G.P.-S. Halssaak J 445

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPÈL DIVISION)
(AFDELING)

APPEAL IN CRIMINAL CASE
APPÈL IN STRAFSAAK

Moffat Vikinduku Nenc
Appellant

versus/teen

Die Staat
Respondent

Nr Stan @ 32/11/81 @ 8.35 vm

Appellant's Attorney
Prokureur van Appellant Prodec

Respondent's Attorney
Prokureur van Respondent P G Pietermaritzburg

Appellant's Advocate
Advokaat van Appellant C. Steyn

Respondent's Advocate
Advokaat van Respondent R.P. Stuart

Set down for hearing on
Op die rol geplaas vir verhoor op 20:8:81 6 7 11.

N.P.D

Coram: Corbett ; Kotzé & Trengove JJAR

Vir Appellant: C. Steyn

Vir Respondent: R.P Stuart

Steyn: 9h50 – 10h03

Stuart: 10h03 – 10h19

Steyn: Geen repliek

UITSPRAAK HOF NR 2 OP 25 AV 81 @ 9.45vm

Appeal dismissed

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of

MOFFAT VINKINDUKU NENE ..... appellant

versus

THE STATE ..... respondent

Coram: CORBETT, KOTZÉ et TRENGOVE, JJA

Date of hearing: 20 August 1981

Date of judgment: 25 August 1981

J U D G M E N T

CORBETT JA

The appellant and a co-accused (whom I shall call "accused no 1", appellant having been accused no 2 at the trial) appeared together before THIRION J and two assessors in the Natal Provincial Division upon a charge of the theft of a fire-arm, viz a semi-automatic pistol (count 1),

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a charge relating to the unlawful possession of the same fire-arm (count 2), a charge relating to the unlawful possession of ten rounds of ammunition (count 3) and three charges of robbery with aggravating circumstances (counts 4, 5 and 7). In the case of count 5 there was an alternative charge of attempted murder. In addition, appellant was indicted on his own on a charge of murder (count 6) and another charge of attempted murder (count 8). The appellant and accused no 1 were acquitted on count 1, but convicted as charged on counts 2, 3, 4 and 5 (the main charge). On count 6 appellant was convicted of murder and the Court found that no extenuating circumstances were present. On count 7 appellant was found guilty of robbery with aggravating circumstances, while accused no 1 was found guilty of theft. And on count 8 appellant was found guilty of assault. The trial Judge sentenced the appellant and accused no 1 in respect of these convictions. In this appeal this Court is concerned only with the death sentences imposed on the appellant

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in respect of counts 6 and 7.

With leave of the trial Judge appellant comes on appeal only in regard to (a) the finding on count 6 (the murder charge) that no extenuating circumstances were present and against the death sentence imposed, and (b) the death sentence imposed in respect of count 7.

On appeal the trial Court's findings of fact were not attacked in any way. Consequently the facts and circumstances relevant to the issues raised on appeal may be stated quite shortly. At some stage, probably during April 1980, appellant and accused no 1 came into possession of a fire-arm, a 6,35 mm C.G. Haenel Suhl-Schmeissers semi-automatic pistol (the subject-matter of count 2) and twelve rounds of 6,35 mm ammunition, which were capable of being fired by the pistol (this ammunition, or rather ten rounds of it, having been the subject-matter of count 3). Thereafter, for reasons which I shall canvass later, the two of them embarked upon a series of

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armed robberies, culminating in the occurrence which gave rise to the charges under counts 6, 7 and 8.

The first of these robberies (charged under count 4) took place at the Pick 'n Click supermarket at Isipingo, near Durban, on Friday, 2 May 1980. At about 6 p.m. on that Friday evening appellant and accused no 1 entered the shop, closed the door to the main entrance and held up the manager of the supermarket at gun-point. They took the contents of the till and then forced the manager, one Hargovan, by means of threats that he would be shot if he did not obey, to the storeroom, apparently attached to the supermarket. The two robbers then ran away with the money. On this occasion the pistol was in the possession of appellant and it was he who threatened Hargovan with the pistol. According to Hargovan the money taken amounted to R650. In pleading guilty to the count appellant stated that the sum was R118; and this was the amount accepted by the trial Court as having been taken by appellant and accused no. 1.

