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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

JOSEPH MADONSELA FIRST APPELLANT

VUSI DLADLA SECOND APPELLANT

ESAU JABULANI NKOSI THIRD APPELLANT

and

THE STATE RESPONDENT

CORAM : VAN HEERDEN, MILNE et KUMLEBEN JJA

HEARD : 15 SEPTEMBER 1988

DELIVERED : 26 SEPTEMBER 1988

J U D G M E N T

KUMLEBEN, JA

The three appellants stood trial in the court a

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quo on four counts: (1) housebreaking with intent to rob; (2) robbery with aggravating circumstances as defined in sec 1 of the Criminal Procedure Act, 51 of 1977; (3) murder; and (4) attempted theft. The facts alleged in support of these charges are that on the night of 8 October 1985 the appellants broke into the home of Arthur Thomas Boshier with intent to rob him. They fatally assaulted him and robbed him of certain of his possessions. In making good their escape they attempted to steal a motor car belonging to Janet Newby. The trial court (Strydom J and two assessors) found the appellants guilty on all counts as charged, save that on count 1 the verdict was one of housebreaking with intent to steal. On the murder charge, the court found no extenuating circumstances and sentenced each appellant to death. On the other counts prison sentences were imposed. Leave to appeal was granted by the trial court to the first appellant against his conviction on all four counts; to second appellant against his conviction of murder and robbery; and to third

appellant against his conviction on the murder charge. All three appellants were granted leave to appeal against the finding that there were no extenuating circumstances.

Before the trial began the second and third appellants each made an extra-curial statement before a magistrate. At the hearing the admissibility of these statements was contested. They were, however, admitted and this is not challenged on appeal. The statement of each appellant places him at the scene of the crimes at the relevant time. The admissions in the statements prove that they committed certain of the offences with which they were charged but do not in any way incriminate them on the murder charge.

First appellant gave evidence at the trial implicating his co-accused on all four counts and admitting his involvement in the commission of these offences. His

defence was one of necessity inasmuch as he alleged that he was acting under compulsion. On the strength of his evidence implicating the other appellants, the court convicted them on the murder and robbery charges.

Certain facts are not in dispute. The deceased, who was at the time 84 years of age and physically frail, lived alone in a housing complex called "Cosy Cottages". He occupied a "cottage" comprising a combined bedroom and living-room, and a bathroom. On the night in question the intruders gained access to the room by smashing the glass panel of the outer door with a large irregular-shaped "brick", weighing approximately 3,4 kgs. It was also used to fatally assault the deceased. They ransacked his room and then went to the motor car of Mrs Newby, the occupant of another cottage in the complex. They started her car and drove it from the car park to a point near the exit gate of the premises. At that stage the engine failed. Whilst they

were attempting to restart it, the occupant of another cottage, a Mr Cooper, saw them, suspected that they were stealing the car and shouted at them. He saw two persons abandon the car and run away. The police were summoned. Inside the car they found inter alia a television set, a blanket and some clothing, all of which belonged to the deceased. He was found dead in his room, lying face downwards next to his bed. The cause of death, according to the post-mortem report, was four lacerated head wounds and fractures of the skull causing cerebral haemorrhage. The blood-stained brick was found on the bed near the body of the deceased. There were blood-stains on the wall opposite the bed and close to where the deceased lay. They were in the form of a hand print and were proved to be the fingerprints of first appellant.

The evidence of first appellant was to the following effect. At about 8 pm on the night of 8 October

