CASE NO 90/92
398/92

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SKUKU NDODENI ZIKHOKHELE NDULI FIRST APPELLANT

DUMISANI PETROS GUMEDE SECOND APPELLANT

SIPHO BONGANI ZULU THIRD APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN, NIENABER JJA et NICHOLAS AJA

DATE HEARD: 26 AUGUST 1993

DATE DELIVERED: 14 SEPTEMBER 1993

J U D G M E N T

NIENABER JA:

The three appellants were sentenced to death cm a charge of murder and to various terms of imprisonment on a charge of robbery with aggravating circumstances. This is an appeal by the first appellant against his convictions and sentences on both counts and by the second and third appellants against the sentences of death imposed on them on the murder count.

The appellants, together with one Malinga, plotted to rob a garage at Reservoir Hills in Durban. The garage, Azmuth Motors, belonged to the deceased and his brother. Second appellant had heard a rumour, a false one as it happened, that the takings at the garage were commonly banked once a week cm Monday mornings. The robbery therefore had to take place early on a Monday morning. On the evening of Sunday, 3 December 1989, the conspirators gathered in first appellant's room at a hostel in Kwa Mashu, Durban. It was agreed between them that Malinga, who owned a vehicle, would convey them to

the scene; that the first appellant, armed with a firearm, would stand guard outside the premises; and that the second and third appellants, armed with a gun and a knife respectively, would enter the building and gather the spoils; whereupon they would all escape in Malinga's car which would be parked nearby. The second appellant, who was the instigator of the plan and the leader of the gang, made a point of mentioning that weapons were needed and would be used if they should encounter resistance.

No sooner said than done. Early the next morning, Monday 4 December 1989, at approximately 6 o'clock, the three appellants left in Malinga's motor vehicle, Second appellant directed him to the garage. Malinga was instructed to park the vehicle half a kilometre or so away and await their return. The three appellants thereupon left. Almost immediately, according to the evidence of Malinga, the first appellant returned and borrowed R2,00 from him. First appellant then rejoined

the other two and proceeded towards the garage. He positioned himself outside the building, some 40 paces or so from its entrance. Second and third appellants entered the office section of the building, second appellant armed with a gun, third appellant with a knife, as agreed. Second appellant had a denim slingbag over his shoulder. They encountered one Luthuli, a youngster employed at the garage, and ordered him to keep quiet. The deceased was in the cashier's office busy counting the petrol takings of the previous two days. Second appellant entered the room, took the money, and reappeared with the deceased. The two appellants wanted to know where the safe was. Both the deceased and Luthuli denied knowledge of any safe. The two appellants shoved the deceased down a passage. Luthuli retreated into a storeroom. Soon thereafter he heard the sound of a gunshot. What had happened is not entirely clear since there were no eyewitnesses, apart from the two

appellants, and they declined to testify. But second appellant did make a statement to a magistrate, exhibit J, which the court a quo, after a protracted trial-within-a-trial, and in the teeth of strenuous opposition from second appellant, eventually admitted in evidence.

In it he said:

> "Two of us entered the garage and one person remained ouside near the door. When he entered the garage the other person was armed with a knife. I was armed with a firearm. When we entered the garage the Indian was busy counting the money. He was facing a window. I touched the Indian with my left hand, I showed him the firearm and told him not to move. He turned towards me and laughed. My companion collected the money and placed it in a bag. We asked him where the other money was. He said there was no other money. I pulled the Indian into an office and instructed him to point out the safe to us. He refused to do so and he grabbed me. When he grabbed me my companion had gone to look for the key. I called my companion and asked him to come and assist me. He came and pushed the Indian and the Indian was still holding me. My companion stabbed the Indian once. The Indian jumped away and screamed. My companion told the Indian to keep quiet. He continued screaming. My companion stabbed him again. The Indian continued screaming. Eventually my friend asked me to shoot the Indian because he was making a noise. I fired once only. After I had fired, the Indian turned his back to me. At that stage we ran out."

(The post-mortem examination of the body revealed only two wounds: a fatal gunshot wound near the deceased's left armpit and a single non-fatal 4 cm deep stab wound which penetrated the left lung.)

