

431/83

B.R. SHANGE & OTHERS

and

THE STATE

JANSEN JA :-

Case no.431/83.
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

<u>BONGOMUZI RUFUS SHANGE</u>	First Appellant (Accused no 1 in court <u>a quo</u>)
<u>THEMBA MAJOLA</u>	Second Appellant (Accused no 2 in court <u>a quo</u>)
<u>MAGXALABA DLAMINI</u>	Third Appellant (Accused no 3 in court <u>a quo</u>)

- and -

<u>THE STATE</u>	Respondent
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Coram: JANSSEN, VAN HEERDEN JJA et
ELOFF AJA.

Heard: 15 August 1984.

Delivered: 28 September 1984.

J U D G M E N T

JANSSEN JA:-

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On 30 March 1983 an attempted robbery occurred at Black Store, Highflats, Natal; the manager of the store, Ramraj Singh, was shot twice and died of his wounds. Subsequently the three appellants were convicted by LAW J and assessors, on circuit at Scottburgh, of the attempted robbery and murder of the deceased. No extenuating circumstances were found in respect of the murder and the appellants were all sentenced to death; for the attempted robbery they were sentenced to imprisonment of 14, 16 and 12 years respectively. By leave of the court a quo the appellants appeal against their convictions of murder and sentences of death.

The findings of fact by the court a quo in

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respect of the attempted robbery must be accepted

in the absence of an appeal in this regard. On the

day in question the three appellants set out from Durban

and by 15h00 were in the vicinity of Black Store.

Their presence there was in furtherance of a common

purpose to rob the store, in accordance with prior

planning done on information supplied by the third

appellant, who knew the store well. The first and

second appellant, each armed with a loaded Beretta

pistol, entered the store whereas the third appellant,

fearing being recognised should he approach the store,

remained in a nearby plantation. In the store the

first appellant fired at least two shots, killing the

deceased; the second appellant fired a shot at one of

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the walls so as to frighten members of the public about to enter the store and he also pointed his pistol at the witness Emelda Haines. The arrival of a police vehicle caused the appellants to make their escape without effecting their purpose to rob.

It is contended on behalf of the first appellant that the court should have found that he did not have the necessary intent to kill so as to justify a conviction of murder. Reliance is placed on the acceptance by the court a quo that part of the appellant's evidence could reasonably be true, viz. that he jumped over a counter to attack the deceased so as to prevent him from drawing a firearm, that the deceased resisted and kicked the

appellant's /.....

appellant's testicles and that the appellant only then fired the two fatal shots. The court, however, rejected his evidence that he was at that stage "completely confused" as a result of pain, and it came to the conclusion that the appellant "knew what he was doing". It is argued that the court erred in this respect.

The court a quo, however, gave the matter full consideration. The court justifiably found the first appellant to be untruthful in a number of respects. As to his description in evidence of the manner in which he shot the deceased, the court said :-

"His evidence-in-chief regarding the events immediately preceding the shooting of the

deceased /.....

deceased was clearly designed to exonerate himself as far as possible and to give as little incriminating detail as possible. The detailed description given by Accused No. 1 under cross-examination regarding the shooting of the deceased is unconvincing because it is inconsistent with the wound tracks testified to by Dr. Phillips and Accused No. 1 was unable to explain such inconsistency. It is also clear that Accused No. 1 must have changed his story as to the manner in which the wounds were inflicted between the time that Dr. Phillips was cross-examined by his Counsel and the time that he gave evidence. In his evidence he stated that he had not grappled with the deceased in the manner described by his Counsel but he admitted that he had told his Counsel that he was grappling with the deceased at the time the shots went off.

For the reasons I have given, we are satisfied beyond reasonable doubt that the evidence given by Accused No. 1 in regard to the manner in which the deceased was shot, is false."

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The court also considered that "his detailed evidence as to the manner in which he fired the shots is clear proof that he knew precisely what he was doing at the time". These are cogent reasons for rejecting the evidence that the first appellant was completely confused. In the light of his admission under cross-examination that he and the second appellant took the loaded pistols into the store in order to overcome any possible resistance and that his own state of mind was that if someone did resist, he would shoot, it cannot be said that the court a quo erred in finding that the first appellant "knew what he was doing". The first appellant's appeal against his conviction of murder

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must fail.

As to his appeal against sentence, it is contended that the court a quo should have found extenuating circumstances. Again the kick on the testicles is invoked. Assuming that such a kick may be accepted as a fact in this phase of the enquiry and not merely as a reasonable possibility (as to which no opinion is expressed), it is clear that in the circumstances resistance of whatever nature by the deceased could hardly lessen the moral culpability of the appellant, particularly where such resistance did not lead to complete confusion on his part and where his pre-existing state of mind was in any event

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to shoot if resistance were encountered. The first appellant's appeal against sentence must also fail.

