

266/88
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALFRED BOTAMANE APPELLANT

and

THE STATE RESPONDENT

CORAM : CORBETT CJ, BOTHA, E M GROSSKOPF,
VIVIER et KUMLEBEN JJA

HEARD : 22 MARCH 1989

DELIVERED : 30 MARCH 1989

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA

Shortly before daybreak on the morning of 7 October 1985 the appellant and one Charles Adams went to the home of Mr Brey in Retreat, Cape Peninsula. As Mr Brey opened the door at the back of his house he was attacked by them. The appellant stabbed him. His son, Ebrahim, who came to his father's assistance, was at a later stage fatally shot by Adams. This led to the appellant being charged in the Cape of Good Hope Provincial Division with the murder of Ebrahim Brey and with the attempted murder of Mr Brey. (Adams had not been traced at the time of the trial and for that reason did not feature as a co-accused.) On the first count the appellant was convicted as charged. The court (Williamson J sitting with two assessors), having found extenuating circumstances, sentenced him to 12 years' imprisonment, of which 4 years were conditionally

suspended. (The verdict on the other count was one of assault with intent to cause grievous bodily harm in respect of which a sentence of 2 years' imprisonment was imposed.) Leave was granted by the court a quo to appeal against the conviction on the murder charge.

The shop of Mr Brey was next-door to his home. A plan depicting the two buildings and the intervening courtyard area was handed in as Exhibit E. The layout of these buildings and their precincts was also explained by Mr Brey in evidence. It appears that between the back of the house and the back or side of the shop there is an enclosed yard with a passage way leading to the street. What appears to be the back verandah of the house is enclosed by a wrought-iron screen which is shown on the photograph Exhibit D1. What was referred to in evidence as a "back gate" is a door in the screen made of the same

material. This door gives access to the yard from the house. Diagonally opposite this screen on the other side of the yard is a store-room shown on the photograph Exhibit D2. Its "wall" facing the yard consists of a similar wrought-iron screen with the same sort of door set in it. However, as appears from Exhibit D2, the screen does not extend to the ceiling or roof of the store-room.

Mr Brey and his wife gave evidence for the State. They were held to be truthful and reliable witnesses. This finding was not challenged on appeal. Their evidence is to the following effect. That morning, as Mr Brey unlocked the screen door of the verandah and was about to open it, he noticed two men, who turned out to be the appellant and Adams, facing him on the other side of this door. They wore balaclava caps partially covering their faces. Adams

was armed with a revolver and the appellant with a knife. Mr Brey, startled by this confrontation, asked them what they wanted. Whereupon, without either of them replying or saying anything, Adams fired three or four shots at point blank range through the screen door. None struck Mr Brey. He reacted by forcefully pushing the door forward in the face of his assailant. With that Adams turned on his heels and ran across the yard to the store-room, apparently not realising that this did not afford an escape route. Mr Brey, undaunted, chased after Adams. The appellant was still standing, knife in hand, in the yard near the wrought-iron door of the house. As Mr Brey passed him he was stabbed by the appellant. The wound was not a serious one and Mr Brey was not deterred by it. He saw that Adams had entered the store-room and proceeded to lock him in it. (Unspent revolver bullets were subsequently found in the store-room indicating that Adams probably

reloaded the revolver there.) In the meantime Mrs Brey and Ebrahim, both of whom had been alerted by Mr Brey's cries of alarm, and no doubt by the shots which followed, had come into the yard. Ebrahim caught hold of the appellant from behind and held him. Mrs Brey picked up a broomstick and struck the hand of the appellant which held the knife. When it dropped, Mrs Brey picked it up and took it to the kitchen. At this point Mr Brey, returning from having locked the store-room, saw the appellant held by his son. He (Mr Brey) was all for setting upon him with the broomstick. Ebrahim, however, restrained his father because at that stage the appellant was offering no resistance. He was placed in a toilet situated in the yard. Since the door could not lock, Mr Brey stood guard outside while Ebrahim, on his father's instructions, went to telephone the police. As he crossed the yard, going towards the wrought-iron door

at the back of the house, Adams emerged from the store-room. He had escaped from it by climbing through the space above the screen. When he was a short distance from Ebrahim he fired a single shot at him. The bullet penetrated his skull and killed him. Adams made good his escape presumably by way of the passage to which I have referred. In due course the ambulance and police arrived. It would seem that before the police arrested him, the appellant had been transferred from the toilet in the yard to one in the house which could be locked.

