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CASE NO 324/91
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MFANAFUTHI NTAKA

Appellant

and

THE STATE

Respondent

CORAM:

HEFER, VIVIER JJA et NICHOLAS AJA

DATE OF HEARING: 10 March 1992

DATE OF JUDGMENT: 30 March 1992

J U D G M E N T

/NICHOLAS AJA....

NICHOLAS JA:

This is an appeal against two sentences of death. The appellant is Mfanafuthi Ntaka ("Ntaka"). He was charged in the Durban and Coast Local Division of the Supreme Court on four counts: (1) murdering Feni Makhosazane Gumede ("Gumede"); (2) murdering V.K. ("K."); (3) raping J.M.H. ("H."); and (4) theft of clothing, a purse and cash belonging to H. or Gumede. All of the offences were alleged to have been committed on the evening of 4 January 1988 and during the night which followed at Madundube Reserve in the district of Umbumbulu, Natal.

When arraigned Ntaka pleaded not guilty on each of the four counts and said that he had no knowledge of the events which gave rise to the charges - during 4 to 5 January 1988 he was at Mfolweni and not at or near Madundube. He was found guilty on all four counts.

The action took place at Gumede's kraal at Madundube. This consists of a number of structures, including the hut where occurred the events to be narrated and which will be called "Gumede's hut", and what was referred to in the evidence as "the main hut" which consisted of a number of rooms.

The dramatis personae were Gurnede, H., K. and Ntaka. Gumede, according to the post-mortem report, was an obese, grey-haired, elderly female. She was aunt to both H. and Ntaka, who are cousins. H. was 24 at the time of the trial and Ntaka was somewhat older. K. was a teen-age herdboys.

The main State witness was H., who was the complainant in count 3 and the only eye-witness. Evidence was also given for the State by Mboniseni Mthembu, who lived not far from Gumede's kraal - "within shouting distance". The reports on the post-mortem

examination held on Gumede and K. respectively were received in evidence by consent. The defence admitted the facts and findings contained in the reports, and made specific admissions that Gumede and K. each died on 4 January 1988 as a result of brain damage caused by injuries suffered on that date.

In giving evidence prior to conviction Ntaka persisted in his alibi defence, but after the verdict he again entered the witness-box to give evidence in extenuation. He then admitted that he had committed the crimes laid to his charge. Consequently there ceased to be any serious dispute on the facts.

The trial court found that there were no extenuating circumstances on counts 1 and 2 and Booysen J, who presided, imposed the sentence of death on each of these counts, as he was obliged to under s 277 of the Criminal Procedure Act 51 of 1977 as it then stood. On

count 3 (rape) and count 4 (theft) Ntaka was sentenced to 10 years' and 4 years' imprisonment respectively.

H. said in evidence that she and her two children visited her aunt Gumede over the Christmas holidays. On the evening of 4 January 1988 they and K. were together in her hut with Gumede who appears to have been lying on a bed. Between 9 and 10 o'clock there was a knock on the door. It was Ntaka. He was admitted. He had with him a nutted stick, more than a half a meter in length, and about 2,5 cm in diameter. He sat on a bench near the door, and smoked a dagga cigarette. He asked for the key to the house of his parents: this was given to him. He asked for a candle: a piece of candle was given to him. He asked for food, but Gumede told him that there was none: she had been away to have her teeth extracted. He then asked for money, but Gumede answered that she had no money - she had just paid her employees. At this stage she stood up and asked Ntaka to leave. He

replied that he was still smoking. Eventually, he stood up and made as if to go, but closed the door and turned and struck Gumede on the head with his stick. She fell on to the bed. H. cried out, and Ntaka came and struck her on the right forearm. K. stood up to open the door, presumably to get outside. Ntaka caught hold of him, saying that the boy wanted to be an informer and report him. He struck K. on the head and when he fell to the floor, he struck him again on the head and on the face. He then turned to resume his interrupted business with Gumede, and struck her again and again. When she was lying still, he turned to H. and told her to take off her panties. When she did not respond, he took them off himself, dropped his trousers and had sexual intercourse with her. She did not consent, but submitted because she feared that if she did not, he would do to her what he had done to the others. When he had finished, he told her that they must go and look for money in the main hut. He took the keys from the table

and they went together to Gumede's room in the main hut. Ntaka ransacked the place looking for money, which he did not find. He then collected clothing belonging to Gumede, which he packed into three bags. They returned to Gumede's hut. He looked into the pots and, finding food there, said that the dog was stingy with food although there was food. He came back to H., who was sitting with her baby on her lap and told her to put the child down. He had intercourse with her again. At about 4 a.m. on 5 January, he had intercourse with her once more and then asked her to help him carry the goods to the bus stop. He told her that if she mentioned what he had done, he would kill her - that if she was asked who had done it, she was to say that two people had arrived and they had caused the damage. She left him at the bus stop, and on her way home entered Mthembu's kraal and made a report in the terms which Ntaka had instructed. On the Friday, after Ntaka had been arrested, and she felt "he would not get me", she told the police the

uth.

