

10/84

N v H

STEVEN ZAHAYI & OTHERS v THE STATE

SMALBERGER, AJA :-

10/84

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STEVEN ZAHAYI 1st Appellant

ALFRED MATHEWS 2nd Appellant

FRANS MABENA 3rd Appellant

and

THE STATE Respondent

CORAM: KOTZÉ, HOEXTER, JJA, et SMALBERGER, AJA

HEARD: 13 SEPTEMBER 1984

DELIVERED: 20 SEPTEMBER 1984

J U D G M E N T

SMALBERGER, AJA :-

The three appellants were convicted in the Witwatersrand Local Division by ELOFF, J, and two assessors of murder without extenuating circumstances

(count /

(count 1), and robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 (count 3).

They were acquitted on a second charge of robbery (count 2).

On the murder charge the second appellant was sentenced to death; the first and third appellants were each sentenced to 12 years imprisonment, the death sentence not being mandatory on account of their ages. On the robbery charge each appellant was sentenced to 8 years imprisonment. In respect of the first and third appellants the sentences were ordered to run concurrently. All three appellants were granted leave by the trial Judge to appeal against their convictions. The trial Judge refused them leave to appeal against their sentences, but this Court subsequently granted such leave to the first and second appellants.

The facts of this matter are dealt with at length in the judgment of the trial Court, and need not be repeated in detail. The evidence establishes that on

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the evening of the 8th April 1982 the deceased, Gekiso Piet Mabusha, his wife, Pauline Dladla, and a companion, Hotnot Phaliso, were walking along a footpath in Tembisa on their way to a church meeting. The footpath is widely used by pedestrians from the Tembisa residential area proceeding to and from a nearby railway station. It was already dark at the time. A group of young men approached them from the opposite direction. There is a conflict on the evidence whether this group comprised three or six men. The trial Court dealt fully with this conflict, and accepted that there were only three men. This finding accords with the weight of evidence, and I am unpersuaded that it was wrong. One of the three men tripped the deceased, apparently deliberately, whereupon all three proceeded to attack the deceased and Phaliso. Two of the three men were armed with knives and one with a klerie. Stones were also used in the assault. The deceased

was /

was fatally injured, and Phaliso sustained head injuries, two stab-wounds of the back and a broken left hand.

The post mortem findings on the deceased revealed that he died of head injuries caused by two blows to the head with a blunt instrument which resulted in haemorrhaging of the brain. In addition the deceased had five stab-wounds of the back, two of which penetrated the chest cavity. According to the medical evidence, although the stab-wounds alone would not necessarily have been fatal, they contributed indirectly to the deceased's death. The post mortem findings confirm the eye witness evidence that the deceased was felled by blows to the head and thereafter stabbed while lying on the ground.

After the assault upon him Phaliso found that his watch and some money were missing. There was insufficient evidence to establish that any of the deceased's possessions had been taken by his assailants (hence the

acquittal /

acquittal of the three appellants on the second robbery charge).

When proper regard is had to the circumstances of the attack on the deceased and Phaliso, the fact that each of their assailants was armed, the vicious nature of the assault upon them, the extent of the injuries they sustained and the fact that Phaliso was dispossessed of certain property, the only reasonable inference to be drawn, in the absence of any explanation of their conduct by those involved in the assault, is that :-

- (a) The deceased and Phaliso were assaulted in furtherance of a common design to rob them;
- (b) Each of their assailants foresaw the reasonable possibility of death ensuing in the execution of the robbery yet persisted, reckless of such fatal consequences;
- (c) The assault on the deceased was accompanied by a direct intent to kill on the part of the perpetrator or perpetrators of such assault.

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It follows that, irrespective of their degree of actual participation, each of the three persons who joined in the attack upon the deceased and Phaliso would be responsible for the acts of the others (S v Shaik 1983(4) SA 57 (A)). All three would accordingly be guilty of murdering the deceased and robbing Phaliso (S v Madlala 1969(2) SA 637 (A)).

The only real issue in this matter is the identity of the persons who attacked the deceased and Phaliso. They were identified by the State witnesses Mandla Gele and Vusie Mahlangu as the three appellants. Paulina also purported to identify the appellants in Court, but her evidence in this respect was correctly disregarded because of a previous conflicting statement. Mandla and Vusie are both young boys. They claimed to have been relatively close to where the assault occurred when they witnessed it. Their narrative of the events they observed largely coincides with what actually happened /

happened. Paulina and Phaliso both confirm the presence of two young boys near the scene of the assault. It is common cause that the three appellants are well known to Mandla and Vusie. The evidence establishes that there was adequate lighting for the purposes of proper identification. The evidence of the State witnesses that the area was lit by nearby street lights and a distant mast light was not disputed during the State case. Only when the first and second appellants testified did they suggest that this was not so. The State witnesses also testified to the fact that the moon was shining. It is common cause that it was full moon, but the defence called a meteorologist, one Waldy, in an effort to establish that the weather conditions at Tembisa on the evening in question were such that cloud cover would probably have obscured the moon. Waldy's evidence was based on observations made and recorded by someone else in the course of the latter's duties. The observations were /

