

Case nr 283/91 & 234/91

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

M. B. MQUABASI

First Appellant

A. E. RABI

Second Appellant

M.S. QOWA

Third Appellant

E.M. MALGAS

Fourth Appellant

andTHE STATE

Respondent

CORAM: E M GROSSKOPF, EKSTEEN, F H GROSSKOPF, JJAHEARD: 21 August 1992DELIVERED: 15 September 1992

J U D G M E N T

E M GROSSKOPF, JA

The four appellants were charged in the South Eastern Cape Local Division on a number of charges. After a long trial they were convicted by JANSEN J and assessors of murder (count 1), attempted robbery with aggravating circumstances (count 2), the unlawful possession of a firearm (count 3), and unlawful possession of ammunition (count 4). The third and fourth appellants were also convicted of the theft of a fire-arm, money and an attache case (count 6). All four appellants were sentenced to death on the murder charge and to ten years' imprisonment for the attempted robbery. In respect of the other offences various terms of imprisonment were imposed. In terms of section 316 A of the Criminal Procedure Act, no. 51 of 1977, the appellants have an automatic right of appeal in respect of the murder count against conviction as well as against the sentence of death. In addition the Court a quo granted them leave to appeal against their convictions and sentences on the count of

attempted robbery, and granted the second appellant leave to appeal against his convictions and sentences on the counts of unlawful possession of a firearm and ammunition. The latter appeal was not pursued before us, and no more need be said about it.

The evidence may be summed up as follows.

It is common cause that on 21 October 1988 the third and fourth appellants stole an attache case belonging to one Cloete. The attache case contained personal documents, cash, and a .38 special revolver, which later became exhibit 2 at the trial.

A witness Ninzinana testified that he knew the four appellants, and was a particular friend of the second appellant. On Wednesday afternoon 23 November 1988 he visited the second appellant. He found all four appellants and one Nunu in the room of the second appellant. When he arrived the first appellant was saying that he needed money to undergo the circumcision ceremony, and that they should

rob a service station at Threeways in New Brighton, Port Elizabeth. The other appellants expressed their willingness to do so. The first appellant also suggested that they should take money from Brito's, a bakery in the area. The third appellant was in possession of a firearm similar to exhibit 2, which he took out and placed on the floor. The first appellant proposed that the robbery should take place on the following day. The three other appellants were in apparent agreement with him. However, the witness Ninzinana told the others that it would be hard for him to join them in the robbery because he was under treatment - some time previously he had been stabbed in his neck and had sustained an injury which affected his speech and the use of his hand. Ninzinana left after about ten minutes.

It is common cause that on the following morning the four appellants went to the vicinity of a shop in New Brighton called Pinkie's Enterprise. Daily deliveries of bread and cake were made to this shop by the delivery van of

Brito's bakery. William Ngana, a van assistant in the employ of Brito's, testified that on that day he and one Nomnganga accompanied the driver of the van, one Mugabo, on their rounds. It was a part of the driver's duties to take charge of money received. They arrived at Pinkie's after 10 a.m. The two assistants alighted from the van, delivered the bread to the shop, received the money for it, and returned to the van. During this period the driver stayed behind the steering-wheel of the van. The two assistants climbed back into the van. Immediately thereafter a person (and it is common cause that this was the first appellant) appeared at the driver's side of the vehicle, pointed a fire-arm (which was wrapped in a cloth) at the driver, and said "give money, give money, give money". While he was saying this, the person tried to open the door, but it was locked, and then a shot rang out. The two assistants jumped out and ran off, leaving the passenger's door of the van open. When he looked back Ngana saw three people coming around to the passenger's

side of the vehicle. The door on that side was still open. One of them got into the van and searched the driver. Two remained standing at the door. Thereafter the three of them ran away. When they entered Maguga Street, about half a block away, a fourth person had joined them.

The driver climbed out of the van, stumbled to the back of it and collapsed there. He had been shot in the mouth and neck and died shortly after collapsing.

The events were also described by one Bongani Blom. On the day of the robbery he went to a service station situated next to Pinkie's Enterprise to have a battery recharged. While he was waiting for his receipt he heard a shot and went to look what had happened. He saw the two van assistants run across the street. Three Black men were standing at the passenger side of the van. The door was open. One of them climbed in and looked around while the other two remained standing outside. The one who had been inside, emerged, and they ran away towards Maguga Street.

