73/90

CG CASE NUMBER: 382/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

OUPA ALEX SEHERI Appellant no 1

SETIMBISO BUTHELEZI Appellant no 2

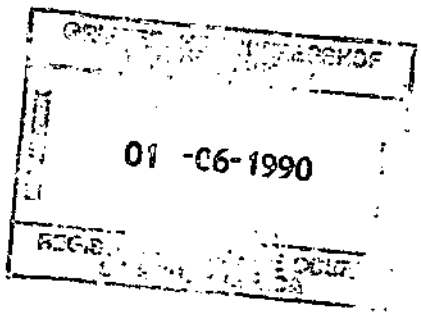
and

THE STATE Respondent

CORAM: **CORBETT CJ, STEYN JA et FRIEDMAN AJA**

HEARD ON: **21 MAY 1990**

DELIVERED ON: **1 JUNE 1990**



J U D G M E N T

STEYN JA

On August 16 1988 appellants and three co-accused were arraigned before O'Donovan AJ and two assessors in the Witwatersrand Local Division on the following counts, viz. two of attempted murder (counts 1 and 2), two of murder (counts 3 and 4), two of illegal possession of firearms (counts 5 and 6) and one of illegal possession of ammunition (count 7). These counts all related to events in Soweto during the night of 24-25 January 1987. First and second appellants were accused 1 and 4 respectively. Accused no 2 was Priscilla Mkhonza, and accused 3 and 5, Ben Dlamini and Charles Zwane respectively. On the night in question the five accused were respectively about 32, 28, 26, 25 and 17 years of age. The attempted murder counts referred to the shooting of Jeremia Nkosi - whose surname is given as "Benkankosi" in the indictment (count 1) - and Collin Dlamini (count 2) and those of murder to the killing by gunshot of Mlando Ngubeni (count 3) and Xola Mokhaula

(count 4). Count 5 referred to the illegal possession of a Scorpion machine pistol and AK 47 rifle in contravention of s 32(1)(a) of Act 75 of 1969, count 6 to like possession of an unidentified firearm and count 7 to the illegal possession of ammunition in contravention of s 36 of the said Act. All the accused pleaded not guilty on all the said counts. Accused 3 was acquitted on all counts. The other accused were all acquitted on count 6. First appellant was, however, convicted on all the remaining counts but second appellant only on count 5. Accused 2 was convicted on count 4 but acquitted on all remaining counts. Accused 5 was convicted on count 5, but only i.r.o. the Scorpion, and acquitted on the rest. Extenuating circumstances were found to exist in the case of accused 2 and she was sentenced to 10 years' imprisonment. No extenuating circumstances were found i.r.o. the two counts of murder on which first appellant was convicted and he was sentenced to death on each

count. He was sentenced to various terms of imprisonment i.r.o. the other counts on which he was convicted. Second appellant was sentenced to 4 years' imprisonment of which 1 year was conditionally suspended for 5 years. On account of his youth accused 5 was sentenced to a wholly suspended term of 1 years' imprisonment. Both appellants appeal with leave of the learned trial judge. First appellant appeals only against the aforementioned finding that there were no extenuating circumstances and consequently also against the death sentences imposed on each of the murder counts. Second appellant appeals only against his sentence.

The facts which emerge from the evidence accepted by the trial court on the merits can be summarised as follows. First appellant is a member of the ANC's military wing and received his training in Angola. He entered the Republic of South Africa illegally, one of his tasks being to train members of the

said movement in the use of firearms. He was equipped with an AK 47 rifle (the AK 47) and ammunition, which he had in his possession at various times on the night of 24-25 January 1987. The appellants met for the first time on the previous night at a vigil held in honour of a deceased member of the Mandela United Football Club in Soweto. They were introduced to each other by one Vuyisile Tshabalala who was also a trained member of the ANC's military wing. On the early morning of 24 January first appellant was taken home by second appellant in a maroon Audi motorcar (the Audi) belonging to Mrs Winnie Mandela. Second appellant was the boyfriend of Mrs Mandela's daughter, Zinzi, and was at that time visiting the Mandela's and lodged at their home at no 8115 Orlando West, Soweto. Whilst so visiting he was allowed to use the Audi and was given the keys thereof. On Saturday the 24th both appellants attended the funeral but did not make contact. After the funeral first appellant received

a message from Tshabalala that a "parcel" had been left for him at the Mandela home. He arrived there at about 20h00 on that day. He had the AK 47, exhibit 2, with him, wrapped in a raincoat. A number of persons were on the premises. The Audi was also parked there. He asked to see the driver thereof and was taken to a back room where he found second appellant and accused no 5. They were in Zinzi's bedroom. He asked for the "parcel". A black bag was shown him. It contained a Scorpion machine pistol (the Scorpion), exhibit 1. He removed it in the presence of second appellant and accused no 5. He opened the raincoat, showed the AK 47 to them and told them he was leaving it with them. He then departed taking the Scorpion with him. He was to instruct certain persons in the use thereof that evening. Second appellant hid the AK 47 under a bed in the room.

