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Case no 578/88
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IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

Between:

ZACHARIA TSELENG

Appellant

and

THE STATE

Respondent

CORAM: HOEXTER, VIVIER et STEYN JJA.

Heard: 17 August 1989

Delivered: 17 August 1989.

J U D G M E N T

VIVIER JA:

The appellant, to whom I shall refer as accused
no 2, and one Shimane Oupa Ndhlovu, to whom I shall
refer as accused no 1, were convicted by O'Donovan

AJ and two assessors in the Witwatersrand Local Division on one count of murder, one count of attempted murder and one count of conspiring to commit a robbery.

Accused no 1 was also found guilty of possessing a fire-arm and ammunition without a licence. In respect of the murder charge no extenuating circumstances were found either in the case of accused no 1 or in the case of accused no 2 and they were accordingly both sentenced to death. For the conspiracy to rob, accused no 1 was sentenced to 9 years' imprisonment and accused no 2 to 7 years' imprisonment. On the charge of attempted murder each accused was sentenced to 7 years' imprisonment. Accused no 1 was sentenced to 2 years' imprisonment for the illegal possession of the fire-arm and ammunition. With the leave of this Court accused no 2 appeals against the finding that there were no extenuating circumstances

and the consequent sentence of death imposed on him.

There is no appeal by accused no 1.

The facts of the case, as found by the trial Court, are relatively simple and can be stated very briefly. A retired couple, Mr and Mrs Gobey, lived on the farm Hartebeesfontein of Mr Lourens Petrus Barnard in the Hekpoort district. Mrs Gobey and Mrs Barnard were sisters. The Gobey's occupied a rondavel in an isolated spot about three kilometres from the main homestead. Mr Gobey was 65 and his wife 62 years old. During the morning of 24 April 1987 the two accused proceeded from Brits to the Gobey's house with the common purpose to rob them of a safe. Accused no 1 had broken into the Gobey's house a week before and had unsuccessfully attempted to remove the safe from the house. When they left Brits accused no 1 was armed.

with a pistol. They went up to the house and hid outside the back door until Mrs Gobey appeared at the door.

Accused no 1 rushed at her and she turned back into the house, followed by accused no 1. From near point-blank range he fired at both Mr and Mrs Gobey. A bullet hit her in the face and penetrated the spinal cord at the back of her head, killing her instantly.

Another bullet struck Mr Gobey in the cheek. He recovered from his injury but later died from other causes.

After the shots were fired both accused immediately ran away. Nothing was taken from the house. Both were arrested a few days later.

The evidence given by accused no 2 at the trial was that accused no 1 initially only asked him to accompany him to the Gobeys' house because he wanted to collect some money which was owing to him. Accused

no 1 had previously worked on the farm. When they were a few hundred metres away from the Gobeys' house accused no 1, for the first time, told him that his real purpose was to rob the Gobeys of their safe.

Accused no 2 said that accused no 1 at this stage produced a fire-arm which he proceeded to load. From that moment onwards he wanted to turn back but he was forced to accompany accused no 1 who threatened him with the fire-arm. The trial Court rejected the evidence of accused no 2 and held that it was clearly established that the two accused from the outset had embarked upon a joint venture with a common purpose to commit a robbery and that the shots were fired in the execution of that common purpose. The trial Court found that accused no 2 subjectively foresaw the possibility that one of their victims might be killed in the course

of the robbery but that he nevertheless persisted in his actions. The trial Court said in its judgment that even if it was accepted that accused no 2 first became aware of the fact that accused no 1 possessed a loaded firearm when they were nearing the Gobeys' house, the subsequent conduct of accused no 2 showed that he was a full participant in the contemplated robbery. He had followed accused no 1 right up to the door of the Gobeys' house. In fact, in his statement to a magistrate, accused no 2 had said that he entered the house.

It was submitted on behalf of accused no 2 that the role which he played in the commission of the murder was insignificant. I do not agree. His assistance was essential to the success of the venture and it is clear that accused no 1 would not have gone

to the Gobeys' house if accused no 2 had not agreed to help him remove the safe. It was a big, heavy object and it had to be removed in broad daylight. There was no reason to think that the Gobeys would not be at home or that they would not resist the attempt to remove the safe. Their resistance would have to be overcome in such a way as to facilitate the slow and laborious task of removing the safe. I cannot, therefore, agree with counsel for accused no 2 that death was foreseen by accused no 2 only as a slight possibility. The absence of direct intention was considered by the trial Court not to be an extenuating factor in all the circumstances of this case. The trial Court did not misdirect itself in arriving at its finding, and there is, in my view, no basis for interfering with that finding.

The appeal is dismissed.

W. VIVIER JA.

HOEXTER JA)
STEYN JA) Concur.