

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

MXOLISI SKOTI

FIRST APPELLANT

GXUNYEVU MXOLISI SOKOYI

SECOND APPELLANT

SIPHIWO MPAMBANI

THIRD APPELLANT

and

THE STATE

RESPONDENT

CORAM : HEFER, EKSTEEN JJA et NICHOLAS AJA.

HEARD : 22 AUGUST 1989.

DELIVERED : 7 SEPTEMBER 1989.

JUDGMENT BY J J F HEFER JA.

J U D G M E N T

HEFER J A:

HEFER

On the evening of 16 March 1986 the appellants entered the house of Mr Otto Freitag situated behind his shop on the road to Kei Mouth in the Eastern Cape. First appellant was armed, to the knowledge of second and third appellants, with a loaded revolver. Their design was to obtain money. When eventually they left the house two men lay dead and another wounded. Mr Freitag and a neighbour, Mr Roux, were shot to death and Mr Promnitz, a relative of Mr Freitag, was wounded. Mrs Roux was fortunate enough not to be hit by a shot fired at her at point-blank range. The appellants fled in Mr Roux's truck. Later that night they ran into a police patrol on the old coastal road at a spot about fifty kilometres from the Freitag

residence. First appellant was arrested on the spot and second appellant shortly afterwards. Third appellant was detained about two years later.

These are the facts that emerged at the appellant's trial in the court below where they appeared before KROON J and assessors on no less than eleven charges. They were convicted of murdering Mr Freitag and Mr Roux (respectively counts 1 and 2 in the indictment), of attempting to murder Mr Promnitz and Mrs Roux (counts 3 and 4 respectively) and of various other offences including robbery, theft, and the unlawful possession of firearms and ammunition. With leave granted partly by KROON J and partly by this court they have now appealed against their convictions on counts 1, 2, 3 and 4 and against the finding that there were no extenuating

circumstances in respect of counts 1 and 2, as a result of which they were all sentenced to death on each of the last mentioned counts.

Argument in this court centred mainly on the trial court's finding (hereinafter referred to as the main finding) that the murders and attempted murders were committed in the execution by the appellants of their common design to rob Mr Freitag and were foreseen by each of them. In order to appreciate the significance of the main finding it is necessary to know that two firearms were used in the shooting; the one was the ,22 revolver which the appellants had when they went to the house, and the other a 9 millimetre pistol belonging to Mr Roux. Mr and Mrs Roux lived on a neighbouring property. On the evening in

question Mrs Roux heard shots at Mr Freitag's house and she and her husband drove there to assist him. Upon their arrival Mr Roux entered the house with his pistol. Several shots were fired and Mr Roux managed to wound first appellant. But he was dispossessed of his weapon and when Mrs Roux entered the house shortly afterwards she found him unconscious on the floor of the diningroom. (He died later of a bullet wound). She looked for but could not find his pistol. Hearing footsteps approaching her she fled into the pantry. It was there that she was shot at. The evidence reveals that this shot was fired with Mr Roux's pistol; and so was the shot which killed Mr Roux himself and another one which struck Mr Freitag in the nose and left eye. When he received this injury

(which would most likely have been fatal by itself) Mr Freitag must have been lying in the passage already dying from a bullet wound through the heart from appellants' pistol. The trial court was satisfied that it was first appellant who had shot Mr Freitag in the heart before Mr Roux's arrival and that it was third appellant who had shot at Mrs Roux, but was unable to ascertain on the available evidence which of the appellants had shot at and killed Mr Roux, which of them had wounded Mr Promnitz, and which of them had fired the shot that struck Mr Freitag in the nose and eye. In view of the main finding all the appellants were convicted on all four counts despite these uncertainties.

Counsel for each of the appellants (separate counsel represented them at the trial and in this court)

accepted that the appellants' common purpose was to rob Mr Freitag and that it was foreseen by each of them that it might be necessary to resort to violence in order to overcome resistance and to make a successful escape after achieving their purpose. Due mainly to first appellant's possession of a loaded firearm and his demonstration of his determination to use it, counsel accepted, moreover, that it was foreseen by each appellant that the achievement of their purpose might entail serious injury to, and even the death of, the occupants of the house and anyone who might come to their assistance. Whilst also accepting that each appellant persisted in the robbery despite this foresight, appellants' counsel nevertheless contested the correctness of the main finding by arguing that it has not

been shown that the shots fired with Mr Roux's pistol after he had been deprived thereof, were fired in the execution of the common purpose or that they were foreseen by those appellants who did not fire them. The evidence does not exclude the possibility, so the argument went, that one of the appellants returned after they had left the house or were on their way out and not only shot at Mrs Roux, but also fired the shots that struck Messrs Roux and Promnitz and the one that struck Mr Freitag in the nose and eye.

