

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

AMOS NDWALANE APPELLANT

and

THE STATE RESPONDENT

Coram : VILJOEN, BOTHA, JJA et VIVIER, AJA

Heard : 15 MARCH 1985

Delivered : 28 MARCH 1985

J U D G M E N T

VILJOEN, JA

With the leave of this Court, the appellant,

who was convicted ia on a charge of murder in the

Durban/.....

Durban and Coast Local Division before Howard J
and assessors, appeals against the finding of that
Court that there were no extenuating circumstances
present and the consequent death sentence.

On 27 May 1983 and at Lamontville, Durban,
the appellant shot and killed one Aubrey Masheshisa
Mahlaba (hereinafter referred to as Mahlaba) under
the following circumstances. Mahlaba was a prominent
and leading figure in the township of Lamontville.
So was one Dube. They both served on the Council
of Lamontville and each conducted a taxi service
in the township. During a bus boycott a disagree-
ment arose between Dube on the one side and Mahlaba
and a number of his supporters on the other side.

As the/.....

As the witness Masango, who was called to give evidence in extenuation, put it:

"M'Lord, people started boycotting buses at Lamontville. Mr Dube supported the fact that there must be taxis operating from Lamontville to assist the members of the public, the commuters. Members of the public liked Dube because he came to their aid during the time of the bus boycott."

For this reason Mahlaba and a number of his henchmen decided to kill Dube, to which decision they gave effect by hiring an assassin to do the killing. To a question put by the prosecutor why Dube was killed, the witness Masango replied:

"M'Lord Mahlaba and Ebenezer Mngadi were against the introduction of taxis who were supposed to come and assist commuters at Lamontville.

That is/.....

That is why he was killed."

Nobody was arrested immediately after the death of Dube but rumours were rife in the township that Mahlaba and his supporters were responsible for the death of Dube. Some time after the death of Dube the appellant waylaid Mahlaba at a taxi rank and while Mahlaba was seated in his taxi talking to a young girl the appellant walked up to the taxi and shot Mahlaba in the head at close range with a fire-arm which he had borrowed from an acquaintance of his. It is common cause that some time after the death of Mahlaba a number of people were arrested and charged before another Court on a charge of having murdered Dube. From

extracts/.....

extracts from the judgment delivered in that Court which were introduced into the record of this case it appears that the Court who heard the matter found that Mahlaba had been one of the conspirators to kill Dube.

Dube was a great benefactor and friend of the appellant. The latter's state of mind and the reason why he killed Mahlaba appears from two statements he made, one before a magistrate and another in court during proceedings under s 119 of Act 51 of 1977. Before the magistrate he stated:

"Gedurende April 1983 is Msizi Dube wat 'n Raadslid was van die Lamontville Swartdorp doodgeskiet deur onbekende persone. Terwyl die polisie ondersoek aan die gang was in verband met die dood van Dube het ek in-

ligting/.....

ligting ontvang dat Mahlaba, Nhlangulela en Gaza laasgenoemde ook 'n raadslid van Lamontville saamgesweer het om Dube te vermoor. Maar as gevolg van 'n gebrek aan getuienis kon die polisie nie een van die drie genoemde persone arresteer.

Ek het toe 'n plan beraam om een van die drie persone te kry. Ek wou een of al drie doodskiet omdat hulle vir die dood van Dube verantwoordelik was.

Ek het toe gedink hoe ek 'n vuurwapen in die hande kon kry. Op 'n sekere Saterdag het ek 'n jong seun in Lamontville gesien met 'n rewolwer. Ek het hom toe genader en daarvoor gevra. Hy het dit toe aan my gegee. Ek het die seun meegedeel dat hy die rewolwer weer by my kan kry nadat ek dit gebruik het. Met die rewolwer in my besit het ek toe begin soek na die drie mense wat Dube se dood veroorsaak het. Ongeveer 2 weke later een oggend vroeg het ek na die plek gegaan waar die huurmotors parkeer in Lamontville naby die begraafplaas. Mahlaba het toe daar aangekom met die huurmotor. Mahlaba het eers gedraai. 'n Swart meisie het hom genader en hy het stilgehou. Ek het agter die huurmotor aan geloop terwyl

hy/.....