were made some distance from Tembisa itself. The admissibility of Waldy's evidence was never challenged at the trial, and its admissibility can be assumed for the purposes of the present appeal. On a proper analysis thereof, however, Waldy's evidence is inconclusive as to the precise weather conditions prevailing at Tembisa at the time of the assault, which must needs have been of short duration. His evidence does not therefore detract from that of the State witnesses that the moon was shining and not obscured at the time. Although the assault took place a distance of some 73 metres from where Mandla and Vusie were, they testified that the three appellants passed within a matter of yards from them ^{immediately} after the incident. All the circumstances were therefore conducive to reliable identification. Furthermore, the first and second appellants place themselves somewhere in the vicinity of where the assault occurred at the relevant time. This further enhances the reliability of Mandla and Vusie's identification of them /

them. In the circumstances it is not surprising that counsel for the appellants conceded that Mandla and Vusie could not have been mistaken in their identification of the three appellants, and confined themselves to attacking the honesty of their evidence.

The trial Court was fully alive to the dangers inherent in the acceptance of the evidence of Mandla and Vusie. They apparently both created a favourable impression. Notwithstanding certain contradictions and discrepancies in their evidence, of which the trial Court was fully aware, they were found to be honest and credible witnesses. In arriving at this conclusion the trial Court was also alive to the fact that Mandla's brother had at one time been charged with the offences of which the three appellants were convicted. The evidence reveals no reason for Mandla and Vusie to implicate the three appellants falsely. If they had conspired to do so one would have expected more specific evidence from them

concerning /

concerning the involvement of each appellant, and a greater measure of agreement on essential detail.

I am accordingly unpersuaded that the trial Court erred in finding that Mandla and Vusie were honest witnesses.

It was not seriously contended on appeal that the trial Court erred in rejecting the evidence of the three appellants, and for good reason. As I mentioned earlier, the first and second appellants admitted to being in the vicinity of where the assault on the deceased and Phaliso occurred, but denied any participation therein. The first appellant's evidence was rightly found to be improbable and contradictory in certain respects. His evidence also differs in material respects from not only that of his mother, but also that of the second appellant. The second appellant's evidence at the trial is at variance with an earlier version of the facts given by him to a magistrate. He also contradicted himself in at least one important respect. The alibi on which the third

appellant /

appellant relied for his defence was destroyed by one of his own witnesses, as well as being contrary to the evidence of both the first and second appellants.

In all the circumstances it can not be said that the trial Court erred in accepting the evidence of Mandla and Vusie, and rejecting that of the three appellants. It follows that the appellants were correctly convicted of murder and robbery (with aggravating circumstances).

The trial Court found that there were no extenuating circumstances. The only factors relied upon by the second appellant, both at the trial and on appeal, to establish extenuation were his youth, the liquor he had consumed and alleged impulsiveness and lack of premeditation on his part. The second appellant was 21 years old at the time the offence was committed, and therefore of an age where his youthfulness no longer plays a significant role in relation to extenuation.

On his /

On his own showing the second appellant had not consumed more than $1\frac{1}{2}$ pints of beer, and it is therefore unlikely that his conduct was influenced by the consumption of alcohol. With regard to the third point, the trial Court held that the crime committed was a planned, deliberate act performed with full knowledge of the probable consequences. Bearing in mind that the onus was on the second appellant to establish the existence of extenuating circumstances, I find myself unable to differ from the trial Court's finding that no such circumstances were proved.

In the case of the first and third appellants, because their ages (17 and 16 years old respectively at the time of the commission of the offence) did not render the imposition of the death penalty mandatory, it was not necessary for the trial Court to make any finding in regard to the existence or otherwise of extenuating circumstances (S v Harman 1978(3) SA 767 (A)).

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The trial Court, however, chose to make such a finding, and concluded that in their case too there were no extenuating circumstances. In doing so it erred.

Their probable youthful immaturity (S v Lehnberg en h Ander 1975 (4) SA 553 (A)) coupled with the fact that they operated in a group, and may well have been influenced by the oldest member of the group, the second appellant (S v van Rooi en Andere 1976 (2) SA 580 (A)) was sufficient to justify a finding of extenuating circumstances, and the trial Court should so have found.

They were therefore sentenced on the basis of their moral culpability being greater than was in fact the case. Interference with the sentence imposed is accordingly justified. An appropriate sentence on the murder charge, in the case of the first appellant, would be one of 8 years imprisonment. The sentence on the robbery charge must also be reduced in order to avoid an imbalance between the two sentences. A sentence of 6 years imprisonment would be appropriate.

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In the case of the third appellant, he was not granted leave to appeal against his sentences.

As he has successfully challenged the finding that there were no extenuating circumstances, which must, needs have influenced the sentences imposed upon him, the dictates of fairness and justice require that his sentences also be altered so as to accord with those of the first appellant. There can be no prejudice to the State if such a course is adopted.

In the result :-

- (a) The appeal of the second appellant is dismissed;
- (b) The appeals of the first and third appellants succeed to the extent that their sentences on the murder and robbery charges are reduced to 8 years imprisonment and 6 years imprisonment respectively, such sentences to run concurrently.

J W SMALBERGER
ACTING JUDGE OF APPEAL

KOTZÉ, JA)
HOEXTER, JA) CONCUR