The driver of the van got out, walked towards the back of the vehicle, and collapsed. Under cross-examination Blom said that one of the three persons who ran away had a gun in his possession. He did not see a fourth person following them.

Evidence was also given by one Ndanele Siyaka, who accompanied Blom on the day in question. He purported to identify appellants 3 and 4 as two of the persons on the scene. However, the trial court had a number of reservations about the reliability of his evidence, and decided to leave it out of account.

At a fairly late stage in the proceedings, the court called Pinkie Mtshanyana, the owner of Pinkie's Enterprise. He testified that he was busy washing himself in a room behind his shop when he heard the shot. The bread from Brito's had already been delivered. He hastily put on a shirt and went outside where he found the driver lying on the ground.

Further State evidence related to events after the

killing of the deceased. Tibo Kojabi is the mother of the second appellant. She testified that the second appellant told her on a Friday some time before the trial that he and the other three appellants had robbed a man who worked at Brito's, and that the first appellant had shot this man. It had been the first appellant's idea. She was shocked to hear this and took the second appellant to his father, where he was subsequently arrested. This evidence was of course admissible only against the second appellant.

The last State witness with whom it is necessary to deal, is Mtungwa Ngekazi. He testified that the third and fourth appellants sold the revolver, exhibit 2, and two bullets to him in the first week of December 1988. This evidence was not disputed.

The four appellants all gave evidence. The first appellant denied that any discussion had taken place on Wednesday 23 November 1988 as testified to by Ninzinana. On 24 November, he said, he and the others smoked dagga

together. The first and second appellants wanted to go to the beach to practice for a forthcoming soccer game. The third and fourth appellants decided to accompany them. The third and fourth appellants suggested that they should sell the gun, exhibit 2, to Pinkie in order to obtain money to buy food for their day on the beach. The gun was handed to the first appellant for this purpose since he was unknown in the area. The first appellant said that he examined the gun and found that it was not loaded. When they arrived at Pinkie's Enterprise, the first appellant alone went inside with the gun. According to his evidence, he did not find Pinkie in the shop, and had been told not to sell the gun to anybody else. He therefore left the shop. As he emerged, he saw Brito's van arriving, and decided on his own, and on the spur of the moment, to rob the driver. He went to the driver's side of the van and demanded money. He pointed the gun at the driver, and it went off accidentally. In his fright he dropped the gun and ran away.

In broad terms this version was supported by the other appellants although there were a number of discrepancies. They all admitted to running away after the shot was fired, although the second and third appellants said that they had not realized that it was the first appellant who had fired the shot. The fourth appellant said that he saw the first appellant drop the fire-arm, and that he picked it up before also running away.

After a thorough examination of the evidence, the trial court accepted the evidence of Ninzinana, Nguna, Blom, Kojabi and Pinkie. The evidence of the appellants was rejected as a version which could not reasonably be true. In particular the court rejected the evidence that any of the appellants thought the fire-arm was unloaded, that they intended to sell it to Pinkie, and that it went off accidentally when the first appellant tried to rob the deceased. The court's main findings on the facts were stated as follows:

"Ons bevind dat die Staat ho redelike twyfel bewys

het dat die beskuldigdes die roofpoging op Brito's reeds die vorige dag beplan het en tot uitvoering gebring het op 24 November 1988. Ons is nie tevrede dat dit bewys is dat daar wel geld buitgemaak is nie. Dit doen egter nie afbreuk aan die feit dat die beskuldigdes wel 'n poging aangewend het om die oorledene en Brito's se voertuig te beroof nie. Ons is van oordeel dat die Staat bo redelike twyfel bewys het dat die beskuldigdes 'n gemeenskaplike doel gehad het om met hierdie vuurwapen, BEWYSSTUK 2, die roof te pleeg. Al die beskuldigdes het geweet dat hierdie vuurwapen gebruik sou word om die oorledene te beweeg om afstand te doen van sy geld. Al vier die beskuldigdes het geweet dat daar ammunisie in hierdie vuurwapen was. Al vier hierdie beskuldigdes moes geweet het, en ons bevind dat hulle wel geweet het, dat hierdie vuurwapen dodelik kan wees indien hy gebruik word. Ons bevind dat die afleiding onvermydelik is, as die enigste redelike moontlike afleiding, dat elke beskuldigde subjektief voorsien het dat in die uitvoering van hierdie beplande rooftog die vuurwapen gebruik kan word en dat 'n persoon met die afvuur van 'n skoot daardeur gedood kan word. Ons bevind ook dat elke een van hierdie beskuldigdes roekeloos teenoor hierdie besef gestaan het. Beskuldigde nr. 1 het die oorledene opsetlik geskiet. Daaroor kan geen

