131/87

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SIPHO MAHUNGELA MTHETHWA .....1st APPELLANT

MVUSENI MANDLAKAYISE MBUYAZI...2nd APPELLANT

and

THE STATE .....RESPONDENT

J J F HEFER JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

SIPHO MAHUNGELA MTHETHWA .....FIRST APPELLANT

MVUSENI MANDLAKAYISE MBUYAZI .....SECOND APPELLANT

and

THE STATE .....RESPONDENT

CORAM : VAN HEERDEN, HEFER et JACOBS JJA.

HEARD : 13 NOVEMBER 1987.

DELIVERED :23 NOVEMBER 1987.

J U D G M E N T

HEFER JA :

During 1986 the appellants committed a series

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of robberies in the Kwambonambi area in northern Natal. Their modus operandi was to steal into private dwellings early in the evening where they subdued the inhabitants with a pistol which second appellant produced on each occasion and robbed them of whatever the appellants could lay their hands on. On the evening of 21 August 1986, intent on committing yet another such a robbery, they entered the farmhouse of Mr Ronald Wiseman through a back door. Producing the pistol as usual, second appellant entered first, closely followed by first appellant. They encountered the Wisemans' cook, Mthembu, in the kitchen. Mthembu immediately started shouting, which drew Mr Wiseman (who had been in the lounge with his wife) towards the

kitchen.....3

kitchen. Near the kitchen door second appellant shot him to death. The same fate befell Mthembu. Thereupon the appellants fled from the house.

These events in due course led to the appellants' appearance in the court a quo where they faced a number of charges arising from the robberies, and two counts of murder arising from Mr Wiseman and Mthembu's death. They were convicted of the two murders and on most of the other charges. No extenuating circumstances having been found, they were sentenced to death for each of the murders. The learned judge, however, granted them leave to appeal to this court, in the case of first appellant, against his conviction on the two counts of

murder.....4

murder and, in the case of both appellants, against the death sentences pursuant to the finding that there were no extenuating circumstances.

At the trial it was conceded by the defence that the appellants had entered the Wiseman dwelling with the common intention to rob. It was common cause, moreover, that the two deceased had died as a result of shots fired by second appellant. As far as first appellant is concerned the only material issue was the foreseeability to him of the deceased's death. His case was that, although he was aware that second appellant carried a loaded pistol which he would use to subdue the occupants, he did not foresee that it would be used to kill any of them.

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In the past, so his evidence went, their victims had always heeded the silent threat of the firearm and had always surrendered their belongings without offering the slightest resistence. This is what he expected of the occupants of the Wiseman dwelling too. The court found, however, that

> "(he) knew that No. 2 carried a loaded pistol, he knew that No. 2 was going to menace the people with this pistol. He must have foreseen and we find that he did foresee, this being the only reasonable inference, that events might turn in such a way as that the pistol might be used and death of one of the occupants might result. This, as I say, is the only reasonable inference that can be drawn from all the evidence against accused No. 1.
>
> Armed robbery, use of a loaded firearm, people in their houses at night,

> resistence, retaliation, shooting, death, are all natural consequences.. They happen all too often and the Court is satisfied beyond reasonable doubt that accused No. 1 subjectively must have appreciated when he entered this house that night,that death might result. He carried on, he was party to the enterprise, he was reckless, he did not care what happened, he was in it till the bitter end. It is therefore a clear case against him of dolus eventualis ----------. This is to say that he subjectively foresaw that death might result. It was part of the bargain that he took into account and he carried on until the end."

The main submission by first appellant's counsel in challenging this finding was that the court erred in rejecting first appellant's evidence and accepting second appellant's version of the sequence of events on the occasion of the murders. No useful purpose can,

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however, be served by enquiring into the question whether first appellant's rather than second appellant's version should have been accepted. It emerged at the trial that second appellant encountered Wiseman in the dining room. It is reasonably clear that it was there that he started shooting. First appellant who, as mentioned earlier, had entered after second appellant, got no further than the kitchen. A scuffle developed there between him and Mthembu and, according to his evidence, it was while this was going on that the shooting started. He immediately fled from the house, he said, and hid near the house until second appellant also emerged and joined him. Second appellant's version was that when

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he fled first appellant must still have been in the house, because, while he ran from the house, first appellant was behind him. It makes no difference, in my view, to the outcome of the appeal whether first appellant fled after hearing the first shot or whether he remained in the kitchen until all the shots had been fired. First appellant's counsel argued that first appellant's evidence supports an inference that he disassociated himself from the shooting immediately upon hearing the first shot and that, for this reason, the distinction is important. I do not agree. Assuming that he fled after the first shot, the inference which counsel sought us to draw, is not justified. Taking into account that first appellant did not

know.....9

know who was shooting he might equally probably have fled for fear for his own safety. The sequence of events does not reflect on and does not assist in the determination of the question of the foreseeability to first appellant of the deaths, which, as mentioned earlier, is the only issue as far as first appellant is concerned. I am quite prepared to assume in his favour that he fled at the stage when he said he did and to examine the correctness of the trial court's finding as to foreseeability on that basis.

The trial court's reasoning in the passages from the judgment quoted above is obviously correct. Elsewhere in the judgment the learned judge said:

"At.....10

> "At the Wiseman house, when they were running away, he said, as I have already mentioned, that he was afraid that Mrs Wiseman was going to shoot them, the relevance of this being, of course, that he recognised then and must have appreciated at all material times that retaliation was a reasonable possibility and it does not require much foresight to recognise that if you are with a person armed with a loaded gun and if retaliation is encountered and if the people in the house start shooting, that accused No 2 would shoot back; in other words that it would degenerate into a shooting scene and there might be a loss of life."

Much more need not be said. The fact that resistance was not encountered in the appellants' previous raids makes no difference. It is ludicrous to suggest that this could have expelled the reasonable possibility of resistance in all further ones. I am in full agreement with

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the trial court's conclusion. First appellant's appeal against his conviction cannot succeed.

Nor can the appeal of either appellant against the finding that there were no extenuating circumstances be upheld. I do not propose entering upon a discussion of this aspect of the matter. Every factor mentioned to us was considered by the trial court and rejected. I have no reason to differ.

The appeal is accordingly dismissed.

J J F HEFER JA.

VAN HEERDEN JA)
JACOBS JA) CONCUR.