1985, as he was having a meal in his room, a visitor arrived with a message from the two appellants that they were looking for him. When the visitor left he went to bed and slept. At about 9 pm the other appellants arrived. After they had conversed for a while, third appellant suggested that he should accompany them to a "stokvel" at Wattville. They went by bus to Schapenmuur, a railway station on the outskirts of Brakpan. The idea was to proceed further by train. Third appellant, however, suggested that they should steal a motor car instead. First appellant asked third appellant to give him money so that he could return home. With that second appellant produced a "jungle knife" and threatened to kill first appellant if he did not accompany them. They walked from the railway station to "Cosy Cottages" where second appellant pointed out a motor car, which he said was to be stolen. He gained entry to it by breaking a small side window of the car and the three of them pushed it to a more secluded spot. Whilst second appellant was attempting to

join the ignition wires, third appellant left them. He returned holding a brick in a woollen or cloth bag. The three of them proceeded to the dwelling of the deceased. Third appellant used the brick to break in and told first appellant to go inside. He entered with the other two following him. Third appellant switched on the light and first appellant saw the deceased who was busy putting on his trousers. First appellant, on the instructions of third appellant, caught hold of the deceased. Both were seated on the bed. The deceased was on his right hand side and he had his right arm around the neck of the deceased. The deceased asked what they wanted. Second appellant replied that they had come for money. Deceased said he had none. Second appellant produced the knife and threatened the deceased with it, no doubt to induce him to hand over money. The deceased cried out. Third appellant, apparently to silence him, struck him three times on the head with the brick. First appellant could see blood oozing from the head wound from the

time the first blow was inflicted. Whilst the deceased was being struck, second appellant stood directly in front of him maintaining his threatening pose. After the assault upon the deceased, second appellant asked first appellant to assist him in carrying things from the room. First appellant released his hold on the deceased and he fell to the floor. First appellant said that he had held the deceased because he was afraid that, if he had disobeyed, second appellant would have stabbed him. After the belongings of the deceased had been loaded into the motor car, first appellant sat at the back with the other two appellants in front. They travelled only a short distance before the engine stalled. As they struggled to restart it, they were put to flight when Mr Cooper shouted at them.

They ran to first appellant's room in the Tsakane location. Second appellant warned first appellant that if he told the police of their involvement in the crimes, or that he had been threatened with a knife, they would kill him.

First and third appellants returned to first appellant's home where they slept for what remained of the night. Early the next morning third appellant left. Later that morning first appellant left his home, ostensibly to take a pair of trousers to the dry cleaners. His actual intention, he said, was to report the matter to the police. However, at a street corner near his home he met up with third appellant. Together they went to the dry cleaners and on to a bottle store where they purchased a considerable amount of liquor. This they drank at a place called "Happy Valley". First appellant said that he has no further recollection of his movements until he was awakened and arrested by the police at his home that night. He concluded by saying that he never intended assaulting or killing the deceased.

On appeal Mr Kemack, who appeared on behalf of first appellant, submitted that his defence of necessity ought not to have been rejected, in which event the

compulsion rendered his participation lawful and he was entitled to an acquittal on all counts. Alternatively, counsel submitted that, if it was proved that his conduct was unlawful in that the threats did not justify his acts, the facts at least established that he bona fide believed that he was acting lawfully in succumbing to the threats, in which case he cannot be said to have acted cum dolo malo. In that event, on the murder charge a verdict of culpable homicide would be the proper one and one of not guilty on the other counts in the absence of mens rea.

Both these submissions depend upon whether, as a reasonable possibility, first appellant acted under compulsion. The court a quo found this not to be the case for reasons which are unassailable. There is no need to repeat all of them. Perhaps the most cogent is the fact that there was simply no need to enlist the help of an unwilling third person in order to commit the offences. The choice of

the room occupied by a frail, elderly man was probably not a random one. Even if it was, nothing suggests that two persons, one armed with a knife and the other with an improvised weapon, would not have been able to overpower any occupant of a cottage, in what was a housing complex for elderly people. There was thus no reason for incurring the inherent risk involved in unnecessarily including a third person, whose reaction to threats was in the nature of things unpredictable. Moreover, it is plain that first appellant had ample opportunity to dissociate himself from their activities by running away when they were at the motor car before and after the crimes were committed. The evidence leaves one in no doubt that his defence that he acted under duress is false and was correctly rejected by the court a quo.

Notwithstanding the rejection of his evidence that he was not a willing participant, the court accepted his

account of what took place that night and the part played by the other appellants. In evaluating such evidence the court was mindful of the fact that part of his evidence was false, that he was an accomplice and that his evidence implicating the other two appellants was therefore to be carefully scrutinized for the reason that:

"... an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth."

