7/92

Case no 81/88

E du Plooy

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

HENRY MASONDO	First Appellant
SAMPIE MAJOLA	Second Appellant
and	
THE STATE	Respondent

Coram: **VAN HEERDEN, F H GROSSKOPF JJA et VAN COLLER AJA**

Heard:	**Delivered:**
21 February 1992	5 March 1992

J U D G M E N T

F H GROSSKOPF JA:

The appellants were both convicted on two counts of murder by **Bristowe J** and two assessors at a sitting of the Circuit Local Division for the Northern District of Natal. The trial court found that the appellants had murdered Andreas Madonsela ("Mr Madonsela") and his wife Miya Madonsela ("Mrs Madonsela") during the night of 26-27 September 1987 on a farm near Vryheid. The first appellant ("No 1") was also convicted of raping Mrs Madonsela that night. The trial court found extenuating circumstances with regard to the murder of Mr Madonsela (count 1), but none in respect of the murder of Mrs Madonsela (count 2). The appellants were sentenced to 10 years' imprisonment on count 1, while both of them were sentenced to death on count 2. No 1 received a further 8 years' imprisonment on the rape charge (count 3). The trial judge granted both of the appellants leave

to appeal to this court against the sentence of death imposed on each of them on count 2. On 29 November 1989 this court dismissed both those appeals.

The Criminal Law Amendment Act 107 of 1990 ("the amending act") was promulgated on 27 July 1990 and, save for certain sections which are not relevant to the present appeal, came into operation on the date of promulgation. One of the main objects of the amending act was to abolish the compulsory imposition of the death sentence. Section 4 of the amending act provided for the substitution of section 277 of Act 51 of 1977. Section 277, as substituted by section 4, introduced a new approach to the imposition of the death sentence which has been set out and explained by this court in a number of cases. (See, for example, **S v Masina and Others** 1990(4) SA 709(A) at 712J- 715A; **S v Senonohi** 1990(4) SA 727(A) at 731I- 733E, 734F-H; **S v Nkwanyana and Others** 1990(4) SA 735(A) at 742E-745G).

Section 19(1) of the amending act makes provision for the appointment of a panel. In terms of section 19(8) the panel is obliged to consider the case of every person under sentence of death whose sentence was pronounced before the date of commencement of the new section 277 of Act 51 of 1977, and who has in respect of that sentence exhausted all the recognized legal procedures pertaining to appeal or review. The appellants were not excluded by the provisions of section 19(8)(i) or (ii) and their case was duly considered by the panel. On 15 August 1991 the panel made a finding in terms of section 19(10)(a) that in its opinion the sentence of death would probably have been imposed on each of the appellants by the trial court had section 277 of Act 51 of 1977, as substituted by section 4 of the amending act, been in operation at the time sentence was passed on them. As a result of that finding the case of the two appellants was submitted to the registrar for the consideration of this court in terms of section 19(12)(a)

of the amending act. That subsection provides that this court shall consider the case in the same manner as if it were an appeal by the appellants against their sentences, and as if the new section 277 of Act 51 of 1977 were in operation at the time sentence was passed by the trial court. In terms of section 19(12)(b) of the amending act this court may confirm the sentence of death; or, if it is of the opinion that it would not itself have imposed the sentence of death, set aside that sentence and impose such punishment as it considers to be proper; or set aside the sentence of death and remit the case to the trial court with instructions to deal with any matter, including the hearing of evidence. I may mention that there was no application to remit this case to the trial court for the hearing of further evidence.

In considering the present appeal this court exercises an independent discretion. With due regard to the relevant mitigating and aggravating factors, and bearing in mind the main purposes of punishment, this

court must decide whether the death sentence imposed on each of the appellants was the proper sentence. (S v Bosman 1992(1) SACR 115(A) at 118d-f).

No 1 and his girl-friend, Thuluzi Sibiya, as well as the second appellant ("No 2") and his girl-friend, Constance Zungu, lived at a place some distance from Vryheid. They had been drinking on the night of 25-26 September 1987. The evidence as to what happened the next day and night is set out succinctly in the unreported judgment of **Nicholas AJA** dismissing the previous appeal of the appellants. I cannot improve on the exposition of the facts contained in that judgment, and I quote the following passages from it:

> "Constance and No 2 were still in bed at about 8 a.m. [on 26 September 1987] when a girl named Sidudla Sibiya arrived. She bore a message from No 2's sister, who lived near Vryheid, not far from Madonsela's hut: Andreas Madonsela had informed the local white farmer that No 2 had been stealing his sheep. The sister said that No 2 should not come to her by day because the whites were looking for him and they were armed with guns; that money had been left with her by No 2's brothers, and no 2 should come at night and collect it, so that he could flee

to his home district. No 1 was fetched from his room and told the story. The two accused were incensed and upset. No 2 'even stated that he had slaughtered white farmers' sheep and he was supporting Madonsela'. No 1 said to No 2:

> 'Well, it's not going to help us in any way if we are going to sit down and not confront Madonsela with this. Madonsela is aware of our place of residence. He might bring the police here and many things will be revealed.'