twyfel bestaan nie. Beskuldigdes nr. 2,3 en 4 het hulle geassosieer met hierdie daad van beskuldigde nr. 1 en dit maak hulle ook skuldig aan die misdaad van moord."

The court consequently found all four the appellants guilty of murder and also guilty of attempted robbery with aggravating circumstances.

On appeal before us neither Miss Weyer (for the first appellant) nor Mr. Redpath (for the second, third and fourth appellants) questioned the correctness of the trial court's rejection of the appellants' evidence. The only credibility findings which were attacked were those relating to Ninzinana and the mother of the second appellant. As far as Ninzinana was concerned, the court considered his evidence with particular caution because he was the only witness who testified to the discussion on the Wednesday. However, not only did he make a good impression on the court, but his evidence was supported in a number of respects, of which one was particularly important. It will be recalled that,

according to Ninzinana, the first appellant planned the robbery so that he would have money to pay for his circumcision. The first appellant not only denied that this discussion took place, but asserted that he had in fact already been circumcised. This assertion was maintained until a late stage of the proceedings when the court proposed settling this issue by having the appellant examined by a district surgeon. When the court's proposal was conveyed to the first appellant he recanted and admitted that he was still uncircumcised. This volte face not only tends to discredit the first appellant's evidence, but tends positively to support the evidence of Ninzinana: it was not suggested that there was any way in which Ninzinana could have known that the first appellant was still uncircumcised other than as a result of the conversation to which he deposed. It will be recalled that he did not know the first appellant well - he was present on the afternoon in question because of his friendship with the second appellant.

In my view no reason has been shown for doubting the correctness of the trial court's finding on the credibility and reliability of Ninzinana's evidence. The same applies to the evidence of the mother of the second appellant. And, in any event, even without her evidence the case against the second appellant would have been as strong as that against the three other appellants.

If the trial court's findings on the evidence cannot successfully be impugned, as I believe the position to be, then its conclusions on the guilt of the appellants are in my view clearly correct. The appeal against the convictions of murder and attempted robbery cannot therefore succeed.

That brings me to the appeal against the sentences. In regard to the count of attempted robbery, Mr. Redpath submitted, on the authority of S. v. Moloto 1982 (1) SA 844 (A), that on the facts the court a quo should not have found that aggravating circumstances were present. Of course, even

in the absence of a finding of aggravating circumstances the sentence on the attempted robbery charge was a competent one, but I assume for the sake of argument that this court might interfere with the sentence if such a finding was not justified. I do not, however, think that the finding was incorrect. The evidence is that the first appellant pointed the fire-arm at the deceased, and demanded money. Clearly there was an implied threat that the fire-arm would be used if money was not furnished. This by itself would have introduced the element of aggravating circumstances, even if no shot had been fired. See S.v. Moloto (supra) at p. 853 D to H. Whether in the circumstances the actual shot can also be regarded as an aggravating circumstance need not be considered (cf. S.v. Moloto (supra) at p. 853 G). I consider therefore that the court correctly found that aggravating circumstances were present, and in my view the sentence imposed for the attempted robbery was a suitable one.

I turn now to the death sentences. The principles

to be applied in imposing death sentences have been settled in a number of cases by this court, and there is no need to repeat them here. Our first task is to determine what aggravating or mitigating factors are present. I commence with aggravating factors.

On behalf of the State it was argued that the attack on the deceased was premeditated. It is true that an armed robbery was planned, but the inference cannot be drawn beyond a reasonable doubt that the appellants had decided in advance that the driver of the van would be shot. Nevertheless the pre-planning remains an aggravating factor. Then it is said that the motive for the murder was robbery, and that such crimes are on the increase. This is an aggravating factor of some weight. The State further pointed to the lack of remorse on the part of the appellants. Finally reference was made to the previous convictions of the appellants. I do not propose analysing them in detail. None of the appellants has a clean record. The first and fourth

appellants have previous convictions for housebreaking and theft. The second and third appellants had more violent pasts. Their records include offences of violence committed with knives.