There is no substance in this argument. The trial court found Mrs Roux an excellent witness and unreservedly accepted her evidence in every material respect. Since she did not immediately follow him into the house, she obviously did not know what happened there when her husband

entered; she only heard the shots. But from her evidence a clear picture emerges. After the shooting ensuing upon her husband's entry had stopped, she decided to investigate. She entered the house by the front door where she encountered all three appellants but nevertheless forced her way in. What happened then has already been described. The person who had approached her in the diningroom followed her into the pantry. She saw the firearm being aimed at her head and, with remarkable presence of mind, dropped to the floor the moment before the shot was fired. There can be little doubt that this is what saved her and that her assailant (who, as mentioned earlier, the trial court found to have been third appellant) must have been under the impression that he had successfully disposed of her for he

left her alone and shortly afterwards she heard the appellants driving away in her husband's truck.

Mrs Roux could not remember whether one or two shots were fired at her but on her evidence it is clear that no other shots were fired after she had entered the house. The inference is accordingly irresistible that all those who were injured, received their injuries before her entry. That they were shot in the execution of the common purpose is equally plain. At the stage when Mr Roux arrived the appellants were, on their own version, still in the process of looting the house. Mr Freitag had already been shot with the ,22 and Mr Promnitz, who had been injured with a stick, was standing helplessly by. But, although all resistance from the original occupants

of the house had thus been overcome at that stage, and a considerable amount in cash had already been taken from Mr Freitag, Mr Roux's arrival posed a new threat to the completion of the appellants' operation and to their escape. Since, moreover, he started shooting at them, he obviously had to be disposed of and it was in the shooting which followed that he and Mr Promnitz were shot and Mr Freitag received the injury to the nose and eye. Only later, after also attempting to eliminate Mrs Roux, did the appellants escape in the truck belonging to one of their visitors, taking with them the same victim's pistol and Mr Freitag's money.

It is true that one of the appellants - third appellant according to the trial court's finding - did

return to the inner recesses of the house after Mrs Roux had forced her way in and shot at her in the pantry. But this was plainly not an unconnected act even if it were to be assumed in appellants' favour that they were on their way out when Mrs Roux met them at the front door. As has already been pointed out the appellants' operation was interrupted when Mr Roux confronted them and he had hardly been eliminated when his wife entered. Upon noticing the appellants and being unarmed, she took a chair from the verandah and barged her way in, holding the chair in front of her as her only protection. All three the appellants forcibly tried to rid her of the chair; one of them told her not to shout and one or more of them hit her in the face and behind the head. Despite all this opposition

she managed to reach her fallen husband's side when third appellant followed her, obviously realizing that she might prevent their escape at the very least by raising an alarm (which is precisely what she did after the appellants' departure). The shot or shots fired at her formed as much part of the execution of the common purpose as did the shots fired at the others.

On the question of foreseeability little need be said. As mentioned earlier, appellant's counsel accepted that it was foreseeable to, and actually foreseen by, all the appellants that the robbery might entail the death of the occupants of the house and of any one who might come to their assistance. This is in accordance with the evidence and the trial court's findings. That

they might not have foreseen the precise way in which death might occur, or any particular threat to life, is irrelevant to the question of their guilt.

It should also be mentioned that counsel for third appellant challenged the trial court's finding that it was third appellant who followed Mrs Roux to, and shot at her in the pantry. There is, however, no reason whatsoever to question the trial court's finding and, by virtue of the main finding, it is in any event quite unnecessary to know who Mrs Roux's assailant was.

Seeing that the appeal against the convictions cannot succeed the question of extenuating circumstances in respect of counts 1 and 2 remains. This question was carefully considered by the trial court and answered against

the appellants. We have considered it again and have arrived at the same conclusion. The trial court's finding that there were no extenuating circumstances must stand.

The appeal is accordingly dismissed.

J J F HEFER JA.

EKSTEEN JA
NICHOLAS AJA
CONCUR.