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CASE NO: 500/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

AMON NKOSANA MABIZELA

First Appellant

MBUYISENI ERNEST MCHUNU

Second Appellant

and

THE STATE

Respondent

CORAM: HEFER, MILNE et FRIEDMAN JJA

HEARD: 2 MAY 1991

DELIVERED: 21 MAY 1991

J U D G M E N T

FRIEDMAN JA

The two appellants stood trial in the Witwatersrand Local Division before Smit J and two assessors on a charge of murdering one Luis Cabrah Algeria (the deceased) and of being in possession of unlicensed firearms and ammunition. Despite their pleas of not guilty on all charges, both appellants were found guilty on the murder charge and second appellant was, in addition, found guilty of being in possession of a 9 mm firearm and ten rounds of 9 mm ammunition. On these two charges, which were taken together for the purposes of sentence, second appellant was sentenced to two years' imprisonment. The court found, in respect of the murder charge, that neither appellant had discharged the onus of establishing extenuating circumstances. Both appellants were accordingly sentenced to death. At the time the death sentence was, in the circumstances, mandatory. With the leave of this Court each appellant noted an appeal against the death sentence imposed by the trial

court.

Since their conviction and sentence on 28 March 1990 the Criminal Procedure Act, No 51 of 1977, has been amended in certain important respects by the Criminal Law Amendment Act, No 107 of 1990, which came into operation on 27 July 1990. These amendments have been considered by this Court in *inter alia* S v MASINA AND OTHERS 1990 (4) SA 709 (A); S v SENONOH 1990 (4) SA 727 (A) and S v NKWANYANA AND OTHERS 1990 (4) SA 735 (A). The effect of these decisions may be summarised briefly as follows:

1. The death sentence for murder is no longer mandatory.
2. There is no longer an onus on an accused to establish extenuating circumstances.
3. The trial judge has a discretion to impose the death sentence, but only with due regard to the finding which the trial court is obliged to make on the presence or absence of any

mitigating or aggravating factors, and only if the judge is satisfied that the death sentence is the proper sentence.

4. The relevant provisions of the amending legislation are retrospective and must be applied by this Court in an appeal heard by it after the date on which the amendments came into operation.

5. This Court has an independent discretion to decide whether the death sentence is the proper sentence.

6. By the words "the proper sentence", is meant "the only proper sentence".

It is accordingly necessary to approach this appeal in the light of the aforementioned summary.

First appellant did not give evidence either in his defence or on extenuation. Second appellant's defence was an alibi which was rejected by the trial

court. He testified on extenuation but dealt only with his personal circumstances. However, both appellants made statements after their arrest. First appellant conceded that his statement was freely and voluntarily made. Second appellant contested the voluntariness of his statement but after a trial within a trial, it was admitted in evidence.

It emerges from these statements, as common cause, that the appellants, together with two other men called respectively Mafanandota and Beggie (also known as Beji), set out from the Jabulani location for Krugersdorp in first appellant's Opel motor car with the express purpose of robbing a shop in order to obtain money. Second appellant and Mafanandota were each armed with a firearm. Beggie was armed with a panga. First appellant was the driver of the car. They stopped about 200 to 250 m from the Violet Eating House at Millsite in the Krugersdorp district. Second appellant, Mafanandota and

Beggie, armed as aforesaid, alighted from the car and set out on foot for the Violet Eating House. First appellant remained in the car. It was then about 11 am. According to second appellant's statement, he, Mafanandota and Beggie entered the Violet Eating House where there were a number of customers. They played the pin-ball machine and after a while Mafanandota said that they should do their work ("nou moet ons ons werk doen"). They pointed their weapons at the deceased who was behind the counter. As he approached them, but while he was still behind the counter, both second appellant and Mafanandota fired at him, hitting him in the head and arm. All three then immediately - and without any attempt at taking money - fled to the car in which first appellant was waiting for them and they all drove off. The deceased died from the bullet wound to his head.

The trial court found, as far as first appellant was concerned, that he did not have direct

intention to kill the deceased but that he was guilty on the basis of *dolus eventualis*. In the case of second appellant the trial court made no express finding on the nature of his intention, but from the judgment on extenuation it appears that the trial court correctly accepted that it was also a case of *dolus eventualis* rather than one of *dolus directus*. This appeal must therefore be approached on the basis that the guilt of both appellants rested on a finding of *dolus eventualis*.

