

CASE NO 434/91

CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ISAAC VUSI MAZIBUKO

FIRST APPELLANT

MLUNGISI GUGU ZITHA

SECOND APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN, NESTADT et VAN DEN HEEVER JJA

DATE HEARD: 28 AUGUST 1992

DATE DELIVERED: 4 SEPTEMBER 1992

J U D G M E N T

NESTADT, JA

This is an appeal against the death sentence imposed on the appellants consequent upon them having

been found guilty of murder without extenuating circumstances.

The facts appear from the judgment of the trial judge, VERMOOTEN AJ, sitting in the Witwatersrand Local Division. In summary they are the following. The appellants were members of a group of five persons who on the night of 31 August 1987 arrived by car at the house of Patrick Mabanga (the deceased) in Soweto, Johannesburg. He (aged 33) lived there with his wife and children and other members of his family. The group, who were armed with pangas and a shotgun, were looking for the deceased. They demanded entry to the house. When the deceased's wife refused to open the door, they attacked the house. Shots were fired at it; one of the group climbed on to the roof in order, so it would seem, to gain access to the house and thus apprehend the deceased or to frighten him into fleeing outside; and, obviously with the same object in mind,

teargas was thrown into the house. The attackers succeeded in their aim. The deceased apparently ran out of the house. On an open plot near the house he was caught and killed. He was stabbed; he was shot; and the car was driven over him three times. The injuries found by the doctor who performed the post-mortem examination included numerous gaping, deep, lacerated, incised wounds ranging between three and ten centimetres over the head and face as well as other penetrating incised wounds to the shoulder, chest, back and right hand (the thumb whereof had been amputated). There were also multiple fractures of the skull, cheekbone, nose and ribs and there were a number of (probably) "fairly superficial" shotgun wounds over the back. The cause of death was "multiple injuries".

Our task is to decide whether, having due regard to the presence or absence of any mitigating or aggravating factors, the death sentence is the only

proper sentence. The first appellant who was 24 years old at the time of the murder is a first offender. The second appellant, then aged 23, has previous convictions but they are relatively minor and not really relevant. So to this extent there are mitigating factors. But that is all. I cannot agree with the argument on behalf of the appellants that a further mitigating factor was the motive for the murder, namely to avenge the death of the appellants' friend, a certain Bheki, whom it can be accepted, the deceased had killed. In certain circumstances, revenge may constitute a mitigating factor (S vs Dladla 1980(1) SA 149(A) at 151 B). But not in this matter. The reason is two-fold. In the first place, Bheki was killed at the end of March 1987, ie some five months before the attack on the deceased. So the appellants had a lengthy period for their anger to subside (as in Mandela vs S, an unreported judgment of this Court delivered on 6 March

1992 under case no 587/91). Secondly, the attack on the deceased took place after the appellants had already killed an innocent person. He was the deceased's father, Mbengeni Mabanga. The day after Bheki's death on 29 March 1987, the appellants and others attacked the house which he and deceased's mother occupied. Windows were broken and shots were fired into it. The attackers obviously but mistakenly thought that the deceased was there. Mabanga was fatally wounded by some of the shots. (His murder gave rise to another count on which the appellants were found guilty by the court a quo. Extenuating circumstances having been found, they were each sentenced to ten years imprisonment on this count.)

It appears therefore that the appellants (who though relatively young were not youths) were not deterred by the fact that their thirst for revenge had resulted in Mabanga's death. They continued to take

the law into their own hands. Their desire to kill the deceased persisted. He was sought out in the privacy of his home. These are aggravating factors. So too, are the following. The murder was obviously carefully planned. It was cold-bloodedly and cruelly executed. The form of intent was dolus directus. The evidence reveals that it was the first appellant who shot the deceased and that it was the second appellant who drove the car over him. There having been a common purpose between them to murder the deceased, they are each responsible for the acts of the other as also for the other injuries inflicted on the deceased. The appellants were part of a gang against whom the deceased had no chance to defend himself. As I said, he was caught and killed as he was fleeing.

In my opinion what has been stated makes this murder a particularly heinous one. It is one in which, having regard to the interests of society, the death

sentence is imperatively called for and is thus the only proper sentence.

The appeals of both appellants are dismissed.

H H NESTADT, JA

VAN DEN HEEVER JA - CONCURS

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JUDGMENT

VAN HEERDEN JA:

I have no quarrel with the analysis of mitigating and aggravating factors in the judgment of my colleague, Nestadt. In evaluating those factors I am, however, of the view, albeit not without some hesitation, that this is not a case where the death sentences are imperatively called for.

I would therefore allow the appeals and substitute 25 years imprisonment for the sentence of death imposed in respect of each appellant.

H J O VAN HEERDEN JA