

SOUTH AFRICA / JUDGMENT

S v Ndlovu and Another (15/92) [1993] ZASCA 182 (26 November 1993)

[1993] ZASCA 182**COURT**

Supreme Court of Appeal

BEFORE

Vivier, Van den Heever, Howie

CASE / FILE NUMBER

15/92

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Source record**Case no 15/92 /MC****IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)****In the matter between:**

MANDLA NDLOVU Appellant No 1
TEBOGO MAJOLA Appellant No 2- and -
THE STATE Respondent
CORAM: VIVIER, VAN DEN HEEVER JJA et,
HOWIE AJA.
HEARD: 19 November 1993.
' DELIVERED: 26 November 1993.

JUDGMENT

VIVIER JA.

2 VIVIER JA:

The two appellants, to whom I shall refer as accused Nos 2 and 3 respectively, together with one other, to whom I shall refer as accused No 1, were convicted of murder by SUTEJ J and assessors in the Witwatersrand Local Division. Accused No 1 was sentenced to 22 years' imprisonment, accused No 2 to 12 years' imprisonment and accused No 3 to 9 years' imprisonment. The trial Judge granted leave to accused Nos 2 and 3 to appeal to this Court against their convictions on the limited ground that they should have been found guilty of public violence instead of murder. Both these accused were subsequently granted leave by this Court to appeal generally against their convictions.

The deceased, David Mahlangu, lived with his mother, Margaret Maboyana, and his brothers, Archie

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and Patrick, in a house and outbuildings situated on the corner of Leboko and Moshoeshoe Streets in Orlando East near Johannesburg. The State case, in broad outline, was that at about 07:30 on Monday 19 February 1990 a group of people, including accused Nos 1, 2 and 3, arrived at Margaret's house looking for some or all of her sons whom they suspected of having been involved in the killing of one Sammy the previous night. After finding none of the sons at home some members of the group proceeded to Baragwanath Hospital ("Baragwanath") where they expected to find Archie. It was known that he had during the night taken one Elliot Sibiya ("Mthembeni") to Baragwanath to be treated for a stab wound which had apparently been inflicted by Sammy before he had died. On their way to Baragwanath the members of the group came across Mthembeni and some others who were then on their way home. Mthembeni was grabbed and forced to accompany them back to

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Orlando East where the rest of the group were stillstanding around outside Margaret's house. They arrivedthere at about 08:00 just as the deceased was enteringthe premises. He was set upon by people who had beenwaiting outside the house as well as by some of thosewho had just been to Baragwanath. They took him fora distance of about 100 metres along Leboko Street,down Taukobong Street towards a shopping complex andback again along Taukobong Street past theintersection with Leboko Street to the nextintersection with Langa Street. All this time he wasrepeatedly stoned and stabbed. He finally collapsedand died in the middle of the street near theintersection of Langa and Taukobong Streets.

According to the medical evidence of the post-mortem examination the deceased had sustained numerous incised wounds as well as lacerations, bruises and abrasions over the head, neck, face and virtually

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the entire upper part of his body. Four stab wounds, very close together, in the upper part of his neck severed the jugular vein and carotid artery and were the immediate cause of death. Blunt force applied to his head had caused extensive bleeding over the brain.

Day Maboyana, the deceased's nephew, who stayed in the main house, testified on behalf of the State that he was woken on the morning in question by someone kicking at his bedroom door. Accused No 3, who had a brick in his hand, and accused No 1 were among the people who had entered the house. Day at first said that some of them were armed with knives and that another carried an iron rod, but in cross-examination he contradicted himself by saying that he did not see anyone carrying a knife. He heard them say that they were looking for Archie who had killed Sammy and that they wanted to talk to him. In cross-

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examination he said that the intruders said that they would kill all Margaret's sons. The intruders did not find Archie or any of his brothers and left. Despite the threat to kill Archie and his brothers Day did nothing to warn them. Later that morning, while standing at the front gate of the house, he saw the deceased arrive, followed by the group of people who had been there earlier. He could see that the deceased had been drinking. The deceased went to the back of the house and he saw accused No 1; one Bafana and one Seaman dragging the deceased off and taking him down Leboko Street. He saw knives in the pockets of Bafana and Seaman. The group around the deceased then consisted of about 10 or 12 people and there were other people standing around in the street who had not joined the group. When the group was about 20 metres away from him he saw accused No 1 and then Seaman stabbing the deceased in the back with

