

SOUTH AFRICA / JUDGMENT

S v Ndayave (368/91) [1992] ZASCA 142 (14 September 1992)

[1992] ZASCA 142

COURT

Supreme Court of Appeal

BEFORE

Vivier, Nicholas, Howie

CASE / FILE NUMBER

368/91

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Between:

PHILLIP
MLULEKI NDAYAVE Appellant
- and -
THE STATE Respondent
CORAM: VIVIER
JA et NICHOLAS, HOWIE AJJA.
HEARD: 27
August 1992.
DELIVERED: 14 September
1992.

JUDGMENT

VIVIER JA /

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VIVIER JA:

The appellant was convicted in the Queenstown Circuit Local Division by JONES J and two assessors on twelve counts of murder (counts 1, 3, 5, 7, 8, 9, 12, 13, 16, 18, 21 and 22), one count of rape (count 10) and three counts of robbery with aggravating circumstances (counts 11, 15 and 20). No extenuating circumstances were found in respect of any of the murder convictions, and under the then prevailing law he was sentenced to death in respect of each of these convictions. On count 10 he was sentenced to seven years' imprisonment, on count 11 to three years' imprisonment and on each of counts 15 and 20 to one year's imprisonment. The appellant applied for leave to appeal against the finding that there were no extenuating circumstances and the consequent sentences of death imposed. Such leave was refused by the trial

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Judge but granted following a petition to the Chief Justice. The Criminal Law Amendment Act 107 of 1990 has since come into operation and this Court now has a discretion to determine, with due regard to the presence or absence of any mitigating or aggravating factors, whether the sentences of death were the only proper sentences on the murder charges.

The relevant facts are the following. The murders were committed in the period from 22 December 1988 to 31 January 1989 in or near the towns of Stutterheim, Cathcart and Queenstown. All the victims were women and they were all killed in remote, overgrown areas so that most of the bodies were only discovered after a considerable lapse of time. It was possible in only four cases to perform a complete post-mortem examination. The trial Court found that all twelve women killed by the appellant had been

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strangled by him with pieces of their own clothing and that in the case of nine of the victims the cause of death was strangulation, while the other three victims were killed either by strangulation or by a blow over the head with a pick handle. The appellant was charged with having raped seven of his victims and his defence to these charges at the commencement of the trial was that they had consented to intercourse. He was found guilty, as I have indicated, on only one of the charges of rape and, in addition, of having robbed three of his victims. The trial Court found that each of the twelve murders had been committed with the direct intention to kill and that in each case the appellant's motives were either sexual gratification or robbery or both, as well as the fear of subsequent identification. In chronological order the murders were committed as follows. The appellant arrived in

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Stutterheim from his home in Maclear some time during the middle of 1988. He was detained on a charge of housebreaking on 3 September 1988 until 19 December 1988, when he was acquitted. During the late afternoon of 22 December 1988 N.N., 29 years old, visited her brother at his place of employment at Stutterheim and was given R25 to take to her mother. She was not seen alive again. Her body was discovered the next morning in a ditch near a footpath leading to the Kubuse Township near Stutterheim. The body was lying on its back with the legs wide apart, the dress pulled up to the waist exposing the lower body which was naked. There were bruise marks around the neck. The body was removed to the local mortuary but due to a failure of the refrigeration unit by the time the post-mortem examination was conducted on 27 December 1988, an

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advanced state of putrefaction had set in which prevented a complete examination. The appellant admitted in his evidence at the trial that he had strangled N. with the cord of her lumber-jacket. He was found guilty of robbing N. of R25-00. She was the victim referred to in counts 18 and 20.

The next victim was V.S. (count 22), a 17 year old girl, who disappeared at Stutterheim on 26 December 1988. Her remains were found on 17 January 1989 in a remote spot near the sewage plant outside Stutterheim. The third murder was also committed at Stutterheim (count 21). On 2 January 1989 J.N.B., 20 years old, left her home to look for work in Stutterheim and never returned home. Her remains were pointed out to the police by the appellant on 10 February 1989 in a riverbed near the abattoir outside Stutterheim. In his evidence at

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the trial the appellant said that he had struck each of his three Stutterheim victims on the back of the head with a pick handle because they would not give him the money which they owed him for selling dagga on his behalf. The trial Court rejected his evidence that the three women had been involved with him in the selling of dagga and that he had killed them for this reason. The morning after he had killed his third victim in Stutterheim the appellant moved to Cathcart where he succeeded in finding casual employment. During the late afternoon of 9 January 1989 he went to the house of the 30 year old R.R. and her sister and, after drinking wine and beer with them, which he provided, he and R. left the house together. The next day her body, which was naked from the waist down, was found among high grass in the open veld about a kilometre from her home. She had

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been strangled with a handkerchief which was found tied around her neck. A large flat rock which weighed 81 kilograms had been placed on top of the body. The post-mortem examination showed that the deceased's vagina had been torn in two places. The appellant said in evidence that he had strangled the deceased because he was afraid that she would lay a charge of rape against him. He gave the same reason for killing each and every one of his subsequent victims. R.R. was the woman referred to in count 16.

