

In the matter between:

SHANE JOHN MITCHELL

FIRST APPELLANT

TIMOTHY LEE BEDINGFIELD

SECOND APPELLANT

and

THE STATE

RESPONDENT

Judgment by:

NESTADT, JA

CASE NO. 83/90
CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SHANE JOHN MITCHELL

FIRST APPELLANT

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CORAM: VAN HEERDEN, NESTADT et GOLDSTONE JJA

DATE HEARD: 17 SEPTEMBER 1991

DATE DELIVERED: 6 NOVEMBER 1991

J U D G M E N T

NESTADT, JA:

At about 2 pm on Monday, 12 October 1987, a group of school children was walking along the side of the Muldersdrift Road in the Randburg district.

Amongst them was Ronnie Pitso, aged eight. A so-called land-rover approached them. It is a vehicle the rear portion whereof has an open boot where people can sit or stand. Four persons including the two appellants were in this section. As the vehicle passed the children, first appellant stood up and threw what was described in the evidence as a paving brick at them. The brick, which weighed 2,175 kilograms, struck Pitso on the forehead. It fractured his skull and pierced his brain. He died from the injury.

These events led to first and second appellants being charged with murder in the Witwatersrand Local Division. They were respectively accused 1 and 2. The trial came before ROUX J. The learned judge convicted appellants. Extenuating circumstances having been found, they were each

sentenced to ten years' imprisonment. First appellant's appeal is against his sentence. Second appellant appeals against his conviction and sentence. In both cases, leave to appeal was granted by this Court.

Before separately considering the two appeals, it is necessary to sketch the circumstances of the crime and of appellants in a little more detail. First appellant was at the time not quite 17. Second appellant was about to turn 19. Both were pupils at the Florida Park High School. First appellant was in standard eight. Second appellant was in matric. On the day in question they played truant. Instead of attending school, they, together with four friends and first appellant's younger brother, went to a pleasure resort in the area. The party arrived there at about 10 am. They remained at

the spot for about three hours. During this period they had a braai. In addition appellants drank beer and smoked dagga. I deal later with what effect this had on first appellant. The seven of them left the resort at about 1:30 pm in the land-rover. They were on their way home. They stopped at a roadside café to buy cigarettes and food. Before resuming their journey, appellants and two of the others picked up stones which were lying outside the shop and loaded them onto the back of the vehicle. In the words of one of them "We decided that we would throw them at pedestrians that we passed". First appellant in addition picked up the brick. He placed it on the floor of the boot where he was sitting. They continued on their way. Within about five minutes the group of school children came into view. One of the four at the back of the vehicle alerted the others to

the presence of the children by saying: "Check, check, check". What first appellant then did is described by the trial judge as follows:

"Accused No 1 then picked up exhibit 1 (the brick) and hurled it, as if throwing a discus at the group, as the Landrover passed. He threw this missile when he was at the closest point to the schoolchildren. The distance was estimated to be three or four metres. Accused No 1 appears to have stood up or half stood up to make his throw...(H)e waited until he was at the closest possible range from the children before throwing exhibit 1."

Though realising that deceased had been hit by the brick and badly injured, the driver of the land-rover did not stop. When at their destination he later did, it was decided not to report the matter to the police.

I turn to the appeal of first appellant against his sentence of ten years' imprisonment. No fault can be found with the trial judge's description

of the crime as an outrageous one. First appellant was convicted on the basis that he deliberately took possession of the brick in order to throw it at pedestrians whom it was anticipated they would drive past; that he threw it with the maximum force he could muster; that he intended to hit one of the children in the group; and that he knew that whoever the brick struck might as a result be killed. The evidence fully bears out these conclusions. The crime is one which surely evokes in the community a sense of shock and disgust. This would be heightened by first appellant's statement that he threw the brick because "I thought it would be fun"; and that on seeing that the deceased had been struck, he burst out laughing. Consider also first appellant's victim. He was an innocent child lawfully walking alongside the road on his way home from school. Plainly,

society must be protected against the sort of behaviour that first appellant displayed. It cannot be too strongly condemned. There was a degree of planning and deliberation involved.

There are, however, certain considerations which mitigate the moral blameworthiness of first appellant and which therefore must, despite the grievous nature of the crime, be taken account of. They are the following:

- (i) He was convicted on the basis of dolus eventualis only.
- (ii) One of the extenuating circumstances found by the trial judge rested on the principle (as he put it) that "people acting together... tend to incite one another". It was held that this applied to first appellant; that he probably would not have

acted as he did but for the fact that he was "part of an excited group". It seems to me that regard can be had to this consideration for the purposes of sentence as well.

(iii) First appellant's actions cannot be judged as if he was an adult. He was not. As indicated, he was still 16.