(Rex v Ncanana 1948(4) S.A. 399(A) 405.)

The reasons for caution are thus stated in S v Hlapezula and Others 1965(4) S.A. 439 (A) 440:

"First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only

fiction being the substitution of the accused for the culprit."

These reasons, one notes, are of limited application in the instant case. He was not a self-confessed offender. He raised the defence of compulsion which he no doubt hoped would exonerate him. As I have said, the statements of the other two appellants confirm their presence at the scene of the crimes and it is common cause that there were only three persons involved. There can, therefore, be no question of first appellant substituting the other two appellants for persons whom he wished to protect. On his evidence he was significantly involved in the assault on the deceased. Had he in mind playing down his part, it is highly unlikely that he would have admitted to having held the deceased whilst the lethal blows were being delivered. There is a further consideration which distinguishes this case from the normal run of cases involving evidence of an accomplice. Once first appellant had decided to put forward his (false) defence of

compulsion, he had everything to loose and nothing to gain by giving less than a true account of what actually took place.

In argument counsel for second and third appellants stressed the fact that first appellant was a single witness and, with reference to the decision in S v ffrench - Beytach 1972(3) S.A. 430 (A), submitted that, since his evidence was not satisfactory in every material respect, it ought to have been rejected in toto. But as pointed out by Diemont JA in S v Sauls and Others 1981(3) S.A. 180 E - F:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber 1971(3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

In my view the court a quo had good grounds for being thus

satisfied, particularly having regard to the fact that second and third appellants elected not to give evidence.

On an acceptance of the evidence of first appellant there can be no doubt that third appellant was correctly found guilty of murder and that both he and second appellant were correctly convicted on the robbery charge.

On the question whether first appellant is guilty of murder, Mr Kemack submitted that the fact that first appellant held the deceased whilst he was being attacked by third appellant did not justify the inference that he too had the intent to kill. He may have - so counsel argued - merely wished to immobilise him until he could be silenced. First appellant's own evidence runs counter to this submission. He said that he held the deceased because he was instructed to do so; that he did not release his hold on him after the first blow was struck; and that he only did so when third

appellant told him to. He was asked: "You would have held him for as long as accused no. 3 wanted you to?" and he answered "Yes". If one rules out duress - as one must - this evidence establishes active participation in the actual attack upon the deceased at a stage when he saw that he was being beaten to death. He was accordingly correctly convicted of murder.

The evidence implicating second appellant on the murder charge is on a different footing. He did not participate in the actual killing of the deceased. He did draw the knife shortly after they had entered the room. But he did so to frighten the deceased into producing money. As has been pointed out, this caused the deceased to scream whereupon first appellant struck him with the brick. Whilst he was being assaulted, second appellant held the knife poised over him but did nothing more. This conduct is consistent with an intention to rob and, since the deceased

was being held and was totally immobilised by first appellant, not necessarily consistent with an intention to be part of the lethal assault. In fact, bearing in mind that he was standing directly in front of the deceased, had second appellant wished to silence him by stabbing him, nothing prevented him from doing so. Second appellant's liability on the murder charge, if any, must therefore be considered with reference to the doctrine of common purpose. There is no gainsaying the fact that second appellant before and after the deceased was killed was a party to, and actively associated himself with, the planned housebreaking and, as it turned out, robbery. Whether he is guilty of murder thus depends upon whether he foresaw that in the course of committing these offences, the deceased might be killed and with such knowledge nevertheless persisted in the commission of those unlawful acts. It was incumbent upon the State to prove:

"that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S v Malinga and Others, 1963 (1) S.A. 692 (A.D.) at p. 694F - H and p. 695;"

(per Holmes JA in S v Madlala, 1969 (2) S.A. 637 (A) 640 H, cited with approval in S v Safatsa and Others 1988 (1) S.A. 868 (A) 896 H - J).