The appellant gave evidence. Its substance was that he and Adams, both of whom were at the time unemployed, had been staying together. That morning early Adams suggested that they should go and steal at a certain place. He assured the appellant that they would not be seen. He knew Adams had a knife on him

but not that he was armed with a revolver. They arrived at the house. As they were stealing potatoes in the yard, Adams heard a noise at a certain door and went to investigate. A single shot was fired. Appellant intended escaping but before he could do so he was apprehended. The court had no hesitation in rejecting his evidence. There were ample grounds for doing so. Understandably the evidence of the appellant was not relied upon in the argument presented on appeal.

From the State case certain inferences are to be drawn. Firstly, despite the evidence of the appellant to the contrary, their conduct in confronting Mr Brey at the screen door, disguised and armed, clearly shows that the two of them had planned to rob him. When the shots were fired at Mr Brey the appellant did not run away but instead assaulted Mr Brey by stabbing him as he entered the yard. This conduct points to his

being party to a pre-arranged plan to commit a robbery. The objective was probably to overpower Mr Brey and rob him of his possessions in his house or at his shop. Secondly, the facts plainly justify the inference that the fatal shot was fired by Adams in the course of escaping and in order to do so. Thirdly, the conclusion is inescapable that the appellant knew Adams was armed with a revolver. In addition, the evidence of the State witnesses discloses that from the time the appellant was caught and held by Ebrahim, he took no further part in the unlawful venture nor did he at any stage attempt to escape.

In convicting the appellant of murder, notwithstanding the fact that he did not fire the fatal shot, the trial court relied upon the application of the doctrine of common purpose as thus stated in S v Madlala 1969(2) S.A. 637 (A D) 640 F - H:

"Generally, and leaving aside the position of an accessory after the fact, an accused may be

convicted of murder if the killing was unlawful and there is proof-

(a)

(b)

(c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S. v. Malinga and Others, 1963(1) S.A. 692 (A.D.) at p. 694F - H and p. 695;"

(See too S v Safatsa and Others 1988(1) S.A. 868 (A.D.)

896 G - 897 B, in which the formulation of the legal position as stated in the above quoted passage was approved and affirmed.)

On the facts of this case, with reliance on

(c) in the quoted passage of the Madlala decision, the court found the appellant guilty of murder. It concluded that the appellant must have foreseen - in the sense that he did foresee - the possibility that

the revolver might be used with fatal consequences in the execution of the planned robbery, which necessarily included escaping from the scene of the crime.

In the course of argument in the court a quo on the question whether the appellant foresaw the possibility of someone being killed, defending counsel referred to a passage in S v Magwaza 1985(3) S.A. 29 (A.D.). In that case, like the present, two persons set out to commit a robbery in the course of which the victim was shot by one of them. At page 41 C - H the judgment reads as follows:

"In my view the conclusions reached by the trial Court that the appellant knew that his confederate (a) was in possession of a firearm and (b) might use it in execution of the robbery, are unassailable. But robbery is sometimes successfully accomplished by threatening the victim by brandishing an unloaded firearm. The crucial question is whether when the two intruders entered the shop the appellant knew as a fact that

his confederate's firearm was loaded. It is not clear to me that the trial Court was prepared to make such a finding against the appellant. The trial Court found that the appellant's recklessness as to whether or not death might ensue in the course of the robbery consisted in part of the appellant's 'failure to ensure that the firearm was not loaded'. Such an omission on the appellant's part might well be censurable but it cannot, I think, serve as a substitute for his actual subjective knowledge. Although in my view it is not improbable that the appellant knew that the firearm in question was loaded, it seems to me that the meagre evidence of Thandi Zungu and Bongani as to what the appellant confided in them, taken together with the rather sketchy observations of Mrs Momplé and Flora Mthimkulu, cannot sustain, as the only reasonable inference, that the appellant knew that the firearm in the possession of his confederate was loaded. If the appellant lacked such knowledge then it must remain a matter for mere speculation whether subjectively the appellant foresaw the possibility of the deceased's death in the execution of the robbery. It follows, in my judgment, that having excluded Oelofse's evidence of the appellant's pointing out and the statements by the appellant which accompanied such pointing out, the remaining evidence is insufficient to establish beyond reasonable doubt the guilt of the appellant on the charge of murder. Whether, and if so, to what extent, the inference that the appellant bore knowledge of the fact that his confederate's firearm was loaded would be strengthened if recourse to the evidence of Oelofse were permissible, it is unnecessary to consider. In my

view, therefore, the appellant was wrongly convicted of murder."

