188/94

Case no: 675/93; 676/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MABHUNGU ABSOLOM DLADLA First Appellant

NKANYISO WILFRED NDLOVU Second Appellant

and

THE STATE Respondent

Coram: **E M GROSSKOPF, EKSTEEN et**

F H GROSSKOPF JJA

Heard: 4 November 1994.

Delivered: 30 November 1994

J U D G M E N T

F H GROSSKOPF JA:

The two appellants were both convicted by the Judge President of Natal, sitting with two assessors at Pietermaritzburg, on ten counts of murder and six counts of attempted murder. The second appellant was also convicted on further counts of unlawfully possessing a 12 bore pump action shotgun ("shotgun"), an AK 47 assault rifle ("AK 47"), an R1 automatic rifle ("R1"), as well as ammunition for the AK 47 and the shotgun. The appellants were both sentenced to death in respect of each of the ten murder counts, and to various terms of imprisonment in respect of the other counts. The appellants now come on appeal pursuant to the provisions of s 316A of Act 51 of 1977 against their convictions on the ten counts of murder and the sentences of death imposed for those murders.

On Friday 5 March 1993 at about 16:30 a minibus taxi ("the minibus") was ambushed by three gunmen on the road between the Lion

Park and Nkanyezini in the Table Mountain area in the district of Camperdown. These gunmen were respectively armed with an AK 47, an R1 and a shotgun. The minibus carried its driver, one Welcome Mkhize, a conductor, and fourteen other passengers, ranging from a 15 year old girl to a 69 year old man. The attackers opened fire on the approaching minibus and forced it to a standstill. They kept on shooting at the minibus and its occupants, killing ten passengers in the process. Another four passengers suffered gunshot wounds. The victims were predominantly females. The driver escaped injury by fleeing from the minibus when it stalled and came to a standstill.

The police found 38 empty cartridge cases at the scene, 27 of which were R1 cartridge cases, all fired from the same R1 which the police later recovered as a result of a pointing out by the second appellant. The seven AK 47 cartridge cases found at the scene could not be linked positively to any particular AK 47, but the police established that the four shotgun cartridge cases were fired from the shotgun which

the second appellant later handed to the police.

The first appellant admitted that he took part in the attack on the minibus and the killing of the passengers, and that he was the gunman who used the R1. His defence was that the second appellant had threatened to kill him if he did not participate in the attack, and that he therefore acted under compulsion. The second appellant denied having participated at all and advanced an alibi defence.

The first appellant made a confession to a magistrate, but he made no mention therein of any compulsion or threats by the second appellant. He was unable to give any reasonably acceptable explanation for withholding this vital information from the magistrate.

It appears from the first appellant's confession, and indeed also from his *viva voce* evidence, that it was his idea to launch a revenge attack in order to avenge the death of six children who had been killed a few days before on Tuesday 2 March 1993 in the same area. He believed that the persons who killed the children had been conveyed in

a particular "kombi" by a driver who could be identified. The children who were killed in that attack were the children of Inkatha supporters, while their attackers were perceived to be ANC supporters. The first appellant was also a supporter of the Inkatha Freedom Party. According to his evidence he spoke to the second appellant and a certain Pi Mkhizi, also known as Sifiso, on Thursday 4 March 1993 at a place where a prayer meeting was being held for the children who had died two days before. Three of those children were his cousin's children. He told the second appellant and Sifiso that the children who survived the attack identified one of their attackers, but that the police had not yet arrested anyone. He and his two companions however agreed that the police would eventually succeed in apprehending the culprits. The first appellant nevertheless suggested that there should be some form of reprisal. He felt that somebody should be killed as a retribution for the killing of the children, but he repeatedly explained that he was not trying to influence the other two.

The first appellant testified that he had second thoughts that Thursday night about taking part in the proposed vengeance killing. He also said that it was only when he heard a news bulletin over the radio on the Friday morning that he changed his mind. He then heard that the leaders of the Inkatha organisation warned their supporters to refrain from revenge attacks. Once again the first appellant made no mention in his confession of this important change of heart and his decision not to proceed with the planned retaliation.