To answer this question in the instant case one must revert to the evidence of what took place before and as they entered the room of the deceased. After they arrived at the premises, third appellant left the two of them at the motor car, which they were in the process of stealing. He returned with this large brick which had obviously been placed in the bag in order to wield it more effectively. As they approached the room second appellant had no valid grounds for believing that it was unoccupied. (The fact that he entered armed with a "jungle knife" lends some support to the conclusion that he realised someone might be in the

room.) The brick was used to break the glass panel but second appellant had no reason to think that it had been procured for this purpose only or that it had been discarded before they entered the room, which they did immediately after the glass panel had been broken. In the absence of evidence from second appellant as to his subjective state of mind, the only reasonable inference to be drawn from the evidence is that he foresaw the possibility of death resulting from what they were about to do and continued to participate. I am therefore of the view that second appellant was correctly convicted of murder.

Turning to the question of extenuation, the court held, at the conclusion of the judgment on the merits, that the form of intent in the case of each appellant was dolus eventualis. Counsel relied on this finding for their submission that there were extenuating circumstances. That dolus eventualis may, depending upon the facts of each

particular case, serve as an extenuating factor is clear. In S v Dladla en Andere 1980 (1) S.A. 1(A) 3 H Jansen JA explained that:

"Die korrekte benadering is of in die bepaalde geval, in die lig van al die omstandighede, die afwesigheid van oogmerk as 'n versagtende omstandigheid aangemerkt moet word, al dan nie."

In that judgment it was pointed out that there are gradations of foreseeability and that, if death is foreseen as no more than a remote possibility, this fact may be relied upon in deciding whether extenuating circumstances are present.

As regards first and third appellants, whatever their state of mind may have been when approaching the room of the deceased, at the time of the actual attack, when third appellant was striking him with the brick as first appellant held him, if their intent is to be described as dolus eventualis, they must have realised that it was in the

highest degree probable that death would result. There can therefore be no question of their intent reducing the moral blameworthiness of their conduct. In S v Robert John McBride (Case No 323/87), a recent decision of this court, dated 30 March 1988, the extent to which the nature of the crime is relevant to the question of extenuation was closely examined. The conclusion reached appears from the following passage at page 46 of the judgment:

"The nature of the murder (and here I would include the identity of the deceased and the relationship, if any, between the accused and the deceased) and the manner of its commission are factors which, while they cannot be regarded as per se excluding extenuation, are nevertheless relevant to the general enquiry as to extenuation. They may be relevant to the factual enquiry as to whether an alleged extenuating circumstance in truth existed or as to whether it actually influenced the accused; or they may be relevant as part of the web of circumstances associated with the crime which must be considered by the court when it passes its moral judgment and decides whether there exist circumstances which in the minds of reasonable men diminish the accused's moral blameworthiness."

Thus, in this case, the brutal manner in which a defenceless old man was fatally assaulted by these two appellants, in any event, militates against any extenuation as far as they are concerned.

Extenuation as regards second appellant is another matter. As has been said, he took no part in the actual killing. He in fact refrained from stabbing the deceased at the time when the other two appellants were assaulting him. Moreover, dolus eventualis in his case consisted in the realisation that there was a possibility - not necessarily a strong one - that the room might be occupied and the occupant killed. The main reason for the court a quo deciding that in his case too there was no extenuation was the fact that over the short period whilst the deceased was being held and struck with the brick, second appellant did not dissociate himself with such conduct. This justified the inference, so the court found, that second appellant approved of, or

endorsed, the actions of the other two appellants. As I have indicated, I do not consider that such conclusion is warranted. Thus, taking into account the nature of the intent to be attributed to him, and the fact that he did not take part in the brutal assault, in his case the court ought to have found that there were extenuating circumstances.

The appeal of first and third appellants fails. That of second appellant succeeds in part. His sentence on count 3 is set aside and one of 15 years' imprisonment substituted. The sentence on count 2 and six years of the sentence on count 1 are to run concurrently with the sentence now imposed on count 3.

M E Kumleben

M E KUMLEBEN

JUDGE OF APPEAL

VAN HEERDEN JA)

MILNE JA) - concur