IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85 PRETORIA

1988-12-08

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS (10)

S E N T E N C E

VAN DIJKHORST, J.: The approach of our courts to the question of an appropriate sentence can be summed up in the dictum of our appellate division in R v Rabie 1975 4 SA 855 (A) at 862:

> "Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

This will also be my approach. I do not propose to deal in detail with the evidence led in mitigation. It has all been (20) given due consideration. So have the able and lucid arguments of defence counsel.

I deal first with the Vaal accused, that is the accused excluding accused nos. 16, 19, 20 and 21. The crime of which these accused were convicted is terrorism in terms of section 54(1) of the Internal Security Act 74 of 1982. This section covers a wide range of acts and when determining a proper sentence the details of the offence are of the utmost importance. When regard is had thereto this offence does not fall in the most serious class of crimes conceivable under this (30)

section./....

section. This does not mean that it is an offence which can be lightly shrugged off. To organise a stayaway and prohibited protest march with the aim to bring about or to contribute to violence and to encourage others to participate is a serious misdeed. This was not done during a period of tranquility but the acts were conceived against the background of a history of violence stretching as far back as 1976 and earlier. The action was taken and proceeded with when the Vaal was exploding. No court of law can countenance this type of conduct. No society can survive if this becomes (10) the accepted form of political protest.

I now turn to the accused themselves. Some are young men and some are not so young. Some are more sophisticated than others. Some were deeper and longer involved than others. Two have health problems. I seriously considered differentiating between them on this basis but will not do so in view of my ultimate conclusion which by this equalisation does not penalise those with lesser guilt but favours those who bear the greater. Two factors have great weight. The first is that these accused, after an initial long incarceration (20) awaiting trial and when they had been on trial for a lengthy period were granted bail which effectively banished them from their place of abode and cut them off from their livelihood and families. This was done for good reasons as set out in the judgment given at the time but the reasons do not diminish the hardship to the accused. The second factor is that I hold the view that the Vaal accused should, as soon as possible, be reintegrated into their community and that the wounds caused by the Vaal riots should be healed sooner rather than later. In this respect I would rather err on the side of (30)

lenience./....

lenience. In arriving at the ultimate sentence I have given due weight to the history of hardship of each accused and his personal sense of grievance. I have dealt with much of this in the judgment and will not repeat it here. On the other hand the reintegration of the accused into the community should not create the same tensions and fan the old flames that existed prior to the riots of 3 September 1984. The solution lies in my view in the imposition of conditions incorporated into a suitable order of suspension to avoid this situation. A court is empowered to do this in terms of section 297(1)(b) of the (10 Criminal Procedure Act. The alternative would be direct imprisonment. The conditions I will impose will on the one hand be a deterrent to further illegal action but on the other hand be part of the punishment as the normal civil rights of these accused will be curtailed to a certain extent. In this respect these conditions may be novel but they are preferable by far to the imprisonment which the accused in fact wholly deserve. These general remarks have to be qualified in the case of accused no. 5, Malindi. This accused has a previous conviction for an offence much akin to the instant (20) one. On 13 October 1981 he was convicted in the regional court, Vereeniging of the crime of public violence. He was sentenced to a fine of R300 or one year imprisonment and a further four years imprisonment suspended for five years on condition that he be not found guilty of the crime of public violence, arson and/or malicious injury to property. The period of suspension has expired. This previous conviction is therefore only relevant in the sense that it indicates that this accused has previously committed an offence of a similar nature to the one of which he has been found guilty by this(30)

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court and that he then received a lenient sentence coupled with a warning to desist from such conduct. This accused therefore has had his warning. He persists in his course of conduct. He should not expect leniency from this court. He committed this crime while he was still subject to the suspended sentence.