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The second robbery (charged under count 5) took place at the premises of Illovo Sugar Estates, near Stoney Hill, on 27 May 1980. Mr C L Eades, a cane supply officer in the employ of Illovo Sugar Estates went to the premises in question (described as being at "zone 48") at about 4.30 pm on this date in order to pay the labourers working under him. He entered the office and prepared to issue the pay envelopes. In aggregate the pay envelopes contained about R1 800 in cash. While Eades was conversing with one of the clerks who worked at zone 48, accused no 1 entered the office and uttered several times a word which is a colloquialism for money. Appellant then appeared at the doorway brandishing a pistol and pointing it in Eades's direction. Eades turned and sat down and told a clerk to collect the money and to hand it over. Appellant then said: "Quickly, give me the money, or I am going to shoot you"; and then immediately thereafter shot Eades from a range of about

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seven feet (2,134 m). Eades then told the clerks to hand over the money. The intruders grabbed the money and ran away. It was admitted by appellant that they took R1 500 and the trial Court accepted this figure, when convicting appellant and accused no 1, as representing the amount of money involved in the robbery. The bullet fired at Eades struck him in the left upper abdomen, passed through the abdomen and came to rest against his ribcage on the right-hand side. In doing so it passed through and injured portion of his liver. Though this caused severe bleeding, Eades received proper medical attention fairly soon thereafter and his life was never in serious danger. Had the track of the bullet been a few inches lower, however, the injury could, according to the medical evidence, have been "catastrophic".

The third and final episode took place at the Ilfracombe Store at Umkomaas on 29 May 1980. On this occasion the robbery was carried out by appellant alone. At about 4.48 pm appellant entered the shop, walked up to

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the manager of the shop, one Naicker, who was busy at the till checking the day's takings, and asked for a packet of a particular brand of cigarettes. Naicker went to where the cigarettes were stacked on the shelves behind him and then told the appellant that there were no such cigarettes. Naicker went back towards the till. Appellant then shot him. Naicker staggered some distance along the space behind the counter and through a doorway leading off the back of the shop into a storeroom. In the storeroom he collapsed and fell down. The bullet, which had struck him in the left lumbar region, passed through his left kidney, stomach and liver. He died a short while later. In the meanwhile appellant emptied the till. He then pointed the fire-arm at one Kahn, who happened to be in the shop, and asked him where the other money was. Khan denied all knowledge of money. Appellant then walked to where Naicker was lying, kicked him and searched his pockets. He found a bunch of keys, with which he opened the safe. He took a strong box from the safe, forced it open and removed more money from there. This together with the money taken

/ from.....

from the till, he wrapped in newspaper. At the pistol point he then herded Khan and one Mpanga, an assistant in the shop, into the storeroom.

While appellant was busy emptying the till a prospective customer, a Mr M H Vorster, entered the shop to buy cooldrinks and cigarettes. When he saw what appellant was doing Vorster ran home and fetched a spear gun and a panga. He returned to the shop and waited for appellant to emerge. When appellant did so, Vorster shot him in the back with his spear gun. The point of the spear had previously broken off and consequently this did not make much impression on appellant. The latter turned round and without aiming, shot at Vorster with his pistol from a distance of about 15 to 18 feet, ie 4,572 to 5,486 m. (This action formed the subject-matter of count 8.) Appellant then ran away, pursued by Vorster, Khan and others, but they were unable to apprehend him. The spoils on this occasion amounted to R450.

/ Subsequently .....

Subsequently, appellant gave R100 of the spoils of this robbery to accused no 1, who was at the time well aware of the circumstances under which the money had been taken. Appellant and accused no 1 were eventually arrested about three months after the episode at the Ilfracombe Store.

At the trial appellant gave evidence both prior to conviction and, after conviction, on the issue of extenuating circumstances. In the latter regard appellant stated that when in March 1980, he went home to where his father lived in the Dundee district, he found his father in "a very bad condition". His father's health was generally not good - he had lost a leg at some stage - but appellant found too that he was then suffering from hunger. Appellant became "emotionally upset" about his father's condition. He had supported his father until then. At the time he was "self-employed" and "sometimes" earned R150 per month from sewing. He "sometimes" sent his father R50 per month. He had been looking for employment, but without success.