hy besig was met die swartmeisie. Mahlaba het toe net sy venster oopgemaak aan die bestuurder se kant om met die meisie te praat. Ek het die kar toe genader aan die bestuurder se kant en ongeveer drie treë van hom af het ek een skoot afgevuur na Mahlaba waar hy nog in sy motor gesit het. Ek het gesien dat ek hom in sy kop geskiet het. Mahlaba het toe in sy kar omgeval met sy kop op die sitplek. Ek het toe weggeloop in die begrafplaas in. In die begrafplaas het ek gebid en gesê "baie dankie Dube ek het een van die persone gekry". Ek was ook gelukkig dat die swartmeisie Mahlaba laat stilhou het anders sou ek hom nie in die hande gekry het nie. Ek is toe na my huis toe om die vuurwapen te gaan bêre. Ek het Mahlaba geskiet ek was kwaad vir die drie mense omdat hulle vir Dube dood gemaak het. Ek was baie hartseer daarom het ek Mahlaba doodgeskiet. Ek was baie lief vir Dube. Ek dra ook 'n skipper hemp met Dube se gesig daarop."

His statement during the s 119 proceedings contains somewhat more detail. It reads:

"Accused/.....

"Accused I'd like to make a statement.

I would like to tell the court that

I shot Mahlaba.

Court Is that now the deceased, Aubrie
Masheshisa Mahlaba?

Accused That is correct. I shot him
because I heard from rumours that
he was one of the people who killed
Dube. That worried me because I
had seen Dube the previous Saturday.
On that Saturday I had taken Dube
with my car to his wife at Mtwalume.

.....
Accused We then promised that we
would see each other on Monday the
following Monday.

Court You and Dube now?

Accused Yes. And on Monday night,
I think it was about 12 a neighbour
girl knocked on my door and informed
me that Dube had died.

Court/.....

Court Where were you then? You say at your door. Where is your home where you were?

Accused At Lamontville. I then got up, got into my car and I went to Dube's house. When I arrived there Dube was no longer there and they showed me a place where he was lying. I then asked whom they have contacted, his relatives, or whether they had contacted his brother at Umlazi, and they told me that they had contacted nobody and that they did not know the number of his brother who stays in Umlazi. Because I knew his brother's house I got into my car and I proceeded there. I then informed his brother that his brother, that is Dube, had been shot and he was dead and he would not see him any more. I then went back into that place and made a report that I had informed his brother. I then went home and I did not sleep that night. The following morning I went back to Dube's place. I then asked where these people who shot Dube were and I was informed that they

were/.....

were people who were seen around there near his house who were speaking Xhosa. I then went home and thought what was happening. In fact, my business is doing pirate taxi operating there at Lamontville and during those days I did not proceed with my work. I just stayed home because I could not work. I then left my big car at home, did not use it and I used a small one just to drive around, and we made some arrangements for Dube's funeral. And on a certain day I took my Kombi and went to the taxi rank, and I was approached by the deceased, that is Mahlaba, and he had a note.

.....
Accused And he had a note in his hand and he informed me that he was collecting some donations for Dube and that each operator, taxi operator had to pay R10. I then informed Mahlaba or the deceased that I would not pay that R10 because I had already paid R10 at Dube's house and that I had paid another R10 in the community hall during the funeral service.

I then/.....

I then left and went away. After he had collected this money from other taxi operators a person was then needed to take that money to Dube's house. The deceased then approached me and asked me to take this money to Dube's house.

Court Why did he collect money for Dube, the late Dube?

