

CASE NO. 430/88  
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THABANE SITHOLE

FIRST APPELLANT

VUSI PHAKATI

SECOND APPELLANT

and

THE STATE

RESPONDENT

CORAM: GROSSKOPF, NESTADT et EKSTEEN JJA

DATE HEARD: 8 MAY 1989

DATE DELIVERED: 25 MAY 1989

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J U D G M E N T

NESTADT, JA:

On the evening of Sunday, 28 December 1986, Mr and Mrs van der Merwe were in their house on a farm in the district of Dannhauser, Natal. They, aged 67 and 62 respectively, lived

there alone. Shortly after 8 pm, they were brutally attacked with a heavy, blunt instrument and robbed of a large quantity of their possessions. Amongst the injuries sustained by Mr van der Merwe were three lacerations of the head. The most serious was one to the right parieto-occipital region thereof. It was 15 cm in length. Underlying the wound was a compound, depressed fracture and indeed fragmentation of the skull. The brain itself in this area was severely and extensively damaged. Mr van der Merwe died on 16 January 1987 as a result of complications following on his injuries. Mrs van der Merwe was seriously injured. She suffered inter alia a severe head injury in the form of a 12 cm long linear laceration of the left fronto-temporal region. Accompanying it was a large depressed fracture of the skull together with a laceration of the brain itself. Mrs van der Merwe survived but she has been rendered permanently incapacitated. Her ability to speak or to read or

write has been severely impaired. The property stolen included deceased's motor vehicle (a small, open van or "bakkie", which had been parked in front of the house), about R500 in cash (though this was not referred to in the indictment), a loud-speaker, some gold necklaces or chains, a portable radio, a microphone with connecting wires, a tape-player, an old R1 note, a set of cutlery, a ten shilling note and a number of tape cassettes. Within days<sup>1</sup> the vehicle and, save for the cash, the items referred to were recovered by the police who on 31 December 1986 arrested first appellant and on 6 January 1987 second appellant.

These events led to the trial of appellants before THIRION J and assessors in the Natal Provincial Division on three charges, viz, (i) murder (of Mr van der Merwe); (ii) attempted murder (of Mrs van der Merwe) and (iii) robbery with aggravating circumstances. The State case was that appellants were the perpetrators of the attacks and the persons who stole the goods. Appellants denied this. Their defence was in the nature of an

alibi. Their evidence to this effect was, however, rejected and they were found guilty as charged. In the case of first appellant this decision was not unanimous. The trial judge, for reasons which are dealt with later, entertained "some slight doubt" as to his guilt. However, the assessors did not share this view. In respect of the conviction of murder no extenuating circumstances were found. Appellants were, accordingly, each sentenced to death on this count. The death penalty was also imposed for the robbery. They were each sentenced to five years' imprisonment in respect of the conviction of attempted murder.

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This appeal, with the leave of the trial judge, is by first appellant against his convictions and death sentences and by second appellant against his death sentences (only).

I commence with the appeal by first appellant against his convictions. The State did not rely on the evidence of any eye-witness to the occurrence. Because of her disability, Mrs

van der Merwe was not able to testify at the trial. Nor were any identifiable fingerprints found in or around the house. What the prosecution rested on was, in summary, the following circumstantial evidence:

- (i) First appellant had, as recently as July 1986, from time to time worked on deceased's farm. He knew deceased. He had frequently been conveyed in and was therefore familiar with deceased's vehicle.
- (ii) He and second appellant were well-acquainted and friendly with each other. Indeed, they had grown up together.
- (iii) At about 12 o' clock on the night in question they were in each others company. They arrived together at a shebeen situate about 20 kilometers from the Van der Merwe farm. They had driven there in deceased's vehicle at the back of which at least some of the stolen goods were loaded. Inside the shebeen they and

a certain Dumisani Dube drank liquor which second appellant purchased and paid for.

- (iv) The three of them, ie appellants and Dube, then, in the early hours of Monday morning (29 December), proceeded in the vehicle, which second appellant drove, to his mother's nearby house. They entered it. In first appellant's presence, second appellant gave his mother, Irene Phakati, the set of cutlery. It had been off-loaded from the vehicle.

