

VINCENT MUZIKAYIFANI YEDWA NGIDI

1st Appellant

SIKUMBUZO PHILLIP CELE

2nd Appellant

and

THE STATE

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VINCENT MUZIKAYIFANI YEDWA NGIDI

1st Appellant

SIKUMBUZO PHILLIP CELE

2nd Appellant

and

THE STATE

Respondent

Coram: RABIE, A CJ, HEFER, J A et BOSHOFF, A J A

Heard: 6 November 1987

Delivered: 26 November 1987

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J U D G M E N T

BOSHOFF, A J A:

The two appellants were accused 2 and 5  
when they were convicted in the Durban and Coast Local

Division...../2

Division on three counts of murder.

The trial court found extenuating circumstances on count 1 in respect of the death of Idah Dlamini and on count 3 in respect of the death of Mbongiseni Dlamini and they were both sentenced to 12 Years imprisonment on each of these two counts.

The sentences on count 3 were ordered to run concurrently with the sentences on count 1. The trial court found no extenuating circumstances on count 2 in respect of the death of Siba

Dlamini...../3

Dlamini and both the appellants were sentenced to death.

The trial judge allowed the appellants leave to appeal against the finding of the trial court that no extenuating circumstances were established and this is the only question to be considered by this court.

The circumstances and the spirit in which the abovementioned crimes were committed appear to stem from the unsatisfactory state of affairs which existed in the Engonyameni Reserve, a location which is under the control of Chief Cele and which adjoins the Umlazi township, a part of a Durban Black residential area. The kraals of 5 families (the Dlaminis, Msomis, Sibisis,

Gumedes...../4

Gumedes (also known as the Quabes) and Phalagos) are in close proximity to one another and there is a lot of ill-feeling between the young men which in the past had led to attacks on individuals and the respective kraals. One night two young men and a young woman of the Phalago family, Mfankithi, Ndlekevu and Manu, returned from a celebration and were waylaid by young men of one or more of the other families and seriously assaulted. Both Mfankithi and Ndlekevu were in hospital for some time and eventually a leg of Mfankithi had to be amputated. Manu was stabbed with an assegai. Thereafter in September 1983 a group of young men, apparently Msomis and Dlamini's, attacked and burnt down the Phalago kraal and killed the daughter Doda

A week later Chief Cele called a meeting to find out who the culprits were. He had no success and announced that the matter would be left in the hands of the law.

In November 1983 the Dlamini kraal was attacked. Julia Dlamini was injured in the eyes and on the mouth and both her mother and sister-in-law sustained stab wounds. Julia was then afraid of staying there in the reserve and moved to the family house in Umlazi.

These violent instances of hostility regrettably did not receive proper and efficient attention from the Isipingo Police who were responsible for the policing of that area. The police were evidently

too...../6

too scared to enter the area or reluctant to involve themselves in these family disputes.

On the afternoon of the 4th March 1984 a group of about 30 men armed with assegais, shields, sticks and a gun were near the Dlamini kraal when Victor Msomi, the son of Phumzile Msomi, an elderly woman who lives near the kraal of Phillip Dlamini, alighted from a bus. He saw the armed men and started to run away. They chased him but he managed to elude them. The armed men then went to the Dlamini kraal. The two sons, Nhlanhla and Mbongiseni fled from the kraal with the armed men in pursuit of them. They outran the armed men and the armed men then again returned to the Dlamini kraal...../7

kraal . In the meantime Phillip Dlamini had gone to the Isipingo Police for assistance and returned with two policemen to find the armed men sitting approximately 200 metres away from the kraal.

Phumzile and Julia had been visiting Phillip's wife, Idah, at that time and they had noticed the armed men near the kraal. The three of them went to where Phillip was standing with the two policemen to warn them about the presence of the armed men. When the policemen saw the armed men they immediately left to fetch reinforcements. The armed men then moved towards Phillip and the three women. Idah and Phillip

fled...../8



fled in different directions and the armed men broke up into two groups, the one following Idah and the other Phillip. The one group which included the two appellants stabbed Idah to death and the other group seriously assaulted Phillip. Idah is the deceased in count 1.

When Phumzile arrived back at her home she found that her dogs had been stabbed, that all the doors of the house had been opened and that a window had been broken.

When Phillip came out of hospital he moved with his family to his house in Umlazi.

