

SOUTH AFRICA / JUDGMENT

S v Mthembu (407/90) [1991] ZASCA 77 (30 May 1991)

[1991] ZASCA 77

COURT

Supreme Court of Appeal

BEFORE

Smalberger, Nienaber, Preiss

CASE / FILE NUMBER

407/90

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407/90 N v H

BOY MTHEMBU and THE STATE SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:BOY MTHEMBU AppellantandTHE STATE Respondent

CORAM: SMALBERGER, NIENABER, JJA,

et PREISS, AJA

HEARD: 27 MAY 1991DELIVERED: 30 MAY 1991

JUDGMENT SMALBERGER, JA :-

The appellant was convicted in the Natal Provincial Division by HUGO, J, and two assessors (sitting on circuit in Scottburgh) on seven counts of

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2 robbery, two counts of housebreaking with intent to rob and robbery, two counts of attempted murder and two counts of murder - thirteen counts in all. Aggravating circumstances were found to be present in respect of all the robbery counts. The appellant, on arraignment, pleaded guilty to all but two of the counts. He admitted the essential facts on those counts, but put in issue the legal conclusions to be drawn therefrom. The crimes in question were committed over the period 9 September 1988 to 18 October 1988 when a gang bent on robbery, of which the appellant was a member, went on the rampage in certain districts in Natal. The gang's short but devastating reign of violence and terror left in its wake two persons dead and several injured. On the one murder count (count 4) the appellant was sentenced to life imprisonment; on the other (count 12) he was

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3 sentenced to death. On the remaining eleven counts he was sentenced to a total of 96 years' imprisonment, but the sentence on each count was ordered to run concurrently with the sentence of life imprisonment on count 4 and any other sentence being served by the appellant. The present appeal is directed solely against the sentence of death on count 12. When the appellant was sentenced the Criminal Law Amendment Act, 107 of 1990, had already come into operation. Its provisions brought about a radical change in the law relating to death sentences. The effect thereof has been considered in a number of judgments of this Court. Broadly speaking the following principles have emerged from these judgments. The imposition of the death sentence is no longer, as in the past, mandatory in certain circumstances, but rests entirely in the discretion of

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4 the trial judge. This discretion is exercised with due regard to the presence or absence of any mitigating or aggravating factors (as found by the trial court). The death sentence is only authorised where the trial judge is satisfied that it is "the proper sentence", which has been interpreted to mean "the only proper sentence". Its imposition is therefore to be confined to exceptionally serious cases - cases where the death sentence "is imperatively called for". The onus rests on the State to prove the existence of aggravating factors, and to negative any mitigating factors raised by an accused (for which there is a factual basis), in both instances beyond all reasonable doubt. This Court on appeal considers the matter of sentence afresh and determines independently whether the death sentence is, on the proven facts, the only proper sentence. (See, *inter alia*, *S v Masina*

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5 and Others 1990(4) 709 (A); *S v Senonohi* 1990(4) SA 727 (A) and *S v Nkwanyana and Others* 1990(4) SA 735 (A). The proven facts relating to count 12 are the following. On the evening of 18 October 1988 the appellant and four other men, one of whom was Sibongeseni Ntuli ("Ntuli"), went to the kraal of Stanford Nkonzo ("the deceased"). Their purpose was to rob him. . Two weeks previously an attempt by the appellant, Ntuli and one other person to rob the deceased had been thwarted when they met with unexpected resistance from the deceased, who shot at them causing them to turn back. They returned on the evening in question with their ranks strengthened in order to achieve what they had previously set out to do. Ntuli was armed with a firearm (which had been made available to him by the appellant); the others were armed with knives. The idea to rob the deceased

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6 had originated with Ntuli. The deceased was known to him, and it was he (Ntuli) who had told the others that the deceased, who apparently owned a shop, had a large sum of money at his kraal (information which, in the event, turned out to be incorrect). It was Ntuli who led both expeditions to the deceased's kraal. In view of what had happened previously the appellant and

his cohorts anticipated possible resistance from the deceased, and were prepared to overcome it. The deceased, his wife Gretta, and daughter Thokozile, were in one of the huts when the robbers arrived at their kraal. On detecting their presence they immediately closed the door of the hut. The appellant and his cohorts attempted to force the door open. Those inside resisted their efforts to do so. Ntuli fired a shot, wounding Gretta. The door was