His evidence was that when the second appellant came to fetch him that Friday afternoon, he refused to go along. The second appellant then threatened to kill him if he did not participate, and handed him a loaded R1. I find it hard to believe that the second appellant would have armed a reluctant participant with such a dangerous weapon in those circumstances. In any event, on his version the second appellant later took an AK 47, while Sifiso was handed a shotgun. Thereupon they proceeded to the place where the attack was to take place.

The second appellant instructed the first appellant to start shooting at the driver of the minibus. He was perceived to be the driver who had conveyed the persons who killed the children. When the minibus came within range the first appellant opened fire, but he failed to hit the driver. He said that he kept on shooting. His further evidence that he never went near the minibus is refuted by the police evidence that they found no less than eight spent cartridge cases of the R1 inside the minibus. The expert police evidence was that the R1 would eject its empty cartridge cases over a distance of not more than 3 metres. The first appellant was unable to explain the presence of the R1 cartridge cases in the vehicle. The acceptable police evidence showed that he must have been very close to, if not inside the minibus at some stage during the attack. He said the dust from the road prevented him from seeing that there were women in the minibus, but that cannot be true if he was so close to the minibus. His evidence that he was unaware of the presence of women in the minibus must be rejected as false. He could

give no reasonably acceptable explanation for suspecting that any of the occupants of the minibus had anything to do with the killing of the children.

The first appellant was also untruthful when he told the court *a quo* that he never changed magazines. The magazine of the R1 contains only 20 rounds while there were 27 empty R1 cartridge cases found at the scene. The expert police evidence was that there were two magazines which were taped together in combat mode in order that the magazines could easily be inverted once the 20 rounds contained in the one magazine had been fired. This is clearly what happened during the attack. Judging from the number of empty cartridge cases found at the scene the first appellant fired far more shots than his two companions did.

I agree with the finding of the court *a quo* that the first appellant was an untruthful witness and that his defence that he acted under duress should be rejected as false. His appeal against his

convictions on the ten murder counts must accordingly fail.

The second appellant is implicated in the commission of the crimes by the first appellant's direct evidence. He is further connected by his own pointing out of certain of the firearms used in committing the crimes. I have dealt with the first appellant's evidence and its unsatisfactory features, more particularly his lying evidence that he acted under duress from the second appellant. I do not, however, agree with the submission by the second appellant's counsel that no reliance whatsoever could be placed on the first appellant's evidence insofar as it implicated the second appellant. The first appellant's evidence that the second appellant took part in the attack on the minibus is corroborated by the reliable police evidence dealing with the second appellant's pointing out of the R1 and the shotgun, which were both used in the attack on the minibus.

The second appellant conceded that he concealed the shotgun and a plastic bag full of 12 bore shotgun cartridges at the top of the wall

in his room at the kraal of Mr Ntombela. He subsequently pointed them out to the police in the early hours of Sunday morning 7 March 1993. It is common cause that this was the same shotgun which was used during the attack on the minibus the previous Friday. The second appellant explained that the first appellant came to his room on the Friday afternoon at about 17:30 with the shotgun and asked him to keep it for him. He told the court *a quo* that the first appellant was not a friend of his, but a mere acquaintance. He was unable to give any reasonably acceptable explanation as to why he was prepared to keep the shotgun for the first appellant. He further testified that on the same occasion the first appellant took him outside the room and pointed out a spot, between 500 metres and one kilometre away, across the river, on the opposite hill and behind a kraal, and said that there was a ditch in which he had hidden other firearms. The first appellant requested him to keep an eye on that place where the other firearms had been concealed. The second appellant alleged that following upon this request

he kept that spot constantly under observation from the Friday afternoon until the police arrived at Ntombela's kraal in the early hours of Sunday morning.