The two appellants left the building immediately after the shooting. The deceased's son, who had in the meantime arrived at the garage, saw them. They began running. The deceased's son got into his vehicle and chased them and even managed to run the second appellant down with his vehicle but when the third appellant shouted to the second appellant to shoot him, the deceased's son took avoiding action and the two appellants managed to escape, at least for the time being, through the bushes in the direction of the Umgeni river.

Malinga, the driver, had in the meantime had second thoughts about the entire enterprise, or so he said. While the appellants were approaching the building he

drove off and took up a fresh vantage point some distance away. He heard the shot being fired and saw the second and third appellants emerge from the building. At the same time a bus stopped near where the first appellant was stationed. First appellant embarked and was driven off. Malinga returned to the hostel where he found the first appellant and later the third appellant. The latter informed him, in the first appellant's presence, that he and the second appellant fled after the second appellant had shot the deceased. They crossed the Umgeni river on foot but the second appellant who carried the money in the slingbag, was swept away by the stream. The third appellant did not know whether he was still alive. As it happened the second appellant had been apprehended by the police. The denim slingbag, containing a knife, the deceased's keys, bank notes and money amounting to R530,00 as well as the gun, were eventually recovered at places pointed out to the police by the second appellant.

The slingbag was found in a pool in the river and the gun at a hiding place on its bank. The gun was shown by ballistic evidence to be the one from which a spent bullet found next to the body of the deceased had been fired. The second appellant, after some pertinent questioning, took the police to the hostel where the other two appellants and Malinga were found and arrested.

Malinga was initially charged with the three appellants but after being detained in custody for some 18 months the charges against him were withdrawn and he eventually gave evidence for the state.

None of the appellants testified. All of them were convicted by Galgut J, sitting with assessors, in the Durban and Coast Local Division. Each one was sentenced to death on the charge of murdering the deceased. They were also convicted on a second count of robbery with aggravating circumstances. The first and third

appellants were sentenced to 15 years imprisonment each and the second appellant, the ringleader, to 18 years imprisonment.

The first appellant, with leave of the court a quo on the robbery count, appeals against his convictions and sentences on both counts. The second and third appellants appeal only against the death sentences imposed on them in respect of count 1.

I begin with appellant No. 1. The argument advanced on his behalf is that he effectively dissociated himself from the venture and that, at worst for him, he should have been convicted of attempted murder.

Dissociation consists of some or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration. It is a good defence to a charge of complicity in the eventual commission of the offence by his erstwhile associate or associates (see S v Nomakhlala and Another 1990 (1) SACR

300 (A) at 303g-304d; S v Nzo and Another 1990 (3) SA 1 (A) at 11H-I; S v Singo 1993 (2) SA 765 (A) at 771E-773E). The more advanced an accused person's participation in the commission of the crime, the more pertinent and pronounced his conduct will have to be to convince a court, after the event, that he genuinely meant to dissociate himself from it at the time. It remains, I tend to think, a matter of fact and degree as to the type of conduct required to demonstrate such an intention. In S v Beahan 1992 (1) SACR 307 (ZS) at 324b—c, the position was stated, after a review of some English authorities, in rather more rigid terms:

> "I respectfully associate myself with what I perceive to be a shared approach, namely, that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime but has not commenced an overt act towards the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there

> has been participation in a more substantial manner something further than communication to the coconspirators of the intention to disassociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required".

These remarks, to which I shall refer as "the dictum in Beahan's case", are applicable, as was pointed out in Singo's case supra at 772B-C, to persons who, by prior arrangement, became co-conspirators and not to those who, by active association falling short of prior agreement, became associates to a common purpose to commit a crime. The correctness of the dictum in Beahan's case was accordingly not considered by this court in Singo's case. The instant case, unlike Singo's case, is indeed one of co-conspirators. The dictum in Beahan's case would accordingly be applicable. But whether it is essential to apply it to the facts of this case, or to express a view as to its correctness, is another matter to which I shall in due course revert.

