

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOSEPH MAJUDGE DLADLA First Appellant

SIPHIWE GWALA Second Appellant

AND

THE STATE Respondent

Coram: GROSSKOPF, J A, GALGUT et CILLIé, A JJ A

Heard: 10 September 1985

Delivered: 23 September 1985

J U D G M E N T

CILLIé, A J A :

At about 20h00 on Friday, 2 March, 1984,

Charles Pendock (the deceased) was leaving his bottle store

in Somme Street,, Howick, with a bag containing the takings of the day when he was accosted by three Black men. One of them was armed with a gun and the other two with a knife and a knobkierie. In a brief encounter he was superficially injured with the knife and the knobkierie, but he was also shot.

Apparently he managed to take out his own revolver, to step back into the shop and to close and bolt the glass door from the inside. Then he collapsed on the floor and died shortly afterwards. His assailants fled without the bag.

Eight months later three men appeared in the Supreme Court, Natal Provincial Division, in connection with this incident. They were charged with murder and attempted robbery with aggravating circumstances. They were the driver of one of the cars used in the commission of the crime

(accused no 1) and two who had, according to the State, taken part in the confrontation of the deceased and were armed with a knife and a knobkierie (accused no 2 and no 3). The assailant who apparently carried the firearm and the driver of a second motorcar were not before the Court. The three accused were acquitted on the murder charge but found guilty of attempted robbery with aggravating circumstances. Accused no 1 was sentenced to imprisonment for 10 years and sentence of death was imposed on accused no 2 and no 3. By leave of this Division the last mentioned two men now appeal against their convictions and sentences; they will be referred to as accused no 2 and no 3.

According to the evidence the robbery was carefully planned to be carried out by five men. Three of them

would confront the deceased when he left the bottle store.

They would overpower him, grab the bag with the money and

rush to a spot close to the bottle store. There a motor car

would be waiting for them with its engine running and a fourth

member of the gang at the steering-wheel. In this car they

would drive to a pre-arranged meeting place in another street

a short distance away where a fifth member (accused no 1)

would be behind the steering-wheel of another car with its

engine running. Apparently they would have changed to a

third car before heading for home. However, after the shot

went off and they could not grab the bag with the money they

became panic-stricken; the two cars did not meet and accused

no 1 drove off alone. The trial Court found as follows:

"The evidence leaves no doubt that there was an attempt
to rob the deceased at the time and place in question

and that in the course thereof the deceased was shot and killed."

Having found that the two crimes charged had been committed, the trial Court had to consider whether the evidence disclosed, beyond reasonable doubt, that the three accused were on the scene and took part in the execution of the plan. Accused no 1 admitted that he was near the scene as the driver of the second car.

On the complicity of the second and third accused the State called to the witness box two young boys who were both about thirteen years old. They were Innocent Mkhusibe and Thulani Sithole. They were in the street outside the bottle store when the deceased was attacked and they saw what took place. Innocent pointed out accused no 2 as one of

the three assailants; he said that no 2 wore a blue dust-coat and a green hat. Thulani pointed out accused no 3 as one of the assailants; he said that no 3 wore a blue dust-coat and a green hat. There was only one assailant with a blue dust-coat and a green hat. The Court a quo considered the conflicting evidence and the reliability of the two witnesses carefully and came to the conclusion that as a witness Thulani was more reliable and impressive than Innocent. His evidence was therefore accepted.

To a police officer, who was also a peace officer, accused no 2 pointed out certain spots relevant to the commission of the crime and made certain remarks about these spots. The trial Court, however, came to the conclusion that the State had failed to discharge the onus which rested

upon it with regard to the admissibility of these statements and the pointing out. This evidence was therefore not considered by the trial Court in deciding upon the guilt of accused no 2.

When testifying in his own defence accused no 1 said that accused no 2 took part in the attack on the deceased. It appears clearly from its judgment that, before accepting this evidence, the trial Court treated accused no 1 as an accomplice, that it considered the implications of the cautionary rule applicable to these cases, that it evaluated the quality and consistency of the first accused's evidence and that it considered the reliability of and the general support for this evidence to be found in the plan and the execution of the robbery. The judgment reads:

"There can be no question of accused no 1 being honestly mistaken in his identification of accused no 2 accused no 1 appeared to the Court to be speaking the truth when he testified that accused no 2 was one of the participants in the robbery."

