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Case No 363/1986

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IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

ERIC NKOSI

Appellant

and

THE STATE

Respondent

CORAM:

JOUBERT, SMALBERGER JJA et STEYN AJA

HEARD:

26 FEBRUARY 1987

DELIVERED:

26 MARCH 1987

JUDGMENT

/STEYN AJA ...

STEYN AJA:

Appellant and a co-accused, Hamilton Thungo, were arraigned in the Witwatersrand Local Division on February 3 1986 before O'DONOVAN J and two assessors on two counts, one of murder and the other of robbery with aggravating circumstances. On the count of murder it was alleged that they murdered Petrus Coetzee du Plessis ("the deceased") at Doornfontein in the district of Johannesburg on the 22nd April 1984, and on the robbery count that they robbed him under aggravating circumstances at the same time and place of a cash-box containing approximately R1 094,00 and of a light Ford Cortina van no CFF 363 T.

They pleaded not guilty to both counts and each testified in own defence. Appellant denied having been involved in any way in either of the offences and having been in Doornfontein on the said date. But on the 13th June 1984 he made a statement to a justice

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of the peace in the person of Capt P.T. Venter of the South African Police, Booysens, in which he admitted that he was at the scene of the aforesaid crimes on the stated date, that he had then been in the company of Thungo and a third person, Jackson Solly, and that he drove off with them from the scene in the Cortina van, but he nevertheless denied any complicity in either the murder or the robbery. This statement was admitted in evidence after a protracted "trial-within-a-trial", during which its admissibility was contested. On June 16 1984 appellant also correctly pointed out to Major C.H.W. Earle of the South African Police, Brixton, the scene of the crimes in Davies Street, Doornfontein, and also the points where he had been left by Solly and Thungo at the corner of Moseley and Davies Streets about 50 metres from the aforesaid scene and within sight thereof, and where deceased's van was abandoned at Doornfontein railway station, about 400 metres from the scene of the

/crimes ...

crimes.

The trial court disbelieved appellant and rejected his evidence of non-involvement and absence from Doornfontein and also the exculpatory portions of his statement, and convicted him and Thungo on both counts. In respect of the murder the court found no extenuating circumstances. Appellant and Thungo were then each sentenced to death for the murder and to eight years' imprisonment for the robbery. Both applied for leave to appeal against their convictions and sentences but their applications were refused by the learned Judge.

Thereafter appellant was granted leave by this Court in terms of section 316 (8) (c) (ii) of Act 51 of 1977 to appeal, but only against the murder conviction and the finding that there were no extenuating circumstances. By necessary implication leave was also granted to appeal against the death sentence imposed in consequence of that finding. The leave granted in

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respect of the murder conviction was, however, limited to, "the finding that the applicant acted with the other accused in the execution of a common purpose to murder the deceased." No leave having been granted to appeal against the conviction of robbery with aggravating circumstances the findings of fact upon which that conviction is based cannot now be challenged.

To determine the ambit of the appeal now before this Court it is necessary to first establish what the findings of fact are upon which the robbery conviction is based. Those findings were summarised as follows by the learned Judge in the final paragraph of the judgment on the merits:

"The Court finds that this was a carefully planned robbery in which a particular rôle was allotted to each of the three persons and that the first and second accused knew that Jackson was armed with a revolver which would be used if it became necessary to do so, to overcome the resistance of the deceased."

/Then ...

Then, also introducing the basis for the murder conviction, the summary continues in the following terms:

"On the basis that they proceeded nonetheless and recklessly as to whether somebody might be killed in the process of the furtherance of a common purpose to commit a robbery.

The Court finds each of the accused guilty of murder as charged on the first count, as well as guilty of robbery with aggravating circumstances on the second count."

(Although a fullstop appears in the transcript of the record after the words "common purpose to commit a robbery" in the second portion of the above quotation, it is to my mind clear from the flow of the context that it should be a comma.)