The persons first appellant had to instruct in the use of the Scorpion failed to turn up. He then went

to the shebeen of accused 2. There he drank beer but was "not much affected" thereby. The two deceased Mlando and Xola, the latter's brother, Bobo, and their friends were also there. They were regular customers. Xola and first appellant quarelled. The latter had burnt Xola's trousers with a cigarette, possibly by accident. They went outside to fight. Xola got the better of first appellant who fell down with Xola on top of him. First appellant drew the Scorpion, obviously to use it in some manner, but was promptly dispossessed of it by Bobo. Bobo, the two deceased and their companions left, taking the Scorpion with them. First appellant asked for its return but they refused. They went to the house of Xola's parents (Xola's house) where he and his sister Faith also lived. There the Scorpion was handed to Faith for safekeeping. She hid it under the dining-room table. Because they expected an attempt that night by first appellant to regain possession of the Scorpion forcibly,

Xola went to spend the night in the neighbourhood at the house of his friend Tuta, and the rest kept watch at Xola's house, sitting on the stoep facing the street. They were unarmed.

In the meanwhile first appellant, who had been visibly injured in the fight with Xola, went with accused 2 to the third accused and was taken by the latter to the Mandela home in his yellow Chevrolet Rekord motor car. (the Rekord). First appellant's intention was to recover the Scorpion forthwith and to use the AK 47 for that purpose. At the Mandela home second appellant handed the AK 47 to first appellant at the latter's request. First appellant also collected 7 or 8 youths who were there, including second appellant, to accompany him on the venture. Two cars were used to convey the party, viz. the Rekord and the Audi. First appellant, accused 2 and two of the youths travelled in the Rekord driven by accused 3 and the rest in the Audi driven by second

appellant. Accused 2 guided them to Xola's house. On arrival there first appellant reconnoitred the area and summed up the situation by causing the party to drive past without stopping and without taking any action. Ten minutes later they returned. Whilst then driving past first appellant fired through the car window with the AK 47 at the group on the stoep. They immediately dispersed and fled in different directions. The complainant on count 1, Jeremia Nkosi, was hit on the back of his head whilst so fleeing. The vehicles then stopped; first appellant alighted and went to the stoep, carrying the AK 47 and followed by certain members of the group. Second appellant remained in the Audi. Collin Dlamini, the complainant on count 2, had fallen asleep on the stoep but was woken by the shots. First appellant was standing in front of him, holding the AK 47. He asked Dlamini "where is that thing", meaning the Scorpion. Dlamini replied that he did not know and was promptly shot three

times by first appellant - in the chest and left arm, and as he fled, also on the inside of the right leg. One member of the stoep party, Mlando Ngubeni (the deceased in count 3), remained standing. He was too frightened to move. First appellant asked him where the Scorpion was. He replied that it was in Xola's house. First appellant took him to the kitchen door and made him knock. This was done because Mlando was known to the occupants and they would open the door for him. He in fact used Mlando as a stalking horse. Faith and her mother were inside. Her mother opened the door after ascertaining who had knocked. Mlando entered, closely followed by first appellant and a number of the youths accompanying him. First appellant asked where his "mpompo" was. The mother asked what that was. He replied that he wanted his firearm and told Faith and her mother to look down. Mlando then struck Faith on her chest, saying to first appellant "shoot this woman, it is she who has the

firearm". Instead of doing so he shot Mlando in the right hip. Mlando crawled away bleeding profusely. (He eventually bled to death.) Having shot Mlando, first appellant asked Faith whether she had seen what he had done to Mlando and whether she wanted to be dealt with in like manner. He then again asked for his firearm. She replied that she did not know where it was and said that if he wanted to kill her he must start with her children. She had three children. She had the youngest in her arms, called the others and told them to go outside. They did so. First appellant then merely asked her where her brothers were. She replied that she did not know. He told her not to lock the door because he would be coming back. He and his companions then left. They departed by car in the direction of Tuta's house, again guided by accused 2. Faith watched them departing and then hid the Scorpion in the outside coal box at the back of Xola's house.

