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Case No: 529/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GOODMAN MSAWAKHE NGCOBO ..... Appellant

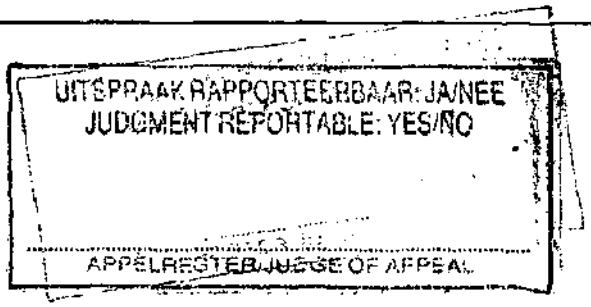
AND

THE STATE ..... Respondent

Coram: HEFER, EKSTEEN et VAN DEN HEEVER, JJA

Heard: 10 March 1995

Delivered: 27 March 1995



J U D G M E N T

EKSTEEN, JA :

The appellant was indicted on 15 counts of murder, 8 of attempted murder, and of contravening section 2 and 36 of Act 75 of 1969 by being unlawfully in possession of a firearm and ammunition. He was convicted on 10 counts of murder and on 4 counts of attempted murder, as well as on the two statutory offences I have referred to. He was sentenced to death on 9 of the counts of murder and to 15 years' imprisonment on the remaining one; to 5 years' imprisonment in respect of each of the counts of attempted murder, and to 1 years's imprisonment on the two statutory offences which were

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taken as one for the purposes of sentence. The first 8 counts of murder were committed over a period of time ranging from January or February 1991 to 12 July 1991. He was arrested on 2 August 1991. After pointing out certain spots to the police on 7 August and appearing in Court, he was released on bail on 30 August. Thereafter on 22 October 1991 he allegedly committed two more murders and an offence of attempted murder. These three offences were charged as counts 23, 24 and 25 respectively. He was convicted on all three. His present appeal is directed against the convictions and sentences in respect of each of the three latter offences. He does not appeal against the convictions on any

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of the other counts, but limits his appeal to the death sentences on the 8 counts of murder.

In respect of counts 23, 24 and 25 there is also before us an application for this Court to remit the matter to the Court a quo for the hearing of further evidence, viz the evidence of one Jabu Maphumulo. In order to consider this application it is necessary to have regard to the evidence adduced in support of those counts and the findings of the trial Court in respect of that evidence.

The Court relied primarily on the evidence of one Mfihlelwa Elias Shange. He deposed to having been at a bus-stop at Sinamu on 22 October 1991 in the company of Steleka Christopher Ngidi

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(also known as Striker Mkize) and Thabani Ndhlovu.

At the bus-stop there was also another man called Zwelake Madonsela Mendu and a schoolgirl whose name Shange could not remember. While they were waiting for the bus a taxi drew up. Three men, armed with handguns, alighted and immediately opened fire on those standing at the bus-stop. Striker Mkize and Thabani Ndhlovu were both shot dead. Shange and Mendu took to their heels and fled across the veld to the nearby homestead of a white farmer. As they ran they were pursued by the three gunmen who fired several shots in their direction. Fortunately for them they were not hit and managed to reach the white farmer's homestead unscathed. The police were summoned and on their

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arrival Shange and Mendu accompanied the police to the scene of the shooting where the bodies of Striker and Thebani were still lying.

Shange says that as soon as the three men got out of the taxi he recognised the appellant as one of them. He was the first one to alight and he was the one who shot Striker and Thabani. Shange knew the appellant well over a long period of time. They used to stay near each other. Shange was also able to identify another one of the killers. He was Dodo Mbambo. Shange apparently did not know him as well as he did the appellant, but he had seen him at the taxi rank and knew him to be a taxi driver.

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The shooting took place at about two o' clock in the afternoon and Shange had no doubt about the identification of the appellant and Dodo Mbambo. There was nothing to obstruct his view and he saw their faces clearly. He did not know the third person. Shange told the Court that he was a member of the African National Congress (the ANC) and that he knew the appellant to be a member of the Inkatha Freedom Party (Inkatha). It appears from the evidence that these two parties were locked in an ongoing feud in the course of which many lives had been lost on either side.

In his evidence appellant denied having been one of the killers. He conceded, however, that

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he and Dodo Mbambo had been together that day. They had gone together from Izingolweni to Port Shepstone to see their attorney. They returned together that afternoon at about 4 o'clock. At Murchison they parted. Dodo decided to complete the journey back to Izingolweni in a truck which he noticed in Murchison. He apparently hoped that the owner of the truck, one Phewa, would let him drive it home. He seems to have been very fond of driving trucks. Appellant then boarded Supa Shazi's taxi, which he says happened to drive past the scene of the shooting. He cannot remember seeing the two bodies lying next to the *road but does remember seeing the police van at the* scene. On an acceptance of Shange's evidence this

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must have been more than two hours after the murders.