First appellant's counsel submitted that in the case of first appellant the following mitigating factors were present:

1. He played a lesser role in the crime in that he remained in the car and was not present when the fatal shots were fired.
2. It was not established that he knew that the firearms carried by second appellant and Mafanandota were loaded; therefore he cannot

be taken to have regarded the possibility of death as a strong one.

There is no merit in the first point. First appellant participated fully in the venture: he drove the other three participants to the scene of the crime which had been planned by all of them, including first appellant and, as arranged, he waited for the others in his car in order to enable them to make their get-away upon completion of the robbery. His role may have been different to that of the others, but it cannot be described as a lesser one.

The second factor relied on by first appellant's counsel does have merit. In the light of the fact that first appellant's guilt is based on *dolus eventualis*, it becomes important to determine his degree of subjective foreseeability i.e. whether he foresaw the possibility of death to the victim as faint or strong. See S v DLADLA 1980 (1) SA 1 (A) at 3. The onus is on

the State to establish the presence of aggravating factors (S v NKWANYANA AND OTHERS, *supra* at 743 I-J).

Accordingly, in so far as the degree of foreseeability is relevant on this issue, the onus would be on the State to prove that first appellant subjectively foresaw the risk of death as a strong possibility. Smit J, having correctly pointed out that *dolus eventualis* was not *per se* an extenuating circumstance and that the risk involved in the venture was a determining factor to decide whether extenuation was present, went on to state:

"In *casu*, in our view, objectively a high risk was involved and subjectively we are left in the dark as to what accused 1 had in mind. We are not satisfied that the legal or constructive intention can in *casu* be regarded as an extenuating circumstance."

I do not, with respect, agree with the trial court's finding, in respect of first appellant, that "objectively a high risk was involved" and that one is "left in the dark as to what (he) had in mind". First

appellant knew that two of his co-participants were armed with firearms. There is no evidence, however, that he knew that either of the firearms was loaded. This is a relevant factor in the determination of an accused person's subjective foreseeability. See S v MBATHA EN ANDERE 1987 (2) SA 272 (A) at 283-5. Robbery is sometimes successfully accomplished by threatening the victim by brandishing an unloaded firearm. Cf S v MAGWAZA 1985 (3) SA 29 (A) at 41. Depending on the circumstances, absence of knowledge on the part of one of the participants in an armed robbery that the firearm to be utilised by another participant was loaded, could be a factor in the determination of the former's subjective appreciation of the risk involved. For example, if the robbery is to be committed at a venue where, to the knowledge of the robbers, they were likely to encounter armed resistance, the risk of their having to use their firearms to overpower their victim by shooting him, if

necessary, would be a high one. On the other hand, if the venue is one where armed resistance is unlikely to be encountered, the degree of risk would be lessened.

In *casu* the robbery was to be committed at an eating house. There is no evidence that armed resistance was likely to be encountered or that it would be necessary to kill anyone in order to effect an escape. In the absence of evidence that first appellant knew that the firearms were loaded and having regard to the venue which had been selected as the target of the proposed robbery, the State cannot be said to have established, as far as first appellant was concerned, that the risk involved was objectively high. Nor has it been established that he subjectively appreciated that there was a high risk of someone being killed either during the carrying out of the robbery or in effecting their escape upon its completion.

There are, however, aggravating factors present

in the case of first appellant. Firstly he has previous convictions. In 1984 he was convicted of assault with intent to do grievous bodily harm, involving a klerie, for which he was sentenced to a fine of R200,00 or six months imprisonment. At the same time he was sentenced to four years imprisonment for motor car theft. Secondly, he participated in a murder committed during the course of an armed robbery perpetrated in broad daylight. It must also be borne in mind that first appellant was not a callow youth; according to the SAP 69 form recording his previous convictions, he was 26 or 27 years of age at the date on which this offence was committed.

Weighing the mitigating factors against the aggravating factors, this is not, in my view, a case where the death sentence can be said to be the only proper sentence and indeed Mr van Staden, who appeared for the State, conceded this. However, having regard to the seriousness of the offence, a long period of

imprisonment is clearly warranted. I regard a sentence of 25 years' imprisonment as appropriate in the case of first appellant.

I turn now to second appellant. He was born in 1963 and was therefore 26 years of age at the time of the offence. He has no previous convictions. He has two children aged 6 and 4 years respectively. He was in regular employment. The fact that he has no previous convictions and that he was in steady employment, constitute mitigating factors. In his case there are, however, certain aggravating features. He was in possession of a firearm which he knew was loaded. As indicated above, his intent falls into the category of **dolus eventualis**. The basis on which it may be so characterised is that he fired at his victim at short range, reckless as to whether or not his victim might be killed in the process. Unlike first appellant's case, second appellant's case involved a high degree of risk.