On 10 January 1989 the appellant moved to Queenstown where he found employment. He at first stayed with a certain woman but she left Queenstown a few days after his arrival and from then on he found shelter at the railway station. He proceeded to kill no fewer than eight women in Queenstown. The identity of three of them (those on counts 5, 8 and 12) was

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never established. The exact dates on which the first five Queenstown women were killed could not be determined. The first victim was probably the deceased on count 8, whose body was discovered on 29 January 1989 in thick grass about 20 metres from a dirt road leading to the municipal dumping ground. She had been strangled with a piece of woman's clothing. Dr Koopowitz, who performed the post-mortem examination on the skeletal remains, estimated that death had occurred during the early part of January 1989. The body of the victim on count 7, that of K.M.L., was discovered on 29 January 1989 and according to the medical evidence she must have died between 15 and 19 January 1989. Her body was found in a thickly overgrown area outside Queenstown only about 30 metres from where the body in count 5 had been discovered on 28 January 1989. A pair of woman's

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panties was found tied around her neck.

The body of the unknown victim on count 12 was discovered on 30 January 1989 and according to the medical evidence death had occurred on or about 16 January 1989. She had been strangled with a belt. The body of the unknown victim on count 5 was discovered on 28 January 1989 and according to the medical evidence she died between 18 and 22 January 1989. A petticoat was found tied around the neck. The appellant testified that he had initially promised to pay the woman R5 to have intercourse with him, but that he subsequently changed his mind and decided to kill her instead. The body of the victim on count 3, P.P., was discovered on 28 January 1989 and her estimated time of death, according to the medical evidence, was 24 January 1989. She had been strangled with a scarf. The appellant's next victim was

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A.N.M., 51 years old (the deceased on count 1), who was killed on 27 January 1989. Her body was discovered the next day in high grass near the Municipal dumping ground about 600 metres from the spot where the appellant had killed his first Queenstown victim, the deceased on count 8.

At about twenty past eight on Monday morning 30 January 1989 the body of the 16 year old T.S. was discovered in tall grass under a tree near a stream just outside the built-up area of Queenstown (count 9). It was found about 17 metres from where the body on count 3 had been found two days before and about 12 metres from where the body on count 12 was discovered later on 30 January 1989. It was in the same area where the bodies on counts 5 and 7 had earlier been found. T. had been strangled with a belt. The grass under the body as well as the

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deceased's clothing showed clear signs of a struggle. Her panties and pantihose had been torn to shreds. The evidence established that T. had been killed earlier that same morning. She was on her way to school in Transkei and had to change buses in Queenstown. She needed some travel documents and the appellant offered to help her. Instead he lured her to the deserted spot where she was killed. The appellant was also found guilty of raping this victim (count 10) and of robbing her of an amount of R105-00 (count 11).

The appellant's final victim, the 32 year old T.R.M., was killed the very next day, 31 January 1989 (count 13). Her body was discovered a day later in a remote and isolated place some 3 kilometres from Queenstown. The body was completely naked except for a brassier. She had been strangled

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with her panties. Afterwards the appellant took her jersey and dress and sold them. He was accordingly also found guilty of robbery with aggravating circumstances (count 15).

The appellant was arrested on 8 February 1989 after he had earlier that day tried to lure two more women to the deserted, overgrown area where he had killed the five victims on counts 3, 5, 7, 9 and 12. On 13 February 1989 he appeared in the Magistrate's Court at Queenstown and was then committed in terms of sec 78(2) of Act 51 of 1977 for observation to Valkenberg Hospital. The enquiry into the appellant's mental condition was conducted by three psychiatrists, Drs Weiss, Quail and Trappier. In a joint report they unanimously found that the appellant was fit to stand trial, that he was not mentally disordered within the meaning of the Mental Health Act 18 of 1973 and that at

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the time of the commission of the offences he was capable of appreciating the wrongfulness of his actions and to act accordingly. At the trial Dr Quail testified for the defence and Dr Weiss for the State and both said that the appellant had a psychopathic personality.

