

Case no 389/89
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

Between:

CLEOPAS NDODA SHANGASE

Appellant

and

THE STATE

Respondent

CORAM:

BOTHA, MILNE JJA et FRIEDMAN AJA.

HEARD:

26 February 1990.

DELIVERED:

6 March 1990.

J U D G M E N T

FRIEDMAN AJA:

The appellant was involved in an armed robbery in which the victim was shot dead. He was charged in the Durban and Coast Local Division with two counts namely murder and robbery with aggravating circumstances and he stood trial before WILSON J and assessors who found him guilty on both counts. In respect of the robbery he was sentenced to twelve years imprisonment and in respect of the murder, no extenuating circumstances having been found, he was sentenced to death. He now appeals to this Court, with the leave of the trial judge, merely against the court a quo's finding that there were no extenuating circumstances.

The relevant facts relating to the commission of the two crimes of which appellant was found guilty

may be summarized as follows. On 11 April 1987 the deceased, one Arnold Hlophe, who was employed at the Umgababa Holiday Resort at Umbumbulu in Natal, drove to the Umgababa Bottle Store in order to collect the previous day's takings on behalf of his employer. Appellant and two associates, Zola Mthethwa ("Zola") and Gideon Khuzwayo, who had planned to rob the deceased, were stationed outside the bottle store. As the deceased who was carrying a canvas bank bag containing the bottle store's takings, reached the driver's door of his vehicle, he was shot in the head at point blank range by Zola. As the deceased dropped to the ground, one of appellant's associates grabbed the canvas bag and the three of them disappeared into the crowd. The money, some R2750-00, was shared between the three of them; appellant received R600-00. By the time appellant's

trial commenced Zola had been shot dead by the police while attempting to avoid arrest after he had escaped from custody and Gideon Khuzwayo had been convicted of murder and had been sentenced to death. Appellant consequently stood trial alone.

Appellant's defence was that he had participated in these two crimes because he was afraid of Zola who was a ruthless killer. This defence was rejected by the trial court. When he testified in extenuation appellant expanded upon his assertion that he had acted in fear of Zola but the trial court once again rejected his evidence.

Upon his arrest appellant made a statement before a magistrate in which he dealt with his association with Zola and Gideon Khuzwayo. From this statement it appears that the present crime was the third

armed robbery in which he and his two associates, to whom he referred in his statement as his "friends", had been involved. They had previously robbed a taxi-driver who had been shot dead by Zola. A week later appellant was involved in another robbery in the course of which Zola shot another taxi-driver and robbed him of his money. The present crimes followed chronologically. The final incident described by appellant in his statement was also an armed robbery in which the driver of a truck was shot in the face and robbed, but apparently survived.

During appellant's trial only that portion of his statement dealing with the present charges was placed before the court. Appellant, when he gave evidence, was instructed by his counsel to confine himself to these offences only. Under cross-examination appellant gave evidence which contradicted his evidence-in-chief and

which did not correspond with the truncated statement which was then before the court. At one stage, when a discrepancy was pointed out to him, appellant stated :

"I was not making a mistake. The reason I am saying these things and it seems as if I am misleading this Court is because my counsel told me that I had only to give evidence about the occurrences of the day of this incident. And because now I am being asked questions I cannot start the story from scratch as I did make my statement initially."

It emerged during the cross-examination of the police witnesses who were called by the State that Zola was considered by them to be an extremely dangerous man and a ruthless and callous killer. Despite this evidence the trial court rejected appellant's evidence that in participating in the robbery and the killing of

the deceased, he had acted out of fear of Zola. The court found him to be a totally unreliable witness who had been a willing participant in the event.

After appellant's conviction his full statement to the magistrate was revealed to the court and appellant testified in regard to all the incidents referred to therein, including the present offences. As indicated above, the trial court rejected his evidence that he had acted under threats from Zola and found that he was an active member of the gang who had played his allotted role on the day in question.

Appellant's counsel argued, before this Court, that the trial court had misdirected itself in finding appellant to be a liar rather than accepting his explanation that he was confused as a result of his

being prevented from giving his evidence in chronological sequence. This - so it was argued - coloured the trial court's approach to appellant's evidence when it came to consider whether extenuating circumstances had been established. Appellant's counsel submitted, further, that the trial court had misdirected itself in not attaching sufficient weight to the fact that appellant was an unsophisticated person who was unemployed and who was living in a squatter camp and who would have been afraid of a man like Zola. It was Zola who - counsel submitted - planned the robbery and who played the leading role in the execution thereof as he was the one who had the firearm and who shot the deceased.

Making every allowance for the possibility that appellant might have found himself at a

disadvantage when he was asked during the trial to isolate the present incident and not to deal with it in the sequence he would have preferred and allowing also for his lack of sophistication, there is no basis for interfering with the trial court's finding that appellant was an untruthful witness. Nor are there any grounds on which the trial court can be said to have misdirected itself in rejecting appellant's evidence in extenuation that he had participated in these crimes out of fear of reprisals by Zola.

Apart from appellant's ipse dixit regarding his fear of Zola, there is no evidence to suggest that such fear was his motive for participating in the robbery. On the contrary, as the trial court found, appellant had ample opportunity to dissociate himself from Zola and the gang but he failed to do so. Appellant suggested that he was unable to extricate

himself because Zola knew where he lived and he feared that Zola would seek him out and kill him. However, throughout his association with Zola appellant made no attempt to seek police protection or to report Zola or the gang's activities to the police. Moreover, although Zola did not know where his home at Umzumbe was situated, appellant made no attempt to return to his home in order to escape from Zola until, according to him, the fourth robbery had been committed.

Appellant's evidence that he feared Zola would harm him if he disobeyed the latter's orders became even more transparent when seen in the light of his testimony that he had, during one robbery, fled without so much as earning a reprimand when Zola subsequently found him waiting at a railway station. Even in the present robbery when he failed, according

to him, to carry out the role that had been allotted to him of grabbing the money bag, Zola failed to remonstrate with him and had no hesitation in giving him a share of the proceeds which he retained.

The trial court accepted that appellant had played a lesser role than Zola but held that this did not constitute an extenuating circumstance. The fact that one member of a gang that commits a crime such as this, plays a lesser role does not necessarily reduce that persons's moral guilt. See eg S v Mbatha & Andere 1987(2) SA 272(A) at 285 D-E. The trial court found that despite the fact that appellant had played a lesser role in that Zola, who was the leader of the gang, had fired the fatal shot, appellant had nevertheless been a willing member of the gang. According to the trial court, the active role that was

assigned to him bore testimony to his willingness.

There is no fault to be found with this reasoning.

This Court's power to interfere with a trial court's finding that extenuating circumstances have not been established, is limited: it can interfere with such a finding only if the trial court has misdirected itself or committed an irregularity, or if on the evidence, no reasonable court could have reached the conclusion that there were no extenuating circumstances. See S v McBride 1988(4) SA 10(A) at 18/19. In the present case the trial court has not misdirected itself or committed any other irregularity; nor can it be said that its finding was one which no reasonable court could have made.

The appeal is dismissed.

G. FRIEDMAN AJA.

BOTHA JA)

Concurred.

MILNE JA)