IN THE APPEAL COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NUMBER: 206/91 ~~459/90~~

In the appeal of:

ISAAC VUSI CHONCO APPELLANT

and

THE STATE RESPONDENT

Coram: SMALBERGER JA, VAN COLLER et KRIEGLER AJJA.

Date heard: 8 November 1991

Date delivered: 27 November 1991

J U D G M E N T

VAN COLLER AJA:

The appellant was convicted of murder in the Natal Provincial Division. The trial court, composed of Howard JP and two assessors, found no extenuating circumstances and the death sentence was imposed on 9 November 1989. An application for leave to appeal against the conviction and sentence was refused but this court granted leave to appeal against the sentence.

Appellant was also convicted of attempted murder and robbery with aggravating circumstances. On these counts he was sentenced to 8 and 10 years imprisonment respectively. On two further counts, relating to the unlawful possession of a

firearm and of ammunition, two years imprisonment was imposed. These two counts were treated as one for the purpose of sentence. This sentence and the period of 8 years imprisonment imposed in respect of the attempted murder were ordered to run concurrently with the sentence of 10 years imprisonment imposed in respect of the conviction for robbery with aggravating circumstances. Appellant was acquitted on two other counts of robbery with aggravating circumstances.

Appellant was 28 years old at the time of the trial. A 19 - year old male stood trial with appellant as accused no. 2. Accused no. 2 was also convicted on the murder, attempted murder and robbery charges. In respect of the conviction of murder, the trial court found that there were extenuating circumstances and a sentence of 12 years imprisonment was imposed. In respect of the attempted murder count, accused no. 2 was sentenced to 8 years imprisonment and in respect of the robbery to 10 years imprisonment. Accused no. 2 was

also convicted on charges relating to the unlawful possession of a firearm and of ammunition. An effective sentence of 22 years imprisonment was imposed on all these counts.

One previous conviction was proved against appellant. In August 1987 he received a suspended sentence of 12 months imprisonment for the unlawful possession of a firearm. Besides convictions in respect of the unlawful possession of a firearm, ammunition and dagga, accused no. 2 has two previous convictions for assault with intent to do grievous bodily harm and one for robbery.

The events which gave rise to the charges against appellant and accused no. 2 took place outside the Cool Air Trading Store in the district of New Hanover on the evening of 22 April 1988. The owner of the trading store, Moonsamy Naidoo, and his wife Rajpathjee Naidoo, were among the witnesses called by the State. It appears from their

evidence that Mrs Naidoo helped her husband in the shop and that the deceased, Absolom Dlamini, was an employee of Moonsamy Naidoo. At about 7.30 pm on 22 April 1988 they left the shop. While Naidoo and the deceased were locking up, Mrs Naidoo and her grandson got into their motorcar which was parked directly in front of the shop. The deceased carried a black bag containing a bottle of Coca-Cola, half a loaf of bread and about R1000 in cash. This represented the day's takings, including the float. The bag also contained a black wallet which belonged to Mrs Naidoo. There was about R100 in the wallet. After Naidoo had locked the door of the store and while he and the deceased were about to get into the car, Mrs Naidoo saw a man walking along the verandah of the trading store and behind the car. Without saying anything, he assumed a crouching position and started shooting. Mrs Naidoo could not say how many shots were fired, but when the shooting stopped she left to seek help. When she returned to the scene she found her husband and the deceased lying on the

ground, both seriously wounded. The deceased died shortly afterwards in her presence. The bag containing the money and the other articles was missing. According to her evidence, Mrs Naidoo only saw the person who did the shooting. She saw no other people. Moonsamy Naidoo testified that as he was about to open the door of his car, he saw somebody coming from the side. This person simply started shooting. Naidoo stated that he was hit five times. The person who fired the shots was about four or five paces away from him at that stage. It appears from Naidoo's evidence that he lost consciousness and he could not say whether the gunman also shot at the deceased. Naidoo also saw only this one person. He was in hospital for 10 weeks. Like his wife, Naidoo was unable to identify the gunman. It seems that Naidoo was mistaken with regard to the number of bullet wounds he sustained. According to the medical evidence there were four bullet wounds; one through the right shoulder; one through the left palm; one through the left thigh and one through the left hip. From the judgment

of Howard JP it appears that when Naidoo entered the courtroom he was still severely handicapped because of his injuries.

