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CASE NO. 425/88

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MDUDUZI CLEOPHAS MATHABELA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: CORBETT CJ, NESTADT JA et NICHOLAS AJA

DATE HEARD: 24 FEBRUARY 1989

DATE DELIVERED: 31 MARCH 1989.

J U D G M E N T

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NICHOLAS AJA:-

Adam's Mission is a settlement near Amanzimtoti in Natal. There Raphael Nyuswa carried on the business of the Kwa Makutha Supermarket, and lived with his wife Virginia and his family in a 4-bedroomed house.

On the night of 27 March 1986 Raphael and two of his children (Dudu and Mfundo) were temporarily away from the house. Stanley Nyuswa, Raphael's 22 year-old son, who occupied an outside room, was also not in the house. Virginia and two small children were in bed, and an adult daughter, Lindi, who was visiting her parents from Pietermaritzburg where she was a teacher, was watching television.

Two motorcars drew up outside the house, and a gang of six men emerged. Their leader was a white man, Barry Shaun Combrink; the others were black. Some of them were wearing police uniforms, and they were all carrying firearms. Declaring

that they were members of the South African Police, they demanded, and were given entry to the house. They said that they had been sent by lawful authority to search for illegal firearms. When they asked for the father of the house, they were told that he was temporarily away, but that they might wait for him.

Shortly afterwards Raphael returned in his car together with Dudu and Mfundo. Members of the gang met them outside and escorted them into the house. At their request, Raphael unlocked a gun-safe in a wardrobe, from which the gang took firearms and R2 500 in cash. Combrink then demanded that they go to the Supermarket, and they set off, leaving behind in the house, Virginia, Lindi , Dudu, Mfundo and the two small children. Combrink deputed three of the gang, Mduduzi Mathabela, Sipho Mchunu and "Sezo" Ndunge to stay behind to guard them.

At the shop Combrink told Raphael to unlock the shop, and then the strongroom. From the strongroom the gang took R23 000 in cash and cheques, and float money from the tills in

the shop, and cigarettes and tobacco.

Meanwhile, there had been developments back at the house. Virginia and the other members of Raphael's family had been herded together in a bedroom (which I shall refer to as "bedroom No 2"). Mathabela had taken Lindi to another bedroom and told her that he loved her and she should take off her clothes. She refused. He put a hand under her dress and another on her left breast. From under his overall he took out a small silver firearm. Lindi cried out and her mother came to her assistance. The two women were going back to bedroom No 2, when Stanley came into the house. Clearly realising that something was amiss, he walked down the passage, asking "What is the matter?" He said to Mathabela, who had now let go of Lindi, "What is it? I seem to know you." While Lindi and her mother walked back to the bedroom, Lindi heard the explosion of a firearm. Shortly afterwards Stanley came into the bedroom saying, "He has shot me", and he then fell to the floor. Mathabela entered and made

some remarks which I shall quote later.

Soon afterwards, Combrink and Raphael and the others arrived back from the shop. Mathabela came to the door of the house and reported to Combrink. The gang drove off after firing two shots into tyres of Raphael's van, puncturing them.

Stanley was taken to hospital, where he was operated on, but he died a few days later. The cause of death was peritonitis and a gangrenous bowel, resulting from a gunshot wound which penetrated the transverse colon and the small bowel.

Arising out of this occurrence, four persons appeared in the Supreme Court in Durban on charges of robbery with aggravating circumstances and murder. A separation of trials was ordered. Barry Shaun Combrink and another man were convicted on 3 March 1987 of robbery with aggravating circumstances and sentenced to 12 years' imprisonment each. Mathabela and Joseph Chili were tried later before FRIEDMAN J sitting with two assessors. Both were convicted on 12 July 1988 of robbery with

aggravating circumstances and sentenced to 12 years' imprisonment; and Mathabela was convicted of murder and sentenced to death after the trial court found that he had failed to prove extenuating circumstances.

Leave was granted to appeal to this court against the latter finding and the sentence of death.

The only State witness who was actually present at the time of the shooting was Sipho Mchunu. He was a member of the gang and one of the men left on guard at the house by Combrink. He gave evidence for the State after being warned as an accomplice.

Lindi said in her evidence that when Stanley came into the house and proceeded to where Mathabela was holding her, he asked, "What is the matter?" and said, "What is it? I seem to know you." Mathabela was holding the silver fire arm, which he pointed at Stanley. Mathabela then let go of Lindi who went back to bedroom No 2 with her mother, who called to Stanley to follow

them. As they entered the bedroom, Lindi heard the sound of a shot. Stanley came into the room, and said, "He has shot me", and then fell down. Mathabela came in and said, "I feel like finishing the dog off". He said to Stanley, "I hit you with this one (referring to the revolver in his right hand); if I had hit you with this one (referring to the shotgun in his left hand) you would be dead". He then said to Stanley, "We will meet, if you are not dead, we will meet at the Supreme Court in Maritzburg".

Dudu said that he was one of those in bedroom No 2, when he heard Lindi cry out. Virginia left to investigate. She heard Stanley speaking in the passage, asking what was happening, and saying "I seem to know you". At that stage Virginia and Lindi re-entered the bedroom. Dudu heard a shot. Stanley came into the room. He was bleeding and there were holes on both sides of his body. He cried out, "Mother, he has shot me", and fell down. Mathabela then appeared, holding a big firearm in his left hand and a small one in his right. He pointed at Stanley,

who was lying on the floor, and said, "I feel like finishing you off". He said, "If I shot you with this one (indicating the weapon in his left hand), you would be dead by now, but I shot you with the one in the right hand We will meet at the Supreme Court in Maritzburg". Mfundo gave similar evidence.