It is hard to believe, as was observed by the court *a quo*, that the second appellant would have been prepared to look after the first appellant's shotgun, and to keep the hiding place of his other firearms under observation, where the first appellant was nothing more than a mere acquaintance who had declined to tell him what it was all about. What is even more improbable on the second appellant's version is that he had no difficulty in leading the police through broken terrain in the dead of night directly to the place where the first appellant had allegedly concealed the firearms in the ditch. On their arrival at the ditch the second appellant pointed to a place in the ditch where an AK 47 was recovered, wrapped in a blue overall. When asked about an R1 he pointed to another spot in the ditch where the police found an R1 wrapped in material. The second appellant's explanation was that it was

by sheer chance that he happened to point out the correct spots. He was, however, unable to explain why the police did not in the first instance ask the first appellant, who happened to be present at the time, to show them where he had hidden the firearms. On the second appellant's version the police asked him instead to show them where the first appellant had shown him that he had concealed the firearms. This evidence of the second appellant is so improbable that it must be rejected as false. It is clear that he knew exactly where to find the firearms. It follows that he personally concealed them in the ditch, or that he was present when they were concealed in the ditch.

The second appellant's case was that he had nothing to do with the attack on the minibus, and that he was at Ntombela's kraal at the time when it took place. He called Ntombela and a certain Michael Mkhize to confirm his alibi, but there were so many discrepancies and contradictions in the defence version that the court *a quo* found it impossible to place any reliance on the evidence relating to the alleged

alibi.

I shall refer to only one of the many discrepancies to show how unreliable the alibi evidence of the second appellant really was. At the commencement of the trial in the court *a quo*, which was a trial of special offences under the Criminal Law Second Amendment Act 126 of 1992 ("the Act"), counsel handed in a statement signed by the second appellant in terms of s 20(4) of the Act. The statement was read out in court and confirmed by the second appellant. Paragraph 2 of the statement reads as follows:

> "On 5 March 1993 I was at my place of residence. I assisted a certain Mr Ntombela, my neighbour, to fix a motor vehicle. We worked on this motor vehicle until approximately 17h00. Thereafter, I proceeded to a room which I occupy and rested. Later on Accused No 1 arrived at my room. It was already getting dark."

This statement was inconsistent with the second appellant's own evidence and was, moreover, not borne out by Ntombela's evidence. Ntombela recalled the particular Friday when the minibus was attacked

by gunmen. He said the second appellant assisted him that Friday morning in repairing his motor vehicle. He left his kraal after 09:00 that morning and only returned between 16:00 and 17:00. He later changed his evidence by saying that he could have returned between 14:00 and 15:00. He denied, however, that he and the second appellant were busy repairing his motor vehicle until 17:00 that afternoon, as alleged by the second appellant in his statement. The second appellant contradicted his own statement when he testified that he assisted Ntombela until about 09:00 to 09:30 that Friday morning. He said he realised he had made a mistake in his statement, but then gave the following nonsensical reason for not rectifying the mistake, viz that he thought it would be wrong to delete what had been written down.

The court *a quo* was satisfied that the second appellant's alibi was a false one, and that it was proved beyond reasonable doubt that the second appellant participated with the first appellant in committing the murders and attempted murders. I have no reason to

differ from that finding, and in my judgment the second appellant's appeal against his conviction on the ten counts of murder must fail.

It was submitted on behalf of both appellants that the death sentences imposed in respect of the ten murder counts were not the only proper sentences in the particular circumstances of this case. A number of mitigating factors were emphasized on behalf of the appellants.

Counsel submitted that we must have regard to the general unrest prevailing in the area at the time, due mainly to political differences between the ANC and Inkatha factions. This in turn gave rise to a spiral of politically motivated violence, followed by the inevitable reprisals. The evidence of Bernhard Mkhize, the chairman of the Inkatha Freedom Party in the Mboyi area of Table Mountain, showed that there had been general unrest in the particular area since December 1991 when there was an attack on his kraal. The first appellant, who is his cousin, was shot in the leg and a vehicle was burnt. Thereafter there was an attack on a bus in the course of which the first appellant's father

was shot in the mouth. On another occasion sixteen houses were burnt down and two girls were shot. On 2 March 1993 three of his children were shot and killed while on their way to school. Three of his neighbour's children were also killed in the same attack by gunmen. He expressed the opinion that ANC supporters were trying to get him and his supporters out of the area where they were living.