After dark on 18 March 1984, Thandi, the twin

sister...../9

sister of Julia, looked through the bathroom window and saw armed men outside the house. She raised the alarm and took her ailing father, her drunk brother Themba and Julia into the bathroom and locked the door. Nhlanhla fled into the main bedroom and hid behind the door next to the wardrobe. His brothers Siba and Mbongiseni and his 8 or 9 year old niece Philisiwe hid under the bed. The armed men broke window panes and forced the kitchen door. A number of them including the two appellants entered the main bedroom and pulled Mbongiseni from under the bed. Makhanya, who was accused 1 in the trial court, chopped Mbongiseni with an axe. The appellants and other persons stabbed him with assegais. He is the deceased

in count 3. He was 26 years old and had been in trouble with young men of the other families before. One witness described him as a trouble-maker in the reserve.

However, after they had finished him off they pulled Siba from under the bed. He was 14 years old and at first tried to get away from them and pleaded with accused 1 that he was still in his childhood and should not be killed. Accused 1 chopped him on the head with the axe. The others including the two appellants proceeded to stab him with assegais. He is the deceased in count 2.

Mbongiseni died of multiple injuries. He

had...../11

had 28 clean cut wounds on his face and body.. He had a 3cm x 3cm cross-shaped laceration on the top of his head, a 4 cm laceration 6 cm above his right ear and 7 overlaying lacerations in the upper right occipital scalp. Underlying these wounds he had fragmented depressed fractures in the right parietal area.

Siba also died of multiple injuries. He had 10 clean cut wounds on his body and legs, 2 puncture wounds on his body, a small depressed fracture under the penetrating wound on the top of his head and fragmented depressed fractures in the occipital bone.

The trial court found that although accused 1

was...../12

was the leader of the armed group which attacked the Dlaminis and played a prominent part in the attack on the deceased persons, there was no evidence that the younger members of the group feared him or were under his direction. The trial court also found that every one who took part in the attack on the Dlaminis did so with a common purpose and with knowledge of the weapons carried by the others in the group and subjectively knew that death was likely to result and that they were thus all equally guilty of murder.

On the question of extenuating circumstances the trial court viewed the murder on Siba (count 2) against the background of the two appellants having

had two weeks previously participated in the murder of Idah (count 1). There was no evidence of recent or previous provocation by members of the Dlamini family which after the lastmentioned murder had fled from their kraal at Engonyameni to seek refuge at Umlazi. There was in addition no evidence that Siba had ever in any way behaved in such a way as to cause anyone to have any personal animosity against him. When he was attacked he as a child of 14 years pleaded in vain for his life. The trial court on this reasoning found that there were no extenuating circumstances. In the case of the murder on Mbongiseni (count 3) the trial court accepted that there were a number of people who bore a grudge against

him...../14

him and that the cause of the attack on him was rooted in the previous trouble and was influenced by the previous attacks on the Phalagos. This in the view of the trial court was sufficient to reduce the moral blameworthiness of the appellants and to justify a finding of extenuating circumstances.

Mr McIntosh on behalf of the appellants concedes that this court cannot interfere with the finding of the trial court on extenuating circumstances unless such finding is vitiated by misdirection or irregularity or is one which no reasonable court could have come to. He contends that the trial court misdirected itself by incorrectly drawing a distinction between counts 2

and 3 in finding no extenuating circumstances in count 2.

According to him, because the two murders were committed

within minutes of each other , the factors affecting

moral blameworthiness which justified the finding of

extenuating circumstances in count 3 were necessarily

also present in count 2. He referred the court to

the fact that the trial court had granted the appellants

leave to appeal because of the possibility that another

court might hold that in distinguishing between counts

2 and 3 its approach was academic. It is not clear

what the trial court had meant by the word "academic"

in this context. Mrs Steyn for the State suggests

that the trial court could have intended to convey

that...../16



that its approach may possibly be seen as somewhat of an "armchair" assessment of the evidence.

However, it appears from the judgment in the application for leave to appeal that the trial court also said:

"It was the view of the Trial Court that a distinction could and should be drawn between the murder of the troublemaker, Mbongiseni, and the slaughtering of the innocent child Siba Dlamini. We came to this conclusion, particularly in the light of the evidence that he pleaded for his life. It was the view of the Trial Court that this in itself should have brought these people to their senses and that their act in thereafter continuing with the killing, distinguished the killing of Siba from that of Mbon-giseni."

It is reasonably clear from the reasons of the trial court that in the case of Mbongiseni it had regard to the fact that the attack on him could be related to the part he had in the past in the hostilities that existed in the reserve. This was a consideration which clearly did not apply in the case of Siba. The attack on him was nothing less than cold blooded.

I am of the view that the approach of the trial court was perfectly regular and proper and it was fully entitled to draw the distinction.

I am not persuaded that the trial court misdirected itself in this respect or in any other respects.

In...../18

In the result the appeal is dismissed.

ACTING JUDGE OF APPEAL

RABIE, A CJ)           concur  
HEFER, JA)