Mthembu said in evidence that he knew Ntaka well: they both lived at Madundube and had grown up together. At about 8.30 on the evening of Monday, 4 January 1988, Ntaka, whom he had not seen for some time, came to Mthembu's home. He asked for cigarettes, which were given to him. He then asked for a stick because, he said, he was going to his girl friend and as it was drizzling he wanted a stick to sweep the dew from the grass in front of him as he walked to avoid getting his trousers wet. Mthembu said he did not have a stick to lend him, but Ntaka took a nutted stick from the floor. Mthembu indicated that it was about 0,75 m long and about 1,5 cm thick. Ntaka left at about 8.40 p.m. H. came to his house the following (Tuesday) morning and reported that criminals had come to Gumede's place and committed murder.

In the report of the post-mortem examination

held on Gumedé, it was recorded that she had sustained multiple extensive wounds on the face and the left side of the head and extensive fractures of the right maxilla and mandible, the left maxilla and mandible and the left frontal bone. There was extensive brain damages under fractures in the frontal and temporal areas. The cause of death was given as brain damage. A note on the report reads: "Injuries caused by a sharp heavy instrument applied with great force e.g. an axe."

In the report of the post-mortem examination held on K., there were recorded a stellate-shaped laceration with a depressed fracture at the right parietal eminence, with underlying brain damage; a laceration on the left temple with a fracture of the temporal bone and underlying brain damage; and a fracture of the second vertebra of the cervical spine with destruction of the spinal cord. The cause of death was given as brain damage. A note on the report records:

"Head injuries caused by a blunt instrument and applied with great force."

When Ntaka gave evidence for the second time, he said that for six years before her death there had been on-going difficulties between Gumede and himself about a sum of R80,00 which belonged to him and which she had persistently refused to repay. In consequence his "heart became sore." During the day of 4 January, he had been smoking dagga. The last occasion was in the afternoon. Asked how the dagga affected him in the evening, he said that he could feel he was drunk. When Gumede did not give him food or money, he was upset. He thought about the R80,00 and then struck her. He intended not to kill her, but just to strike her. K., he said at first, was not killed by him and later he said he did not intend to kill K.. He picked up the stick at Mthembu's house because "it would assist me in hitting her."

Under cross-examination he said that he had been an habitual smoker of dagga for about seven years. He visited his aunt Gumede frequently to demand his money. They were not on friendly terms. When he struck the herd boy, he was trying to destroy evidence so that he would not give evidence in favour of Gumede.

In answer to questions by the trial judge, he said that he took the nutted stick from Mthembu because he was going to hit "these people" with it. When he struck Gumede on the head and she fell down, he decided to continue striking her and desisted only when he noticed that she was unconscious. He admitted that he had sexual intercourse with H., that he took clothing from the main hut, and that he slept in Gumede's hut. He said that the dagga he had smoked affected him just in his mind.

The new regime in regard to the sentence of

death which was introduced by the Criminal Procedure Amendment Act 107 of 1990 has been considered in many cases in this court, perhaps most compendiously in *S v Mlumbi en 'n Ander*, 1991(1) SACLR 235 (A) AT 248i - 250b. No purpose would be served by yet another discussion of the relevant principles. It is sufficient to say that in considering this appeal it behoves this court to make a finding as to the presence or absence of any mitigating or aggravating factors, and then to consider with due regard to that finding whether it is satisfied that sentences of death were the only proper sentences. If this court is so satisfied, then it will confirm the sentences.

In arguing the appeal counsel for Ntaka submitted the following as mitigating factors:

- 1.The on-going dispute between Ntaka and Gumede, and his grudge against her.
- 2.The effect of the dagga which he had smoked on 4

January 1988.

3.He did not intend to kill Gumede (whom he struck "for the money") or K. (whom he struck "to destroy evidence" and so that he would not tell people that he had struck them).

4.He had only one previous conviction, i.e. on 11 January 1985, for assault with intent to do grievous bodily harm in respect of which the sentence was R50.00 or 50 days imprisonment.

5.In the light of 4, he is not inherently violent and is capable of rehabilitation.

6.He was 22 years old at the date of the crimes.

7.He lives at Madundube in a rural area and is unsophisticated and poorly educated.

8.Neither of the murders was accompanied by any additional cruelty or humiliating torture.

Some of these (viz Nos 1, 2 and 3) were advanced in the trial court and were dealt with in Booysen J's judgment on extenuating circumstances:

"In this matter the question arises now whether there were any extenuating circumstances in relation to the murder of the deceased on count one and the deceased on count two.

Both these people were beaten to death by the accused with a nutted stick. It has been submitted that he was under the influence of dagga, that that was an extenuating circumstance, and that he bore a grudge against his aunt, the deceased on count one, and that the offence was not premeditated and it was submitted that either singly or cumulatively, these constituted extenuating circumstances.