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Seaman's knife. Day followed the group and when they had reached the corner of Leboko and Taukobong Streets he saw accused No 3 throwing a brick at the deceased which struck him in the back. Day was then about 20 to 25 metres behind the group. Day gave a most unlikely account of this incident. He said that at first accused No 3 was ahead of the group, but that after picking up a brick he went back to get behind the deceased before throwing the brick at him. The group turned left into Taukobong Street taking the deceased towards the shops at the far end of the street. More people now joined the group but Day remained standing on the corner of Leboko and Taukobong Streets, some 60 metres away from the deceased. People were throwing bricks at the deceased who fell down. Accused No 2 threw a brick at the deceased which struck him. Day could not say where on his body the brick thrown by accused No 2 had struck the deceased and later

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conceded that he had merely inferred that the deceased had been hit. The deceased was lifted up and brought back along Taukobong Street. At the corner of Taukobong and Langa Streets Bafana threw a brick at the deceased which felled him. When he was on the ground accused No 1 stabbed him in the neck. Day then went home. A little while later Day returned to the scene and saw accused Nos 1 and 3 standing near where the deceased's body was lying in the street. In cross-examination he denied seeing accused No 3 near the deceased's body. In further cross-examination Day said that neither accused No 2 nor accused No 3 was among the group who came to the house on the second occasion. He saw accused No 2 in the company of Mthembeni.

Margaret also testified and her evidence differed from that of Day in certain material respects. She said that all three accused came to her

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house both on the first and second occasions. On both occasions members of the group said that they wanted to talk to her sons. When the group tried to assault her on the first occasion accused No 2 intervened saying that they should not assault an old woman. On the second occasion she

followed the group to the gate in front of her house. She saw accused No 1 stabbing the deceased when they were about 25 metres away from her, and when they had reached the corner of Leboko and Taukobong Streets accused No 2 also stabbed the deceased. At this stage she went back to her house. Later she heard that the deceased had died and she went up to where his body was lying in the street. She saw accused No 1 there but she did not see the other accused. Margaret said that when the deceased arrived at her house that morning he was sober. His blood alcohol content, however, was 0,30 grams per 100

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millimetres which, according to the medical evidence, meant that he must have been moderately to severely under the influence of alcohol at the time of his death.

All three accused testified in their own defence. Accused No 1 said that after hearing the news that Sammy had been killed he went with a group of people to Margaret's house to find out what had happened. He did not accompany the group to Baragwanath and was not a member of the group who took the deceased from his home and assaulted him. He spent the best part of the morning drinking at a shebeen and when he emerged at one stage he saw the body of the deceased lying in the street and Seaman and three others, still with knives in their hands, celebrating his death in a nearby yard. Nothing further need be said about his evidence.

Accused No 2 said that at about 05:00 on the morning in question three of his friends came to his

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home and told him that Sammy had been killed by a group of people including Mthembeni and Margaret's sons. He and his friends went to where Sammy's body was lying in the street near the shops where they were later joined by other people. They all then went to Margaret's house where he waited outside while some of the others entered the house. He did not see anyone carrying any weapons. They did not find any of the people they were looking for and it was decided to go to Baragwanath to look for them there. On their way they met Mthembeni and forced him to return with them. In Leboko Street he saw the deceased surrounded by a large number of people. Some of the people who had just returned from Baragwanath rushed forward and joined the group around the deceased. Margaret was standing at her front gate and accused No 2 and Mthembeni walked past her and followed the people who were taking the deceased towards Taukobong Street.

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Some of them tried to grab Mthembeni but accused No 2 prevented them from doing so. Accused No 2 and Mthembeni stopped at the corner of Leboko and Taukobong Streets and he saw the group returning with the deceased from the direction of the shops. They were undecided as to what to do with him as some were saying that he should be taken to the police station while others were saying that he should be taken to hospital. They passed him and went up Taukobong Street. He later saw the deceased's body in the street.

Mthembeni testified on behalf of accused No 2 and confirmed much of his evidence. He said that in the early hours of the day in question he was treated at Baragwanath after he had been stabbed by Sammy. He left there between 07:00 and 08:00 with Archie and a few others and on their way to Orlando East they came across a group of people, including accused Nos 2

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and 3, Bafana and Seaman. The group was armed with knives and iron bars. They grabbed him and started assaulting him, saying that he had killed Sammy and that he should be killed. His friends ran away.

Accused No 2 stopped the others from assaulting him and

he returned with them to Orlando East. When they got

to Leboko Street he saw the deceased entering the

premises of Margaret's house. Some members of the

group he was with rushed forward and joined other

people who had gone after the deceased. They grabbed

the deceased and took him away, while assaulting him

with iron bars and knives. He and accused No 2

followed behind. He heard Bafana say that he

should be killed as well but accused No 2 said that

they should leave him alone. He saw the group

taking the deceased towards the shops in Taukobong

Street and back again towards the intersection with

Langa Street where he fell down and died. Accused No

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2 was with him all the time and took no part in the attack on the deceased. He did not see accused No 3 among the group who attacked the deceased.

