

85/89

Saak No. 111/88

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IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

NCAMILE NOMAKHLALA First Appellant

SANDILE ("BUNNY") JACOBS Second Appellant

and

THE STATE Respondent.

Coram: CORBETT CJ HOEXTER et F H GROSSKOPF JJA

Heard:

19 May 1989.

Delivered:

27 July 1989

J U D G M E N T

F H GROSSKOPF JA:

The two appellants were both convicted of murder in the South Eastern Cape Local Division of the Supreme Court held at Port Alfred. The court a quo found extenuating circumstances in respect of both appellants and sentenced them each to 20 years imprisonment. The appellants were given leave to appeal to this court against their convictions and against the sentences which were imposed on them.

It is common cause that the incinerated remains of the deceased were found in the boot of his burnt-out motor car, but it could not be established whether the deceased had been dead at the time when his body was set alight. The police located the burnt-out wreck on 15 July 1986 on an open area of veld in the black township of Soweto near Port Elizabeth. The deceased, a 73 year old white male, apparently lost his way earlier that day and eventually ended up in the Veeplaas section of the black township where he met

his untimely death.

Both appellants made statements containing certain admissions; the first appellant to a police officer and the second appellant to a magistrate. The only evidence to connect the two appellants with the commission of the crime is that which is contained in their respective statements. A trial-within-a-trial was held and the court a quo ruled that these statements were admissible in evidence. It was not argued before us that such ruling had been wrongly made. It should, however, be pointed out that the trial court did not reject as manifestly untrue any portion of the statements, with the result that these statements must be viewed in their entirety and without disregarding any portion which may be in favour of the party who made the statement. (See R v Valachia and Another 1945 AD 826 at 835; S v Felix and Another 1980(4) SA 604 (A), at 609H-610A; S v Yelani 1989(2) SA 43(A), at 49H-50F). I shall later return to some of the more exculpatory aspects of these statements.

The appellants in their respective statements

related how the deceased was killed. Each appellant gave his own version of the events which led up to the death of the deceased and described the role which he personally played in those events.

The first appellant's statement reads as follows:

"Ek was by Nkawini - winkel om te gaan koop. Toe kom GOTSI en MADJIDA en Madjida sê hy soek n motorbestuurder en sê ek kan mos bestuur, ek sê toe ja.

Ek loop toe saam met hulle na n kar toe. Die kar was by n shack-huis by n mechanic in Veeplaas. Toe ons by die kar kom sien ek SKARI, NTSIKELELO en SANDILE en n ou wit man agter in die kar. Skari het links gesit, toe die ou man, toe Ntsikelelo en toe Sandile. Skari en Ntsikelelo het die ou man vasgehou. Die ou man het gesoebat hulle moet hom los. Ek klim toe agter die wiel in, Gotsi en Madjida klim toe ook voor in en Gotsi sê toe ek moet ry, reguit met die teerpad.

Hy beduie my toe met n gang tot by die rugbyveld. Ons hou toe op die veld stil. Skaji, Ntsikelelo en Sandile klim toe met die die ou man uit en slaan hom met die vuiste.

Ek, Gotsi en Madjida klim toe ook uit. Gotsi haal toe n mes uit sy sak en gee die mes vir my en sê ek moet die ou man steek. Ek sê toe, nee. Sandile gryp toe die mes by my en sê, O, jy's n banggat. Hy steek toe die oubaas in die nek en in die sy.

Gotsi sê toe, dié van ons wat bang is moet loop. Ek gaan staan toe h entjie weg. Ek sien toe die ou man lê op die grond en skree, ek kan die woord, 'eina' onthou. Gotsi haal toe h vuurwapen uit sy klere en hou dit met twee hande vas. Hy skiet toe die ou man een skoot. Ek skrik toe en loop weg. Ek het toe op h afstand gestaan en kyk. Ek sien toe Skari maak die bagasiebak van die kar oop, Ntsikelelo, Gotsi, Madjida, Sandile sit toe die ou man in die bagasiebak. Die ou man het toe nog geskree. Sandile het h bottel (Ship Sherry) 3/4 met petrol gehad.

