

Case No. 496/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ERIC HANANA

First Appellant

KHOLEKILE KHESI

Second Appellant and

THE STATE

Respondent

Coram: JOUBERT, SMALBERGER JJA, et NICHOLAS AJA.

Heard:

Delivered:

12 March 1990.

29 March 1990.

J U D G M E N T

NICHOLAS AJA:

The two appellants were charged as accused Nos. 1 and 2 before VAN REENEN AJ and two assessors in the Eastern Cape Division of the Supreme Court. Arraigned on a number of counts, they pleaded not guilty to all of them. Each was convicted on certain counts, including one of murdering Mr. Raymond Llewellyn Thomas without extenuating circumstances. On this count they were each sentenced to death. With the leave of the trial judge, they appealed against that conviction and sentence.

The following is a brief outline of the main facts established at the trial.

At about 6 o'clock on the morning of Wednesday 15 April 1987, Mr Jacobus Postma drove his car from his property in Montmedy Road, Port Elizabeth, to go to gym training. He closed the garage door before leaving. On his return at about 7.30 a.m. he saw that the door was ajar. Investigation

showed that his daughter's Raleigh 12-speed racing bicycle was gone. Examining the road, he saw bicycle tracks leading away from his house and along Montmedy Road. He returned to his car, and drove along the road following the tracks. He found a Black man riding a bicycle which he recognized as his daughter's. He stopped next to the man and, taking out his Walther 9 mm pistol, ordered him to alight. Postma operated the automatic release catch in the car which opened the boot, and at gun-point told the man to bring the cycle to him. Holding the fire-arm in his right hand, he started to put the cycle (which was light) into the boot with his other hand. The pedal got hooked and, while he was trying to free it, the Black man seized his opportunity, and got hold of Postma's gun-hand. A struggle ensued: Postma was stabbed several times in the head and the pistol was wrenched away from him. He then managed to make his escape in his car.

It was later established that the Black man was accused No. 2. The pistol, which was handed in at the trial

as Ex 7, was found on 17 April 1987 in No. 2's room under his clothes. It was to play a prominent part in the events of 16 April to which I now turn.

At about 5 pm on that day, Xoliswa Khesi arrived home from work. She found sitting there No. 1 accused and No. 2 accused, who is her brother. No. 2 asked her for money, which she did not give him, whereupon he produced the firearm Ex 7 which he pointed at her. No. 1 and 2 left later. At No. 2's request she accompanied them for part of the way. While they were walking, No. 2 fired a shot into the air - for what reason she did not know. No. 1 told No. 2 that he should not fire "because there are only two bullets left". Xoliswa then left them and returned home.

The scene now changes to Walmer Heights, Port Elizabeth. At about 7 o'clock on the evening of 16 April, Mr Alfred Allan and his wife Maria went for a stroll after dinner. As they walked hand-in-hand along the street they saw two Black men coming towards them. (It was established

at the trial that these were accused Nos 1 and 2.). They passed, and the Allans walked on. A little later they heard behind them the footsteps of someone running. Then the two accused were alongside them. One of them (it must have been No. 2) said, "Friends", and, pointing a firearm at Allan, said, "This is a hold-up." Acting instinctively, Allan grabbed hold of the barrel of the gun and shouted to his wife to run. Mrs Allan tried to help her husband, and got a blow on the mouth and had her glasses knocked off. She then ran to summon help.

Allan himself screamed for help, shouting "Koos! Koos!" - the name of his neighbour. He struggled with No. 2 for possession of the pistol. No. 1 joined in, grabbing hold of Allan's arm. He felt a blow on the head, and an article of clothing was thrown over his head. The next thing he remembered was that he was on his back on the ground. He managed to kick No. 2 between the legs. At the same time someone was kicking him on the left eye and against the left

side of his neck and head. Somehow he managed to get loose, and to get up and make his escape.

