

Case No: 211/85

WHN

THEMBILITSHE RICHARD ZUMA First Appellant

JAMES MFANELO NTSETE Second Appellant

and

THE STATE Respondent

JOUBERT, JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THEMBILITSHE RICHARD ZUMA First Appellant

JAMES MFANELO NTSETE Second Appellant

and

THE STATE Respondent

Coram: JOUBERT, HOEXTER JJA et CILLIÉ AJA.

Heard: 19 November 1985

Delivered: 26 November 1985

J U D G M E N T

JOUBERT JA:

/Appellant

Appellant no 1 and appellant no 2 were charged as accused no 1 and accused no 2 respectively with Bongani Israel Mbele as accused no 3 in the Durban and Coast Local Division before FRIEDMAN J and two assessors with having murdered the deceased Buzibandla Shandu during the night of 13 June 1984 at the premises of Marmic Scrap Dealers (hereinafter referred to as "Marmic"), Ottawa, in the district of Inanda (count 10). They were also charged with other offences which cover the period from 21 April 1984 to 13 June 1984. Their activities on the premises of Marmic during the night of 13 June 1984 also gave rise to a charge of robbery

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with aggravating circumstances in that they deprived the deceased of the possession of a Mazda van while he was performing his duties as a night-watchman (count 9). They were tried and convicted on count 10 of murder without extenuating circumstances and were sentenced to death. The Court a quo granted the appellants leave to appeal to this Court only in respect of their death sentences.

The following dictum in S v Ndlovu, 1970(1) SA 430 (AD) per HOLMES JA at p 433H - 434A is a very apt synopsis of the relevant legal principles which this Court has to observe in the present matter viz. :

"The

"The onus of establishing the existence of extenuating circumstances rests upon the accused. This means that there must be a factual foundation for a trial Court's finding of circumstances, on a preponderance of probability. This does not necessarily mean that the accused must give evidence : in a proper case the trial Court may be able to find the required degree of probability from the evidence as a whole or from so much thereof as it has accepted. But there must always be a foundation of probability before the Court can exercise what is in effect a moral judgment in the matter of extenuating circumstances. Furthermore, it is well settled that this Court cannot interfere with a trial Court's finding of absence of extenuating circumstances, unless such finding is vitiated by misdirection or irregularity, or is one to which no reasonable court could have come."

/According

According to the accepted evidence the relevant circumstances relating to the perpetration of the murder may be briefly summarized as follows. The trial Court found that the appellants and accused no 3 formed a gang under the leadership of accused no 3 to commit offences for financial gain. Their criminal activities as a gang commenced when they burgled the flat of Miss Francis on 21 April 1984 (count 1). On that occasion they stole her pistol (Exhibit 1) and a supply of ammunition. Accused no 3 took possession of the pistol and its ammunition. Appellant no 1 showed him how to use the pistol by releasing its safety catch. From then on accused no 3 was

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to the knowledge of the appellants in possession of the pistol when they committed various housebreakings and robberies. To their knowledge accused no 3 used the pistol for the purpose of threatening victims and firing warning shots. They also knew that he would use the pistol if and when the occasion arose. Fortuitously nobody had been killed by accused no 3 during their criminal undertakings prior to the murder of the deceased. The faces of the appellants and accused no 3 were covered with balaclavas on the night of 13 June 1984 when they were seen to approach the premises of Marmic. They acted with a common purpose because they had planned

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to commit robbery and/or housebreaking. The trial

Court then made the following finding on the relevant

events that occurred :

"It is not unimportant that a shot was actually fired at the gate of those premises. It seems that this shot was fired when the accused were first confronted by the deceased, Shandu, the night-watchman at those premises. A cartridge shell fired from the pistol was found near the main gate of the premises. Thereafter it seems abundantly clear, and indeed this has been described by accused no 3 graphically at the section 119 proceedings, that accused no 3 went on what I may call 'a shooting spree'. He pursued the deceased and in effect emptied the gun on or at him. The probable reason for this is that given by accused no 3 himself, namely that the deceased refused to submit and was making a noise trying to summon help by blowing upon a whistle."

/Accused

Accused no 3 pursued the deceased into the toilet/
shower area of the offices. He fired shots at the
deceased in a confined space not to scare him but
with the intention of shooting him in order to keep
him quiet. The deceased was fatally struck by
at least two bullets. Accused no 3 was the per=
petrator of the murder whereas the appellants were
his accomplices. The act of killing (actus reus)
must in law be imputed to the appellants who had the
requisite intention to kill since they did foresee
the possibility that the use of the pistol by accused
no 3 would have fatal consequences.

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The personal circumstances of the appellants were known to the trial Court. Appellant no 1 was 30 years of age. He claimed to be totally uneducated. The trial Court found that he displayed a reasonable amount of intelligence. Appellant no 2 was 20 years of age with a standard 1 education. The trial Court found him to be by no means an immature person. Although he had lost his job he was not destitute prior to the murder. He willingly joined the gang and willingly participated in the criminal activities of the gang.

The trial Court also had regard to the fact that neither of the appellants fired the fatal shots.

On the evidence as a whole I am of the opinion that there is in the circumstances of the present case no factual basis from which the existence of extenuating circumstances could possibly be established. I am accordingly not persuaded that the trial Court misdirected itself in its finding that there are no extenuating circumstances. Nor can it be said that no reasonable court could in the circumstances of the present matter have come to such a finding.

In the result the appeals against the death sentences are dismissed.

C P JOUBERT J.A.

HOEXTER JA)
 CILLIÉ AJA) concur.