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147/92

CASE NO 378/91 /CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

FANO MAFU APPELLANT

and

THE STATE RESPONDENT

CORAM: NESTADT, VAN DEN HEEVER JJA et HARMS AJA

DATE HEARD: 3 SEPTEMBER 1992

DATE DELIVERED: 15 SEPTEMBER 1992

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J U D G M E N T

NESTADT, JA:

This is an appeal against the death sentence. It was imposed by PAGE J sitting on circuit in the Natal Provincial Division consequent upon the appellant having

been found guilty of murder.

The crime took place in the district of Port Shepstone on 16 January 1990. At about 5 pm that day a group of young persons known as the "comrades" apprehended 62 year-old Ndokuzempi Mkhize (the deceased). The appellant was the leader of the group. He was then aged 21. The deceased was escorted to his kraal. He was accused of practising witchcraft. The appellant gave instructions that the kraal be searched for herbs or muti. None was found. Certain members of the group then said that the deceased should be freed. The appellant however demanded that he be killed. The deceased's son, Kenneth, aged 17, was present. The appellant handed him a bottle containing petrol. He told him to pour the petrol over his father. Kenneth refused to do so. The appellant, who

was in possession of a knife, threatened to stab Kenneth if he did not. Kenneth complied and poured the petrol over the deceased. The appellant gave Kenneth some matches and told him to set the deceased alight. Kenneth threw the matches to the ground and fled. Thereafter the appellant himself set the deceased alight. It was in these circumstances that the deceased was killed.

In favour of the appellant is his comparative youth and perhaps the fact that he had had no schooling. A further mitigating factor is that though he has two previous convictions, they do not relate to crimes of violence and were in any event committed many years before. Against this background PAGE J, with justification, said:

> "(Y)ou are a young man who, despite your lack of education, has evinced qualities of leadership, and who is not basically criminal by nature. There is

> accordingly reason to believe that there is room for your rehabilitation if I am justified in passing a sentence which gives an opportunity for that to take place."

The learned judge, however, went on to find that despite this, the death sentence was, because of a number of aggravating factors, imperatively called for. We have to decide whether this is so. Clearly there are serious aggravating factors. This is not a case of the accused having been emotionally swept up by the occurrence or even influenced by the conduct or example of others. On the contrary, and as I have said, the appellant was the leader of the group. It was he who insisted that the deceased be killed. His denial of this and his version that he was compelled by members of the group to set the deceased alight was rejected. And, of course, he played the dominant if not sole role in the actual murder. He acted with dolus directus.

The crime was obviously a planned one. It was not impulsively committed. The appellant's motive arose from it having come to his attention that the deceased had, shortly before, disapproved of his son's membership of the comrades. As a result, Kenneth ceased attending meetings of the group. It would seem that the appellant wished to punish the deceased for this; or that his aim was to intimidate others from acting similarly. In either event, his motive was a base one.

The manner in which the deceased was put to death was cruel and savage in the extreme. He, elderly and defenseless, was shown no mercy. Involvement by the appellant of the deceased's son in the manner I have described was especially abhorrent.

During the course of argument in the Court below, it was submitted on behalf of the appellant that

account should also be taken of the possibility that the appellant was a creature of his times and background and had become accustomed to violence as a part of his daily life. Perhaps one could add to this the possible influence or effect of the unrest environment which I will assume existed in the area at the time. Even so, and as the trial judge put it, it is difficult to believe that the appellant's sensitivities "could have been so blunted as not to fully appreciate the enormity of (his) deed". It seems to me, therefore, that the aggravating factors in this case far outweigh those in mitigation. It does not, of course, follow that the death sentence should be imposed. But this is a particularly bad case. In his judgment on sentence, PAGE J said:

> "I cannot conceive of any right-minded member of society thinking that anything less than the death sentence would be a fitting retribution for your

deed or would furnish an effective deterrent against similar crimes."

After much anxious consideration I have come to the conclusion that this is the correct approach. In my opinion, therefore, the death sentence is the only proper sentence.

The appeal is dismissed.

H H NESTADT JA

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J U D G M E N T

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HARMS, AJA:

I have had the opportunity of reading the judgment of my brother NESTADT and am in respectful

agreement with his exposition of the salient facts as well as his summation of the aggravating and mitigating factors. I am, however, unable to agree with his ultimate value judgment namely that the death penalty is, in the circumstances of this case, the only proper sentence. Lest there be any misunderstanding, that sentence is no doubt a proper sentence especially if regard is had to the appellant's callousness and his method of execution of the murder.

The learned trial judge could not conceive of any right-minded member of society who could think that anything less than the death sentence would be a fitting retribution for the crime and therefore imposed that sentence. I am unable to endorse the reasoning and wish to deal with two issues that arise from it.