The "Jackson" referred to in the summary is the aforementioned Jackson Solly. He was not charged and did not give evidence in this matter and was at the time of the trial being held in maximum security at the Central Prison in Pretoria.

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The trial court found that the deceased was shot and killed by Jackson Solly with a .38 Special Arminius revolver during the course and for the purpose of the robbery.

Appellant will be guilty of murder if he subjectively foresaw the possibility of Jackson using the firearm to shoot and kill somebody in the execution of their common purpose to rob and nonetheless recklessly persisted in the furtherance thereof. The trial Court found that to have been proved beyond reasonable doubt. The correctness or otherwise of that finding must now be decided. To do so requires a wide review and consideration of the evidence. But in that process it must be borne in mind that it is not a requirement of our law that it be proved beyond reasonable doubt that appellant knew that Jackson's firearm was loaded. This was made clear by JOUBERT JA in the

recent and as yet unreported decision of this Court in Mathews Mbatha en Andere v Die Staat wherein the judgment was handed down on November 27 1986. In considering S v Magwaza 1985 (3) SA 29 A, wherein it was held that proof of such knowledge was necessary, JOUBERT JA said the following at p 41 of the judgment.

"Ons reg stel subjektiewe kennis aan die kant van 'n socius criminis dat die dader se vuurwapen gelaai is of dat sy mes skerp is nie as 'n voorvereiste vir dolus eventualis as opsetvorm nie. Daar is geen regsnorm of regsbeginsel wat sodanige subjektiewe kennis as 'n voorvereiste vir dolus eventualis stel nie,

/At ...

At 42 - 43 the learned Judge of appeal added the following:

"Die feit dat 'n socius criminis nie subjektief kennis gedra het van die omstandigheid dat die dader se vuurwapen gelaai is nie of dat sy mes nie skerp is nie kan wel relevant wees by oorweging van die vraag of die socius criminis die moontlikheid subjektief voorsien het dat die dader se aanwending van die vuurwapen in die pleeg van die roof op die dood van die slagoffer sal uitloop, as een van die fasette van dolus eventualis as opsetvorm. Dit is bloot 'n feite-kwessie en nie 'n regsreël nie wat relevant is by die oorweging van voorsienbaarheid as 'n faset van dolus eventualis."

The following are the salient facts emerging from the evidence accepted by the trial Court, with which acceptance no fault can be found.

Jackson Solly was no stranger to appellant and Thungo, having been the lover of the former's sister and the latter having become acquainted with him when he was a petrol attendant at the garage in Fordsburg which Thungo used to frequent.

/On ...

On the late afternoon of Sunday, April 22 1984, the three of them proceeded on foot from Fordsburg to their destination at no 19 Davies Street, Doornfontein, a distance of several kilometers. That destination was the Vita=Freeze Icecream depot of which deceased was then the manager. The business conducted at that depot was inter alia the sale of icecream by vendors using pedal=carts for that purpose. The modus operandi was the following. The vendors collected their supplies at the depot, sold their wares to the public in the streets of the adjacent areas and returned at end of day to transfer unsold icecream to the refrigerators at the depot and hand over their takings for the day. These monies were placed by the manager in a cash=box and taken by vehicle to the main office at the factory. This was the settled procedure on every day of the week, including Sundays. The cash was usually taken to the factory between 19h00 and 20h00. And it was deceased's custom

/to ...

to use his Ford van for this purpose. At that time of the evening a considerable number of vendors were usually still present in and in front of the depot, which was normally locked by an employee, Rackson Mashekeng, after the manager's departure with the cash. The van was usually parked in front of the depot in Davies Street which runs North - South and is one-way in a northerly direction, ending in a cul-de-sac at Doornfontein station, 400 m from the depot, which is on the western side of Davies Street.

On the evening in question the van was parked in front of the depot facing north towards the station. The driver's door was consequently on the street side of the van. Appellant, Jackson Solly and Thungo arrived at the intersection of Moseley and Davies Streets shortly after 19h00. The van was then parked as aforesaid and there was approximately 20 icecream vendors still in and in front of the depot, some of them engaged in a card

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game at the vehicle entrance about 6 paces from the depot's front door. It was already dark but the area was well-lit by street lights and clearly visible from the aforementioned intersection.