The argument that the first appellant disengaged

himself from the enterprise with his co-accused is rooted in the first appellant's duly admitted extra-curial statement made to a magistrate, exhibit F. This is what he said:

> "In the morning I left B section to go to the Hostel. I met Malinga who happens to be my doctor. He was with Bhekithemba in my room. Malinga asked me to accompany him and said he had been hired by Pat [appellant no. 2] to take him to Reservoir Hills. I agreed to go. We set off. It was Malinga and Bhekithemba. We came to a point where the vehicle was parked near Pat's room. We got off. Bhekithemba and I went into the room. Bhekithemba then told Pat that Malinga said they must go elsewhere. We set off. There was also Bongani Zulu [appellant no.. 3]. We got into the vehicle. When we got near the cemetery - which is in the Hostel -the part of it which is known as Indian graves. Bhekithemba got off saying he was going to fetch a firearm. He came back and got into the vehicle. Pat said we were too many and said he wanted one person only. He said a small amount could be found and pointed out that the "tip men" also had to get a share. I then said I'll remain behind. Malinga said if I chose to remain behind he will also remain behind. Bhekithemba said he will remain behind and said I must go. Bhekithemba then handed the firearm he had over to me. The vehicle was then driven away. Pat said I must point the gun at the petrol attendant at the garage and he and Bongani will go inside. He said he will point a gun at the Indian inside and that Bongani will have to take the money. We got there and alighted. They pointed out the

> place and the person where I have to point the gun at. I said this job you give me is too heavy for me. They said they will go inside. I asked for R2 from Malinga to board a bus. He gave it to me. I went to a" bus stop. While I was still waiting at the bus stop they went inside. While I was still waiting for a bus I saw them coming out. I noticed they were chased by a Volkswagen vehicle. A bus came and I got into it. I alighted in Durban. I got off at Durban station. I took a train. I got off at Thembalihle. I went to my room where I stay. That is all."

Once introduced into evidence an extra-curial statement

of this nature must be viewed and evaluated in its

entirety, inclusive of assertions and explanations

favourable to its author (Rex v Valachia and Others 1945

AD 826 at 835; S v Felix and Another 1980 (4) SA 604 (A)

at 609H-610A; S v Khoza 1982 (3) SA 1019 (A) at 1039A-B;

S v Yelani 1989 (2) SA 43 (A) at 50 A-F). A statement

made by a man against his own interests generally

speaking has the intrinsic ring of truth; but his

exculpatory explanations and excuses may well strike a

false note and should be treated with a measure of

distrust as being unsworn, unconfirmed, untested and

self-serving. As was stated in Rex v Valachia supra at

837:

> "Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency."

Counsel for first appellant highlighted three features of the evidence in order to show that first appellant effectively distanced himself in advance from the crimes committed by his erstwhile associates:

i. his averment in his statement, exhibit F: "I

said this job you give me is too heavy for me";

ii. the R2,00 which first appellant borrowed from

Malinga;

iii. first appellant's departure by bus.

This argument which was also advanced in the court below, must be rejected for the reasons which follow.

To begin with the averment in the statement, exhibit F, remained, firstly, unconfirmed: it was not supported - by first appellant himself, who chose not to testify, nor by Malinga who did not mention and was not asked about it.

In the second place the explanation which, if taken at face value, constituted a complete and obvious defence, was not immediately forthcoming. The first appellant did not, when arrested, mention it to the police. In fact it took the first appellant almost two years to disclose it when he eventually made his statement to the magistrate. Curiously enough he again did not mention it when he was asked to plead in the magistrates' court in terms of section 119 of the Criminal Procedure Act, 1977 or before the Supreme Court in terms of section 115 of that Act.

In the third place the explanation is ambiguous: it is equally capable of interpretation as a mere petulant

complaint rather than as a disavowal of further complicity.

The second aspect relied on, the borrowing of the R2,00 from Malinga, is equally equivocal. Malinga confirms that it happened but does not confirm that it was expressly earmarked as busfare. Except for the first appellant's own statement one does not know why he asked for the R2,00; in any event there was nothing to suggest that it was related to the usual fare charged on that particular route. First appellant did not, thereafter, distance himself from his co-appellants. On the contrary, he joined them and there is nothing in Malinga's evidence or in the second appellant's statement to show that he remonstrated with, or tried to return his gun to them while accompanying them to the point, some 40 paces from the entrance to the garage complex, where he took up his position. Elsewhere in his evidence Malinga says that this was close to a bus stop. The court a quo

identified this as the bus sign which is visible on the photograph, exhibit N5, which, judging from it and the other photographs, is in close proximity to the petrol pumps. First appellant remained at his post until after second and third appellants appeared from the building and were chased by the deceased's son. That must be so because the first appellant mentions these episodes in his statement, exhibit F. Only then, according to his statement, did he board the bus. Far from suggesting a firm decision to withdraw from the robbery before the event his conduct is equally consistent with an attempt to escape its consequences thereafter.