Finally, there was the gratuitous and cold-blooded way in which the deceased was shot even before he had a chance of complying with the first appellant's demand for money. This factor applies particularly to the first appellant since it cannot be said that the second, third and fourth appellants should have foreseen, or did foresee, such conduct on the part of the first appellant.

I now turn to mitigating factors. First, there is the question of youth. The first appellant was 21 and a half when the offence was committed. The others were some years older. This is not a factor of any great weight. Despite his youth the first appellant was the instigator and main perpetrator of the crime. There is no suggestion here that he was influenced by others, or that other facets of an

immature personality affected his behaviour, except perhaps youthful lack of judgment.

Then there is the nature of the intent with which the murder was committed. It is accepted that at least the second, third and fourth appellants acted without dolus directus. The position of the first appellant is more questionable, but even in his case one cannot, in my view, infer beyond a reasonable doubt that he had the direct intention to kill the deceased. No doubt every person must know that there is a strong possibility that a person who is shot at close range might die as a result thereof, and one can infer that the first appellant subjectively realized this, but in my view this is the furthest that one can go.

A further possible mitigating factor is the use of dagga. All the appellants testified that they smoked dagga on the morning of the offence, and there is no reason to reject their evidence in this regard beyond a reasonable doubt. Indeed, the trial court accepted this evidence, but

did not regard this as a mitigating factor because there was no evidence that the use of dagga had influenced the appellants in a manner which could extenuate their conduct. In so finding, the court proceeded on the basis that "[W]aar daar ... aspekte is wat aan 'n beskuldigde persoonlik kleef, soos byvoorbeeld die effek wat een of ander faktor op sy gemoedstoestand gehad het, sal dit uit die aard van die saak van 'n beskuldigde verwag word om die Hof te oortuig dat daardie invloed 'n strafversagtende faktor daarstel." The judgment in the court a quo was delivered before this court decided in S. v. Nkwanyana and Others 1990(4) SA 735 (A) that the onus is on the State to negative, beyond reasonable doubt, the existence of such mitigating factors as are relied on by an accused (at p. 744 B). In the light of Nkwanyana's case it was wrong of the trial court to place an onus on the accused, even in respect of matters peculiarly within the accused's own knowledge. Applying the test laid down in Nkwanyana's case it seems to me that the use of dagga may, as

a reasonable possibility, have had an effect on the actions of the appellants. This applies particularly to the gratuitous act of the first appellant in shooting the deceased even before he had an opportunity to hand over the money demanded from him.

When one weighs up the aggravating and mitigating factors it seems to me that this case, although a very serious one, is not of such exceptional seriousness as to render the imposition of the death sentence imperative. The appellants are young men, and, despite their records, may well be capable of rehabilitation. The requirements of deterrence, prevention and retribution can, in my view, be sufficiently served by long periods of imprisonment.

The final question then is what sentences should be imposed. Although there are differences between the circumstances of the appellants, they tend to cancel out. The first appellant is the youngest and he has no record of violence. On the other hand, as I have already said, he was

the instigator and main perpetrator of the offence. The fourth appellant also has a less serious record, but he was one of the persons who supplied the fire-arm with which the offence was committed. Taking all factors into consideration I do not consider that we should distinguish between the different appellants. A long term of imprisonment is clearly called for, and I consider that 25 years will be appropriate.

In the result the following order is made:

1. The appeals against the convictions of all the appellants on counts 1 and 2, and of the second appellant on counts 3 and 4, are dismissed.
2. The appeals of all the appellants against their sentences for attempted robbery (count 2) and of the second appellant against his sentences on counts 3 and 4, are dismissed.
3. (a) The appeals of all the appellants against their death sentences on the count of murder (count 1) are allowed and a sentence of 25 years'

imprisonment substituted in respect of each.

(b) The commencement of this period of 25 years is, in terms of section 282 of the Criminal Procedure Act, no. 51 of 1977, antedated to the date of sentence in the court a quo, being 23 August 1990, and the sentence of 25 years is to run concurrently with the sentences imposed on counts 1,2,3,4 and 6.

E M GROSSKOPF, JA

EKSTEEN, JA

F H GROSSKOPF, JA Concur