them and his undisputed evidence is that part of the crowd did likewise - also to no avail. The decision to seek Mosese out after the crowd had dispersed, and after time for reflection, further militates against the inference that crowd influence at the scene was responsible for atypical violent behaviour on the part of the appellants. In the circumstances one cannot conclude that "deindividuation" played a role in the commission of these offences.

As to the state of unrest and hence tension that night or shortly before the occurence, Menong's evidence, as already indicated, did not establish any tension or unrest of any special nature at that time which could be realistically regarded as explaining

or to some extent excusing the appellants' conduct. Nor was there evidence to suggest that unrest was endemic in that township or that violence was the order of the day - or night.

In the absence of specific evidence of this nature, with a view to mitigation, there were put forward as a possible explanation for the appellants' conduct, certain general propositions by Dr Cooper. The following is, I trust, a fair and accurate summary of his evidence in this regard. As a result of strikes, boycotts, withholding of wages and retrenchment, there was antagonism and tension between White employers and Black employees in the Goldfields at that time. These feelings were exacerbated by the disparity in the living conditions, educational facilities and generally in the opportunities for social upliftment between the White residents and those living in the townships.

As Dr Cooper put it, the one group was living in "very nice middle class houses" whilst in close proximity the other group had to be content with a "shack settlement". He also referred to the activities of members of White right-wing extremist organisations. Some had been guilty, he said, of indiscriminate and lethal attacks upon innocent Black people in the Goldfields area. This too had contributed to the alienation of the two racial groups and perhaps even created the perception that they were in effect at war with each other.

I have more than one difficulty in agreeing that these factors amount to mitigation in this case. Assuming that it can be said that such resentment, antagonism and tension existed in the township that night, it is quite impossible, without any evidence on the part of the appellants, to assess to what extent such factors influenced them in their decision

to take part in the multiple murders. Furthermore, there are counter considerations which cannot be overlooked. According to the evidence White persons did on occasions visit the township without mishap. Thus one must infer that these factors did not cause other residents to behave with brutality to assuage any hostile feelings. As a matter of fact, according to Menong, after this incident the local civic organisation, of which he was a member, distanced itself from the murderous attack and deplored it. One knows that these factors did not have that effect upon Mosese. He too, like the appellants and others, was living in deprived and difficult circumstances. One need hardly add that Mosese, as a fellow "Comrade" and a member of the ANC, showed outstanding courage and responsibility, risking his own life in an attempt to save the lives of complete strangers. Indeed, in view of the obscene cruelty and brutality

shown by the appellants, he risked the prospect of a particularly grisly death both to prevent the outrage, and to preserve the reputation of the organisation to which they all belonged. His conduct is to be praised in the highest terms. Once again, and finally, I must refer to their conduct in seeking out Mosese in order to kill him. If these factors to which Dr Cooper adverted, caused them to murder Whites, that is, to act contra naturam sui generis, it is difficult to reconcile this explanation with the excursion to kill Mosese.

No elaboration of the aggravating circumstances is necessary. They speak for themselves and can hardly be overstressed. One cannot conceive of any community, regardless of its racial composition, not being appalled by such senseless slaughter, regardless of the racial composition of the perpetrators or their victims.

The crimes make the retributive element of punishment the overriding one and the death penalty the only proper sentence.

The appeals are dismissed.

M E KUMLEBEN
JUDGE OF APPEAL