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It was in these circumstances and in order to obtain money wherewith to assist his ailing father that appellant embarked upon the robberies described above. Some of the proceeds of the robberies were sent home. First he sent an amount of R100 and then he sent goods to the value of about R190, together with the sum of R100. This was all done with the proceeds of the second robbery. According to appellant he used the rest of the money to pay his own debts.

It was argued at the trial that the above-mentioned circumstances, inter alia, constituted extenuation. In this regard the trial Judge made the following observations:

> "As far as the argument that the accused found his father in a pitiful state and was influenced by that, is concerned, we shall assume or accept that the accused had a filial affection for his father and that he did feel that he had to do something to assist his father and that this gave him the idea to resort to robbery as a means of obtaining money. As against this there is the fact that as recently before the murder as the 27th May 1980 the accused had obtained a sum of R1 500,00 in a robbery and had used, of that amount, only the sum of about R300,00 to assist his father. He therefore had obtained by means of the robbery on the 27th May 1980

> a considerable sum of money yet one finds that 2 days later he was again prepared to run the risks involved in the commission of armed robbery. We therefore do not find that indigence was not the motive for the robbery in the course of which the deceased was murdered."

(It seems clear from the context generally and from the Court's finding that there were no extenuating circumstances, that the last sentence of this quotation contains an error, possibly a transcription error. Either the first "not" or the second "not" should be omitted to arrive at the true sense of what the Court intended.)

Other grounds of extenuation were advanced at the trial - and rejected by the trial Court - but on appeal the only argument advanced on the issue of extenuation was that the Court a quo had misdirected itself by restricting its view of the influence that the sight of his father's pitiful state had on appellant's mind only to one aspect, viz the indigence aspect and appellant's determination to overcome

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this; whereas, had the full extent of the influence been considered, a complete change in appellant's mental state, personality and outlook on life would have been revealed and the reason why he "went on the rampage" explained. This constituted extenuation.

In my view, there is no substance in this argument. In his evidence on extenuation appellant advanced only his feeling of pity and the resultant desire to obtain money in order to assist his indigent father as his motivation for the robberies. There is no suggestion in his evidence of a change of mental state or personality or general outlook on life. Nor is there any other evidence to substantiate counsel's submission in this regard. Consequently there was, in my view, no misdirection by the Court a quo. Moreover, I am in full agreement with the trial Court's view on the so-called "indigence" aspect; and with the finding that this did not constitute an extenuating circumstance in regard to count 6. Accordingly, I am of the opinion that there is no

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ground for interfering with the trial Court's finding that no extenuating circumstances were present. It necessarily follows that the appeal against the conviction and sentence in respect of count 6 must fail.

In regard to the sentence of death imposed in respect of count 7 (robbery with aggravating circumstances) appellant's counsel raised two points. In the first place he argued that as between count 6 and count 7 there had been an improper duplication of sentences. He referred in this connection to the judgment in S v Mathebula (1978 (2) SA 607 (AD)), in which this Court considered the problem of duplication of punishment in the passing of sentence, where the accused has been convicted of both murder without extenuating circumstances and of robbery with aggravating circumstances in relation to facts constituting one transaction. In delivering the judgment of the Court TROLLIP JA emphasized the extreme care which should be exercised by the Court to avoid a duplication

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of punishment and ruled that in imposing punishment on the robbery conviction it behoved the Court to "think away" the murder which was committed in the course of the robbery.

Further guidance as to what aggravating and other circumstances may or may not be taken into account when imposing sentence for robbery with aggravating circumstances in the kind of case under discussion was given in an unreported judgment of this Court (S v Sedick, 3/10/80) in which VAN HEERDEN AJA stated -

> "Ons is nie versoek nie om die riglyne neergelê in die Mathebula-saak in heroorweging te neem. Soos ek die uitspraak verstaan, moet in 'n geval soos die onderhawige ~~dit~~ by oorweging van 'n gepaste straf op die roofklag sover doenlik die noodlottige gevolg van die aanranding - die dood van die oorledene - buite rekening gelaat word, maar kan en behoort nog steeds ag geslaan te word op die geweld wat gebruik is en veral op die feit dat dit lewensgevaarlik van aard was."

