

IN THE SUPREME COURT OF SOUTH

(APPELLATE DIVISION)

In the matter between:

KHALELWAYO GUMEDE First Appellant

MFANOZI MTHETHWA Second Appellant

and

THE STATE Respondent

Coram: JOUBERT, VAN HEERDEN et EKSTEEN, JJA

Heard: 22 August 1988

Delivered: 20 September 1988

J U D G M E N T

EKSTEEN, JA:

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The two appellants in this matter were charged before the Circuit Local Division for the Zululand District firstly with the attempted murder of one Totoyi Gwebitshali; secondly with having robbed the said Gwebitshali; thirdly with the murder of one Shane William Stuart Charles Mc Donald; and fourthly with having robbed the said Mc Donald. All these offences were alleged to have taken place near Stanger on 31st May 1986.

Both appellants pleaded not guilty on all counts.

After having heard the evidence the trial Court acquitted both accused on the first count, but convicted them on each of the remaining three counts. On the third count, viz. that of the murder of Shane Mc Donald, the Court found that there were no extenuating circumstances and both appellants were consequently sentenced to death. The trial Judge, however, granted both of them leave to appeal to this Court against the finding of the trial Court that there were no extenuating circumstances to the murder of which they had been convicted.

On the evidence adduced at the trial it was common cause that the appellants were together on the night of 31st May 1986. The evidence shows that the first appellant turned up at the home of the second appellant at about 10 am. that morning and that the two of them sat talking in the shade of a tree nearby. During the course of the conversation the first appellant produced a gun from his waistband and fired a shot in the air. At about 6 pm. the two of them left together.

The evidence also shows that some time thereafter they accosted the complainant in the first count, who was on his way home from a beer hall, very much under the influence of the liquor he had consumed. He told the Court how he had heard someone calling him and demanding money. Two men, whom, it is common cause, were the two appellants then came up to him. They removed the overall he was wearing and also took a jacket, a jersey, and his wallet containing R30.

The evidence indicates that the complainant fell as a result of having been shot in the region of his chest. Each of

the appellants blamed the other for having fired the shot. The trial Court found that it was not possible to say which of the two had shot the complainant and although they clearly had a common purpose to rob him, the Court was not prepared to find that they also had a common purpose to shoot him. Both of them were aware of the fact that one of them had a gun, but the Court found that it was reasonably possible that the one who did not fire the shot might have believed that the pistol would only be used to threaten and not to kill. On this basis both of them were acquitted on that count.

Both, as I have indicated, were found to have had a common purpose to rob the complainant of his possessions, and they were therefore both convicted on the second count.

The evidence disclosed, and the Court found, that thereafter the two appellants walked off to a spot on the Stanger- Blythesdale Beach road some four kilometres from where they had attacked and robbed the complainant in the first two counts. There they came across the deceased referred to in the

third count. He too was accosted by the two appellants and shot at point blank range in the back and behind the left ear, causing his death within a few minutes.

It was common cause that it was the first appellant who had fired the two fatal shots, and that the second appellant was present at the time. Together they dragged the body from where he had fallen to a spot near a pipe-drain, under the road embankment, overgrown with tall grass. They also took the deceased's shoes he was wearing, his belt, his jacket, and whatever money he had on him.

Both appellants gave evidence in their own defence.

The Court rejected their evidence as being palpably false and this finding is amply born out on a mere reading of the record.

In considering whether or not there were extenuating circumstances the Court took into consideration the comparative youthfulness of the appellants - first appellant was 20 years of age and the second appellant 23. It however found no signs of immaturity in the way in which the first appellant had given his

evidence, and indeed found little to distinguish between the maturity of the first and the second appellants. It found that the first appellant had demonstrated that he was "an inherently evil person" and that he had not been influenced by the second appellant or by anyone else to commit the offence.

Although it had found that the mens rea of the second appellant had consisted in dolus eventualis, and that he had played a lesser role in that he had not fired the fatal shots, it nevertheless found that he had been a "willing party to this evil killing" and that he had been an "essential member of the team".

In considering all the evidence as well as the arguments advanced before it, the Court came to the conclusion that there were no extenuating circumstances and so it passed the mandatory sentence for murder.

In this Court Mr. Slabbert, who appeared on behalf of the first appellant, submitted that the Court a quo had failed to give due weight to the youth of the first appellant and to his

lack of education. He also submitted that the Court had erred in finding that the first appellant was inherently evil.

In considering an appeal of this nature it is as well to bear in mind that in arriving at its conclusion that no extenuating circumstances were present the trial Court formed what is essentially a moral judgment as to whether the circumstances pertaining were to be characterised as extenuating (R. v. Taylor 1949 (1) SA 702 (A) at p. 717), and this Court will only interfere with that finding if it is satisfied that the Court a quo misdirected itself in a material respect, or if the finding was one to which the Court, properly applying its mind to the matter, could not reasonably have come. (S. v. Babada 1964 (1) SA 26 (A) at p. 27; S. v. Caesar 1977 (2) SA 348 (A) at pp. 352-3.)

In the present case the trial Court did have regard to the youth of the first appellant and to his somewhat rudimentary standard of education as revealed in the evidence. As far as the Court's remark that he was an inherently evil person is

concerned, the Court referred to the fact that the first appellant had stolen the pistol with which he had shot the deceased from his employer. Thereafter he had brandished it about at the home of the second appellant and had gratuitously fired a shot in the air. He had been a party to the attack on the complainant, and had thereafter walked some four kilometres to the spot where he shot and killed the deceased. He had therefore had ample time to reflect on the course of conduct on which he and the second appellant had embarked, and must fully have appreciated the nature of his attack on the deceased. The motive for this attack, viz. to kill the deceased and to rob him of his possessions, the Court also found to be "the basest conceivable". The Court found that first appellant had not been influenced to commit the crime by the second appellant or by anybody else, and that, despite their disparity in ages, there was nothing to distinguish their degree of maturity.

It has not been suggested to us that the trial Court misdirected itself in coming to any of these conclusions, and we

are not persuaded that the ultimate conclusion to which it came was unreasonable in any way.

Mr. Lee, on behalf of the second appellant, also relied on the second appellant's comparative youthfulness, as well as the trial Court's finding that his mens rea amounted to dolus eventualis, and that he had played a lesser role in the murder. Here again these aspects were taken into consideration by the Court a quo. It went on however to find that the second appellant was a willing party to the killing of the deceased and that he was an "essential member of the team". He too, with a full appreciation of the nature of their expedition that night after the attack on the complainant in the first count, had the same opportunity of reflection as the first appellant prior to the shooting of the deceased, yet he actively co-operated with the first appellant and assisted him to dispose of the body of the deceased. Here too there was no question of the second appellant having been influenced by his co-accused. The Court

found him to be apparently more intelligent than the first appellant with a more dominant personality, a stronger and almost overbearing character, and physically the superior. Again it was not suggested that the Court had misdirected itself, and we are not persuaded that it was wrong in coming to the conclusions that it did.

In the result the appeals cannot succeed and are dismissed.

J.P.G. EKSTEEN, JA

JOUBERT, JA)

concur

VAN HEERDEN, JA)