Williamson J considered that this dictum was in conflict with the exposition of the legal position in the quoted passage from Madlala's case and had difficulty in reconciling them. It is perhaps more accurate to say that the requirement in Magwaza's case appears to place a limitation or restriction upon the enquiry as to whether - as stated in Madlala's case - "he foresaw the possibility of one or both of them causing death to someone in the execution of the plan". Be that as it may, notwithstanding what was taken to be conflicting authority on the subject, the court found that the fact that it was not positively proved that the appellant knew that the revolver was loaded, did not preclude it from holding - as it did - that the appellant foresaw the possibility of it being used with fatal results. This conclusion was subsequently endorsed by a later decision of this

court in S v Mbatha en Andere 1987(2) S.A. 272 (AA).

As regards the proposition in the above-quoted passage in Magwaza's case it was said at pages 283F - 284A of the Mbatha decision that:

"Na my mening maak hierdie passasie dit by implikasie duidelik dat die omstandigheid dat so 'n socius criminis nie subjektief kennis gedra het van die feit dat die dader se vuurwapen gelaai was nie, glad nie tuisgebring moet word onder sy onverskilligheid of die slagoffer gedood kon word of nie. Wat die passasie egter nie duidelik maak nie is of dit 'n voorvereiste vir dolus eventualis as opsetvorm is dat 'n socius criminis subjektief kennis moes gedra het van die feit dat die dader se vuurwapen gelaai was. 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 regsbeginself wat sodanige subjektiewe kennis as 'n voorvereiste vir dolus eventualis stel nie,

"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 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 mag uitloop, as een van die fasette van dolus eventualis as opsetvorm. Dit is bloot 'n feitekwessie en nie 'n regsreël nie wat relevant is by die oorweging van voorsienbaarheid as 'n faset van dolus eventualis."

As a matter of fact it was on the strength of the decision in Magwaza's case that leave to appeal was granted. However, Mr van der Merwe, who appeared for the appellant, conceded that, in the light of the subsequent decision, no argument could be presented along those lines. Counsel did, however, advance others in support of the appeal.

The first argument was directed at the requirement of foreseeability on the part of the appellant, though on the supposition that he knew that the revolver was loaded. Counsel submitted that it was not proved that the appellant foresaw that Ebrahim might be killed having regard to the particular circumstances in which the shooting took place.

Counsel relied, firstly, on the fact that Adams had been locked up in the store-room and that at that stage it was thought by all concerned that he no longer presented a danger to Mr Brey or Ebrahim; and, secondly, on the fact that the appellant had been apprehended and in a sense was no longer involved in the robbery. In these circumstances, so it was submitted, it is reasonably possible that appellant no longer foresaw the possibility that the revolver would be used to effect an escape. It is true that at that stage such may have been the appellant's state of mind but from the point of view of his criminal liability this is irrelevant. At the time he decided to take part in the armed robbery he foresaw that the revolver might be used for this purpose with fatal results. This cannot be gainsaid. That is precisely what happened. The fact that at a particular stage during the occurrence, and for a short period of time, its use

appeared to be improbable or remote is, as I have said, immaterial. In S v Malinga and Others 1963(1) S.A. 692 (AD) the facts were in many respects similar to those of this case. A policeman, in the course of pursuing the appellants by car after the commission of the offence, was shot by one of them. At page 695 A - D Holmes JA observed:

"In the present case all the accused knew that they were going on a housebreaking expedition in the car, and that one of them was armed with a revolver which had been obtained and loaded for the occasion. It is clear that their common purpose embraced not only housebreaking with intent to steal and theft, but also what may be termed the get-away. And they must have foreseen, and therefore by inference did foresee, the possibility that the loaded fire-arm would be used against the contingency of resistance, pursuit or attempted capture. Hence, as far as individual mens rea is concerned, the shot fired by accused No. 4 was, in effect, also the shot of each of the appellants. On the question of intention to kill, they must have foreseen, and therefore by inference did foresee, the possibility that the use of the loaded firearm would have fatal consequences. Violence, fire-arms, and death are ever an easy and sombre trinity, as I observed in S. v. Masheane and Others (A.D., 16 November,

1959). And the appellants were clearly reckless whether death would in fact ensue or not. Hence the intention to kill must be imputed to each one of them."

These observations, and the conclusion on the question of foreseeability, may aptly be applied to the facts of this case.