The sentences are as follows: Accused no. 5, G.P. Malindi, accused no. 7, T.D. Mphuthi, accused no. 8 N.B. Nkopane, accused no. 9 T.E. Ramagula, accused no. 11, S.J. Mokoena, accused no. 15, S.J. Hlanyane and accused no. 17, H.S. Matlole are each sentenced to five years imprisonment. In the case of accused no. 7, no. 8, no. 9, no. 11, no. 15 and no. 17 the whole of this sentence of imprisonment is suspended for five years on the following conditions:

1. That the accused within the period of suspension not be found guilty of one of the following offences committed within the period of suspension:
   (a) Treason.
   (b) Sedition.
   (c) Public violence.
   (d) Terrorism, sabotage and subversion in contravention of sections 54(1), 54(2) and 54(3) of the Internal Security Act 74 of 1982.
   (e) Arson.
2. That the accused for a period of two years does not attend any public meetings with the exception of bona fide church services in the parish church of the denomination of which he is a member and bona fide sports meetings. For the purposes of this condition any gathering of more than 20 people will be regarded as a

public meeting.

3. That the accused during the said period of two years does not issue public statements to the press or otherwise and does not grant interviews to journalists.

4. That the accused during the period of suspension does not serve on the executive of any political or civic or youth organisation and does not participate in the organisation of any meeting of such organisations or speak at such meeting.

5. That the accused during the period of suspension does not participate in or organise any form of public protest action.

Before dealing with the remaining accused a few remarks of a general nature on the approach to sentencing for the crime of treason are apposite. Treason, which endangers the continued existence of the state, is a very serious crime which generally is punished severely, in extreme cases with death. When determining a proper sentence the effect of the deeds of the accused has to be taken into account. His personal circumstances, which include his motive, age and state of health will be given due weight. A factor which weighs heavily with me is the lengthy period of detention the accused have already undergone. This will be taken into account.

I deal now with accused no. 16, Manthata. This accused was found guilty of treason on the following facts. At the mass protest meeting on 19 August 1984 in the St Cyprian's Anglican Church, Sharpeville accused no. 16 vehemently attacked the town councillors and said words to the effect that they should be killed if they refused to resign, they should

be attacked with stones and set alight. It was his intention that the councillors be intimidated into resigning or be killed. We found that the UDF leadership had the aim to destroy the Black Local Authorities by mass action which would include violence and render South Africa ungovernable. We found that accused no. 16 was aware of that aim and that he identified therewith. A paper of which he was co-author, Exhibit B.6, is a document that expressly espouses Marxist revolution. A position statement found in his possession, Exhibit AL.149, and drafted just prior to his speech predicts bloodshed in South Africa after August 1984. Documentation found in his possession shows an interest in Marxism and revolution which becomes propagation thereof in Exhibit B.6. I recap these facts as the defence in mitigation led evidence which turned a blind eye to the facts found by this court and blithely proceeded on a false premise.

The crime of treason is one of the most serious kind. Not only in our society but all over the world. It is here punishable by the death penalty and if that is not imposed there have always been stiff sentences of imprisonment meted out in respect thereof. On the other hand I have to bear in mind that despite accused no. 16's affinity for revolutionary thought only one occasion of actual incitement to violence was proved against him and though the incitement was serious there was no evidence that anybody acted upon it. We found that the state did not prove a nexus between the meetings in Sharpeville and those in the rest of Sebokeng and we did not find that the action of accused no. 16 was part of a greater UDF plan, though he identified therewith. If the crime of treason can be notionally divided into categories his action would clearly/.....

clearly fall in a less serious class. I take into account the age of accused no. 16 and that he has no previous convictions. I listened carefully to character evidence led by the defence. The witnesses clearly know only one side of his character. Due weight will be accorded this evidence. There can be no doubt that a sentence of imprisonment is called for. I take into account that accused no. 16 was detained in 1985 and only released on bail on 30 June 1987. His conditions of bail did, however, not effectively banish him from his home and family as in the case of the Vaal accused. I take into account that he had to attend the hearing of this case for many monotonous months. The sentence which I impose is low for the crime of treason. I am lenient in the hope that accused no. 16 will, upon his return to society, resume a leadership role but in a more responsible and constructive way. Accused no. 16 is sentenced to six years imprisonment.