Appellant was left at the street corner at that intersection which, as stated above, is about 50 m from where the van was parked. Jackson and Thungo then took up a position across the street, directly opposite the van.

About a quarter of an hour later the deceased emerged from the depot's front door carrying the cash-box containing the day's takings, was greeted by certain of the card players and proceeded round the back of the van to the driver's door. At the same time Jackson and Thungo crossed the street and as the deceased got to the driver's door he was grabbed from behind round the neck by Jackson who then forthwith shot him in the

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head at point blank range. He was killed instantly and fell down at the side of the door. When Mashekeng came out of the depot after the shot he was threatened with the revolver by Jackson who told him to "voertsek", which he immediately did. Jackson and Thungo then pulled the deceased's body clear of the van, Jackson took the cash-box and he and Thungo got into the van, Thungo taking the driver's seat. Appellant, who had remained at the street corner, then joined them and they drove away at high speed, Thungo driving. They raced through two stopstreets, stopped at the station where they abandoned the van in the dead-end and fled further on foot with the cash-box and the van's keys, to which the key of the cash-box was apparently attached. Shortly thereafter they opened the cash-box and each received a portion of the contents. In his aforementioned statement appellant admitted that his share was R150=00.

/The ...

The trial Court made the following findings, which, despite argument to the contrary addressed to us, we have no reason to differ from.

The three participants acted throughout as a team in the execution of their common purpose and clearly knew that they were engaged in an extremely dangerous operation in the process of which they would as it were have to snatch the meat out of the lion's paw. They would undoubtedly have had to act with great and effective speed to successfully take the cash and escape in the van before they could be set upon by the icecream vendors and depot staff present in considerable numbers in their immediate vicinity. For that they needed an instrument sufficiently effective to immediately overpower the deceased and keep the vendors and staff at bay. Under the circumstances the most appropriate instrument would have been a loaded firearm. And it had to be used, and if necessary

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fired, by one or other of those members of the team whose task it was to take the cash and the van.

In his extra-curial statement appellant admitted that he was at the street corner for about 15 minutes before the shot was fired. During this period he and his two team mates were afforded an ample opportunity to assess the situation and they could clearly have done no other than realise subjectively that the operation in which they were engaged could not be successfully concluded without the use of a firearm. And that appellant saw deceased being shot by Jackson and disposed of as aforesaid, is clear beyond any reasonable doubt. Even if appellant did not before the shot was fired subjectively know that the revolver was loaded the lack of such knowledge does not by itself mean that he did not have the intention to murder. His conduct subsequent to the shooting in running to the stationary van; rejoining the team, escaping with them in the van and

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sharing in the spoils of the robbery without any objection or sign of surprise, hesitation or remorse however indicate, also beyond reasonable doubt, that he in fact knew at all relevant times that Jackson had a firearm, that he subjectively realised the likelihood of it being loaded and the possibility of Jackson using it to kill somebody during the course of the robbery, and that he nevertheless continued to participate in the execution of their common purpose reckless whether that happened or not. That amounts not only to an intention but also to a common purpose to murder. Appellant was therefore rightly convicted of murder and the appeal against that conviction must fail.

As to the existence or otherwise of extenuating circumstances the trial Court gave no reasons for its finding that none existed. Such a finding is one on a question of fact.

The main grounds of extenuation advanced are

/that ...

that appellant was convicted on the basis of dolus eventualis, that he played only a minor role in the robbery and "did not pull the trigger", that he was still relatively young and only educated to a modest degree, and that at the time of the murder he had been unemployed for a considerable time. I am not convinced, having regard to these grounds either individually or cumulatively, that they reduce the moral blameworthiness of the appellant in the circumstances of the present case.

The appeal is dismissed.

M.T. STEYN AJA

JOUBERT

CONCUR

SMALBERGER