In the course of this argument counsel submitted that the appellant could not have foreseen the precise manner in which Ebrahim came to be shot and for this reason the appellant is not to be held criminally responsible for his death. I doubt that the circumstances relied upon can be properly described as the "manner" in which the deceased was killed: his death arose from the use of the revolver the possibility of which - as has been pointed out - was foreseen. In any event, as was stated in this court in S v Msiza (Case 326/83: judgment delivered on 29 May 1984 and reported in 1984(1) Prentice Hall H 116):

"Selfs indien die dood van die oorledene, wat as 'n moontlikheid voorsien is, ingetree het op 'n wyse wat nie presies dieselfde was as wat appellant voorsien het nie, sal dolus eventualis nogtans aanwesig wees."

This was said with reference to an accused who was actually responsible for the killing of the deceased but applies equally to an associate in the context of common purpose. See too R v Lewis 1958(3) S.A. 107 (AD) at 109 H and S v Nhlapo and Another 1981(2) S.A. 744 (AD) at 750 E - G. In the last-mentioned decision van Heerden AJA said in reference to the facts of that case:

"..... I have no doubt that the robbers must have foreseen the possibility that one of them might kill one of the guards, and that they were reckless as to whether or not this consequence ensued. If they did not foresee the further possibility of a guard being killed by a shot fired by one of his co-guards, the question would arise whether the unforeseen manner in which a foreseen consequence was caused, is legally relevant; in other words, whether dolus eventualis requires foresight not only of a consequence but

also of the causal sequence leading to the consequence. See, in regard to the distinction drawn in German law between material and immaterial deviations from the foreseen causal chain, Jescheck Lehrbuch des Strafrechts, Allgemeiner Teil 2nd ed at 232-3. In view of the conclusion at which I have arrived, I find it unnecessary, however, to consider this question." (My emphasis.)

Assuming that the question is to be affirmatively answered, in the present case the "causal sequence leading to the consequence" was the use of the revolver in order to escape and, I repeat, this was foreseen as a possibility.

In South African Criminal Law and Procedure

(Second Ed.) Vol. I at page 150 the authors point out that:

"Where the manner of the occurrence of the consequence is very different from that foreseen by the accused, his liability or otherwise is likely to turn on the question of causation rather than of mens rea."

Causation was in fact the basis of the appellant's alternative argument. It was founded on substantially

the same facts as those to which I have referred, namely: (a) that the shooting took place after Adams had been locked in the store-room; and (b) that at that stage the appellant had - as it was put - dissociated himself from the criminal venture on which they had both embarked.

Whatever doubts may have existed as to the legal position before the decision in S v Safatsa (supra), it is now settled law that a participant who, like the appellant, agrees beforehand to the commission of an offence, in this case the robbery, may be found guilty of murder without his conduct having caused or contributed causally to the death of the deceased. As was stated at page 896 D of that decision:

".... in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants (provided, of course, that the necessary mens rea is present)."

In the instant case - as I have indicated - the compact to rob and mens rea on the part of the appellant were proved. Thus, the appellant is criminally liable for the death of the deceased unless it can be said that the act of Adams in killing the deceased fell outside the compass of the common purpose, that is, was not causally connected with the robbery. Thus stated the question virtually answers itself. He killed the deceased at the scene of the crime in order to escape. The short interval when he was in the store-room (which incidentally he apparently put to good use by reloading the revolver) cannot possibly be said to have severed the causative link between the robbery and the fatal shot. The causal connection, one notes in passing, is far more direct as to time and place than that which gave rise to the conviction of the appellants in the Malinga case (supra.) And unlike the situation in the case of S v Talane

1986(3) S.A. 196 (AD), the shot was not fired when the danger of being arrested in the course of escaping had passed (see pages 207E - 208A).

As to the fact that the appellant was apprehended shortly before the shot was fired, I fail to see how this can bear upon the question of causation. In the first place it cannot be said on the evidence that the appellant voluntarily decided against continued participation in the robbery, which at that stage was in the nature of things restricted to escaping. In his evidence he did not say that he had taken such decision. When he was caught by Ebrahim, he simply remained caught. In any event, were a socius in the course of the commission of an offence to decide against further participation, such decision would not necessarily exempt him from liability for the foreseeable consequences of the prior unlawful acts in

which he had been actively involved. In the present context, at the stage when the appellant - let it be assumed - dissociated himself from the robbery, a fatal shooting by his associate in the course of escape was such a possible consequence. It is, however, unnecessary to consider this question more fully since, as I have said, there is no evidence justifying the conclusion that the appellant did in fact voluntarily elect to dissociate himself.

The appeal is dismissed.

M E Kumleben

M E KUMLEBEN
JUDGE OF APPEAL

CORBETT	CJ)	
BOTHA	JA)	
É M GROSSKOPF	JA)	- Agree
VIVIER	JA)	