First appellant and his party went to an empty house next to that of Xola. Accused 2 pointed it out as a house where Xola and Tuta occasionally slept. They were not there. She then guided the search party to Tuta's house. Xola and Tuta were there. (Tuta is the state witness Noblet Mlambo.) First appellant and members of his party hammered on the door of the house shouting that they would bomb the house if the door was not opened. Tuta opened the door. First appellant and a number of his companions entered. Tuta and Xola were each grabbed by two of them and taken on foot to Xola's house. First appellant walked in front and held the AK 47 to Xola's temple. Arriving at Xola's house first appellant pushed Xola inside with the AK 47 which was still being held to his temple. Faith and her mother were in the dining-room. First appellant took Xola there, still holding the AK 47 to his temple, and said he was going to kill him. Seeing Xola's plight Faith asked

first appellant what he would do if the firearm was found. He said he would then leave Xola alone. She then hinted that the Scorpion was in the coal box. First appellant grabbed her by the chest and told her to show him where the coal box was. She did so. He handed the AK 47 to one of his party and went to the coal box. He found the Scorpion there, removed it and said that he would kill the dog, apparently meaning Xola. Faith who was standing in the kitchen door, screamed. He told her to stand aside. Xola ran inside and hid in the bedroom. First appellant and his companions followed. Xola had locked the door, but they forced it open. Xola was on his knees and pleaded for his life. First appellant said he was going to kill him. Faith grabbed hold of first appellant and pleaded with him to forgive Xola. First appellant nevertheless fired a shot in the room with the Scorpion. It hit the wardrobe. First appellant and his companions then left the house. Faith followed them.

They went to the street. Accused 2 was there. She asked first appellant whether he had killed Xola. He replied in the negative and said "I have taught him not to be forward". She told him to go and kill the dog and erase the evidence. First appellant and his companions then returned to the house. He now had the AK 47. He went into the bedroom where Xola was still on his knees. First appellant said he was going to kill Xola and called Faith and her mother to come and look. Despite their pleas for mercy he shot Xola in the head twice, killing him instantly. The group then left again. Outside accused 2, who was waiting at the Rekord, asked first appellant whether he had killed Xola. He replied that he had done so. He and accused 2 then departed with accused 3 in the Rekord. The others followed in the Audi driven by second appellant. On their way back to the Mandela home accused 5, who was also in the Audi, showed the Scorpion to second appellant. He took it from accused 5

at the Mandela home and hid it in a suitcase in Zinzi's room. First appellant went to sleep at a house in the Phefeni ward of Soweto. His home at that time was in the Emdeni ward. The place where he slept was, however, apparently a known haunt of his. He was arrested there on the morning of the 25th.

First appellant did not testify during the enquiry relating to extenuating circumstances. A clinical psychologist, Mr Graeme Friedman, was, however, called to testify as to first appellant's mental condition at the time of the murders. He was of the opinion that first appellant suffered from a mixed personality disorder. A feature thereof was a low tolerance of frustration and a poor ability to control his impulses, especially under stress. This condition was exacerbated by the alcohol first appellant had ingested that night. Mr Friedman was of the opinion that first appellant was very angry when he committed the

murders and in a state of diminished responsibility because he was then unable to control his impulses or to think about the consequences of his actions. He did, however, experience difficulties in consulting with first appellant, as appears from the following passage in his evidence. "-- in my consultations with the accused he stuck to the story that he had given the Court in the first place, so I was unable to assess with him what was going through his mind at the time that the events, as the Court has accepted, took place. So I can only really hypothesize about what a man with his personality type and disorder would do". Mr Friedman's analysis of the killing of Xola was that it was "very bizarre behaviour" and that "the act itself seems to be so bizarre that it can only indicate that it is the action of somebody who is not reasoning at high level and who is acting on pure impulse". Mr Friedman testified that first appellant may also have sustained minimal brain damage at some time in

the past which, if it existed, could be a factor contributing to his condition. He however, said that he was not competent to establish whether such damage in fact existed. After completion of his testimony the trial was postponed in order to have first appellant examined by competent medical authority. No brain damage was detected by the specialists who examined him therefor. At the resumed hearing their reports were handed in by consent. Dr Victor Nell, a clinical neuro-psychologist, who had also examined first appellant, was then called to testify. His diagnosis differed in certain respects from that of Mr Friedman. His conclusion was that first appellant suffered from a personality disorder known as the dyscontrol syndrome. This condition causes intermittent and unpredictable outbursts of uncontrollable rage during which the sufferer undergoes a complete personality change. He is then unreachable and out of control. His report was

