LL Case No 342/1985

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ABSALOM MAKHEHLA SHANGASE Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, HEFER et SMALBERGER JJA

HEARD: 14 MARCH 1986

REASONS HANDED IN: 18 MARCH 1986

REASONS FOR JUDGMENT

/VAN HEERDEN JA ...

VAN HEERDEN, JA:

The appellant and two co-accused (hereinafter referred to respectively as no 1 and no 2) were arraigned in the Circuit Local Division for the Zululand District on charges of murder and robbery. They were convicted on both counts. The trial court found that as regards no 2 and the appellant there were no extenuating circumstances and they were consequently sentenced to death on the capital charge. With the leave of the court a quo this appeal was directed against that sentence.

It appears that one Sibiya, who was some form of headman, promised to provide the appellant with a building site on condition that he kill a certain Ngcobo. The appellant consented but at a later stage, for reasons which are not material, Sibiya changed his mind and instructed the appellant and his two co-accused to stage a robbery at the home of Olga Sithole ("the deceased") at Driefontein. On the evening of 13 July

1984 the three would-be robbers proceeded to the house in question. They gained entrance by a subterfuge, pretending that they were members of the police force. No 1, however, remained outside since he was known to at least some of the occupants of the house. He was armed with a pistol and the appellant and no 2 with shotguns. Inside the house the appellant was the only spokesman. He demanded, and obtained, money and food from the deceased whilst no 2 was guarding her husband ("David"). After their main purpose had been accomplished, no 2 fired a shot at the deceased. She was hit in the chest and died instantaneously. The villains then fled with their loot.

David, who was an eye witness, could give no explanation as to why the fatal shot was fired. His impression was that the deceased was killed shortly after the appellant and no 2 had left the house.

The appellant's version of the fatal events is

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as follows: when he was on the point of departing the deceased grabbed hold of him. He tried to break free but she held on to the tails of his jacket. He screamed for help, saying: "I am dying." He did so to invoke the assistance of his companions. Immediately thereafter he heard a shot go off.

This version was largely corroborated by no 2. He said that he saw the appellant being held by the deceased. She had her arms around his waist and was attempting to pull him towards a bedroom.

Both the appellant and no 2 testified that the shot was in fact fired by no 1. This was denied by the latter and his version was accepted by the court a quo which found:

(a) that the shot was fired during the course of and in furtherance of the robbery in which all three accused had joined, and

(b) that they were aware that each was armed

/with ...

with loaded guns which, if used, could bring about death, and that they did foresee/FORESAW the possibility that one or more of the guns could be used, but were reckless as to that possible consequence. X?

The court also found that having regard to the lighting conditions in the house, and the fact that David, who was some distance removed from where the shot was fired, was in a state of shock, it was possible that the deceased had in fact grabbed the appellant by the tails of his jacket.

In the judgment on the question of extenuation the court took into consideration that the appellant did not fire the fatal shot, but did not regard that fact as a circumstance reducing his moral blameworthiness. The court pointed out that he was a man of 24 years who had chosen to embark on the robbery for personal gain, and that he had not been under the influence of alcohol or subject to any pressure.

/The ...

The main submission of counsel for the appellant was that on David's evidence, which was accepted by the court a quo, the murder was committed after the robbery had been completed and the appellant had withdrawn from the scene of the murder. Since no 2 acted independently when shooting the deceased, and did so coldbloodedly and not in furtherance of the robbery, so it was argued, the moral blameworthiness of the appellant is clearly less than that of no 2.

The short answer to that submission is that it flies in the face of the probabilities; the evidence of the appellant and no 2, and a statement made by the appellant when questioned in terms of s 113 of the Criminal Procedure Act. It is true that the court a quo spoke only of a possibility that the deceased might have grabbed hold of the appellant, but in my view it is a strong probability. If the appellant did not cry out for assistance, there appears

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to be no motivation for the firing of the fatal shot by no 2, unless the villains were indeed instructed by Sibiya to kill the deceased. This is not a far fetched possibility, since, according to the appellant's testimony, Sibiya had told him that he hated the deceased. The reason was that she had jilted him whilst he was attempting to court her. Of course, if the appellant and his co-accused went to the house with the intention of robbing and killing the deceased, there can be no question of extenuation.

I am accordingly of the view that if the villains did not go to the house with the intention to rob and kill the deceased, the latter was shot because of the instigation provided by the appellant's call for assistance.

Counsel for the appellant also relied on the appellant's "relative" youth, the fact that he acted on the orders of Sibiya, and that according to the

/findings ...

findings of the trial court his mens rea was not that of dolus directus. However, the court was fully alive to those factors and correctly emphasised that the appellant's motive for complying with Sibiya's instructions was the prospect of personal gain. Counsel conceded, rightly, in my view, that the trial court did not misdirect itself and its finding as to the absence of extenuating circumstances certainly is not one at which no reasonable court could have arrived.

For these reasons the appeal was dismissed.

H.J.O. VAN HEERDEN JA

I CONCUR J.J.F. HEFER JA

I CONCUR J.W. SMALBERGER JA