(iv) Coupled with his youthfulness and immaturity is the fact that he was not sober. I do not propose to detail what quantity of liquor he drank or how much dagga he smoked at the resort. It suffices to deal with how he was affected by this consumption of alcohol and drugs at the time of the crime. Based on the evidence of one of first appellant's companions who gave evidence for the State, ROUX J found that

first appellant was then "a bit happy"; that there had been "a mild intake of liquor". Though first appellant admittedly "knew what was going on around (him)" (his conduct confirms this), I think the learned judge's approach somewhat underestimates first appellant's intoxicated condition. I leave aside first appellant's evidence that he was "drunk". He was found to be a dishonest witness. But one must have regard to another State witness, a certain Craig Goslin. He was one of those with appellants in the back of the vehicle. The trial court found him to be a credible and reliable witness. According to Goslin, first appellant was "very drunk" when they were about to leave the resort and "still

drunk" about 30-45 minutes later when the brick was thrown. Another member of appellants' group was Valerie Schoeman. She too (in her evidence for first appellant) said that he was drunk (at the café).

- (v) It does not seem as if first appellant (who is a first offender) is an inherently violent or aggressive person. That was the opinion not only of a probation officer but also of a clinical psychologist who interviewed him and who both testified in mitigation of sentence. Their evidence was that first appellant's behavioural problems stemmed from an unstable upbringing and a lack of parental supervision and control; that he lacks self-discipline.

The nature of the crime was such that the retributive and deterrent aspects of punishment require that first appellant be sentenced to imprisonment. However, having regard to the cumulative effect of the mitigating factors referred to, I am of the opinion that the sentence imposed was unduly severe. We are therefore justified in interfering with it. The period of ten years is appropriate but I think that justice will be done if four years thereof is conditionally suspended.

This brings me to second appellant's appeal against his conviction. He was found guilty on the basis that he was a party to a common purpose which embraced the throwing of the brick by first appellant. The question that arises is whether this finding was correct. I mentioned earlier that stones were picked up outside the café by inter alia second appellant and

then loaded on to the back of the vehicle. There can be no doubt that this was done pursuant to a common purpose between appellants and their two companions to throw them at persons whom it was anticipated they would pass when they continued driving along the road. With good reason the trial judge accepted Goslin's evidence that at the café the four of them entered into an agreement to this effect. His evidence is this regard reads:

"We decided that we would throw them at pedestrians that we passed on our way...

Tell me exactly what you discussed as you recall it? -- Well we all discussed that we would throw stones at the passing pedestrians.

MR VAN DER MERWE Was that between the four of you? -- Yes. That was between me, Deane, accused 1 and accused 2...

(W)ere all four of you on the lookout for somebody to throw stones at? -- That is correct."

True to their design, when shortly after they left the café and a cyclist was encountered, second appellant

threw one of the stones at him. Had the issue arisen, the other three would on the basis of common purpose, also have been responsible for second appellant's actions. Similarly, had first appellant thrown one of the stones at deceased, second appellant and the other two would have been parties to his crime. In both cases this would be so even though they acted individually rather than in concert. The throwing of a stone by any one of them would have been imputed to each member of the group and not (as was argued) be regarded as the independent act of the individual perpetrator only.

But did the throwing of the brick by first appellant fall within the ambit of the common purpose? ROUX J's affirmative answer was rightly not based on a finding that the agreement to throw stones per se included the throwing of the brick. The size of the

the stones was variously described as "big ones", "medium sized stones", "smallish stones", "about half the size of a tennis ball" and "not more than an inch or two in diameter". Whatever their exact proportions, there is nothing to gainsay Goslin's evidence that the brick was "in an entirely different category (to) any of the other stones...". The same applies to second appellant's attitude. He said:

"There is basically no comparison. (T)he stones were so small...compared to (the brick)...(I)t could kill somebody whereas the ...stones they were not of killing potential...it is much bigger. It is a totally different thing".

The dimensions of the brick, namely 16 cm in diameter and 5 cm thick bear this out. It is clear therefore that first appellant's actions in throwing the brick involved means and consequences different from those contemplated by the parties to the agreement to throw stones. Obviously recognising this, the trial judge

based his finding that second appellant was responsible for what first appellant did on different reasoning. It was: (i) Second appellant saw first appellant pick the brick up and place it in the vehicle; (ii) he knew that it was going to be thrown at someone they passed; (iii) he saw first appellant arm himself with the brick just as they approached the group of children; (iv) he did not try to stop first appellant from throwing it; (v) this was because he regarded it as consistent with their common purpose; (vi) he did not entertain any belief that first appellant would throw the brick with the object of missing the children; (vii) second appellant thus foresaw the possibility that deceased might be killed.