The trial Court also considered the following aspect of the case. When the first and second accused were asked to plead before the magistrate, a statement made by the first accused was read out in Court. In that statement accused no 1 said that accused no 2 was one of the five men involved in the robbery. After their appearance before the magistrate the two accused were locked up in the same cell. There the two of them discussed the case but accused no 2 never asked accused no 1 why he had falsely implicated him. When he testified at the trial accused no 2 admitted that he had heard the statement of accused no 1, that they

were thereafter present in the same cell, that they discussed the case and that he failed to ask why he had been implicated. The trial Judge said:

"Accused no 2 was obviously untruthful as to why he had not asked accused no 1 why he had implicated him. This untruthfulness was not in regard to a collateral issue but concerned the very vital issue of his own complicity in the robbery. The fact remains that accused no 2 never asked, as one would have expected him to do if he was innocent, why accused no 1 had implicated him."

The trial Judge also pointed out that accused no 1 was in his evidence not trying to minimize his own part in the robbery at the expense of accused no 2. Finally the Court held that generally accused no 2 was an unsatisfactory and unimpressive witness. For these cogent reasons the trial Court, correctly in my view, came to the conclusion that it had been proved beyond reasonable doubt that accused no 2 took part in the robbery.

Accused no 3 gave evidence at the trial. He denied that he was at the scene of the crime or took part in the attempt to rob the deceased. The trial Court found him to be a "very unsatisfactory witness" and "an untruthful one". The boy Thulani, who was believed on this issue, identified him as being one of the three men who assaulted the deceased. Furthermore, the evidence of accused no 1, which was accepted by the trial Court in this respect, puts him on the scene of the crime. It should be mentioned that, as in the case against accused no 2, the first accused did not try to minimize his own part in the robbery at the expense of accused no 3. Accused no 3 also pointed out certain spots and commented on them in the presence of Lieutenant Upton who is a peace officer. The trial Court

found that these actions and statements virtually amounted to a confession by accused no 3. In his evidence in chief he admitted that he had pointed out the spots and made the comments. During cross-examination he changed his ground and said that he had been told, presumably by Lieutenant Upton, that it was "alleged" that certain things had taken place at these spots. It was pointed out to him that this fact had never been put to the Lieutenant in cross-examination and he conceded that he had not told his counsel about it. The following passage from the trial Court's judgment is apposite:

"The Court was satisfied that the State had proved beyond a reasonable doubt that what accused no 3 had told and pointed out to Lieutenant Upton was done freely and voluntarily in his sound and sober senses without having been unduly influenced thereto."

In the result the trial Court found that accused no 3 as well as accused no 2 were at the scene of the crime in pursuance of a preconceived plan and that they took part in the attack on the deceased and the attempt to rob him.

It having been concluded that the three accused were at the scene of the crime, the next step was to decide whether they were guilty of any of the crimes with which they were charged. In respect of the charge of murder the trial Court came to the following important conclusions, namely, that it had not been established who had the firearm and who fired the shot that killed the deceased, and that it had also not been proved that the accused had a common purpose to murder. It was, however, found proved that they were party to a common purpose to commit robbery. The following

question is whether, as the only reasonable inference from all the proved facts it can be found that they foresaw the possibility that the deceased would be killed. The trial Judge mentioned the following facts in his judgment. The deceased was an old man of 77 years and the three assailants were to overpower him. He further said:

"Accused nos 2 and 3 appear to be strongly built and it might well have been thought that between the two or three of them they would have no difficulty in over-powering the deceased. The bottle store is situated on the street and not far from the police station. Firing a shot in those circumstances would have been the last thing they would have intended to achieve their purpose It is not known when this firearm was produced and whether the others beforehand knew about it or at what stage at least they must have known about it. The question is not whether they ought to have foreseen but, as was stated in Madlala's case (S v Madladla, 1969 (2) S A 637 (A) at p 640) whether they in fact foresaw. The question, as already mentioned, is certainly not

free from doubt. The Court is satisfied that they probably foresaw but on the evidence as a whole has some doubt whether, and is hesitant to find that, they in fact foresaw. The accused are entitled to that doubt and may probably be fortunate."