- (v) After a short stay there, they left and drove to the house of Beatrice Sibiya. She was the mother of second appellant's girlfriend. They remained there until about mid-afternoon (still on the Monday). During this period, three significant incidents took place. Firstly, first appellant went out to the vehicle and returned with some of the necklaces which he gave to the young children of the house. Secondly, he

produced the old R1 note which at his request Sibiya took in exchange for giving him current coinage to the same value. Finally, there was first appellant's reaction to Dube's report to appellants that he had seen the identity document of a white man lying on the floor of the cab of the vehicle. First appellant thereupon demanded that Dube should immediately take the vehicle away and burn it. On second appellant's refusal to accede to this, first appellant stabbed him.

(vi) From Sibiya's place appellants and Dube proceeded in the vehicle to Dannhauser and thence in the direction of appellants' homes. First appellant was now driving. At a certain bus stop along the way Dube alighted. Before he departed first appellant gave him four of the cassettes, the ten shilling note, the microphone and one of the gold chains.

(vii) On the Tuesday (31 December) appellants were still together. At about 8:30 that morning, having abandoned the vehicle, they arrived on foot at the house of Julie Mdluli. She was a friend of first appellant. He gave her the loudspeaker and radio. She was to keep them for him or them. He told her that he would come and fetch them later. He explained that he had used the two instruments to celebrate Christmas.

(viii) Before they parted later that day, second appellant gave first appellant the tape-player together with one of the cassettes.

In addition to what has been stated, there was other evidence implicating second appellant in the commission of the crimes. Since, however, his convictions are not in issue, it is unnecessary to particularise it. But I must briefly refer to second appellant's evidence and, of course, that of first appellant, in explanation of what amounted to a strong prima



facie case against them. Second appellant testified that on the evening of 28 December the vehicle had been pledged with him by an unknown gambler to whom he had lent R500. He had purchased the other articles from the same person for R150. As I have indicated, this evidence was rejected and second appellant was found to have participated in the crimes.

First appellant's explanation was the following. On the night in question he met his co-accused at a stage when second appellant was already in possession of the vehicle and goods. This occurred at a shebeen. From there the two of them proceeded to a second shebeen where they met up with Dube. First appellant's further movements over the next few days were, basically, as described. Second appellant had invited him to go along which he agreed to do because "it was during the Christmas festival so I thought that was the way one could enjoy oneself". Second appellant had told him that his employer had given him the vehicle and the goods. He believed this. It was true that he

had exchanged the R1 note with Sibiya. Second appellant had given it to him. The tape-player and cassette had been left with him so that he could repair them for second appellant. He had merely been carrying the loudspeaker and radio for second appellant and, on his instructions, left them with Julie Mdluli. He had never told her that he had used them as she alleged or at all. He did not dispose of or even possess any of the other goods. He denied the incident concerning his alleged suggestion that the vehicle be burnt. Though he knew the Van der Merwe vehicle well, he at no stage realised that it was the one that he was travelling in and which he admittedly did drive.

It will be seen that in numerous respects first appellant's evidence conflicted with that of the State. A number of credibility issues therefore arose. They were, in the main, and to the extent set out above as constituting the case made out against first appellant, resolved in favour of the State. Before us, these findings were, for good reason, not

assailed. It was furthermore conceded, again I think correctly, that first appellant was guilty of theft. He must have known that the articles which he appropriated had been stolen during the robbery. This is what the trial court (unanimously) found.

The judgment of THIRION J in this regard reads:

"Accused No 1 would never have been so gullible as to believe that Accused No 2's employer would have given him a vehicle for his private use...

The goods which Accused No 2 had in his possession were not of a kind which one would expect an employer to give to a deserving employee...

Accused No 1 must have known Accused No 2 as an indigent labourer. Accused No 2 made no attempt to hide the fact that he had plenty of cash on him. He bought liquor on several occasions with R20 notes. There is no reason to believe that he would have concealed his sudden affluence from Accused No 1. Therefore if Accused No 1 was innocent of the robbery, he would have realised, if not on the Sunday then at least on the Monday, that Accused No 2 could not have come by the vehicle and the other goods and the money by honest means."