Sipho described events leading up to the shooting. He said that he, Mathabela, and Ndunge (who had since died) were left behind to guard the house when Combrink and the others went off to the supermarket. Before they left, Mathabela asked Combrink to leave the small firearm with him because the big firearm, which he had, had only one bullet in it. Sipho described Mathabela's encounter with Lindi, and said that shortly after the mother and daughter had gone into the bedroom, a male person came through the front door. Ndunge tried to stop him and so did Sipho, but they were unsuccessful and Stanley went on towards Mathabela, who also tried to stop him, saying, "Who are you?". Sipho then heard Mathabela say, "I am shooting him".

A few seconds later, Sipho heard a gunshot. He took fright and ran away out of the house.

Mathabela gave evidence in his own defence. He admitted that he was a member of the gang at Raphael's house on the night concerned, but said that he did not go on an expedition to rob - he believed that the excursion was one by police reservists in search of firearms. He did not try to molest Lindi. He did not fire a shot at Stanley. He did not speak the words which the State witnesses said he uttered. He did not know of shots fired at the tyres of Raphael's van.

The trial court found that Mathabela was an unmitigated liar, and it had no hesitation in rejecting his evidence as false beyond any reasonable doubt. It was satisfied that in general all of the State witnesses were satisfactory, honest and reliable witnesses. Such discrepancies as there were between them were not material and not great. Although Sipho was an accomplice and his evidence had to be approached with caution, he was

nonetheless an honest and reliable witness, whose evidence the court accepted.

After conviction, Mathabela elected to give evidence in extenuation. He now admitted having fired a shot with the revolver, claiming that he did so in the course of a scuffle or struggle with Stanley as the latter was trying to enter the room where the others were penned. The trial court was, however, satisfied that the shot was not fired in the way now described by Mathabele: there was nothing to support a conclusion that the shot was fired in the course of a scuffle or struggle; and it was inconsistent with the remarks which Mathabela made when he followed Stanley into bedroom No 2.

In the judgment on extenuating circumstances, the trial court accepted that -

- (a) Shaun Combrink, who was the leader of the gang and planned the robbery, instructed Mathabela, Sipho and Senza to guard the house and its inhabitants while Combrink and the

others went off to rob the supermarket. Combrink handed the revolver to Mathabela. Mathabela, Sipho and Senza were to ensure that no one left the house.

- (b) It was not foreseen that anyone would try to enter the house, and Stanley's entrance was unexpected. He evaded Sipho and Senza, who tried to prevent him from entering, and walked down the passage to where he was confronted by Mathabela.
- (c) What happened then is not clear. It is possible that Mathabela tried to prevent Stanley from proceeding further. Although the trial court found that "the shot was probably fired somewhat in the heat of the moment", it considered that Mathabela fired it deliberately for one of two reasons: either Stanley made the remark above referred to and that induced Mathabela to shoot him; or Mathabela shot him when he found himself frustrated when he could not prevent Stanley entering the room. The trial court found it difficult to decide which of the two possibilities was the more probable.

In the judgment FRIEDMAN J said that there were indeed

circumstances calculated to influence Mathabela's mental state and that he was subjectively influenced thereby: he was, in a general sense, influenced by the instructions given him by Combrink; and, more pertinently relevant, he shot Stanley either because the latter recognised him, or to prevent him from going into room No 2.

However, those circumstances did not, in the view of the trial court, serve to reduce Mathabela's moral blameworthiness so as to amount to extenuation.

In the result, the conclusion was that Mathabela had failed to prove the existence of extenuating circumstances.

Counsel for the appellant contested the finding of the trial court that the shooting was deliberate. He placed reliance on a photograph which was handed in by consent after the close of the defence case. It showed a woman pointing to a mark on a door frame, which it was alleged was a bullet mark. He submitted that the inference from this was that the firearm had

been held in a somewhat unnatural position, probably pointing downwards. This led to the further inference that the firearm was not aimed at Stanley, but was fired in the heat of the moment and without any real time for reflection; and that therefore the shooting was an unexpected and perhaps freak occurrence.

This line of reasoning lacks an essential foundation. There was no evidence regarding the mark - either that it was a bullet-mark, or how or when it was caused.

It was argued that the trial court over-emphasized the significance of Mathabela's remarks after the shooting - that they were equally consistent with the state of mind of a person who has acted in the heat of the moment. I do not agree. They were the words of a man who was in control of himself and the situation, who had acted purposively, and was aware he might have to meet his victim in court.

There was no evidence to suggest that the shooting was otherwise than deliberate. Mathabela's evidence was rightly

rejected by the trial court; no criticism can be made of its acceptance of the evidence of the State witnesses, including Sipho's, which reads reasonably and convincingly. There is no factual basis for a finding that there was a struggle or a scuffle, or that Stanley grappled with Mathabela, or that the shot was fired accidentally.

The trial Court made every assumption in favour of Mathabela which the evidence could possibly bear. It was, in my opinion, correct in holding that extenuation had not been shown.

The appeal is dismissed.

NICHOLAS, AJA

CORBETT CJ) Concur.
NESTADT JA)