None of the three features emphasised by counsel for the first appellant is persuasive. Furthermore, the first appellant's subsequent conduct, after he left the scene, does not substantiate a decision to withdraw. Both Luthuli and Malinga testified that they heard the sound of the shot. The first appellant, who was closer

to the building than Malinga, must therefore also have heard it. He must have realised, when he saw the second and third appellants running from the building with the deceased's son in hot pursuit, that the robbery had been committed and that someone might have been injured in the course thereof. Yet he immediately proceeded to the hostel where he met up with Malinga and, later, the third appellant. The first appellant did not tell them, according to Malinga, that he had caught the bus for the stated reason that he dissociated himself from the robbery. In fact it was the first appellant who suggested to the two of them that they should search for the second appellant, which all of them did. He was still in their company when they were eventually arrested.

Evidence of how someone behaved after the event can serve as an indication as to his state of mind at the time (S v Petersen 1989 (3) SA 420 (A) at 425E-F; S v

Majosi and Others 1991 (2) SACR 532 (A) at 538b-c) .

Far from distancing himself from his colleagues, the first appellant's conduct after the robbery shows that he remained a willing participant in their joint venture.

In my view it has not, therefore, been established as a reasonable possibility that the first appellant dissociated himself from the planned enterprise. I arrive at that position without regard to the dictum in Beahan's case supra, quoted earlier in this judgment. If the letter of that dictum were to be applied to the facts of this case, it would of course be an a fortiori situation: even in terms of his own statement the first appellant failed to notify his co-conspirators, when he had ample opportunity of doing so, of his fixed intention to abandon their unlawful common purpose; and to the extent that the matter had already progressed well beyond the mere planning stage, he failed to nullify or frustrate its implementation. But because I come to the

conclusion, without regard to the dictum in Beahan's case, that dissociation has not been established, it is not necessary to venture a view as to whether that dictum, expressed as a rule, is a rule of law in this country or at best a rule of thumb. That issue can be left for consideration by some other court at some other time.

In the result the defence of dissociation cannot succeed. It follows that the first appellant was correctly convicted. Admittedly he was not present in the garage building when the deceased was robbed and killed by his asoociates, but that does not exonerate him. He was a party to the planning of the robbery. He knew that weapons would be taken along and might have to be used. He accompanied the robbers. He acted as a lookout for them. He is guilty on the basis of his common purpose. His appeal against his conviction must fail.

I turn now to the first appellant's appeal against his sentence on count 1, the count of murder. He was sentenced to death. Two grounds were advanced on his behalf why this court should interfere with that sentence. The one ground is the lesser role he played in the killing of the deceased. He was not present when it happened and he was not involved in the decision prompting the murder of the deceased. The other ground was his state of mind which was clearly one of dolus eventualis, not directus. Those are cogent considerations which would normally sway a court not to regard the death sentence as the only proper sentence (see S v Mthembu 1991 (2) SACR 144 (A) at 147f; S v Sithebe 1992 (1) SACR 347 (A) at 355d-g). But in this case there is a complicating factor. A few weeks before his involvement in the current robbery and murder the first appellant committed another murder and attempted robbery with aggravating circumstances, for which he was sentenced, in

September 1991, to 18 years and 10 years imprisonment respectively. One is fully justified, I think, to regard the first appellant, in the light of this history of convictions for murders and robberies, as no better than an unrepentant criminal and the question may legitimately be posed whether society ought to be burdened with gangsters of his ilk. But in the end it is his more remote involvement in the killing of the deceased, in fact and in intent, which persuades me that a sentence of imprisonment for life rather than a sentence of death ought to be imposed in his case.