I turn now to accused no. 19, Molefe, accused no. 20, Lekota and accused no. 21, Chikane. This court found that the UDF was a revolutionary organisation whose policy of mass action against governmental institutions included the violent option and was intended to render South Africa ungovernable. We found that the UDF had a conspiratorial core and that these three accused formed part thereof. We found that the dominant core of the leadership of the UDF formulated and executed a policy of mass organisation whilst formenting a revolutionary climate in order to lead to mass action against governmental institutions. Violence was an intended, necessary and inevitable ccmponent of such action by the masses. Accordingly we found these three accused guilty of treason. Their conviction can, on the scale of seriousness, be distinguished from

that of accused no. 16. In their case it was a well conceived plan that was executed over a prolonged period with devastating effects. Though not all unrest and unrest related damage can be ascribed to the UDF and some of its affiliates the UDF has a lot to answer for. The defence led evidence of a number of prominent figures in the political, educational and literary fields that they saw nothing wrong with the UDF. When regard is had to the limited perspective of some of them and the bias of others it was a futile exercise. I must repeat here what we said in the judgment, namely that (10) there must be many members and supporters of the UDF, especially those on the periphery, that would not have become aware of the course which the UDF took. There must be many more, woven in the cocoon of their political outlook, who closed their eyes to the fact that this course was leading to revolt. To call such persons as witnesses to give opinion evidence on the UDF is an exercise in futility. I accept that in order to work out, through negotiation, a peaceful co-existence of all people in South Africa a credible leadership is needed. I accept that the UDF was seen by many to have an important (20) role in that process. I fully appreciate that the demise of the UDF may leave a void which may take a number of years to fill. It may well be that this will slow down the process of reform as was alleged. For these consequences, however, the UDF has itself to blame. It was a viable movement with a message which merits attention in our political debate. It had a large and enthusiastic following. It chose the path of violence instead of the path of moderation. Thereby it did South Africa a disservice.

A few remarks on the role of the courts in political (30)

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cases of this nature are apposite. In our sharply divided society which is a cauldron of conflicting forces from which the amalgam of our future is to be forged the courts are in an invidious position. The courts of the land have to uphold the law of the land and in sentencing are to reflect the sentiments of the community. Where the community itself is divided any sentence imposed will by some be seen as far too lenient and by others as far too severe. If that is the result achieved the sentence will probably be fair and moderate.

I have taken serious cognisance of the evidence in (10) mitigation, especially that of men prominent in the black community, like Mr Mabuza and Dr Motsuenyane. When the sentences imposed are regarded against the background of past sentences, for example those of the Rivonia trialists, it will be noticed that the pleas of these gentlemen for leniency have not been in vain. There is some cause for leniency in this case. None of the accused has been found guilty of executing or planning direct violence. Our appellate division, in S v Mange 1980 4 SA 613 (A) at 619 stated that in our turbulent history cases of high treason mostly originated (20) from situations in which military forces were openly engaged against persons who could be called rebels. It was not a crime for which the death sentence was ordinarily imposed yet with the advent of terrorism a complete change of approach would not be unjustified. This is not the situation in our case and the extreme penalty would be wholly unwarranted. I hold the view that these accused, especially accused no. 19, can in future play a constructive role on the political scene provided they, by word and deed, foreswear the violent option and act within the law. The sentences should (30)

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therefore not frustrate this possibility. On the other hand our appellate division has laid down that sentences for serious crimes should not be too lenient as that may bring the administration of justice into disrepute. (R v Karg 1961 1 SA 231 (A) 236B).

Accused no. 19 and accused no. 21 have no previous convictions. That is not the position with accused no. 20. On 21 December 1975 he was sentenced to a total period of imprisonment of ten years on two charges under section 2(1)(a) of the Terrorism Act 83 of 1967. The charges were that he conspired to commit acts intended to endanger law and order in the Republic of South Africa. As the sentences to an extent ran concurrently accused no. 20 only served six years imprisonment. He was released on 20 December 1982 and did not wait long before joining the UDF leadership conspiracy. He did not learn from his experience. He has scant respect for the law. He is not entitled to leniency to the same extent as the others. I bear in mind that the accused are relatively young men and that they have been in detention since early 1985. Their sentences are as follows:

Accused no. 19, Molefe, is sentenced to ten years imprisonment. Accused no. 20, Lekota, is sentenced to twelve years imprisonment. Accused no. 21, Chikane, is sentenced to ten years imprisonment.