I have come to the conclusion that the learned judge's approach cannot be supported. None of the State witnesses deposes to facts from which it

can be inferred that second appellant saw first appellant take possession of the brick at the café or that when they drove away second appellant already knew that first appellant was going to throw the brick at someone. The only evidence on these points is that of second appellant himself. He says:

"Now when you say you saw accused 1 throw the paving brick, was that the first time that you noticed the paving brick or had you, EXHIBIT 1, or had you seen it before? -- I might have seen it before but the whole thing was my, I did not pay, if I had seen it I did not pay attention to it lying there.

Can you say at what stage you might have seen it in the journey? In other words before you reached the café, after you left the café? -- I think after, probably after we left the café...

Now before...EXHIBIT 1 (the brick) was thrown by accused 1 did you have any expectation that accused 1 was going to do this, did you have any awareness that accused 1 intended throwing EXHIBIT 1?-- No, no.

Did you encourage accused 1 in any way to throw EXHIBIT 1?-- No I did not.

So when accused 1 threw EXHIBIT 1 it took

you by surprise? -- Yes...

Well at this stage now you have already seen accused 1 pick the (brick) up, not so? -- Okay, correct.

Yes and at that stage what did you do when you saw accused 1 pick the (brick) up? -- I did not do anything.

What did you think? -- I did not think anything.

Mr Bedingfield in the light of what had been taking place.. -- I am not going to think he is going to be so stupid as to throw such a big thing off the back of the landrover...

I do not know why I did not stop him, because it never occurred to me that he was going throw a stone like that to kill somebody, never, it never occurred to me he was going to kill somebody."

It is true that second appellant was, with justification, found to be an untruthful witness. But there would appear to be no reason to reject the testimony I have quoted. On this basis, second appellant's guilt was not proved. Besides not having the requisite mens rea, his mere presence at what may be regarded as the scene of the crime was insufficient to establish an association by him with first

appellant's actions. Nor can this be inferred from the fact that after deceased was seen to be struck, second appellant also laughed. It follows that second appellant's conviction of murder cannot stand.

The remaining question is whether second appellant should not have been convicted of a lesser offence. A conviction for culpable homicide can be discounted if only for the reason that it cannot be said that he was negligent in that he ought to have foreseen the throwing of a brick at deceased as a reasonably possible result of the common purpose to throw stones. Nor can a verdict of a conspiracy (an offence created by sec 18(2)(a) of the Riotous Assemblies Act 17 of 1956) to assault deceased be substituted. Whilst second appellant may have so conspired, this would not be a competent verdict on a

charge of murder (cf S vs Mavhungu 1981(1) SA 56(A) at 68 D - E; see too Burchell and Hunt: South African Criminal Law and Procedure, vol 1, 2nd ed 490). Conspiracy is not an offence referred to in sec 258 of the Criminal Procedure Act, 51 of 1977. And it does not include all the essential elements of the crime of murder. So resort cannot be had to sec 270 of the last-mentioned Act. This leaves for consideration whether, arising from second appellant's association in a common purpose to throw stones, he cannot be convicted of assault (with intent to do grievous bodily harm). Whilst the doctrine of common purpose is usually applied to murder, there is in principle no reason why it should not apply to a crime such as assault. Throwing a stone of the size mentioned at a person would undoubtedly constitute an assault. Accordingly, had first appellant thrown a stone at

deceased, second appellant would, as indicated earlier, have on the basis of common purpose been guilty of an assault. Does it matter that first appellant threw a brick instead? The general principle is that the liability of parties to a common purpose depends on whether the result produced by the perpetrator of the act falls within the mandate and is not concerned with the means by which the result is produced (R vs Shezi & Others 1948(2) SA 119(A) at 128; R vs Chenjere 1960(1) SA 473(FC) at 476 E - 477 A). A qualification to this principle (at least in dolus eventualis cases) is that if the consequence occurs in a way which differs markedly from the way in which it was anticipated it might, the requisite intent is lacking (S vs Goosen 1989(4) SA 1013(A)). In casu, so it seems to me, the Shezi principle does not apply. Because of the different means employed by first

appellant, his actions fell outside the scope of the common purpose. His throwing of a brick at deceased therefore cannot for any purpose be imputed to second appellant (or the other two). To do so, on the basis of the unlawful joint enterprise to throw stones, would amount to an application of the versari in re illicita doctrine. Second appellant cannot therefore be found guilty of an assault on deceased. He must be acquitted.

The following order is made:

- (1) First appellant's appeal against sentence succeeds. His sentence of ten years' imprisonment remains but four years thereof are suspended for three years on condition that he is not convicted of any crime committed during the said period involving an assault on a person for which

imprisonment without the option of a fine is
imposed.

(2) The appeal of second appellant succeeds.

His conviction and sentence are set aside.



NESTADT, JA

VAN HEERDEN, JA	)	
	)	CONCUR
GOLDSTONE, JA	)	