According to the medical evidence, the deceased, Dlamini, died as a result of bullet wounds which penetrated the heart, lungs and liver. There were four bullet wounds. Two bullet heads were removed from the body and the police found one bullet head at the scene of the crime, as well as eight spent .45 cartridges. On 5 May 1988 the police arrested appellant and accused no. 2 at a farm referred to as "By-the-Way" farm. They were sleeping in different rooms at a kraal on the farm. In the room where accused no. 2 was sleeping, the police found a .38 revolver. In the room where appellant was sleeping, they discovered a .45 pistol. In the room with appellant was a man known as Ndodo Khosa, who was also arrested. According to the evidence of other witnesses the .45 pistol, exhibit 8(1), belonged to appellant and the revolver, exhibit 9(1), belonged to

accused no. 2. The evidence of a ballistics expert proved that the cartridges which were found at the scene of the crime were fired from exhibit 8(1). It was also established that the bullet head which was found at the scene could not have been fired from exhibit 8(1). It is possible, however, according to this evidence, that it could have been fired from exhibit 9(1). The ballistic evidence also showed that the bullet heads which were recovered from the body of the deceased could not have been fired from exhibit 9(1). Due to their damaged condition, it could not be stated categorically that they were fired from exhibit 8(1) but it could well have been because such grooves as were still visible on them, matched the grooves of exhibit 8(1). Appellant and accused no. 2 were also connected with the crimes at the trading store by statements which they made to justices of the peace. According to these statements they were both at the trading store at the time when these crimes were committed. It emerged from the State's evidence that appellant, accused no. 2 and Ndodo Khosa were members of a

gang. The gang was sometimes augmented by other persons. It is clear from the evidence that the gang possessed only two firearms, namely exhibit 8(1) and exhibit 9(1). Although exhibit 8(1) was the property of appellant, the evidence disclosed that it changed hands between appellant and Ndoda Khosa from time to time. Ndoda Khosa was initially charged with appellant and accused no. 2. At the commencement of the trial the prosecutor informed the court that Khosa had escaped from custody and the trial proceeded against appellant and accused no. 2 alone.

Appellant and accused no. 2 preferred not to give evidence and the trial court concluded that the evidence against appellant was overwhelming. It is clear from the judgment of the court a quo that the guilt of appellant on the murder, attempted murder and robbery counts rests on the doctrine of common purpose. There was, according to the judgment, a common purpose to rob. All the participants knew that firearms would be used in the course of the

robbery and they foresaw that the consequences might be fatal. The participants were reckless as to whether people might be killed or injured in the course of the robbery and were therefore equally guilty of all the crimes committed that evening. The trial court found that two firearms were used at the trading store and that the bullet head found at the scene was probably fired from exhibit 9(1). It was also found that exhibit 8(1) was used in the commission of the crimes and that the fatal shots were probably fired from that revolver. An important finding by the trial court, and one particularly relevant to the question of sentence, is that it was not established on the evidence that it was appellant who fired exhibit 8(1). It could also have been fired by Khosa. In view of these findings, and where it has not been proved that appellant fired the fatal shots, his intention to kill must be seen as dolus eventualis.

In his judgment on extenuating circumstances, Howard JP dealt with the possibility that it was not appellant but

Khosa who fired the fatal shots. The trial court was, however, of the view that in the circumstances of this case, the absence of dolus directus on the part of appellant could not serve to reduce his moral blameworthiness.

Since the trial in this case, the Criminal Procedure Act has been amended by Act 107 of 1990. The compulsory imposition of the sentence of death has been abolished and the concept of extenuating circumstances has been done away with. The approach that should be followed and the powers of this court when dealing with appeals against the death sentence have been considered in a number of recent decisions. In State v Matshili and Others 1991 (3) SA 264 (A) at 268 C - D Nestadt JA summarised the position as follows:

> "In brief, our task is to consider the sentence afresh. We have to decide whether, having due regard to the presence or absence of mitigating and aggravating factors, and bearing in mind the main purpose of punishment, the death sentence is the only proper sentence. So no longer is it necessary for an accused to prove extenuating circumstances in order to avoid its imposition."

The appellant was convicted of a very serious offence. He was an accomplice in a crime where a defenceless man had been murdered in a callous manner. The deceased was shot at close range without having been given an opportunity to hand over the money. Why the gunman acted in this manner is difficult to explain. One cannot, however, find that the murder was planned, as was contended on behalf of the respondent. It is obvious that the robbery was planned but the same cannot be said about the murder. An important factor in appellant's favour is that it was not proved that appellant acted with dolus directus. It must be accepted, as found by the trial court, that appellant's intention consisted of dolus eventualis. As was pointed out by Eksteen JA in State v Ntuli 1991 (1) SACR 137 at 143 and 144, it is important, when the question of a proper sentence is considered, to decide whether the mens rea was dolus directus or dolus eventualis. Although it must be accepted

in appellant's favour that it was dolus eventualis it must nevertheless be borne in mind that the facts clearly indicate that the risk that someone could get killed was a substantial one. It must also be taken into account in appellant's favour that he is an unsophisticated and uneducated person with a relatively clean record. I have come to the conclusion that in these circumstances the death sentence cannot be regarded as the only proper sentence. Although appellant committed a very serious offence, it is not of such a nature that the death sentence is imperatively called for. Taking all the relevant circumstances into consideration a sentence of 15 years imprisonment would, in my judgment, be a proper sentence.

The appeal against the death sentence imposed in respect of Count 3 succeeds. The death sentence is set aside and a sentence of 15 years imprisonment is substituted.

A P VAN COLLER AJA

SMALBERGER JA)

KRIEGLER AJA) CONCUR