confirmed by him and his testimony was based thereon. It was handed to the court. Therein he stated that during their consultations first appellant claimed that he could not remember everything that had happened on the night of the murders. Dr Nell testified that such an inability to recall was symptomatic of the said condition and that first appellant's apparently complete and coherent evidence at the trial was in his opinion due to first appellant having filled in the gaps between his "islands of recall" with "confabulation of what he thought might have happened". Dr Nell was of the opinion that the facts found by the court demonstrated that at the time of the murders first appellant was in the grip of such an outburst of uncontrollable rage and, therefore, in a state of markedly diminished responsibility. He dismissed a contrary interpretation of those facts in these terms:

"... I think that the claim that he was

> executing a carefully thought-out plan of action to recover his firearm is, please forgive me for using a strong word, I think it is far-fetched."

No evidence was called by the State to contradict the evidence of Mr Friedman and Dr Nell. The trial Court consequently felt obliged to accept Dr Nell's diagnosis of first appellant's condition, but did so "with some misgiving". Mr Friedman's evidence was not dealt with by the Court, but by necessary implication his evidence as to first appellant's condition was also accepted, at least in so far as it was in consonance with that of Dr Nell. Fundamentally they were in agreement with each other that as a result of his condition, whatever it was, first appellant suffered from an impaired ability to control himself and to realise the consequences of his actions when angered.

The trial Court did not, however, accept Dr Nell's (and by necessary implication, also Mr Friedman's)

interpretation of the facts and found that first appellant was not influenced by his said condition on the night in question, and, more particularly, when he committed the murders. The Court's reasons for coming to this conclusion, and for finding that there were, therefore, no extenuating circumstances, are set out in the following terms by O'Donovan AJ:

> "The alleged syndrome is apparently a very rare one and Dr Nell states that this is only the second case within his experience where the syndrome existed without any brain damage.
> Mr Kuny has, however, correctly conceded that it is for the court to decide as an issue of fact whether the syndrome, assuming its existence, influenced the accused in acting as he did on the night in question. The court, on the review of all the evidence, feels constrained to answer this question in the negative. Dr Nell has described the symptoms to which the syndrome gives rise in various ways. At page 4 of his report which has been handed to us, he refers to 'explosive outbursts by the subject, arising unpredictably during which the subject is both irrational and unpredictable'. He contends that the actions of the accused on the night in question in killing Mlando and Xola and attempting to kill two others, Collin Dlamini and Jeremia Bekankosi, were totally

senseless.

The court cannot accept this contention for the following reasons: However ill-advised they were, the actions of the accused after he was deprived of his machine pistol and beaten up were deliberately planned and executed for a rational objective, namely for the purpose of recovering possession of his fire-arm. In short, his actions were the following: He procured transport, reinforcements, a firearm from Orlando West; Accused no. 2 who was required to accompany the accused's party to point out houses where Xola and others might be found; Mlando was used to gain access to Xola's parents' house.

It was the accused who directed this operation, almost as a military operation. It is clear that the accused had not lost control of his actions. He did not, for instance, shoot at random as suggested by the defence. That he was reachable and able to control his actions, is illustrated by the following incident: After recovery of the firearm from a coal bin in which it had been hidden, Xola fled to his parents' home, followed by the accused. When the accused was about to shoot Xola, the accused responded to pleas for mercy from Xola and the latter's sister and mother. He in fact desisted at that stage from killing Xola. On being asked subsequently by accused no. 2 what he had done to Xola and whether he had killed Xola, he replied that he had merely taught Xola not to be 'forward'. It was only after accused no. 2 replied: 'Go and kill the dog and wipe out the evidence' that he returned and shot

> Xola in cold blood.
> These circumstances were in the court's view not consistent with any loss of self-control as contended on behalf of the accused. The court concludes that the accused was uninfluenced by any syndrome of blind and insensate rage on the night in question. No other ground of extenuation has been advanced, save for a fleeting reference to drunkenness and provocation which the court finds to be insufficient to operate as extenuating features.
> On all the evidence the court comes to the conclusion that the defence has not shown on a balance of probability that the moral blameworthiness of the accused for acting as he did, has been reduced by any extenuating factors."