Accused I think it was just a donation because the late Dube was a councillor. I then approached - but I refused to take that money to Dube's house because I did not contribute anything of that money. I then do not know who later took that money to Dube's house and whether it was taken there or not. The late Dube was then buried and the matter was then handed to the or it was collected by the police. Days went on without anybody being arrested for the death of Dube but the rumours were spreading that these were the people who killed him.

.....

Accused/.....

Accused Yes. I then thought how was I going to get a firearm, and one day whilst driving in my car I met another boy and he had a firearm with him and I knew him. I then asked him to give that firearm to me.

Court Was this now a hand gun or a proper gun?

Accused It was a revolver. He then gave it to me and I told him if he needed it he would come to take it from me. I then looked for all these people that were being suspected and one day early in the morning I woke up and I went to Gijima and that is where all the taxis are turning. Mahlaba in his car came there and he turned his

car/....

car and a child came there and went to speak to him. I do not know what this child was saying to him, and I leaned against his car on the driver's side.

Court So you also went to his car? So did you go to his car then?

Accused Yes, I went to his car while he was still busy speaking to this child.

Court Yes, and you leaned against it?

Accused Yes, I then came nearer to him. I then shot him.

Court When he was sitting in his car?

Accused Yes, he was sitting in his car. His head protruded through the window as he was speaking to this child. I then left, went towards the cemetery.

Court You?

Accused Yes. I then went to pray. I then prayed saying "Thank you, Dube and Ndwalane families, for helping me fulfilling my wish." I then went home. I did not tell anybody. I just kept my revolver in a safe place. Thereafter I took the firearm and went to hide it at my girlfriend's place, and I just sat at home and nobody knew except me."

The judgment on the question of extenuating circumstances reads as follows:

"The/....

"The question is whether, in the opinion of the Court, there are extenuating circumstances present in this case, that is any facts bearing on the commission of the crime of murder which reduce the moral blameworthiness of the accused. In the judgment culminating in the verdict I have already traced, in broad outline, the background to the murder of Mahlaba. We have since heard the evidence of Mr Masango, which confirms and adds to what we have already found to be the circumstances leading up to this crime. He has described the accused as an obedient and respected member of a quiet and respectable family. The accused himself has testified that he is thirty-five years old. He is married and has five children. Mahlaba, by contrast, associated with persons whom Masango described as rogues and was guilty of provocative and violent conduct, particularly provocative and cynical was his action in collecting money after Dube's death, ostensibly for Dube's family, as described by the accused in his statement during the proceedings in the Magistrate's Court, Exh E. Masango testified to the community's distress at the death of Dube and its jubilation when Mahlaba was killed. Whilst conceding that the accused should be punished for the murder of Mahlaba, he claimed that his

community/.....

community would not regard the death sentence as an appropriate penalty.

Mr Kuny submits that in considering the question of extenuating circumstances we should look at the accused's subjective state of mind in the context of his community and its mores, his very close relationship with Dube, his distress at the killing of Dube, his conviction that Mahlaba was one of those responsible and his frustration at the fact that Mahlaba, whose conduct was brazen and provocative, appeared to be going unpunished. The evidence justifies the conclusion that these factors were present and we accept that they subjectively influenced the accused in the commission of the crime. They influenced him to take the law into his own hands and exact revenge for Dube's death by killing Mahlaba. To that end he acquired a firearm and spent the next two weeks or so looking for the suspects. When he found Mahlaba he approached his victim unawares and deliberately shot and killed him in cold blood.

It is true that the accused did not stand to gain any tangible reward for the killing and that he probably thought that he was performing a public service in ridding the community of

Mahlaba,/.....

Mahlaba, but it was nevertheless a premeditated and coldblooded assassination executed in furtherance of a plan which was formulated some two weeks previously.

Under the circumstances we do not think that the various factors relied upon as extenuation, whether considered singly or cumulatively, serve to reduce the accused's moral blameworthiness. In our opinion, which is unanimous, there are no extenuating circumstances in this case."

It is trite that the jurisdiction of a court of appeal to interfere with a finding that no extenuating circumstances exist, is strictly limited. It can only do so if it is shown that there was a misdirection or that the finding, viewed in the light of all the evidence, is of such a nature that it could not reasonably have been arrived at.

