

Case no 622/89
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

THEMBA RICHARD DLADLA

Appellant

and

THE STATE

Respondent

CORAM:

HEFER, VIVIER et EKSTEEN JJA.

HEARD:

5 March 1991.

DELIVERED:

5 March 1991.

J U D G M E N T

VIVIER JA:

The appellant, together with two others,

appeared before HUGO J and assessors in the Natal Provincial Division on a charge of murder, arising from the death of one Jabulani Rodgers Dumakude ("the deceased") on 21 February 1988. At the commencement of the trial the charge was withdrawn against the appellant's co-accused, to whom I shall refer as accused no's 2 and 3 respectively. At the conclusion of the trial the appellant was convicted of murder with extenuating circumstances and he was sentenced to eight years' imprisonment. The trial Judge granted leave to appeal to this Court against the conviction on the question whether or not the participation of the appellant in the events surrounding the death of the deceased amounted to murder.

The facts as found by the trial Court may be summarised as follows: During the afternoon of

21 February 1988 the appellant and accused no's 2 and 3 were at a shebeen in the Imbali township near Pietermaritzburg. An argument started between accused no 2 and the deceased with the result that the appellant and accused no's 2 and 3 left the shebeen. They returned later and accused no 2 grabbed hold of the deceased and stabbed him in the chest with a knife. The appellant thereupon hit the deceased with a plank so that he would run outside. According to what the appellant himself later told Colonel Beeslaar, he did this in order to assist accused no 2. The deceased ran out and was chased by the appellant and accused no's 2 and 3. Outside the shebeen accused no 2 caught up with the deceased and inflicted another 15 stab wounds upon him until he was dead. The trial Court found that there was a reasonable possibility that the

first stab wound inflicted upon the deceased in the shebeen in itself had caused his death and that the assault by the appellant did not cause or contribute to the death of the deceased. The trial Court also found that the appellant had not formed a common purpose with accused no 2 to bring about the death of the deceased prior to the infliction of the fatal wound, but that he subsequently formed such common purpose with accused no 2.

The facts of the present case are therefore that the appellant acceded to a common purpose to kill the deceased at a stage when the deceased was still alive but only after the deceased had been fatally injured, and that nothing done by the appellant thereafter expedited the death of the deceased. On those facts the appellant should have been found guilty

of, at most, attempted murder. See S v Motaung 1990(4) SA 485(A) at 521 B-C. This case was decided subsequent to the decision of the trial Court in the present case. It is not necessary, therefore, to say anything more about the trial Court's reasoning or to refer to the decisions on which the trial Court's judgment was based and which were fully dealt with in the Motaung decision.

In my view the only inference which could be drawn from the conduct of the appellant in hitting the deceased with the plank is that he did so with the intention of associating himself with no 2's attack on the deceased. At that stage the deceased had already been stabbed in the chest and the appellant's statement to Colonel Beeslaar that he wanted to assist accused no 2 by forcing the deceased out of the house,

can only mean that he thought that it would be easier to kill the deceased once they were outside the house, where the deceased would be alone and unprotected. His further conduct in pursuing the deceased outside the house until they caught up with him, and he was killed, confirms that this was his intention.

I am accordingly of the view that the appellant should have been found guilty of attempted murder. In view of his age - he was between 18 and 19 years old when the offence was committed - and the fact that he has no previous convictions, a sentence of four years' imprisonment would be an appropriate sentence.

In the result the appeal succeeds. The appellant's conviction is altered to a conviction of

attempted murder. For the sentence imposed by the trial Judge a sentence of four years' imprisonment will be substituted.

W. VIVIER JA.

J.J.F. HEFER JA.

J.P.G. EKSTEEN JA.