Appellant called Supa Shazi to support his evidence. Shazi told the court that he had come from Port Shepstone and passed the scene where the police van and the bodies of the murdered men were. He did not stop but drove straight on to Izingolweni. The appellant was one of his passengers. He had picked him up at Murchison. In cross-examination a sworn statement which he had made to Warrant Officer Breedt on 31 October 1991 was put to him. This statement was at variance with a previous statement he had made in which he denied that the appellant and Dodo Mbambo had been in his company on 22 October. He conceded that this was a lie, and that

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appellant had in fact been a passenger in his taxi that day.

In its judgment the trial Court rejected Shazi's evidence, and found that he had been totally discredited by the statement put to him. It also rejected the appellant's evidence that he had simply driven past the scene after the shooting had taken place as being false beyond a reasonable doubt. I might add that the appellant's evidence had already been rejected on all the previous counts on which he had been convicted as being "highly improbable"; "totally unsatisfactory and untruthful" and "false beyond a reasonable doubt". On the other hand it found Shange to have been "an excellent witness"

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who gave his evidence well, and who was unshaken in cross-examination. An aspect which weighed with the Court was the fact that Shange had deposed to having recognised not only the appellant, but also Dodo Mbambo - the very man that the appellant conceded had been in his company that day in the very area in which the shooting had taken place.

The appellant was defended in the Court a quo by Mr Lingenfelder, and he also launched the application to lead further evidence. He did so by notice of motion and brought it in his capacity as pro deo counsel. The gist of the application is that at the subsequent trial of Dodo Mbambo on two counts of murder and one of attempted murder arising

out of the same incident, Shange was again called as a state witness. In his evidence at that trial he was able to recall the name of the schoolgirl who had been with them at the bus-stop at the time of the shooting. She was Jabu Maphumulo. The defence then called her as a witness. She gave the same account of the events as Shange had given, except in one important respect. She said that all three attackers wore balaclava caps which covered their entire faces except for their eyes. She could therefore not recognize any of them. By analogy, therefore, it was submitted Shange could not have done so. In fact if the evidence were true, then Shange was lying to the court a quo when he said that

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he could see their faces clearly. The appellant's founding affidavit goes on to say that -

> "I have been informed by Counsel who acted for me at the trial that Dodo Mbambo was acquitted on the three counts in question."

This was clearly hearsay and was not supported by any affidavit from the counsel referred to.

An excerpt from the record of that trial containing the evidence of Jabu was annexed to the application, and bears out the allegations made in appellant's favour. In her evidence Jabu admits that both she and Dodo Mbambo are members of Inkatha, and, as we know, Shange was a member of the rival ANC. She was closely questioned by the presiding Judge, and does not seem to have come out

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of it without some doubts having been raised in respect of her credibility.

The excerpt from the record then reflects a remark by the presiding Judge that Jabu's allegations had not been put to Shange, and that Shange would be recalled to deal with them. That is where the excerpt ends. We are left to wonder whether Shange was recalled, and what he may have said in reply. The judgment of the Court was not annexed, so we were unable to see whether the Court believed Jabu or not. The application can only succeed if the applicant satisifies this Court that there is "a prima facie likelihood of the truth of the evidence" (S v de Jager 1965 (2) SA 612 (A) at 613 C-D) or, as it is put in

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section 316(3) of the Criminal Procedure Act, No 51 of 1977, that the evidence "would presumably be accepted as true". This requirement can hardly be said to have been satisfied when we do not know what the Court that heard the evidence thought of it. Mr Lingenfelder, who also appeared before us on behalf of the appellant, proferred a copy of the judgment from the bar, and this we accepted in the interests of justice.

In this judgment it appears that Shange made a favourable impression on the Court, but that, in the light of Jabu's evidence which was well given" with "no obvious blemishes" the Court felt itself unable to say that the State had discharged the onus

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resting on it to prove the guilt of the accused beyond a reasonable doubt. It also appears from the judgment that, apart from various policemen, the Court had only heard two witnesses, viz Shange and Jabu. Not being able to reject Jabu's evidence as being false beyond a reasonable doubt, Dodo's acquittal was bound to follow.