At about 8 p.m. the two accused and their girlfriends took a taxi to Vryheid. From there they took another taxi to Mondlo and went to the house of No 2's sister. They drank there for a while and then No 2 said, 'Let's go'. The sister said to them, 'Do not kill Madonsela. You must just hit him and take his money'.

The four of them walked to Madonsela's house. Each of the accused was in possession of an Okapi knife. No 1 knocked at the door. He said 'Please open the door. It's me, Mduduzi. I am injured.' (This was a ruse. Mduduzi was a man who often stayed at Madonsela's). Madonsela replied, 'Mduduzi, go to bed. I will see you in the morning.' No 2 then picked op a cement building block which was lying a short distance from Madonsela's house. He struck the door with it: the bolt was bent and the door opened. No 1 went inside. There were screams from the room. A woman - it was Miya - came running out with No 1 in pursuit. He caught her and brought her back to the house. The four of them then left taking Miya with them. They reached what the witness called 'the dirt road', when No 2 turned and went back to the house. He returned carrying a radio and a 20 litre plastic container full of liquor. No 2 poured half

the contents onto the ground and instructed Miya to carry the container. No 1 told her to put it down and come to him. He walked with her to a point about 15 m away and then raped her in the view of the others. Afterwards No 2 asked Miya whether she was married to Madonsela. She replied that they were not yet married. No 2 said to her -

> 'Do you like to get married? I am going to cause you to be married. You are going to have the last marriage!'

And No 1 said -

> 'Did you see that your husband is dead? He is dead. There is nothing you can do. I have killed your husband'.

Then the five set out on a journey whose route it is not easy to follow from the evidence and the meagre sketch plan which was put in. Miya, on instructions, was carrying the plastic container which was half-full of sorghum beer. They walked along a footpath over the veld which led to a tarred road. This they crossed. They got onto a dirt road which runs beside a plantation and past a school. Near there, No 1 said that the woman must be killed - he said that he had already killed the man and that No 2 should kill the woman. No 2 said:-

> 'I am not going to stab her. I have never stabbed a person in my life. But I will cut her throat because I am used to cut sheeps' throats .'

When they got to a point where the dirt road meets the tarred road, No 2 ordered Miya to put down the plastic container. She did so and No 2 led her into the tall grass. He was away for a long time. When he came back he was carrying his open knife. The woman was not with him. He said that he had caused her to run away. He and No 1 spoke together and then asked their girl-friends; 'If you are asked what you saw, what are you going to say?' They

replied, 'We will say we did not see anything.'

Miya was later found dead. She had indeed had her throat cut like a slaughtered sheep. On post mortem examination it was found that she had sustained a deep wound, 14cm by 5 cm, across her neck: the trachea, the oesophagus and both carotid arteries had all been severed. In addition she had several other wounds to the neck, shoulders, chest and wrist, (which was superficial), and one wound in the rib-cage which penetrated to the lung and up to the superior venacava.

Next day Andreas was found dead on the floor of his house. He had sustained a single stab wound just above the right clavicle which penetrated to the apex of the lung and cut the sub-clavian artery."

Counsel for the appellants pointed out that they had consumed intoxicating liquor at intervals throughout the day on 26 February 1987, and he submitted that this fact ought to be taken into account as a mitigating feature in respect of the second murder.

Constance Zungu and Thuluzi Sibiya were in the company of the appellants from the afternoon of 26 September 1987 until the next morning. According to the evidence of Constance Zungu they were walking in the rain that night and No 1 later remarked that the rain had

caused him to sober up. She further testified that No 2 became intoxicated only after he had killed Mrs Madonsela, and when he had consumed the beer in the container which Mrs Madonsela had to carry for him. Thuluzi Sibiya confirmed that when Mrs Madonsela was murdered neither of the appellants appeared to have been affected by the liquor they had consumed during that day.

