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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Saaksw. 22/92

In the matter between:

MBONGANI ERIC LUSHOZI ..... First Appellant

NTAKA KHANYILE ..... Second Appellant

AND

THE STATE ..... Respondent

Coram: VAN HEERDEN, EKSTEEN et NIENABER, JJA

Heard: 6 November 1992

Delivered: 20 November 1992

J U D G M E N T

EKSTEEN, JA :

The two appellants were indicted together with another person, on ten counts of murder, one of attempted murder and three of arson. Both appellants were convicted on all counts. Their co-accused was acquitted on all counts. Both the appellants were sentenced to death on each of the ten counts of murder; to 12 years imprisonment on the counts of attempted murder; and to six years imprisonment on each of the three counts of arson. There was no application for leave to appeal against any of the convictions or sentences. The present appeal, however, is brought against both the convictions and sentences in respect

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of the ten counts of murder for which they had been sentenced to death, in terms of the provisions of section 316 (A)(i) of the Criminal Procedure Act 57 of 1977.

From the evidence led at the trial it appears that during March 1990 the kraal of the second appellant was attacked and burnt to the ground by unknown attackers. He suffered considerable loss as a result. A Datsun van, a 135 Ferguson tractor, and "a machine which is used to grind maize" were completely destroyed. Five hectares of sugar cane was also burnt as well as a wattle plantation. The matter was reported to the police but they were unable to bring anyone to book.

The appellants' kraal was not the only

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one to have been burnt and destroyed at this time. His elder brother's kraal suffered the same fate. There seems to have been a feud between members of the African National Congress ("ANC") or United Democratic Front ("UDF") on the one hand and members of Inkatha on the other. Members of one faction would attack and burn the kraal of a member of the opposing faction; who in turn would retaliate by attacking and burning their kraals.

After the attack on second appellant's kraal he took refuge at the kraal of one Psychology Ndlovu, a member of the Kwa-Zulu Legislative Assembly and a supporter of Inkatha. Second appellant was also a member of that party.

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During April 1990 he moved to a place called Trust Feed.

First appellant was a special constable in the Kwa-Zulu Police Force. During January 1990 he was posted to the kraal of Psychology Ndlovu to act as his personal bodyguard. He was still on duty at the kraal on the fateful night of 6 October 1990. Psychology Ndlovu's kraal seems at that time to have been a place of refuge for Inkatha supporters who had been attacked or felt themselves threatened by members of the ANC. One such refugee was Jabulani Zuma. He gave evidence for the State at the trial. The Judge a quo described him as "an excellent witness" and went on to say that "the Court

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had no hesitation in accepting him as a truthful and reliable witness".

Zuma told the Court that the second appellant had told him that he suspected "the boys" from Khanyile's kraal as being responsible for burning his kraal down.

What happened on the night of 6 October 1990 appears from the evidence of Zuma and from that of other witnesses. On that night at about 8 o'clock second appellant arrived at Psychology's kraal in his blue van. He was accompanied by some eight other men. They were armed. Two of them carried AK 47 rifles and the others had shotguns. Second appellant called the young men living at Psychology's kraal together and they all repaired to "the round house" of the kraal. Zuma was present.

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at this gathering and so was the first appellant. Second appellant encouraged them to "go and attack at Khanyile's place" and told them that he "was going to pay a revenge to those people who had burnt his kraal". The meeting lasted for more than an hour and eventually a group of some 19 strong left on their expedition of reprisal. Zuma says he saw first appellant exchange his shotgun for an AK 47 rifle. Second appellant was also armed with an AK 47 rifle and so was a third man. The others in the party either carried shotguns or assegaais. Zuma was also asked to accompany them but excused himself on the pretext that he was inebriated. In fact, he says, he was just too lazy to go along and did not relish

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the prospect of killing people, which he realized only too well was the object of the operation.

The group - or the "impi" as it was referred to at the trial - approached the kraal of Johannes Khanyile at about one o'clock in the morning when all the inmates were asleep. The previous night they had undergone a cleansing ceremony in preparation for the obsequies for a deceased relative the next day. This probably accounts for the fact that six of the men slept together in one of the huts of the kraal.

The intruders burst into the main hut where the kraal-head's wife was sleeping, and demanded to know where the men - the "amaqabane"

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i.e. UDE or ANC members - were. When she told them that the men were not there they slapped her in the face and demanded money. She gave them R200. They also took some liquor and a radio/casette player. They then went to the other huts where they found the men. Six of the men were shot dead. A seventh was so badly wounded that he died in hospital. Another one also sustained several serious wounds but survived to tell the tale. The huts at Khanyile's kraal were set on fire and burnt down.

The "impi" then proceeded to the kraal of Mathombi Hlope where a woman was shot and killed and two huts burnt down. The kraal of Frieda

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Hlope was the next to be attacked. Here a man and his seven-year old son were shot dead and three huts set on fire.

It was then about 3 am and the "impi" returned to the kraal of Psychology Ndlovu. Zuma, who had heard the sound of shooting while they were away, saw them return. The second appellant appeared to be in a jovial mood and remarked that if anyone were to speak about the events of that night, he would "open his stomach" with an AK 47 rifle. The first appellant was carrying a radio/ casette player. Both appellants told Zuma that they had destroyed Khanyile's kraal and that they had also "hit" some other kraals nearby.

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After a short while the second appellant left in his blue van, together with the people who had come with him the previous evening.

On 9 October - i.e. some two days after the raid - an AK 47 rifle was found in a room occupied by first appellant under a bed on which he slept. Ballistic evidence showed that this rifle had been used in the attack on Khanyile's kraal on the night of 6-7 October. In a formal admission recorded in terms of section 220 of Act 31 of 1977 the first appellant admitted as much, viz that the rifle had been found under a bed in the room occupied by him, and that that rifle had been used in the attack on the Khanyile

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kraal. In his evidence, however, he denied all knowledge of the fact that the rifle had been hidden under his bed.