On count 2, the robbery count, the first appellant was sentenced to 15 years imprisonment. The only ground advanced against that sentence is that it was shockingly harsh. At the time of his conviction on the count of robbery now in question, the first appellant was 35 years of age. He was unemployed. As stated earlier he was involved, shortly before the commission of the robbery

now in question, in another attempted robbery with aggravating circumstances for which he was sentenced to 10 years imprisonment. In the circumstances the sentence of 15 years imprisonment for the current robbery does not induce in me even a quiver of shock. His appeal against his sentence on count 2 must accordingly be dismissed.

I turn to second and third appellants. Not surprisingly they are not appealing against their convictions. Their appeals are noted solely against the sentences of death imposed on them on the murder count.

Second and third appellants were respectively 29 and 25 years of age at the time of the commission of the crimes in question. Unlike first appellant they were directly responsible for the death of the deceased. Second appellant was armed with a gun, third appellant with a knife, and they had determined in advance to use these weapons if circumstances should so demand. That, according to second appellant's confession, exhibit J, is

exactly what happened. The deceased offered resistance. He was able to grab hold of the second appellant. The second appellant called for help from the third appellant. The third appellant stabbed the deceased which caused him to release the second appellant. The second appellant then shot him at point blank range, causing instant death. It was argued on behalf of the appellants that they acted in a state of panic because the deceased continued to scream after he was stabbed by the third appellant. Even if one accepts that version at face value, it was a self-created and foreseeable emergency. In any event it was not necessary for the second appellant to kill the deceased in order to make good their escape, and even if it were, that would not in my view qualify as a mitigating factor of any consequence. In my opinion this was no more and no less than a callous and gratuitous killing, committed for greed, in the course of a well-orchestrated armed

robbery. It is the sort of crime which immediately calls the death sentence to mind.

In the case of the second appellant there is an additional aggravating factor. In November 1989, only a matter of weeks before the commission of the present offences, the second appellant committed an armed robbery for which, shortly before the current trial commenced, he was convicted and sentenced in the regional court to 8 years imprisonment. (It was during that robbery that the firearm was obtained which was used in the current robbery). But because the time for lodging an appeal had not yet expired when the matter was argued before the trial court, the trial court chose to ignore that previous conviction for the purpose of sentence. That period has now expired and counsel for the second appellant has informed this court that no appeal was noted. The previous conviction for armed robbery can therefore properly be taken into account. Having regard

to its nature and its timing - shortly before the current offences were committed - it is indeed a weighty consideration which finally convinces me that the death sentence on the murder count is the only proper sentence in his case.

. As far as the third appellant is concerned there are two features which distinguish his situation from that of the second appellant. The first is that he was not immediately responsible for the death of the deceased. It was the second appellant who fired the shot which killed the deceased. The third appellant stabbed him but the wound did not appear to be particularly severe. Even so, that stabbing enabled the second appellant to free himself and fire the fatal shot, a consequence which must have been in the third appellant's contemplation. I accordingly attach no more than minimal weight to this consideration. The second consideration is, in my view, more to the point. Unlike the second appellant the third

appellant has no previous convictions. Taken in conjunction with the consideration just mentioned this circumstance tilts the balance, if only marginally so, in favour of the third appellant and against the imposition of the death sentence. As in the case of the first appellant a sentence of imprisonment for life ought to be imposed in its stead.

The following orders are made:

1. The first appellant's appeal against his convictions on counts 1 and 2 is dismissed.

2. The first appellant's appeal against the imposition of the death sentence on count 1 is upheld and is set aside. A sentence of imprisonment for life is substituted for it.

3. The first appellant's appeal against his sentence on count 2 is dismissed. It is directed that the sentence of 15 years imprisonment on count 2 is to run concurrently with the sentence of imprisonment for

life on count 1.

4. The second appellant's appeal against the death sentence is dismissed.

5. The third appellant's appeal against the death sentence on count 1 is upheld. A sentence of imprisonment for life is substituted for it. It is directed that the sentence of 15 years imprisonment on count 2 is to run concurrently with the sentence of imprisonment for life on count 1.

P M Nienaber JA

VAN HEERDEN JA)
R NICHOLAS AJA ) CONCU