This Court has frequently emphasised that psychopathy is not per se an extenuating circumstance. See *S v Mnyanda* 1976(2) SA 751(A) at 766 H; *S v Pieterse* 1982(3) SA 678(A) at 683 E - 684 C and 688 A-B; *S v Kosztur* 1988(3) SA 926(A) at 938 D. Although these decisions were delivered before the coming into operation of the Criminal Law Amendment Act 107 of 1990, their rationes apply equally to the presence or absence of mitigating factors for the purposes of sec 277(2)

- (a) of the Criminal Procedure Act 51 of 1977, as amended. To determine whether psychopathy constitutes

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a mitigating factor, the Court must have regard to the nature and severity of the psychopathy as well as the nature of the crime and the circumstances in which it was committed. See *S v Van Vuuren en 'n Ander* 1992 SACK 148(A) at 155 b-e.

In their evidence at the trial Drs Quail and Weiss dealt fully with the nature and severity of the appellant's psychopathic personality. Both said, in effect, that the psychopathy was not of such a degree that it bordered on a mental illness or that it had reduced the appellant's ability to control his actions. Dr Weiss said that the pattern of behaviour which had emerged throughout the commission of the twelve murders showed that the appellant's conduct was deliberate and not impulsive. In the light of the psychiatric evidence the trial Court found that the appellant's psychopathic personality played no role in the

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commission of the crimes, which it described as a series of deliberate, callous and cold-blooded killings, committed for motives of self-gratification and the avoidance of identification and being brought to justice. The trial Court accordingly found that the appellant's psychopathic personality did not constitute an extenuating circumstance. I agree with the trial Court's conclusion that, on the facts of the present case, there was no causal link between the appellant's psychopathic personality and the commission of the offences involved. They were planned, premeditated crimes, not committed on the spur of the moment or as a result of an inability to control his tendency towards aggressiveness and violence. His conduct throughout was rational and not in the least impulsive. It is abundantly clear from his own account of the murders that on each occasion, after

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he had had intercourse with his victim, he rationally and logically weighed the situation, decided to kill and without anger carried out his intention. In my view the appellant's psychopathic personality cannot be regarded as a mitigating factor in the present case.

With regard to the use of drugs as a possible mitigating factor, Dr Weiss said that although the appellant admitted to using dagga and alcohol regularly, he denied making excessive use of these substances. Both she and Dr Quail considered that the use of dagga and alcohol played no role in the commission of the crimes. In my view the trial Court correctly found that the appellant's conduct throughout was not in any way influenced by the use of these substances. It is clear that the appellant knew exactly what he was doing on each occasion and that he acted with cold deliberation. Afterwards he was able

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to give a detailed and rational account of his actions and to point out the exact scene of each crime to the police.

I am accordingly unable to find any mitigating factor of any substance in the present case. The aggravating factors are self-evident and of an extremely serious nature. The appellant was 32 years old when the crimes were committed. He had three previous convictions: one for indecent assault and two for robbery involving the use of a knife. Not only is his prognosis, so poor that the possibility of rehabilitation can be excluded, but his tendency to rape and kill makes him a danger to the community. Hours before he was arrested he had attempted to lure two more women into the veld and, it would appear, to certain death. It is probable that, given the right circumstances, the appellant will continue to

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commit more murders in the same way as he killed his previous twelve victims. In *R v Roberts* 1957(4) SA 265(A) at 269 G HOEXTER JA quoted the following passage from the judgment of the trial Judge in imposing sentence of death on the appellant. The same, I think, can be said of the present appellant, except that in his case his inclination to commit the crimes in question appears not to be limited to the occasions when he is under the influence of liquor:

"The accused suffers from strong sexual urges and, under the influence of liquor, experiences a desire to rape and do violence to women. It is this criminal tendency that makes him the dangerous killer that he is.

I have given careful consideration to the extenuating circumstances found by the jury, as well as to what Mr Gordon has said, but I must do my duty as I see it. My duty is to protect the public against the accused and other would-be killers. The accused belongs

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to a class of person whose conscience is gravely impaired. They are deterred only by fear of detection and punishment. I believe the fear of the death sentence is still the strongest single deterring factor with this type of person. I have a strong feeling that if the accused were ever to be set free again this desire to rape and to do violence to women when under the influence of liquor may well manifest itself again. As I see it, anybody who should give the accused his liberty again will be risking somebody else's life. The accused committed a horrible murder, a typical sex murder, and may strike again if given the opportunity."

Apart from the factors of deterrence and prevention referred to in the passage I have just quoted, I consider that the appellant's conduct was so serious that the perceptions, sensibilities and interests of the community demand nothing less than the extreme penalty (*S v Majosi and Others* 1991(2) SACR

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532(A) at 541 e-f). In my view the death penalty is the only proper sentence in respect of each of the twelve murder counts.

The appeal is dismissed and the sentences of death are confirmed.

W. VIVIER JA.

NICHOLAS AJA)

HOWIE AJA) Concur.

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