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7 eventually forced open. What happened thereafter is not entirely clear. According to the appellant the deceased fled from the hut and was shot and killed by Ntuli in the process of doing so. Thokozile, however, testified that the deceased was dragged outside where he was shot in cold blood. She could not identify the person who fired the shot. She also mentioned that the deceased had been shot earlier while still in the hut. This does not tally with the post-mortem report which reflects that the deceased only sustained one gunshot wound which penetrated his chest and abdomen and caused his death. The trial court did not attempt to resolve the conflict between the appellant and Thokozile concerning the precise circumstances in which the deceased was shot. On either version, however, the deceased was not offering any resistance at the time he was shot. Gretta was dragged from the

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8 hut and taken to an adjoining hut which was searched for money. There she was again needlessly shot by Ntuli. Ntuli was party to all the offences of which the appellant was convicted. He was tried separately in respect of such offences. He was initially sentenced to death for the murder of the deceased. On appeal to this Court his death sentence was set aside and a sentence of 25 years' imprisonment substituted therefor. The judgment is reported - see *S v Ntuli* 1991(1) SACR 137 (A). I shall revert to the judgment and the findings in that case later. The deceased was shot and killed in the course of a robbery in which the sanctity of his' home was violated. At the time he was shot the deceased was entirely defenceless and not offering any resistance. The appellant and his cohorts were

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9 motivated purely by greed. The robbery was carefully planned and executed. The fact that they had previously been repulsed did not deter them. If anything, it stiffened their resolve. Their conduct was part of an on-going campaign of robbery and violence. Although the appellant did not himself fire the fatal shot, he consciously associated himself with persons whom he knew were not averse to using violence to achieve their ends. Apart from the above, the appellant has a substantial list of previous convictions including two for robbery. By his own admission, which is supported by his conduct, robbery had become a way of life for him. This is further evidenced by the fact that while awaiting trial in the present matter he escaped from custody (in circumstances which do not appear from the record) and proceeded to commit a further series of four robberies.

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10 These are all aggravating factors. The appellant gave his age at the trial as 43 years. Judging by his past record and conduct he is a recidivist of the worst order who displays one of the basest of motives - greed

- when committing crimes. There can be no real prospect of his rehabilitation. There are certain mitigating factors. The appellant is illiterate and comes from an under-privileged background. He pleaded guilty and made a clean breast of everything. This prima facie indicates some measure of contrition on his part. Unfortunately the robberies committed by him after his escape suggest that he may not be fully remorseful. He did not fire the fatal shot himself, and even though, on his own admission, he foresaw the possibility of the deceased's death as strong, there was no prior resolve to kill on his part. I shall

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deal with this latter aspect in more detail later. In the present matter the aggravating factors clearly outweigh the mitigating factors. While this has a bearing on whether the death sentence is the only proper sentence, it is by no means decisive. The absence of mitigating factors in a given case, or the predominance of aggravating factors, does not mean that the death sentence should be passed (*S v Nkwanyana and Others*, supra, at 745 C). The prospect of rehabilitation - which is a powerful consideration against the imposition of the death sentence - plays no role in the present matter. Furthermore, the appellant, judged by his conduct, is a danger to the community. Law-abiding citizens are entitled to be protected against him, and to that end he must be permanently removed from a free society. But even having regard to these considerations cumulatively it

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12 does not of necessity follow that the death sentence is the only proper sentence. Life imprisonment may well meet the case and satisfy the main purposes of punishment (*S v Mdau* 1991(1) SA 169 (A) at 176 G -177 C). In determining whether, on a conviction of murder, an accused's conduct is so serious that the death sentence "is imperatively called for" one must have regard primarily to the circumstances of the offence, the extent of actual participation therein and the form of intent present. Where a person by his own act, and with direct intent to kill (*dolus directus*), causes the death of another, then the greater the premeditation that preceded his conduct, the more base his motive, the more brutal, heinous or callous the crime, the greater will society's resultant indignation and revulsion be, and the more readily can the

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13 conclusion be reached that such person's deed "is so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing" (*S v Matthee* 1971(3) SA 769(A) at 771 D). However, when dealing with an accused convicted of murder who was not a perpetrator or co-perpetrator, and whose mens rea was not in the form of *dolus directus*, sentence of death will rarely be imperatively called for. This is the situation which pertains in the present matter. The evidence establishes that when the appellant

and his cohorts went to the deceased's kraal on the fateful evening they had a common purpose to rob the deceased. In cases of armed robbery, where the participants have knowledge that dangerous weapons