S v Mkonza 1981(1) SA 959 (A) at 963 F - G.

It is/.....

It is not clear from the learned Judge's reasoning whether he prima facie found the factors relied upon by counsel as extenuating circumstances to be such. All he said was that the evidence justified the conclusion that the factors were present and that they subjectively did exercise the mind of the accused in the commission of the crime. I assume that the Court did regard the factors referred to, by themselves, without being affected by any aggravating features, as extenuatory. As I read the judgment it would appear that the Court found that, because the factors which otherwise would have been extenuating, influenced the appellant to take the law into his own hands and, by a carefully planned stratagem, exact revenge for Dube's death, any extenuation was wiped out or neutralised. Such reasoning postulates a weighing/.....

a weighing up of, or a comparison between the
 extenuating circumstances and the nature of the
 crime. In so doing the Court a quo, in my view,
 misdirected itself. The inquiry is whether the
 factors which subjectively influenced the mind of
 the offender to commit the murder are extenuating
 or not; the manner in which he committed the murder
 is irrelevant. As Steyn CJ pointed out in S v Petrus
 1969(4) SA 85(A) at 90 E - G every murder is a repre-
 hensible crime. He calls this basic reprehensibility.
 Botha JA said in S v Van der Berg 1968(3) SA 250 at
 252 in fin to 253 :

"Daar dien in ieder geval opgemerk te word
 dat die erns van die moord in die onderhawige
 geval, die wreedheid daarvan en die onnodigheid

van die/.....

van die geweld wat gebruik is, nie verskil van die erns of die wreedheid van of die onnodigheid van die geweld by enige ander moord nie, veral nie 'n moord wat, soos in die onderhawige geval, by wyse van die toediening van 'n steekwond met 'n mes gepleeg word nie."

At 252 F - G of the Van der Berg case,

supra, Botha JA said:

"Dit is voor-die-hand-liggend dat, ofskoon in die aard van die wandaad 'n aanduiding van die gemoedstoestand van die dader gevind mag word, die vraag of 'n bepaalde omstandigheid as 'n versagtende omstandigheid aangemerkt behoort te word, wat 'n subjektiewe ondersoek na die gemoedstoestand van die wandader verg, nie aan die aard van die wandaad getoets kan word nie. So kan provokasie bv. 'n dader se gemoed so beïnvloed dat dit aanleiding kan gee tot die pleging van 'n afskuwelike daad, maar die afskuwelikheid van die daad kan die provokasie nie as 'n versagtende omstandigheid uitwis nie."

The last sentence in the passage quoted

above/.....

above was approved by Steyn CJ in the matter of Petrus, supra, at 92A. In the latter case Steyn CJ explains at 92 D - G to what extent and to which effect the nature of the offence may be taken into account in the inquiry.

"Dit beteken egter nie dat die aard van die wandaad, in die sin van die moord en die wyse waarop dit uitgevoer is, by die beoordeling van versagtende omstandighede buite rekening gelaat moet word nie. Vir sover feite wat met die moord in verband staan, by bedoelde beoordeling ter sake is, kan hulle vanselfsprekend nie uitgesluit word nie. Die manier waarop die dader te werk gegaan het sou kan aantoon dat hy bv nie so dronk was as wat hy voorgee nie, of dat beweerde voorafgaande provokasie geen noemenswaardige nawerking by die daad gehad het nie. By 'n vooruit beplande moord sou uit die omstandighede met volkome sekerheid afgelei kan word dat 'n bewese hoë graad van dronkenskap tydens die daad, geen aanleiding hoegenaamd tot die daad gegee het nie, dat dit die dader glad

nie/.....

nie beïnvloed het nie, en daarom nie as versagting gereken kan word nie. Die feit dat dergelike aspekte van 'n moord medebepalend kan wees vir die bestaan of andersins van versagtende omstandighede, bring egter nie mee dat beweerde versagting buite bevinding gestel kan word bloot deur die wreedaardigheid of snoodheid van die daad nie."