Toe ek weer sien toe brand die kar en hulle hardloop. Ek is toe na my huis toe. Later het die weermag en Polisie daar opgedaag.

Madjida en Gotsi het nou Maandagaand by my geslaap. Ek vra toe hoekom hulle nie by hulle eie plek slaap nie waarop hulle toe sê hulle is bang vir die Polisie. Ek sê toe my Ma gaan nie tevrede wees nie - hulle is toe later die nag weg.

Ek wil nie vir hulle ken nie, hulle is Comrades, ek is nie een nie, net by die skool het ek h membership gehad van PEYCO. Ek het dit ook gelos."

The second appellant's statement reads as follows:

"Die dag het h ander man my geroep, sy naam is Mayita. Hy was saam met ander gewees. Toe sê hulle ons moet h motorkar in die middel van h pad laat staan. Ek het geweier en toe gaan sit hulle die motorkar in die middel van die pad. Toe kom daar h motorkar wat bestuur is deur h blanke man. Hulle het hom gestop, Die 'oubaas' vra vir hulle hoe die pad na Blouwaterbaai gaan. Die oubaas het

een skoot in die lug geskiet.

Majita, Rotsi, Ski en 'n ander een wie se naam ek nie ken nie, het na die oubaas gegaan en Majita het die motorkar se deur oopgemaak en die oubaas bespring en hom uit die motorkar gehaal. Toe sit hulle hom op die agterste sitplek van die motor. Ntsikilelo, Rotsi en Ski en die een wat se naam ek nie ken nie het die oubaas tussen hulle laat sit op die agtersitplek - twee was aan die linkerkant en twee aan die regterkant van die oubaas. Majita het voor in die motor aan die passasierskant gaan sit. Mcamile het toe bestuur. Ek het toe buitekant aan die motor se kattedak vasgehou. Toe ry die motor in die veld in. Toe ons daar kom was die deure oopgemaak en toe vat ek die oubaas aan die hand - toe was hy buite gewees - toe staan hy daar. Skara het hom toe met 'n klip gegooi en dit het die oubaas getref. Rotsi het die oubaas se vuurwapen en geld gevat. Majita het hom gesteeek. Ntsikilelo, Rotsi, Ski, Majita en die een wat se naam ek nie ken nie, het die oubaas gevat en hom in die kattedak gesit - toe brand hulle die motorkar. Toe gaan ek weg. Dit is al."

The first appellant closed his case without testifying at all, while the second appellant gave evidence only during the trial-within-a-trial, but not on the merits. The trial court sought to draw an adverse inference from the fact that the appellants failed to testify. In doing so the

trial court placed reliance on the judgment of SCHREINER JA in the case of R v Ismail 1952(1) SA 204 (A), at 210. It should, however, be pointed out that the learned judge in Ismail's-case also made the following observation at 210 A:

"On the other hand it is right to bear in mind that there is no obligation upon the accused to give evidence in any sense except that if he does not do so he takes a risk."

In the present case the State produced no evidence to contradict what the appellants had said in their statements. On their own statements the case against them was tenuous. In those circumstances it cannot be said that the appellants exposed themselves to any appreciable risk in deciding not to give evidence.

It need hardly be mentioned that the statement of each appellant is admissible only against the appellant who made that statement.

Certain adverse inferences may be drawn from the appellants' statements, but it also appears from these statements that the appellants participated only to a very

limited extent in the events leading up to the death of the deceased. Another favourable aspect which emerges from the statements is that the two appellants were not the prime movers behind the initial detention or the ultimate killing of the deceased. No doubt there were members of the group who shared a common purpose with the actual perpetrators to kill the deceased, but the limited participation on the part of the two appellants, and the minor role which they played, tend to refute the argument that they were parties to such common purpose.