Both first and second appellants denied that they had taken part in the raid. Second appellant sought to set up an alibi. The Court however accepted Zuma's evidence and rejected that of both appellants. On appeal before us this finding was not seriously contensted. It is in any event questionable whether that finding could be challenged as long as the convictions of attempted murder and arson stood. Be that as it may, on the premise that Zuma's evidence was properly accepted it was conceded that the members of the raiding party acted in terms of a prior agreement or understanding to attack the three kraals and to kill people in that attack; that each member of the group made common cause, and shared a common purpose

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with the rest, to commit the offences and associated themselves with the conduct of the group; and that both appellants were members of the group. Their convictions were therefore fully justified.

The learned trial Judge rightly regarded the offences as being of a most serious nature. The attacks, he indicated, were pre-meditated and brutal. They were made under cover of darkness on the unsuspecting inmates of the kraals who were all fast asleep. Ten people were killed, and the killers clearly had the direct intention to kill. The actions of the first appellant the learned Judge regarded as particularly reprehensible

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in view of the fact that he was a policeman posted to the kraal of Psychology Ndlovu and charged with maintaining law and order. These are all aggravating factors and the learned Judge was fully justified in so regarding them.

The heinousness of the offences is, however, tempered to a certain extent when one has regard to the mitigating factors which appear from the evidence. In the first place we must have regard to the general unrest prevailing in the area at the time. The cause of this unrest lay in the political differences between the ANC and the Inkhata factions. They seem to have been intolerant of each other and this intolerance found expression

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in the excesses committed by the one against the other. And then the inevitable reprisals would follow. In such a politically charged atmosphere emotions would be expected to run high. It was in such a climate that the second appellant was made to feel the cruel blows of his political opponents' spite. He was a man of 51 who had led a blameless life. Now, at a stroke, his home and much of his worldly goods were laid in ruin. He and his family - his wife and six minor children - were compelled to seek temporary refuge at the kraal of Psychology Ndlovu, before setting about building a new life at Trust Feed. The per-

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and when rumours reached his ears that the men of J.K. Khanyile's kraal had been responsible, his mind became set on vengeance. This came to fruition on the night of 6 October when he, and some eight of his supporters, arrived at Ndlovu's kraal - an Inkhata stronghold. There he gathered more willing sympathisers, and the shameful slaughter followed.

The second appellant, as I have indicated was a man of 51 without any previous convictions. This in itself tends to indicate that he was not a man given to violence, nor one with a criminal bent. (S. v. Senonohi 1990 (4) SA 727 (A) at 733 I-J; S. V. Ramba 1990 (2) SACR 334 (A) at 342 h.)

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He seems to have had a steady work record. He hed been employed by Escom at Wartburg as a labourer for ten years before being compelled to leave because of ill health. For the six years immediately preceding these offences he had been self-employed in buying and selling the "ncema" grass which is used in making mats. The success of this venture is reflected in his income of some R1500 per month. Despite being illiterate and without any schooling he was nevertheless able to support his not inconsiderable family by dint of steady and apparently dedicated work.

First appellant was a man of 26 years of age. He was a constable in the Kwa-Zulu Police

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Force. He joined the Kwa-Zulu Police Force in 1989. and from the beginning of 1990 was posted to the kraal of Psychology Ndlovu as his personal body-guard. Ndlovu was a member of the Legislative Assembly and an influential member of Inkhata. First appellant lived in awe of him. The evidence does not disclose what part, if any, Ndlovu played in the 6 October raid nor whether he had any personal knowledge of it, nor what influence if any he brought to bear on first appellant. He was not called as a witness despite the fact that, on first appellant's evidence, he seems to have been at his kraal that night. This does seem to be a somewhat strange lacuna in view of

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the fact that his kraal was the base from which the raiders set out and to which they subsequently returned.

First appellant also has no previous convictions, and cannot therefore be seen as a man normally given to violence. In fact, in the light of all these considerations, both appellants appear, up to that stage at any rate, to have been ordinary lawabiding members of society - humble in their calling and without any intellectual pretentions - caught up in the spiral of political violence sweeping the area in which they lived. Political issues are generally charged with emotion, and emotion drives out reason (cf. S. v. Masina and

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Others 1990 (4) SA 709 (A) and S. v. Khanyile and Others 1991 (1) SACR 567 (A)). The onus is on the State to negative, beyond reasonable doubt, the existence of such mitigating factors as an accused person relies on (S. v. Nkwanyana 1990 (4) SA 735 (A) at 744 A-C). The factors I have mentioned have not been so negatived, and weighing them against the aggravating circumstances, as I am bound to do (sec 322(2A)(b) Act 51 of 1977) I cannot say that the death sentence is the only proper sentence in the present case. That however does not detract from the seriousness of the offences. The intentional killing of a fellow human being is always a serious offence. The killing of ten

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people in the present case, even though it may have been done in the emotion engendered by political fervour, is and must always be a most serious transgression which strikes at the very roots of a free and ordered society. No court of law can regard such offences lightly.

The appeal against the convictions of both appellants on the counts of murder is dismissed. The death sentences imposed in respect of each of the ten counts are set aside, and for them is substituted a sentence of 25 years imprisonment in respect of each such conviction. It is ordered that the sentences in respect of these ten counts are to run concurrently, and

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they will also run concurrently with the 30 years imprisonment imposed in respect of the other counts of which the appellants were convicted.

J.P.G. EKSTEEN, JA

VAN HEERDEN, JA)
NIENABER, JA) concur