The possible effect of intoxicating liquor on the appellants was also raised at their previous appeal, and this court then dealt with that argument as follows:

> "There was, it is true, abundant evidence that both the accused consumed intoxicating liquor from time to time during the course of the day, the last occasion being at the house of No 2's sister. This was recognized by the trial court when finding extenuating circumstances in respect of count 1 : the report which had been conveyed to the accused through the medium of Sidudla obviously incensed them: the liquor they consumed had fanned the flame ignited by Sidudla's report. But the killing of Miya was on a different footing. Their decision in this regard was taken cold-bloodedly and callously. Their actions do not suggest that the effect of the alcohol was of any significant order. They had no quarrel with Miya which the alcohol might have inflamed. She was simply an inconvenience who might

testify against them and had therefore to be removed.

In my opinion there is no fault to be found with this view."

The above finding of this court was made before the amending act came into operation, and at a time when the appellants were still obliged to establish extenuating circumstances. The concept of extenuating circumstances has since been abolished by the amending act, and it is now for the state to disprove mitigating factors. (**Nkwanyana's** case, **supra**, at 743F-745A). The evidence shows that the consumption of alcohol by the appellants earlier that day did not play a significant role as far as the second murder was concerned, and in my opinion the effect of the alcohol should not be regarded as a mitigating factor.

It was further contended on behalf of the appellants that while they had the intention to punish Mr Madonsela they never planned to harm Mrs Madonsela. However, once Mr Madonsela had been killed they were

faced with a problem which, according to counsel, they were incapable of handling: what to do with Mrs Madonsela. This problem was, of course, of their own making. The appellants must, in any event, have foreseen as a distinct probability that Mrs Madonsela would be at home that night. She ran out of the house when her husband was stabbed, but No 1 immediately followed her and brought her back to the house. When the appellants and their girl-friends left the house they took Mrs Madonsela with them. The probabilities are that the appellants had already envisaged the killing of Mrs Madonsela at that stage. That was indeed what this court found at the previous appeal: "Why else did they take her with them? What else would they do with an eye-witness to the killing of Andreas?"

After leaving the house they walked a distance of approximately 3 km before No 2 killed Mrs Madonsela. Counsel for the appellants agreed that with all the delays along the road it must have taken them about one

hour to cover those 3 km. The appellants therefore had ample opportunity to reconsider their plan to kill Mrs Madonsela. They certainly did not kill her on the spur of the moment or in a sudden panic. At the stage when she was eventually murdered it had become a premeditated and deliberate killing of an eye-witness to a previous murder. The appellants, acting in concert, certainly had the direct intention to kill her.

There are indeed serious aggravating features surrounding the murder of Mrs Madonsela. At some stage during their journey the appellants openly discussed her fate in front of her. This was done in a calculated and most callous manner. The appellants acted with total disregard for human suffering. Their conduct was not only inhuman, but also cruel and wicked. And when she was murdered she was slaughtered in cold blood.

Counsel contended that No 1 did not take part in the actual killing of Mrs Madonsela. On the other hand, he was the one who first suggested that Mrs

Madonsela be killed. No 2 was later delegated to do the actual killing. When he committed the murder he did so in the execution of an explicit agreement.

The one mitigating factor which applies to both of the appellants is that neither of them has any previous convictions involving violence. In 1986 No 1 was convicted of theft of a motor vehicle and sentenced to 2 years' imprisonment. No 2 has five previous convictions for stealing sheep and chickens. For the last two convictions he was sentenced in 1983 to 3 years' imprisonment and in 1986 to 18 months' imprisonment. Both the appellants have therefore served terms of imprisonment in the past. I would agree, nevertheless, that the possibility of rehabilitation cannot be ruled out in respect of both of them. But that does not necessarily mean that their death sentences should be set aside. The court must also consider the other main purposes of punishment, and the interests of society, in particular, should not be overlooked in this regard.

The trial court found extenuating circumstances as far as the first murder was concerned, but not in respect of the second murder. The murder of Mrs Madonsela was indeed committed under entirely different circumstances and for another reason. Mrs Madonsela was a completely innocent party who had done nothing to harm the appellants. The only reason why she had to be eliminated was because she happened to be an eye-witness to the first murder. The cruel way in which she was treated by the appellants before she was murdered, was particularly reprehensible. It should also be borne in mind that this was the second murder which the appellants had committed that night. In my judgment the death sentence is the only proper sentence for each of the appellants on count 2.

Both appeals are accordingly dismissed, and the death sentence of each of the appellants is confirmed in terms of section 19(12)(b)(i) of Act 107 of 1990.

VAN HEERDEN JA

VAN COLLER AJA Concur

F H GROSSKOPF JA