That evening Mr Raymond Llewellyn Thomas and his wife Ester (who was sometimes called Hetta) had visitors. They were Mr and Mrs Lötter. At about 7.30 p.m., when they were sitting drinking coffee, they heard a row outside, and a man's voice calling out, "Help, help, Koos, help." All four got up and ran outside. They could see people who appeared to be fighting. Thomas went to telephone the police. Mrs Thomas and Lötter ran closer. They saw two Black men kicking and hitting a person who was lying in the street. When Lötter approached them, he shouted, "Wat maak julle? Los die man!" One of them (it was shown to be No. 1) said to the other (No 2) "Skiet hom!" Lötter turned to Mrs Thomas, and shouted, "Hetta, hardloop, hulle is gewapen". The man lying on the ground managed to get to his feet and to run away. Immediately the two accused started running. They went over a fence and disappeared among some bushes.

Mrs. Thomas ran back to her house, followed by Lötter. He told her to tell Llewellyn (her husband) to get firearms. She ran into the bedroom and got her husband's 9 mm service pistol (he was a warrant officer in the South African Air Force) and gave it to Lötter. He and a neighbour, Esterhuizen, who had in the meantime arrived at the house, got into the front of Lötter's car which was parked outside. Thomas arrived with his personal .22 revolver and got into the back seat, and Lötter drove off.

They made a reconnaissance of the neighbourhood, and eventually saw two Black men walking on the other side of the road. Lötter called on them to stop. They ignored him: they did not look round, or run away - they just continued walking. Lötter drove up to them and stopped. The crucial incidents which followed can best be described in Lötter's own words:

"...Toe ek langs hulle stop het die swartman sy arm omgeswaai na die voertuig toe. Hy het 'n vuurwapen in sy hand gehad wat hy gerig het op mnr Boeta

Esterhuizen wat links voor in my voertuig gesit het. Op dieselfde tydstip het mnr Thomas egter die agterdeur oopgemaak....Mnr Esterhuizen se ruit was nie afgedraai nie. Toe die swartman die vuurwapen op hom rig, het hy gekeer met sy hande ...Ek het gesien dat mnr Thomas die voertuig se deur oopgemaak het, want ek het gekyk na die linkerkant van die voertuig. Die swartman het dadelik sy arm wat hy gerig het op die voorste persoon na agter toe geswaai en hy het n skoot afgetrek Ek het dadelik weggetrek. Die voertuig se linker deur was nog oop gewees ... Toe die skoot afgetrek is het mnr Thomas geskree "the bastard shot me. I want to get him back." En hy het agteroor geval."

Thomas rattled in his throat once. Lötter drove him to the Provincial Hospital and he was found dead on arrival.

Evidence was given by each of the accused.

No. 1 said that he was 25 years old. At about 7 am on Thursday 16 April 1987, No. 2 arrived at his house. After some conversation, No. 2 asked him to accompany No. 2 to fetch his money. No. 1 agreed. They went to the house of a woman who was unknown to No. 1. They waited until the woman's husband came home. No. 2 spoke to him out of earshot of No.1 and then came back with a R10 note in his hand. The

two of them then went to Mount Pleasant, where No. 1 bought a bottle of brandy which the two of them consumed. Then they went to Arlington where No. 2 wanted to see his sister, Xoliswa Khesia. There No. 1 at one stage saw No. 2 with a pistol in his hand. This was the first time he had seen it. At the house two bottles of brandy were consumed by five persons including the two accused. Outside No. 2 fired two shots into the air, frightening No. 1. The two of them went off. He described an incident which occurred at about 20 minutes to 7 that evening - it was plainly the encounter with the Allans. As he described it, he was innocent of any involvement, but he fully incriminated No. 2. He went on to describe an encounter with a white motor vehicle, in the course of which No. 1 fired a shot. After this the two of them separated and ran away.

Accused No. 2 said that he was 23 years old. His defence was a complete denial. He was not present at the attack on the Allans, or the shooting incident in which

Thomas was killed.

The trial court rejected No. 2's denial, and held that it could come to no other conclusion than that he was involved in the attack on the Allans and the shooting of Thomas. It also had no hesitation in regard to No. 1's complicity. In statements which he made shortly after his arrest, and in his evidence at the trial, he admitted his presence at both incidents. The facts showed clearly that he actively participated in the attack on Allan, and when Lötter intervened he incited No. 1 to shoot him. He fled in the company of No. 2 and was with him when Lötter confronted them, for the second time. He stood by when No. 2 fired the shot which killed Thomas. He left the scene in the company of No. 2 and they slept the night on the same premises. He knew that No. 2 was armed with a pistol and he must have contemplated that No. 2 would use it if they were confronted by anyone. Nevertheless he stayed with him. The death of Thomas could not be separated from their common purpose to

rob. He associated himself with the acts of No. 2 and his conduct showed that he had dolus eventualis at least. Both No. 1 and No. 2 were accordingly found guilty of murdering Thomas, and after addresses from counsel, the trial court found no extenuating circumstances and sentenced them to death.