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14 are being carried by their associates, the possibility of a victim being killed in the course of the robbery must almost inevitably be present in their minds. The remoteness or strength of such possibility will depend on the peculiar facts of each case. On the appellant's own evidence, allowing for the fact that it was not always entirely consistent, his foresight encompassed the strong possibility of death. In view of what had occurred on the previous occasion when they had attempted to rob the deceased, the appellant knew that resistance from the deceased could not be ruled out - in fact it was anticipated. He and his cohorts were prepared, in the event of encountering resistance, to overcome such resistance by killing the deceased. The appellant's evidence goes so far as to suggest that they had in fact so agreed among themselves. But resistance by the deceased, even

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15 though anticipated, was not a foregone conclusion. It was therefore not inevitable that the deceased would be killed, although the possibility of that happening was strong. In the event the deceased was shot by Ntuli when he was defenceless and before he offered any resistance. Ntuli's conduct in this regard went further than what had been agreed upon. The greater the degree of subjective foresight by the appellant the closer his intent borders on *dolus directus*. There remains, however, a clear dividing line between *dolus directus* on the one hand and *dolus eventualis* on the other (*S v Dladla en Andere* 1980(1) SA 1(A) at 4A). In the present matter the State failed to prove beyond all reasonable doubt that the appellant's intention was other than *dolus eventualis*.

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16 Apart from that the appellant was not a perpetrator. He did not fire the fatal shot. It cannot be said that it was purely fortuitous that Ntuli, and not the appellant, used the firearm. The shooting of the deceased went beyond the earlier arrangement that he would only be shot if he offered resistance. It may well be that had the appellant possessed the firearm he would not have used it in the circumstances. The actual act of shooting was that of Ntuli only. In the absence of actual participation in the killing of the deceased by the appellant and *dolus directus* on his part, it cannot in my view be said that the death sentence is imperatively called for in the present matter.

There is a further reason why it would be inappropriate to sentence the appellant to death when Ntuli only received a sentence of imprisonment. The

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principle exists that where more than one person is convicted of the same offence (whether they are tried together or separately), and their circumstances with regard to sentence are roughly comparable, there ought, if justice is to be done, to be reasonable uniformity in the sentences imposed on each of them (S v Dombeni, a judgment of this Court delivered on 6 May 1991 - at p 14). This principle is subject to a qualification similar to that stipulated in S v Marx 1989(1) SA 222 (A) at 225 J - 226 B (which qualification is, however, not of application here). In the present matter certain facts emerged which were either not known or not fully established in Ntuli's case. Had it been proved in Ntuli's case that there had been a prior attempt to rob the deceased, and that Ntuli was the person who actually shot him (both of which facts were established in the

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18 present case) the outcome in Ntuli's case may have been very different. Be that as it may, a comparison between the factual basis on which Ntuli's guilt (and ultimately his sentence) was assessed, and that on which the appellant's guilt is founded, suggests that they do not differ sufficiently materially to justify imprisonment in the one case, and a death sentence in the other. There are undoubtedly differences in their respective situations relevant to sentence. Ntuli is much younger than the appellant, probably less mature ' and he only had one previous conviction. He has prospects of rehabilitation, the appellant not. On the other hand, Ntuli played a far greater role in the events that led to the deceased's death than the appellant. Any relevant differences in their circumstances that call for the appellant to be punished more severely than Ntuli can be adequately

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catered for by imposing a longer term of imprisonment on the appellant. There is no justification for differentiating between them to the extent of giving one (Ntuli) a prison sentence and the other (the appellant) the death sentence. There must accordingly be substituted for the death sentence on count 12 a sentence of imprisonment. As I have previously mentioned, the appellant is a threat to a free society and there is no real possibility of his rehabilitation. The appropriate sentence is therefore life imprisonment, by which is intended nothing less than imprisonment for his natural life. He ought never to be returned to society. It is to be hoped that the authorities will take due note of these remarks.

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20 The appeal succeeds. The sentence of death on count 12 is set aside and there is substituted in its stead a sentence of life imprisonment. This sentence is to run concurrently with all other sentences currently being served by the appellant.

J W SMALBERGER JUDGE OF APPEAL

NIENABER, JA)

PREISS, AJA) CONCUR

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