The crucial question for determination, therefore, is whether the finding of the majority of the court that the evidence justified the further conclusion that first appellant

had actually participated in the robbery was correct. On behalf of first appellant a negative answer was contended for though, I would add, it was not in dispute that if the argument was rejected, first appellant was guilty of murder and attempted murder as well. As the trial court found, the manner of execution of the robbery and the nature of the attacks were such that both first appellant (if he was one of the robbers) and second appellant must be taken to have made common cause with each other to commit the crimes and, in so acting, to have had the necessary mens rea, whether in the form of dolus directus or dolus eventualis.

What has to be considered is (i) whether the inference that first appellant was one of the robbers is consistent with all the proved facts and (ii) whether those facts exclude every reasonable inference save that one (R vs Blom 1939 AD 188 at 202 - 3). A number of matters arise in relation to (i). Firstly, that there was no acceptable evidence that any blood was

found on first appellant's clothing. Having regard to the nature of deceased's and Mrs van der Merwe's injuries and the blood found in and around their house, this might have been expected. Secondly, only a relatively small proportion of the stolen goods was recovered. For the rest, there was no direct evidence that first (or second) appellant was ever in possession thereof. Thirdly, so it would seem, it was second appellant who played the leading role in his and first appellant's post-crime activities. He seems to have decided where they should go. In the main he used the vehicle. And it was he who was the one who apparently had all the money. As I have said, the liquor purchased at the shebeen, where Dube was, was paid for by second appellant. It was this consideration that gave rise to the trial judge's doubt as to whether first appellant participated in the robbery.

I do not think that any of these factors are truly inconsistent with first appellant's guilt. If he took part in

the actual attack, he could have subsequently changed his clothing and thus got rid of any incriminating evidence. There was ample opportunity for the other items of stolen property to have been disposed of by appellants. Or (whilst the vehicle was left unattended, especially at the shebeens) they could have been removed or (during their travels) lost. Finally, as regards second appellant's predominance and, in particular, the fact that he was the one who was spending the money, the evidence that first appellant was intoxicated must be borne in mind. This would explain the more submissive role that he at times played. In any event, it may well be that first appellant was content to allow second appellant, pending them later sharing the money, to keep (and spend) it. Much of what I have said is, of course, speculative but I indulge in the exercise in an attempt to show, without the use of too fertile an imagination, that the factors under consideration do not detract from the inference that first appellant participated in the commission of the crimes.

This brings me to the second stage of the enquiry, viz., whether the inference of guilt is the only reasonable one. It is clear that first appellant was in possession (and indeed disposed) of some of the stolen goods. There were the necklaces which he gave to the children at Sibiya's place; the R1 note to Beatrice herself; and the four items to Dube. Did his possession of these articles originate merely from second appellant's gratuitous willingness to share the booty acquired by him? Or had first appellant actively assisted second appellant in obtaining them and thus "earned" them? It seems to me that the latter is inherently the more probable state of affairs.

There are, moreover, positive indications of this. According to Irene Phakati (who was categorised as "a truthful witness whose evidence we accept without hesitation"), first appellant said that they would later come and fetch the cutlery. The well-reasoned finding of the trial court was that the robbery was (probably) committed by more than one person. This means that

second appellant had an accomplice. First appellant was not only a long-standing friend of second appellant but, having worked on the farm, would, in the words of THIRION J, "have been acquainted with the habits of the victims". He would know the lie of the land. Second appellant, who knew that first appellant had worked on the farm, would surely have been aware of this. First appellant would be his natural choice as a partner in crime. Not more than (at the most) a few hours later, first appellant was in his company. And over the following two or more days they continued to associate closely with each other, travel around in the vehicle and deal with the goods. If all this was a coincidence (as on first appellant's version it was) it was, in the circumstances, a most singular one. It is rather more likely that second appellant's confederate was first appellant and that they had been together from an earlier point in time, ie during the robbery. This conclusion gains support from first appellant's earlier referred to response to Dube's disclosure at



Sibiya's place that he had seen the identity book of a white man in the vehicle. Dube described what happened as follows:

"I then decided to go out to where the vehicle was parked and when I got into the vehicle I saw an identity book with a photograph of a White man on the floor of the vehicle...

And thereafter I closed the door of the vehicle and went back towards the house. And before I entered the house Accused No. 1 said to Accused No. 2 that he, Accused No. 2 had to give me the keys of the vehicle so that I could drive the vehicle to where I had to burn it.

Yes? --- But Accused No. 2 refused to give me the keys so as to have the vehicle burnt.