The accused has shown himself to be an inveterate liar. It is quite clear from his conduct that evening that whatever dagga he had smoked, did not affect either his performance physically or his reason. He decided, even on his own evidence which he gave later in extenuation, at Mthembu's kraal, that he was going to strike his aunt with this nutted stick which he took with him. He had the presence of mind to give a false but plausible reason for taking this nutted stick. It is quite clear that he was annoyed because the deceased on count one did not give him food or money when he asked for it. It seems that he then decided that he would beat her with a nutted stick, because he then closed the door and then turned and set about doing so. Not content with beating her once, he carried on until she died. This was nothing more than callous murder.

His decision thereafter to kill the young boy to ensure that he should not give evidence against him, was a rational but cold-blooded and callous decision. It was not premeditated in the sense that he decided before going there

to do so, but it was a deliberate killing of an innocent young boy.

He was then, obviously, physically and mentally quite fit enough and able enough to remove the complainant's panties and to rape her.

He then, quite cold-bloodedly and rationally, decided to steal the deceased's belongings, and, for good measure, to rape the complainant again, and also to devise this story, which he told her to tell the police.

When he finally came to tell the truth in this case in extenuation, he remembered everything he did that night perfectly.

We find, beyond all reasonable doubt, that his mental faculties were not affected by his consumption of dagga to any material degree, and certainly not to an extent which serves to reduce his moral blameworthiness to any appreciable extent. It is clear that he suffers from no mental defect. He is just a cold-blooded and vicious murderer.

He is such a proven liar that we have no doubt that his evidence that the deceased owed him R80,00 and that he thought about that when she did not give him food or money, is as much a cock and bull story as the numerous other lies he told us.

It has been suggested that he was guilty only of *dolus eventualis*. He carried on with these brutal attacks with a dangerous weapon and it is just not so - he deliberately killed these two people.

After having told us earlier that he had been on good terms with the deceased on count one, he tried to convince us in evidence upon extenuation, that he had been on bad terms for a long time. It is true that the killing as

such may not have been premeditated in the sense that he had already decided at Mthembu's home, that he was going to kill the deceased on count one, but these killings were nevertheless deliberate and intentional.

There are no circumstances that we can find lessening the accused's moral blameworthiness in relation to these two murders, and we find no extenuating circumstances in regard to counts one and two."

I entirely agree, and do not think that any of these three items can be considered as mitigating factors. I deal briefly with the remaining items:

4.His comparatively offence-free record does not in my view provide any reason for mitigating the punishment which should be imposed for crimes of this enormity.

5.His propensity for violence is demonstrated by the crimes of which he has been convicted. His conduct on the terrible night and his evident lack of any remorse show him to be a man without conscience and any human feeling which might make him responsive to therapy.

6.I do not think his age to be a mitigating factor. These crimes are not to be ascribed to immaturity, lack

of experience of life, youthful thoughtlessness or influence by others.

7. For all that I know Madundube may present a picture of peace and tranquility in contrast to some strife-torn areas in Natal. Lack of sophistication and poverty of education are not known as factors leading towards the commission of violent crimes.

8. I do not understand the meaning of the word "additional" in the context of these crimes. Ntaka desisted only when his victims had succumbed to the injuries he inflicted.

As to aggravating factors, *res ipsa loquitur*.

Ntaka went to Gumede's hut bent on robbery. He was armed with an ugly weapon. When asked to leave, he attacked her, felling her. He then struck H. and went on and felled K. to prevent him escaping and setting up the hue and cry. After that he returned to Gumede to complete the unfinished job. He terrorized H., so

that she submitted to sexual intercourse, and to helping him steal Gumede's clothes, and to acting as a porter to the bus stop the next morning.

When one comes to consider whether the death sentence for these two crimes is the only proper sentence, the fact that there are no mitigating factors is not decisive. Rumpff JA said in *S v Zinn* 1969(2) SA 537 (A) at 540G that what has to be considered in determining sentence is the triad consisting of the crime, the offender, and the interests of society. Where the death sentence is being considered as a possible sentence, each of these elements must be anxiously weighed.

In this case the crimes are of such enormity that the death sentence must be regarded as eminently an appropriate punishment for them. It does not seem that the interests of society can be served by imposing

another sentence. The offences clamantly call for extreme retribution, for the emphatic denunciation of the crimes as totally unacceptable in a civilized society and to give expression to society's sense of outrage. As to the offender, he stands revealed as a cruel and ruthless killer, and totally bereft of compassion and any human feeling. He had no compunction in sleeping in the same room as his murdered victims, and one can only wonder what would have happened to H. if he had not required her as an object on which to slake his sexual urges, and to help carry his booty to the bus stop in the morning. This is a case absolutely without redeeming features.

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

H C NICHOLAS
Acting Judge of Appeal

HEFER JA]
] CONCUR
 VIVIER JA]