In the case before us, however, there were clearly other factors supporting the conviction of the appellant. Not only was the evidence of the appellant, and that of his witness Shazi, rejected as being false beyond a reasonable doubt on good grounds - and Mr Lingenfelder did not contend to the contrary - but Shange's evidence was supported by his implication

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of Dodo and the appellant's subsequent concession that he and Dodo had indeed been together that day in the very area where the shooting had occurred. In the light of these considerations it seems to me most unlikely that Jabu's evidence could be accepted as true. After all, as I have indicated, she had a strong motive to protect her fellow Inkatha member from being convicted by declining to identify him simply by saying that the balaclava cap (which caps are fairly generally worn) had been pulled down over his face. The Court in Dodo's trial, did not have these additional facts at its disposal, and was left with the stark contradiction of one witness by another on one small, albeit important aspect of the evidence.

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Shange's evidence was not rejected in that case but the incidence of the onus and the absence of other probabilities made the acquittal of Dodo inevitable.

The appellant has, in my view, not succeeded in showing any likelihood of Jabu's evidence being accepted as true in the case before us, and his application for the matter to be remitted for that evidence to be led cannot succeed.

As appears from the facts I have referred to above, the State made out a strong case against the appellant, and Mr Lingenfelder conceded that without the acceptance of Jabu's evidence he was unable to advance any argument against the convictions. The appeal against the convictions on these three counts therefore, cannot succeed.

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The appeal, as I have indicated, is also directed against the death sentences imppsed in respect of nine of the convictions of murder. The appellant was a man of 31 years of age at the time the series of murders was committed. He was not married but had five children by various women. He advanced to Std 3 at school, and was subsequently employed as an assistant in his brother's shop.

The murders of which he was convicted reflect a protracted reign of terror mainly in the Izingolweni area. During January or February 1991 he abducted one Dan Cele, took him to a remote spot in the Oribi Gorge where he shot him twice through the head. Then on 16 March he shot and killed one

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Dlamini while he was waiting at a bus-stop together with some of his school friends. On this occasion he also tried to shoot three of Dlamini's companions. On 24 March he shot and killed one Ngcobo near the Mtatweni bus-stop. On 19 May he shot and killed three people who were sitting in a house talking. On the evidence the appellant simply walked into the house, took out his gun and started shooting. Another person who was also in the house at the time was wounded. On 7 June Khehlo Mkhize was sitting in his house with his mother when they heard the sound of a gunshot. Khehlo went out to see what was happening. The appellant was standing outside. When Khehlo fled the appellant pursued

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him and shot him dead. After Khelo had fallen the appellant continued to shoot at him. On 12 July appellant again chased a man from a kraal and shot him dead.

Appellant was arrested, as I have indicated, on 2 August and after having been charged with all these crimes, he was released on bail on 30 August. Then on 22 October he committed the offences charged in counts 23, 24 and 25. These were the offences that I dealt with fully earlier in this judgment.

The only reason advanced by the appellant for his diabolical reign of terror was that he was only killing those people who had been involved in

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killing his mother. The only person, however, who, on the evidence, was suggested to have been implicated in the death of appellant's mother was Dan Cele. There is nothing to suggest that any of his other victims were so associated. On the evidence all these killings seem to have been at random. Mr Lingenfelder referred to the feud between the ANC and Inkatha, and to the large numbers of people killed in the course of it, and submitted that appellant's offences were probably politically motivated. The evidence, however, does not support this submission. There is no evidence as to the political associations of most of appellant's victims, nor is there any evidence to suggest that he thought

that any of them belonged to the ANC. In fact in the course of his evidence appellant explicitly denied that he had ever committed any crimes for a political motive.

Mr Lingenfelder also submitted that none of the murders was committed in a particularly brutal way and that this should be seem as a mitigating factor. The appellant may not have dismembered his victims, or tortured them over a period of time, but the cold blooded way in which each of them was shot for no apparent reason at all seems brutal enough on the face of it. As the learned Judge a quo pointed out, most of the victims were shot through the head. One was shot through the neck and another

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through the spinal cord. All the offences seem to have been committed at random and in cold blood and constituted a reign of terror in that area stretching over some eight months. The aggravating factors so far outweigh any mitigating factors there may be - and indeed there do not seem to be any - that the death sentence is, to my mind, the only proper sentence in this case. Because the constitutionality of that sentence is presently under consideration by the Constitutional Court, it is desirable to postpone the consideration of sentence until that Court has given its judgment.

The appeal against the convictions on counts 23, 24 and 25 is dismissed.

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The appeal against the death sentences imposed on the appellant in respect of counts 1, 2, 4, 5, 6, 7, 9, 23 and 24 is postponed to a date to be arranged after the Constitutional Court has given its judgment on the constitutionality of the death sentence.

J P G EKSTEEN, JA

HEFER, JA)
VAN DEN HEEVER, JA) concur