In the first instance, the reference to all the right-minded members of society may create the impression that the "reasonable man" test is an

appropriate test in the present context. It is not. In any event and with respect to the learned judge, I am able to conceive of persons who would not share his view. The fact that they may not be like-minded does not mean that they are not right-minded. Also, the views of the majority of right-minded persons are not known to me. As Alf Ross, On Guilt, Responsibility and Punishment (1975) p 59 said, "the professed opinio communis is of course a fancy. All we can say is that there is a certain unanimity within a certain cultural group". The sentencing judicial officer has to make (within the relevant legislative context) his own value judgment. He will obviously, in the words of NIENABER JA in S v Majosi and Others 1991 (2) SACR 532 (A) at 541, take into account the "perceptions, sensibilities and interests of the community" (insofar as he can surmise what they are) but, in dispensing penal justice he is not only obliged to protect society against the

accused but also to protect the accused against society. Cross, The English Sentencing System (3rd ed) p 201 pointed out that "(t)he position of the judges is certainly a little ambivalent, for they claim to be the mouthpiece of the public and yet there are instances in which their views are probably more moralistic than those of a considerable sector, if not a preponderance, of the public." The other side of the coin is that the public can often be rather vindictive and vengeful, sentiments a court has to ignore. The experience of O'LINN J as recounted by him in S v Heita and Another 1992 (3) SA 785 (NmHC) illustrates rather vividly the point I am trying to make.

The next aspect on which I wish to express some views relate to the question of retribution. I do endorse the proposition underlying the learned judge's finding that where a crime is as horrendous as the present and is malum per se, the only moral

justification for the sentence can be retribution. The other so-called "theories" or "aims" of punishment may have little, if any, role to play. (See in general on the question of the concept of "theories" of punishment: Rabie & Strauss Punishment, An Introduction to Principles (4th ed) p 18 and on its "aims": Alf Ross, op cit, p 60 - 65.) That does not mean that one adopts "sentencing nihilism" as a philosophy (see Mueller The Future of Sentencing : Back to Square One in Grosman New Directions in Sentencing p 13) but simply that one has regard to the realities and effectiveness of sentences. Accepting, as I do, that retribution must in this case justify the nature of the sentence, it may be useful to recall that retribution in this context means requital for evil done (The Concise Oxford Dictionary (1990) s v "retribution"; Stockdale & Devlin, Sentencing, p 23), or, in the terminology of Du Toit, Straf in Suid-Afrika, p 102 - 105, "vergelding

in verhewe sin". And although there must be a certain proportionality between punishment and the crime, that does not "imply that the punishment be equal in kind to the harm that the offender has caused" (Rabie & Strauss, op cit, p 21).

Against that background I now wish to assess the question whether the death sentence is the only proper sentence. In this regard I do believe that this Court cannot close its mind to what is happening beyond its portals. Regard should be had to the fact that the crime was committed, not only with a political motive but also in what can be described, without any hyperbole, a combat zone; an area where sense and sensibilities do not govern political thought or action; a place where political intimidation is a part of life; where moral principles have become blunted. It seems to me that any attempt to impose, ex cathedra, in this case the civilized standards in which one

believes, is doomed. I do not wish thereby to condone or create new or lesser standards of morality or to formulate a rule applicable to all cases of "political" murders but merely to verbalise my innate conviction that the death sentence is not imperatively called for in this instance and that a sentence of 18 years' imprisonment would do justice to the case.

L T C HARMS
ACTING JUDGE OF APPEAL

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**J U D G M E N T**

**VAN DEN HEEVER JA**

I have had the advantage of reading the judgments of both my colleagues. I agree with that of Nestadt JA, and would wish to add to the exposition of the salient facts by him only three further ones.

The middle-aged deceased was degraded and made to sing what Kenneth said "are usually referred to as toyi-toyi slogans" as he was marched home by the group of young men of which appellant was the leader.

Before Kenneth was instructed to pour petrol on his father, the latter had already been severely injured. He had head wounds which were bleeding profusely, a broken leg, and according to his son's description "part of his heel was not in place".

When appellant produced a knife and threatened to stab Kenneth were he to persist in his refusal to pour petrol on his father, the nobility of the father's intervention "by saying that I should pour petrol over him since I could do nothing" roused no compassion in appellant.

The murder committed by appellant was not committed with a political motive. Appellant at no stage claimed that to have been the case. The acts done by him and those he incited do not fall within the dictionary definition of "politics" ("science and art of government") or "political" ("of or affecting the State or its government; of public affairs ... engaged in civil administration" etc). The Concise Oxford Dictionary defines a "terrorist" as "one who favours or uses terror-inspiring methods of governing or of coercing government or community". Appellant was not the victim of terrorism but its imaginative perpetrator, moreover corrupting others to follow in his footsteps.

VAN DEN HEEVER JA