The trial court came to the conclusion, however, that these statements showed that the two appellants actively associated themselves with the actual perpetrators in furtherance of the common purpose. The trial court further found that each appellant also had the necessary legal intention, in the form of dolus eventualis, to kill the deceased.

I shall first deal with the case of the first

appellant. The trial court found that at the time when he drove the car to the open area the first appellant actually foresaw the possibility that the deceased might be killed. The trial court based its finding on the cumulative effect of the following facts:

- "a) When he arrived at the car he found the deceased in the back of the car between and being held by other Black men.
- b) The deceased was begging them to release him.
- c) He, the accused was requested to drive the car and directed to an open place described as a rugby field.
- d) The state of unrest that existed during that period of time.
- e) Also the fact that the murder was in fact actually committed.
- f) He, the accused gave no evidence and did not therefore rebut the strong inference to be drawn from the aforementioned facts."

The trial court's conclusion that the first appellant subjectively foresaw the possibility that the deceased might be killed, is in my view not the only inference which can reasonably be drawn from the known facts.

It is not beyond reasonable doubt that the first appellant might, for instance, have thought that the deceased's assailants intended merely to dump him and then take his motor car. It is true that the first appellant did not say so, but the State must, in the final analysis, prove that the first appellant had the requisite foresight.

The State must not only prove subjective foresight, but it must also show that the first appellant persisted in the execution of a plan regardless of the consequences. (See S v Madlala 1969(2) SA 637(A), at 640 H; S v Shaik and Others, 1983(4) SA 57 (A), at 62 A-B). According to the first appellant's statement he did not persist in rendering assistance. Once the true intention of the actual perpetrators manifested itself to the first appellant, he immediately dissociated himself from any further active participation. Despite an instruction to stab the deceased with a knife which was handed to him, the first appellant refused to do so and immediately withdrew from the scene of the crime.

The trial court considered this aspect of the case, but found as a fact that this was not an act of dissociation on the part of the first appellant, "but rather that he was squeamish and did not want to partake in the actual physical assault". In my respectful view there was no justification for such a finding. It also appears that the trial court made a factual finding which was indeed based on speculation as to the true motives of the first appellant.

Counsel appearing for the State submitted that what the first appellant had done in the circumstances of the present case did not amount to a proper dissociation. Counsel suggested that the first appellant should at least have tried to dissuade his alleged companions or to protect the deceased in some way. This argument loses sight of the fact that the first appellant said that he was not a comrade. In the light of the circumstances which prevailed in the townships generally at the time it might not have been very prudent for the first appellant to have done

what counsel now suggests.

Counsel for the State also relied on the judgment in the case of S v Ndebu and Another 1986(2) SA 133 (ZSC) in support of his contention that the first appellant failed to dissociate himself from the crime. In my view Ndebu's-case should be distinguished from the present case on the facts. The socius criminis in Ndebu's-case initially participated in the commission of the crime with a full appreciation that death might ensue, whereas the first appellant in the present case certainly did not do so. Moreover, the first appellant in the present case did not merely run away from the scene of the crime, as was done by the accused in Ndebu's-case. The first appellant actually refused to comply with an instruction to stab the deceased when he realised what the assailants had in mind for the deceased. Thereafter the first appellant withdrew from the scene of the crime.

In my judgment the first appellant, by refusing to stab the deceased, clearly indicated that he wanted no part

in the attack on the deceased. The State consequently failed to prove that the first appellant had the necessary intention to kill, and his appeal against his conviction and sentence must accordingly be upheld.

I shall next deal with the case of the second appellant. He was a youngster of between 17 and 18 years at the time of the commission of the crime. In his case the trial court found that he knew that the deceased would be killed, or at least foresaw the possibility of the deceased being killed. The trial court based its finding on the cumulative effect of the following facts:

- " a) He was present when the car of the deceased was stopped.
- b) He was aware that the deceased fired a shot apparently to scare away the group.
- c) He was present when the deceased was dragged out of the car and forced onto the back seat.
- d) He accompanied the car holding onto the back, that is the boot of the car, into the veld.
- e) The state of unrest that existed during that period of time.
- f) The fact that he gave no evidence to

rebut the inference to be drawn from the
aforementioned facts.