/ In .....

In the present case THIRION J stated fully his reasons for passing the death sentence in regard to count 7. He referred to the case of S v Ntuli (1978 (1) SA 523 (AD)) in which it was pointed out that where the death sentence is a discretionary form of punishment it should ordinarily be imposed only in extreme cases, and he also referred to the judgment of TROLLIP JA in S v Mathebula (supra). In weighing the gravity of the offence to which the robbery conviction related the trial Judge stated, inter alia, —

> "... by the date of the robbery which is the subject of count 7, the accused had already completed 2 successful robberies with aggravating circumstances and that seemed only to have served to whet his appetite. Furthermore, in the robbery which is the subject of count 5, accused no 2 had to his knowledge, inflicted a very serious wound on one of his victims. When, therefore, he went on the day of the robbery in count 7 to commit that robbery, he knew full well the risks involved. This notwithstanding and notwithstanding the fact that on the 27th May he had obtained a sizeable amount of loot in that robbery, he again 2 days later on the 29th, embarked upon the robbery which is the subject of count 7. He went to the

/ deceased's.....

> deceased's store with the settled intention of committing an armed robbery there and with the intention of making use of a loaded pistol as a means of persuasion. The fact that he used this pistol on the slightest of pretexts and for the slightest of reasons shows that accused no 2 had all along foreseen that he would use it. Therefore even if the actual fact of the killing of the deceased is disregarded for the purposes of imposing sentence on accused no 2 on count 7, the facts relevant to count 7 are nevertheless so serious that they justify the imposition of the ultimate sentence."

Appellant's counsel also referred us to the report made by the trial Judge in terms of sec 320 of the Criminal Procedure Act 51 of 1977. In this THIRION J stated the following:

> "In passing sentence on count 7 I was mindful of the judgment in S v Mathebula and Another 1978 (2) SA 607.
> I endeavoured to avoid a duplication of sentence on counts 6 and 7 by leaving out of consideration, when passing sentence on count 7, the fact that the appellant brought about the death of the deceased and that he did so in circumstances amounting to murder.
> I did however take the following circumstances into account on count 7:
>
> (i) The appellant had no relevant previous convictions but committed three serious robberies within a space of one month.

/ (ii).....

(ii) On the occasion of each of the three robberies the appellant made use of a firearm to forestall resistance to the taking of the money.

(iii) Each of the three robberies was planned as a robbery in which the pointing of the firearm was intended to be the means of persuasion.

(iv) On all three the occasions the firearm was loaded.

(v) On two of the three occasions the appellant fired shots at his victims.

(vi) When the appellant went on the 29th to rob the Ilfracombe Store he did so with the knowledge that circumstances could easily arise in which he would have to use the firearm and shoot someone.

(vii) The appellant, at the time when he went into the Ilfracombe Store, must have known that the storekeeper would be there and that he would at least have to point the firearm at the storekeeper in order to be able to rob him.

(viii) The appellant, in the course of the robbery, fired a shot at the storekeeper as a means of overcoming or forestalling resistance.

It is in respect of the consideration mentioned in paragraph (viii) above that I am of the view that another court might find that, as a matter of law, I have misdirected myself. I accordingly granted leave to appeal."

Counsel submitted that in taking into account point (viii) above the trial Judge erred and infringed the above-stated principles concerning the duplication of sentences. I cannot agree. In terms of what was said in Mathebula's case (supra) and Sedick's case (supra), the trial Judge was, in my view, perfectly entitled to take into account the fact that appellant fired a shot at the storekeeper as a means of overcoming or forestalling resistance. Counsel's first point cannot, therefore, succeed.

The second point taken by appellant's counsel was that in any event in sentencing the appellant in respect of count 7 the trial Judge misdirected himself in that he failed to take into account the full extent of the influence which the pitiful sight of his father must have had on appellant's mind. This argument relies upon the same factual premise as that advanced in regard to extenuating circumstances.

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For the reasons already stated that factual premise is, in my opinion, not well-founded and consequently this second point, too, must fail.

The appeal is dismissed.

M M CORBETT

KOTZE JA)
TRENGOVE JA) CONCUR