Although the trial judge granted leave to appeal against the convictions on the murder charge as well as the death sentences, no argument was advanced before us in regard to the convictions. This attitude was undoubtedly correct: the trial court's conclusion that both accused were guilty on that charge is unassailable.

The judgment of the trial court in regard to extenuation is laconic in the extreme. That is perhaps understandable having regard to the meagre material available to the court. Neither accused gave evidence in extenuation, and such evidence as stands on the record is sparse indeed.

On behalf of No. 1 it was argued that there were

three factors which constituted extenuation: consumption of liquor, youth, and his minor part.

As to liquor, his own evidence was that the two of them drank a bottle of brandy at Mount Pleasant, and that at Arlington he and No. 2 were part of a group of 5 persons who consumed two bottles of brandy. The trial court accepted that both accused had liquor on 16 April, although there was no evidence of the exact quantities they drank or at what times. Clearly, consumption of liquor does not amount per se to extenuation: it may do so to the extent that it affects an accused's mental and emotional processes - e.g. his loss of inhibitions and of self-control. No. 1 testified that when they left Arlington he was under the influence of alcohol, but he was not so drunk that he was staggering: "ek was nog in my volle gedagtes". There was no evidence at all as to his condition that evening when the murder was committed.

Accused No. 1 was 22 or 23 years old at the date

of the murder, an age, it was submitted, when a person has not yet reached maturity. There was nothing in the evidence to suggest that No. 1 was immature.

The submission was made that No. 1's role in these events was a minor one. It was No. 2 who acquired and kept possession of the firearm and fired it. It was No. 2 who came to No. 1's home and asked him to accompany No. 2 to collect money. It was No. 2 who held up the Allans, and there was no evidence of any prior planning or consultation between them. All this may be so, but it does not serve to reduce No. 1's moral blameworthiness. He did not suggest that he engaged in the Allan hold-up unwillingly. The two of them were obviously on the prowl in Walmer Heights, where they had no business, looking for prey for robbery. They were working together when they first passed the Allan's; They came back together; they were together when they confronted the Allan's; both assaulted Mr Allan, and it appears that it was No. 1 who assaulted Mrs Allan; both

joined in kicking and hitting Allan when he lay on the ground; when Lötter intervened, No. 1 incited No 2. to shoot him; the two ran away together; shortly afterwards they were found walking together; after Thomas was shot they again ran away together; and they spent the night at the same premises. There was nothing in the evidence to suggest that No. 1's participation was otherwise than willing, unreserved and complete.

In regard to No. 2 it was sought to rely on No. 1's evidence that the two of them drank during the day. In the cross-examination of No. 1, however, it was put to him that No. 2 denied that they drank together at Mount Pleasant, or at Arlington. There was no evidence that No. 2 was in any way affected by liquor.

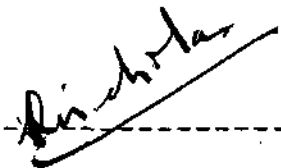
Reliance was sought to be placed on evidence that at Arlington No. 2 pointed the firearm at his sister, and played with it in front of children and fired a shot into the air. The significance of this as an extenuating factor is

not apparent.

Then it was argued that the lack of planning and the clumsiness of the two accused earlier in the evening was relevant to extenuation. This too one has difficulty in appreciating.

In the judgment on extenuating circumstances, VAN REENEN AJ said that it was clear that in the case of No. 2, there could be no extenuating circumstances. In the case of No. 1 the trial court had sedulously looked at the facts available to it in order to ascertain whether there were any extenuating circumstances, but found none.

In the case of each of the accused, this court cannot but agree. The appeals are dismissed.



H C NICHOLAS.

JOUBERT JA
SMALBERGER JA concur