I can find no fault with that reasoning. The following further considerations are also supportive of the Court's finding. Whilst it is clear that first appellant must have been angered and distressed at being deprived of the Scorpion, it does not necessarily follow that he therefore lost his self-control and acted impulsively thereafter without a realisation of the consequences of his conduct. His action in firing at the group assembled

on the stoep of Xola's house was clearly neither impulsive nor senseless. He caused his party to drive past the group initially without doing anyting more than scouting the situation. That was a controlled and militarily wise action. As commander of what was in effect his task force, he had to assess the situation before deciding on the best course of action to achieve his object. Shooting at the group from the moving car on the second pass was equally controlled and well-reasoned. The group were obiously waiting for him to attempt a recovery of the Scorpion and were prepared to prevent it. He had no means of ascertaining from a safe distance whether they were armed and, if so, with what. He did, however, have every reason to believe that they possibly had the Scorpion with them and that they were prepared to use it when confronted by him. Taking them by surprise and dispersing them successfully before closing in on the house was consequently vital for the safety of his force

and the success of his operation. First appellant's ability to control his impulses is also well demonstrated by his refraining from doing any violence to Faith or her mother. His alleged amnesia was never mentioned by him when testifying very fully and clearly as to the events of that night; and his choice of a probably known haunt as sleeping place may very well have been due to an impression that he had so cowed his surviving victims that they would not dare to expose him. There are consequently no grounds for interfering with the trial Court's finding. S v McBRIDE 1988 (4) SA 10 (A) at 18-19. First appellant's appeal should accordingly be dismissed.

Turning to the appeal of second appellant it must be borne in mind that over an extended period of time he repeatedly took into his possession and hid two firearms that, by their very nature, were most dangerous instruments which were quite obviously being used for

illegal and potentially lethal purposes. When hiding the Scorpion on the early morning of the 25th January he must have known that one or other or both those weapons had in fact been so used. Second appellant is an intelligent and mature university student who had already successfully completed the second year of his studies for the B.Comm. degree, and was therefore clearly well aware of the nature and probable consequences of his conduct. He did, however, whilst testifying on the merits, allege that when first appellant took the Scorpion and left the AK 47 with him as aforesaid, he told second appellant that he would be shot by an unknown person should he disclose the whereabouts of the AK 47. First appellant denied having uttered such a threat, but second appellant was corroborated by accused 5. This evidence of his was not rejected by the trial court. It was not even dealt with, probably because his counsel had conceded his guilt on count 5, and also because second appellant had made a

written admission of possession of both weapons. There is to my mind no good reason for rejecting second appellant's evidence in this respect. It is, however, otherwise with his allegation that he so feared first appellant because of that threat that he was cowed into accompanying him on the foray to recover possession of the Scorpion. His conduct as disclosed by his own evidence shows that he was a willing participant in the recovery thereof. It is, however, likely that he was influenced to some extent by first appellant, and especially by his own companions, to so participate. He was, in addition, a first offender and is a very promising young man who would by now probably have obtained his degree and been well on his way to becoming a chartered accountant (which had then been his aim), had it not been for the disaster which befell him as a result of his participation in the events of that night. He was arrested on the 10th February 1987 and held in custody

awaiting trial. When testifying in mitigation of sentence he said that he was suffering from severe depression as a result of his incarceration. No mention was made of these matters by the learned judge when sentencing second appellant. The State did not, however, dispute that second appellant had been so detained or that he was suffering from depression as alleged by him. For purposes of determining whether he had been sentenced appropriately those facts must, to my mind, be accepted as proven and taken into account. Second appellant was sentenced on November 17 1988. He was not granted bail during the trial or pending the outcome of this appeal and has consequently already served 18 months of his sentence. But he has in fact been deprived of his freedom for a period of three years and three months.

By virtue of the gravity of this offence a substantial term of actual imprisonment is to my mind the only appropriate sentence to impose upon second

appellant. But in the light of what has been set out above I am of the opinion that the sentence imposed upon him was too severe. A sentence of 18 months' imprisonment is under the circumstances the appropriate punishment. Taking into account the period of imprisonment already served, it will be necessary for this sentence to be antedated in terms of s 282 of the Criminal Procedure Act, no 51 of 1977. The sentence imposed by the trial court must be reduced accordingly.

The following orders are made:

1. The appeal of first appellant is dismissed.

2. (a) The appeal of second appellant succeeds.

   (b) The sentence of 4 years' imprisonment imposed upon him by the trial court is set aside, and a sentence of 18 months' imprisonment is substituted therefor. Such sentence of 18 months' imprisonment is antedated to 17 November 1988.

M T STEYN JA

CORBETT CJ)
FRIEDMAN AJA) CONCUR