Accused No 3 testified that early that morning he heard about Sammy's death and that the deceased and his brothers were involved. He went to Margaret's house and saw a group of people coming from the house saying that the people they were looking for had taken Mthembeni to Baragwanath and that they should go there. He accompanied this group and on their way they met Mthembeni, Archie and some others. Archie and the others ran away but Mthembeni was grabbed and forced to accompany the group back to Orlando East. When they came near Margaret's house he saw the deceased running into the yard of the house, followed by a group of

about 10 to 15 people. They were joined by some of the people who had just returned from Baragwanath. The deceased was seized and taken

down Leboko Street. He saw Seaman and one Quinton hitting the deceased with their fists while others threw stones at him. Accused No 3 followed at a distance and he saw accused No 2 and Mthembeni walking together behind the group. When accused No 3 reached the corner of Leboko and Taukobong Streets the group came past him with the deceased who was bleeding. They proceeded towards the intersection with Langa Street. He followed and when he reached the corner of Taukobong and Langa Streets he saw Seaman and Quinton stabbing the deceased who was lying in the middle of the street.

The trial Court described Day as a very good witness whose evidence alone was sufficient to sustain a conviction. It accepted his evidence that Margaret had been drinking on the morning in question even before the first group came to her house, and rejected her evidence in this regard. The trial Court also

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rejected Margaret's evidence that accused No 2 had stabbed the deceased on the corner of Leboko and Taukobong Streets. No more was said about Mthembeni's evidence than that the trial Court accepted his evidence where it conflicted with the evidence of accused Nos 2 and 3.

The trial Court found that all three accused were among the group of about 15 people who arrived at the deceased's house at 07:30 that morning and that they all went there in furtherance of a prior agreement to kill the deceased and his brothers in order to avenge Sammy's death. The trial Court further found that "everybody who marched from that house down to the shops and back again to Langa Street" did so with a common purpose to kill the deceased and that they all associated themselves with the conduct of the others.

In my view there is insufficient evidence to show that accused Nos 2 and 3 were parties to any prior

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agreement to kill the deceased. There is no direct evidence of a prior agreement and the facts do not justify such an inference. It is clear that Sammy's death, and the involvement of Archie and his brothers, created wide-spread concern among residents of the township and that some of them went to Margaret's house on the morning in question for no other reason than to find out what had happened. An accused's mere presence at the house or in the vicinity is thus insufficient to justify the inference that he was party to a prior agreement to kill the deceased. It does not appear from the evidence that those who went to Margaret's house at 07:30 that morning arrived there together or that they arrived there pursuant to any prior arrangement to go there. According to Day there was no display of weapons on the first occasion and the group merely wanted to talk to Margaret's sons. Had the group threatened to kill her sons one would

have expected the occupants of the house to warn them, which they did not do. The mere fact that some of the group may have been armed is in any event insufficient to show a common purpose to kill. The two warring factions had clashed the previous night and at least one person had been killed and another stabbed, so that the situation clearly was tense. In the circumstances the carrying of arms does not, in my view, necessarily point to a common purpose to kill. The same applies to those who went to Baragwanath to look for Archie. The fact that Archie was not pursued after he had run away and Mthembeni was not harmed indicates that there was no common purpose to kill even at that stage.

Turning to the occasion when the deceased was seized and dragged off, both accused Nos 2 and 3 said that they were not among the group who did so and that they were mere spectators. Their evidence is

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supported by that of Day who was standing at the gate and who testified that neither of the two was among the group who came to the house the second time. Their evidence is further supported by Mthembeni who also said that accused Nos 2 and 3 were at no stage among the group who carried the deceased off and assaulted him. In the circumstances the State has clearly not proved that accused Nos 2 and 3 were part of this group.

The State case that accused Nos 2 and 3 subsequently joined in a common purpose to kill the deceased by throwing bricks at him rests entirely on Day's evidence. There are a number of weaknesses in Day's evidence to which I have already referred. As I have said his evidence that accused No 2 threw a brick was based largely on inference and his evidence of how accused No 3 threw a brick was most unlikely. His evidence is furthermore contradicted by that of

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Mthembeni. The trial Court did not reject the latter's evidence and made no finding on the question whether bricks were thrown by accused Nos 2 and 3. In my view the State has failed to prove that either accused Nos 2 or 3 threw a brick at the deceased. Even if it is accepted, therefore, that the group who carried the deceased off and assaulted him had at that stage formed a common purpose to kill, it has not been proved that accused Nos 2 and 3 were ever parties to such common purpose.

For these reasons the appeals are allowed. The convictions and sentences of accused Nos 2 and 3 are set aside.

W. VIVIER JA.

VAN DEN HEEVER JA)

HOWIE AJA) Concur.

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