Yes? --- Accused No. 2 then said that the vehicle will have to be left where it was taken from. Accused No. 1 then produced a knife and... stabbed... him."

This account, which was accepted by the trial court, shows, I think, a degree of anxiety on first appellant's part as well as an independence of behaviour which is more consistent with an actual involvement in the crimes than with mere knowledge of their commission or that the goods were stolen. As THIRION J put it:

"Accused No 1's proposal that the vehicle should be burnt was an immediate reaction verging on panic and

manifesting at the same time a guilty state of mind resulting from his knowledge that the vehicle had been associated in a serious crime and resulting from the realisation that Dumisani was now asking awkward questions about that very matter."

First appellant, by falsely denying Dube's account of what happened, failed to explain why he wanted the vehicle burnt. Nor did he advance the version that, though guilty of theft, he nevertheless did not participate in the robbery. Instead, he untruthfully denied having disposed of the articles referred to or that he knew they were stolen. And I agree with Mr Farrell, in his able argument for the State, that if first appellant had himself not been involved in the crimes, there would have been no need for him to attempt to justify his possession of the loudspeaker and radio to Julie Mdluli.

The cumulative effect of all these considerations convinces me that on the night in question it was first appellant who, with second appellant, entered deceased's house. It follows that he was correctly found guilty as charged.

This brings me to the issue of extenuation. The submission on behalf of first appellant that extenuating circumstances should have been found to have been established was based on the proposition that he (who was aged 24 at the time) was influenced by second appellant. The leading role, as evidenced by the factors referred to earlier, which it was said second appellant played in the events, was relied on in this regard. On behalf of second appellant on the other hand, it was argued, on the strength mainly of the incident concerning the burning of the vehicle and the fact that first appellant was the elder of the two, that he (second appellant) was the minor participant. Further factors which allegedly reduced his moral blameworthiness were his relative lack of education (second appellant only passed std 4), his limited sophistication and his youth per se (he was then 23). It was also contended that the murder was not premeditated and that he had acted with dolus eventualis only.

Substantially the same argument was presented to the trial court. There is no merit in it and it was correctly rejected. I agree with THIRION J that this was not a case where any sophistication was required for appellants to realise the enormity of their crimes. I agree, too, that it was not established that either appellant acted under the dominance or influence of the other. Neither said so. And the circumstances relied on by each were, in my view, wholly insufficient to show this. There is no reason to think that they were anything but equal partners in the crimes. They can hardly be described as youths. With every justification, it was found that the attack had been planned as a robbery and that appellants must have foreseen that there would be resistance which would have to be overcome. In the circumstances, it is improbable that the death of the Van der Merwes was not premeditated and, in the case of deceased, not achieved with dolus directus. But, in any event, I do not think that, taking

into account the motive, nature and place of the attack, these factors constituted extenuating circumstances in this case.

The remaining matter concerns the propriety of the death sentence imposed in respect of the robbery. The learned trial judge's reasons for exercising his discretion in this manner were the following:

"You committed a very serious offence by robbing these two elderly persons. You invaded the safety of their home to do so and you launched a callous and vicious and cowardly assault on an unsuspecting couple. After having inflicted fearful wounds on them and while they were lying there seriously injured with extensive skull fractures, you ransacked the house and made off with the loot. This was a calculated robbery committed for gain.

The only features that count in your favour are that you have no relevant previous convictions and that you are fairly young. But you are not so young that that by itself should be the deciding factor.

Attacks of this kind are of all too common occurrence in this province. In the circumstances I have decided to impose upon you the ultimate penalty in regard to count 3 as well."

I can find no fault with this approach. It cannot be said that the death sentence was not one which could not reasonably have

been imposed. This is the test (S vs Pieters 1987(3) S A 717(A)). Nor were there any misdirections. Obviously, consideration must have been given to the alternative imposition of a long period of imprisonment. Whilst the violence used was taken into account, the death of deceased was clearly not a feature which in any way weighed with the trial judge in imposing the death sentence for the robbery (cf S vs S 1987(2) S A 307(A) at 312 F and cases there cited).

The appeals of both appellants are dismissed.

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NESTADT, JA

GROSSKOPF, JA )  
                  ) CONCUR  
EKSTEEN, JA     )