The appeal by the second appellant against his conviction of murder, rests upon the contention that although he played his part in carrying out the common purpose to rob he did not have a direct intention to kill, as evidenced by him not firing at anyone but only at the wall, and that "he could not have foreseen that first appellant would be kicked in his private parts and would react in the manner he did". However, as pointed out above, the court a quo's finding that the first appellant was not completely confused cannot be faulted. It follows from the other uncontested findings

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of the court a quo that the shooting by the first appellant was a not unforeseeable reaction by the first appellant to resistance encountered by him.

The court a quo was fully justified in holding that in carrying out his part of the planned common purpose, the second appellant foresaw and accepted that the first appellant might use his loaded pistol to lethal effect and that he participated in carrying out the common purpose, being indifferent to that possibility. The appeal against the conviction must fail.

As to extenuating circumstances, it is argued on behalf of the second appellant that the court a quo "should have found that the fact that the second appellant had not fired any shot at the deceased and that he could

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not have foreseen the reactions of first appellant over the circumstances in which those reactions took place, were extenuating circumstances". As has been pointed out above, the court a quo correctly found in effect that the first appellant shot the deceased, not as a result of mental confusion, but as an intended reaction to meeting resistance of any kind, a reaction which was foreseen and accepted as a possibility by the second appellant. This disposes of the argument in this regard. The appeal against sentence must also fail.

The third appellant did not enter the store but waited in a nearby plantation. On his own version he ran away when he heard the shots, but it is common cause

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that he joined the others the next morning and accompanied them to Durban. The findings of the court a quo that he and the others planned robbing Black Store before setting out from Durban, that he supplied the necessary information, and that he knew that the first and second appellants each carried a pistol, are not contested. The only point made in the appeal against the third appellant's conviction of murder is that "the court a quo erred in drawing the inference that third appellant foresaw the possibility of first appellant causing the death of the deceased in the execution of the planned robbery". It is argued that the court a quo should have found

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the appellant was unaware that the pistols were loaded and that he did not expect the deceased to be in the shop to put up any resistance; alternatively, that he expected the first and second appellants to "either shoot on the side or flee if there was any resistance".

The court a quo found that the third appellant was aware that the pistols were loaded because the other two inserted the cartridges in his presence in the vicinity of Black Store. It accepted the evidence of the second appellant on this point and rejected the evidence to the contrary of the first and third appellants.

The court a quo, it is argued, erred in this regard.

But even assuming that it is now open to the appellant to raise, in the absence of an appeal in respect of the

robbery conviction, this point and that the court a quo should not have relied on the evidence of the second appellant, it could not be held that the court a quo was wrong in coming to the conclusion that the third appellant knew that they were embarking on a robbery with loaded pistols. The third appellant was an untruthful witness and his evidence that he was unaware that the pistols were loaded does not carry much weight. Moreover, there are additional facts, found by the court a quo and now uncontested, that show that the appellant must have known that loaded pistols were to be used. The robbery was planned in Durban and the third appellant supplied the necessary information. He had himself

attempted /

attempted a robbery at Black Store some time previously and had been shot and wounded by the deceased for his pains. The court a quo justifiably came to the conclusion that he informed the others of this experience. The inference is then irresistible that the three of them must have discussed the need to cope with any resistance of a similar nature, which would require them to be likewise armed with loaded pistols.

The argument that the court a quo should have found that the third appellant believed that the deceased was not in the store as his motor car was not seen when the three of them approached the store, and that he therefore did not foresee the possibility of resistance entailing the shooting of anyone, is tenuous. It must

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be remembered that the planning in Durban must have contemplated the possibility that the deceased would be in the store and that he might use his firearm.

The planning must have proceeded on the basis that loaded pistols were to be used and the third appellant was obviously at no time deterred by this prospect.

Even if it could reasonably be true that the third appellant at the final stage thought that the deceased was not in the store, he must at least have foreseen the possibility of some other person resisting and being fatally wounded as a result. This did not cause the third appellant to disassociate himself from the common purpose: he waited for the robbery to be effected.

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As to extenuating circumstances, it is contended that the court a quo "overlooked the high probability that third appellant was under the impression that deceased would not be there and therefore would not afford any resistance" and that it should have found "the degree of remoteness as to the foreseeability of deceased's death" to be an extenuating circumstance. Again the alleged absence of the deceased's car is invoked. However, as has been pointed out above, the appellant must in any event have foreseen the possibility of someone else offering resistance and being shot by first or second appellant. The conjunction of armed robbery and death is so common that the third appellant could not have considered death to be a remote possibility,

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even if he were to have believed at the last stage of the execution of the common purpose that the deceased was not in the shop. But, in any event, as the initial planning and excursion to Black Store was done on the assumption that the deceased would be in the shop and that pistols were to be used to overcome any resistance by him, a mistaken belief at the last moment that the deceased was fortuitously not then in the shop, could hardly reduce the appellant's moral blameworthiness. The court a quo has not been shown to have erred in any respect in coming to the conclusion that there were no extenuating circumstances in the case of the third appellant.

The appeals are dismissed.

VAN HEERDEN JA)
KLOFF AJA) Concur.

E.L. JANSEN JA.