In his evidence on extenuation he did not refer to the circumstances under which the killing took place. There is no suggestion, however, that he thought that the firearm would be used only to frighten his victim. In his statement he describes how the shooting occurred as follows:

"Toe ons in die winkel kom het ons eers die masjien gespeel.

Mafanandota het toe gesê nou moet ons ons werk doen.

Ek het 'n vuurwapen gehad, dit was 'n 9 mm short en Mafanandota het 'n vuurwapen gehad - dit was dieselfde as myne maar ek weet nie hoe groot nie.

Beji het 'n panga gehad.

Ons het die wapens op die witman gehou - Mafanandota was voor.

Dit witman het eers probeer uit die toonbank uitkom en toe het Mafanandota 2 skote gevuur. Ek het ook 1 skoot op die witman gevuur. Die witman het toe geval.

Ek kan nie onthou of die Mafanandota enige woorde gebruik het maar toe die witman na ons rigting wou kom het ons geskiet.

Ons het dadelik uitgehardloop en in die kar geklim en gery terug na Soweto."

Second appellant's counsel, while conceding

that second appellant was a primary participant who fired a shot at the deceased, submitted that as he has no previous convictions, the reformatory aspects of sentence come strongly to the fore. In weighing up what the proper sentence should be, the reformatory purpose of sentencing must obviously be taken into consideration together with the other main purposes, namely deterrence, prevention and retribution. Consideration must also be given to the question whether these objects can be achieved by a sentence other than the death sentence. See S v MBONAMBI AND ANOTHER 1991 SACR 123 (A) at 126 i-j. The fact that an accused is young and has no previous convictions provides an indication of the possibility of reformation. This is, however, not a rule that can be applied as a matter of course. A young first offender, may, depending on the circumstances, not be regarded as reformable. In the instant case there is nothing except the fact that second appellant is a first offender to

indicate that he might be reformable. I do not consider this indication, in itself, to be sufficiently persuasive to justify a finding that the death sentence is not the proper sentence.

There is, however, a factor which could be regarded as mitigatory. The manner in which this murder was committed suggests that second appellant and his co-perpetrators panicked at the first sign from the deceased that he did not propose to yield to their demands. Having shot him, they immediately abandoned their objective, i.e. to obtain money, and ran away. The manner in which they reacted leaves one with the impression that this was an amateurish effort at robbery and that the fatal shots were fired in panic rather than as part of the plan to achieve their objective. The shooting was neither planned nor premeditated. In my view, in the circumstances of the present case, this constitutes a mitigating factor.

The State, in pressing for the death sentence to be confirmed in the case of second appellant, emphasised the frequency with which murders are committed in the course of armed robberies and submitted that an exemplary punishment was called for in order to deter others from similar conduct. An "exemplary" sentence has been said to be inherently "unjust" and may be justified only where the injustice done thereby to the individual is "moderate". S v KHULU 1975 (2) SA 518 (N) at 521 F, applied with approval by this Court in S v KHUNDULU AND ANOTHER (unreported) 18 March 1991. In KHULU'S case, *supra*, Miller J said:

"A degree of injustice in that sense may be a lesser evil than the neglect of the broad interests of society which sometimes require that severe sentences, possibly in excess of the true deserts of the offender in the particular circumstances of his case, should be imposed for deterrent effect".

Where the imposition of an exemplary sentence would result in a death sentence, whereas a lesser sentence

would be the proper sentence for the particular offender, the injustice would never justify the imposition of an exemplary sentence.

While this remains a most serious crime, there are the mitigating factors which I have mentioned. According these their due weight, this is not a case where the death sentence is "imperatively called for". See S v J 1989 (1) SA 669 (A) at 682 D. Although the death sentence may be a proper sentence, it is not the only proper sentence.

Despite the fact that second appellant is a first offender, the mitigating factors in his case are not as strong as in the case of first appellant. Taking the main purposes of sentencing into account, I consider that in his case a sentence of life imprisonment is warranted.

The appeals of both appellants are upheld. The death sentence in each case is set aside. There is

substituted, in the case of first appellant, a sentence of 25 years' imprisonment and, in the case of second appellant, a sentence of imprisonment for life. It is ordered that the sentence which second appellant is at present serving is to run concurrently with such life imprisonment.


G FRIEDMAN JA

CONCUR:

HEFER JA
MILNE JA