Rumpff JA expresses his view at

95 G - 96 B as follows:

"Om vas te stel of daar versagtende omstandighede is of nie, spreek dit m i vanself dat die feite van die misdaad sowel as die moontlike omstandighede wat as versagting sou kon dien oorweeg moet word. Die erns of afskuwelikheid van die misdaad, as sodanig, kan nie die moontlikheid van versagtende omstandighede uitsluit nie. En ek dink nie iemand sou dit ooit wil beweer nie. Wat wel kan gebeur is dat wanneer die versagtende omstandighede oorweeg word in die lig van die feite van die misdaad, 'n Verhoorhof sou kon bevind dat die beweerde omstandighede in die besondere geval nie volgens sy mening as versagting kan geld nie. So sou 'n jeugdige van 17 jaar oud, wat reeds werk en betreklik volwasse is, en wat sy oom en tante

vergiftig/.....

vergiftig om 'n groot som geld in die hande te kry, hom miskien tevergeefs mag beroep op sy jeugdigheid as sodanig, sonder meer. In hierdie lig moet ook gelees word wat verskyn in S v Mohlobane, 1969 (1) S A 561 (A A) te bl 568, waar melding gemaak word van die noodsaaklikheid om die agtergrond van 'n jeugdig te ondersoek met die oog op sy graad van volwassenheid. Die bedoeling van wat daar staan, is nie om te beweer dat die hoogs laakbare aard van 'n misdad die bestaan van versagende omstandighede per se uitsluit nie, maar dat al die feite van 'n misdad so kan wees dat 'n Verhoorhof sou kon besluit dat 'n spesiale ondersoek in verband met die jeugdig se graad van volwassenheid onnodig is en dat sy jeugdigheid (en dus moontlike verbetering) nie as versagting kan dien nie."

The inquiry therefore is whether the
circumstances are such that they are truly extenuating
and, if so, whether they did influence the mind of
the offender to commit the crime. The youth who out
of sheer/.....

of sheer wickedness kills his father and mother will rely on his youthful age in vain. The plea of having been under the influence of liquor when he committed the murder will not avail an accused who commits a premeditated murder. And if there was provocation but the provocation did not really influence the accused to commit the murder it will not assist him to rely thereon as an extenuating circumstance. I am therefore of the view that the Court a quo erred in concluding that the nature of the crime neutralised the extenuating circumstances.

But if I am wrong in the assumption that the Court a quo did regard the factors referred to as extenuation it, in any event, in my¹ view, mis-directed itself. The Court should have found those

circumstances/....

circumstances to be extenuating. In R v Biyana

1938 EDL 310 at 311 Lansdown JP said:

"In our view an extenuating circumstance in this connection is a fact associated with a crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt."

It is therefore essentially a moral judgment.

In my view the circumstances were clearly, from this point of view, extenuating. Dube was a close friend of the appellant's. He loved and respected him. He looked upon him as a father. When Dube was assassinated he was overcome with grief. He could not sleep and, it is clear, he suffered excruciating anguish at this cowardly deed committed/.....

committed by the conspirators. In his mind Dube was a benefactor of the community. He was beset by feelings of outrage and frustration because the people responsible were not brought to book. He felt he owed it to Dube to avenge this terribly grievous wrong done to Dube, his family and himself and a touching illustration of his relief at having been able to avenge the death of his great benefactor and friend was the moving prayer he said in the cemetery after the killing of Mahlaba. His overriding thought was not so much, as I see it, that he was performing a public service in ridding the community of Mahlaba; it was a feeling of satisfaction at having been able to bring just retribution upon/.....

upon Mahlaba.

The appeal accordingly succeeds. The death sentence is set aside. The appellant is sentenced to ten years imprisonment.

JUDGE OF APPEAL

Botha JA)
) - concur
Vivier AJA)