The first appellant testified that he had been shot by an ANC supporter shortly before their reprisal attack on the minibus on 5 March 1993. The second appellant testified that there had also been attacks on the homes of Inkatha supporters in the Nkanyezini area where he lived. Ntombela's son, whom he regarded as a brother, was shot and killed by ANC supporters during 1992.

Counsel for the appellants referred us to a number of cases where this court set aside death sentences imposed for murders motivated by political unrest or violence. Those cases are, however, distinguishable on the facts, and I shall refer to only two of them. In S

v Khanyile and Others 1991(1) SACR 567(A) this court accepted that the instruction to kill the murdered children may have been issued by the Inkatha commander of the community guards who were convicted of the murders. The children were also perceived to be the aggressors and trouble makers during a period of violence when conditions were close to a state of civil war. In S v Lushozi and Another 1993(1) SACR 1(A) the two appellants were convicted of ten murders committed during a reprisal raid at a time of general unrest and political violence. The victims in that case were perceived to be the enemy who had been responsible for burning down the second appellant's kraal, his sugar cane and wattle plantation, and for destroying his possessions.

Each case must, of course, be decided according to its own facts and in the light of its own particular circumstances. In the present case the Inkatha leaders specifically warned their supporters to refrain from revenge attacks after the six school children had been murdered. Bernard Mkhize confirmed that there were public appeals by prominent

churchmen and Inkatha leaders following upon the murder of those children. He also instructed his own people not to launch vengeance attacks. The first appellant heard these public appeals over the radio on the Friday morning before the attack on the minibus, and the second appellant must have been aware of the warnings issued by the Inkatha leaders.

It is clear that the reprisal attack of the appellants was directly motivated by the killing of the six school children three days earlier. But there are certain important factors which distinguish this case from the cases referred to above. The present case is more in line with the case of **S v Botha en 'n Ander; S v Marais** 1993(1) SACR 113(A) where the death sentences were not set aside by this court on appeal. In that case it was found that an attack by whites on a bus conveying black passengers had been carried out in revenge for an earlier attack by black youths on whites. There is, however, an important distinguishing feature inasmuch as the appellants in that case were not

related to the victims of earlier attacks, nor were they personally affected by it, as was the case here. But in our case, as in that case, the appellants killed innocent passengers while they had no reason whatsoever to suspect that anyone of the passengers had anything to do with the earlier attack they were avenging. In our case the appellants persisted in their attack when it must have been obvious that they were killing innocent women, children and elderly people. The appellants furthermore had no reason to believe that the passengers were supporters of the ANC.

Although the history of politically motivated violence in the area, and the senseless killing of the six school children, constitute some mitigation for the appellants' crimes, it cannot in my judgment weigh up against their flagrant disregard for the lives of innocent people. They indiscriminately opened fire on their victims with deadly weapons and with the direct intention of killing in cold blood as many as they could.

There are other mitigating factors, like the relative youth of

the two appellants (they were respectively 20 and 23 years old), and the fact that they were first offenders. They grew up in an area where violence was rife, where murder was an everyday occurrence and where there was no regard for the sanctity of life. They have both been affected by that violence, but the magnitude and callousness of their crimes are of such an order that notwithstanding these mitigating features, and the possibility of rehabilitation, considerations of deterrence and retribution must prevail. The interests of society demand that the sentence of death be imposed. In my judgment the death penalty is the only proper sentence for both appellants in respect of each of the ten murder counts.

Counsel for the appellants asked that the appellants' appeals against the death sentences be postponed until the constitutionality of the death sentence has been decided by the Constitutional Court.

The following order is made:

1. The appeals of both appellants against their

convictions for the murders are dismissed.

2. The appeals of both appellants against the death sentences imposed on them are postponed to a date to be arranged by the Registrar in consultation with the Chief Justice.

F H GROSSKOPF
Judge of Appeal

E M Grosskopf JA

Eksteen JA Concur