They were found not guilty of murder.

The three accused were, however, correctly found guilty of attempted robbery. The circumstances of the crime also justify the trial Court's finding that the crime was committed with aggravating circumstances. The appeal against their convictions must therefore fail.

The next aspect of the case to which this Court must pay attention on appeal is whether it may and should interfere with the death sentences imposed by the Court a quo. The rules relating to this Court's power to interfere are well known and need not be repeated here.

After finding that accused no 1 had taken a minor part in the attempted robbery the trial Judge said the following in his judgment on sentence:

"Accused nos 2 and 3, on the other hand, played a more active part in the actual robbery itself. They were two of the three who rushed at the door. One of the three had a stick and, as the evidence indicates, a knife was probably used. A shot was fired by one of the three and, as found by the Court, the other two ought to have foreseen that a firearm would be used and, if they did not know it beforehand, ought to have seen it at the scene of the crime at some stage This, as far as they are concerned is one of those extreme cases ... "

About this passage I want to make the following comments. Firstly, the fact that this was, in the opinion of the trial Judge, an "extreme case" does not mean that the extreme penalty should have been imposed. In the case of S v Tshomi en n Ander, 1983 (3) S A 662 (A) the learned

Chief Justice deals with the Afrikaans expression "uiterste geval", points out that it must not be taken literally and says at page 666 E - H:

"Die stelling dat die doodstraf net in uiterste gevalle opgelê kan word, hou dus, in 'n geval soos die onderhawige, niks meer in nie as dat die Verhoorregter nie die doodstraf moet oplê nie tensy hy van oordeel is dat die misdaad van so 'n ernstige aard is dat die doodstraf die gepaste straf sal wees. Hiermee word niks nuuts gesê nie want dit is bekende reg dat die Verhoorregter, wie se taak dit is om te besluit oor wat 'n gepaste straf sal wees, in die lig van die ernstigheid van die misdaad wat gepleeg is en al die ander feite van die betrokke geval moet besluit wat 'n gepaste straf sal wees."

The second matter in the judgment on sentence about which I wish to comment is that there is no evidence that accused no 2 or no 3 possessed and used a firearm in the attack on the deceased. It would appear as if it was

generally accepted at the trial that the third assailant, who was not before the Court, had used the firearm.

Thirdly, the trial Judge said in the judgment on sentence that accused no 2 and no 3 ought to have foreseen that a firearm would be used. This seems to me to be in conflict with two findings in the judgment on the merits of the murder charge. They were that the accused may have thought that they would easily over-power the deceased and that the firing of a shot so near the police station "would have been the last thing they would have intended to achieve their purpose."

Fourthly, there is, in my view, no evidence to justify a suggestion that accused nos 2 and 3 ought to have seen the firearm at the scene of the crime before the

shooting. The probability is that the shot was fired after the other injuries were inflicted with the knife and knob-kierie, and it could very easily have been fired from behind the two accused.

On a consideration of the above I have come to the conclusion not only that there were misdirections in connection with the sentences but also that the sentences were not fitting and appropriate in the light of all the relevant circumstances. These sentences should therefore be set aside. Counsel indicated that there would be no objection if, in case of a finding as indicated above, this Court would then substitute fitting sentences.

In deciding on a proper and appropriate sentence this Court will take into account that this was

a very serious crime. Three armed men attacked the 77 year old owner of a bottle store and tried to rob him. They had dangerous weapons and one of them killed their victim. The seriousness of such a crime is emphasized by the fact that the Legislature has seen fit to give the Courts leave to impose the death penalty in an appropriate instance. As far as accused no 2 and no 3 are concerned they both have previous convictions; those of accused no 2 are not serious and they were committed more than twenty years ago. Accused no 3 has a long list of previous convictions, some for serious offences. His first conviction was in 1965 and the list includes theft, assault, culpable homicide, attempted robbery and two convictions of robbery with aggravating circumstances. On the last occasion he