- g) The fact that the deceased was in fact
murdered where the car was stopped on the
rugby field."

The trial court further found that the second
appellant, by taking the deceased's hand, actively associated
himself with the conduct of the actual perpetrators who had
formed the common purpose to kill the deceased.

I should point out that there are also other facts
which emerge from the second appellant's statement; facts
which are more favourable to the second appellant and which
ought to be considered together with those facts on which the
learned trial judge relied. It appears from the second
appellant's statement that he actually refused to assist in
the erection of a road block which was intended to obstruct
the road along which the deceased was to travel. The second
appellant was present on the scene when the deceased's car
was later stopped and when the deceased was dragged from the
car, yet the second appellant played no part at all in

overpowering the deceased. The second appellant was no more than a mere spectator at that stage. It is not unlikely, therefore, that when this youngster jumped on to the boot of the car he did so out of sheer curiosity, and without any aggressive intent.

The vehicle was driven for a short distance to the open area and then brought to a standstill. The doors of the car were opened and the deceased was taken out of the car. At some stage after the car had stopped, but before the serious attack on the deceased had commenced, the second appellant took the deceased by the hand. It is this single act on the part of the second appellant which led the trial court to hold that the second appellant actively associated himself with the acts of the assailants who eventually killed the deceased.

It was submitted by counsel for the State that the second appellant's act of holding the deceased's hand should be seen as an act of violent removal from the car and

therefore as an act of aggression. The second appellant's statement is not very helpful in this regard. On the probabilities, however, one would not have expected the second appellant suddenly to have assumed the role of an aggressor, or to have taken a leading part in the events.

It also seems improbable that the second appellant would have ventured to pull the deceased out of the car where he was sitting at the back between four assailants, two on each side, or that the second appellant would have succeeded in doing so. It appears to be more probable that the second appellant took the deceased by the hand at the stage when the deceased had already been removed from the car.

It is difficult to envisage what the second appellant had in mind when he took the deceased by the hand, or what his possible motives could have been. Mr. Buchanan, who appeared on behalf of the appellants, submitted that the holding of the deceased's hand in those circumstances should be seen as an act of compassion. That seems to me to be

highly improbable. On the other hand, it also appears to be unlikely, as I have mentioned before, that the second appellant would suddenly have emerged as one of the leaders, and that he would have started to attack the deceased even before anyone else had done so. If the second appellant had indeed suddenly decided to abandon his role as a mere spectator one would also have expected the second appellant to have participated in the more serious attack on the deceased which followed immediately thereafter. Yet there is nothing to show that the second appellant had done anything more than to hold the deceased's hand for a while.

I have serious doubts as to whether that single act on the part of the second appellant, viz., the holding of the deceased's hand in the particular circumstances of the case, can be regarded as an act of aggression. But even if it were to be considered as such, I still do not think that that act should be viewed in such a sinister light as to justify the conclusion that the second appellant, from that

moment onwards, became an active participant making common cause with those assailants who had the common purpose to kill the deceased. If that had been the case, as I have pointed out before, one would have expected the second appellant to have displayed further aggression once the deceased was attacked with stones and a knife.

There is a reasonable doubt in my mind as to whether the second appellant actively associated himself with those aggressors who had formed the common intention to kill the deceased. In my judgment it cannot be held, without pushing the bounds of common purpose too far, that the State has proved beyond reasonable doubt that the second appellant became a party to the common purpose to kill the deceased. I am accordingly of the view that the second appellant's appeal against his conviction and sentence ought to be upheld.

In the result the appeals of both the appellants
are upheld and their convictions and sentences are set aside.

F H GROSSKOPF JA

CORBETT CJ

HOEXTER JA Concur.