IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO 543/90

In the matter:

PHILLY NCUBE APPELLANT

AND

THE STATE RESPONDENT

CORAM: HEFER, GOLDSTONE JJA et HARMS AJA.

DATE HEARD: 20 NOVEMBER 1992

DATE DELIVERED: 22 FEBRUARY 1993

J U D G M E N T

GOLDSTONE JA:

On the night of 6 January 1988, Mr John Roussos, to whom I shall refer as "the deceased", drove home from his shop in Waterkloof Glen, Pretoria. He parked his motor vehicle in the garage where a group of men were awaiting his arrival. As he alighted from his car he was attacked by members of the group. He was severely assaulted about the head with a hammer and in consequence of the injuries thus inflicted he died.

Five men were arrested and charged with the murder of the deceased and robbery with aggravating

circumstances. One of them was the appellant. Before their trial in the Transvaal Provincial Division, the appellant escaped. The other four were tried and convicted. One of them, Edward Tobie Qekisi, was sentenced to death. His appeal against the death sentence was dismissed by this Court.

Subsequently, the appellant was rearrested and stood trial before Weyers J and two assessors. He was found guilty of the murder of the deceased and of robbery with aggravating circumstances. In respect of the murder the sentence of death was imposed. For the robbery he was sentenced to eight years' imprisonment. The appellant has appealed to this Court against the conviction for murder and, in the alternative, against the imposition of the death sentence.

The state relied primarily upon the evidence of Qekisi. The Judge a quo correctly held that he could not safely rely on the evidence of this witness and it is

unnecessary to set out the detail of his version. Suffice it to say that he placed the hammer in the possession of the appellant and testified that it was the appellant who assaulted the deceased with it. (I might mention that in convicting Qekisi of murder in the earlier trial it was held proven beyond a reasonable doubt that it was he who struck the hammer blows).

At all times the appellant has admitted being present with the other members of the group on the night in question. He originally relied on a version which distanced himself from the actual attack on the deceased. Again, it is not necessary to set out the detail of that version which, indeed, was repeated by the appellant when he testified in the Court a quo. It is unnecessary because whilst he was still testifying in his own defence, the appellant decided to change his version. The trial court, again correctly, decided that in the absence of other acceptable evidence the guilt or

innocence of the appellant would have to be determined on the basis of his second version to which I now turn.

According to the appellant he was enlisted by Qekisi to join a group of men which was to rob the deceased. They waited for the deceased outside the garage of his apartment. It was agreed that the appellant and Qekisi would attack the deceased in the garage. The appellant was to hold him while Qekisi searched him. The other three men would search the deceased's car. When the deceased alighted from his car the appellant grabbed him around his neck and held him down. Instead of searching the deceased, Qekisi took a hammer out from under his shirt and began to hit the deceased with it. The first blow struck the deceased. The second, which presumably came immediately after, hit the appellant's left elbow. It was a painful blow as a result of which the appellant released his strangle hold of the deceased. Qekisi continued to hit the deceased

with the hammer and did not let up even after the deceased fell to the floor.

The appellant stated that he did not know that Qekisi was armed with any weapon. He was not aware of any intention but to rob the appellant, tie him up and make a getaway.

It would appear from the appellant's version that the group had intended also to take the keys of the deceased's shop, go there, and steal goods from it. The appellant said that after they left the deceased he refused to do so.

That, then, is the version of the appellant. It is highly suspect and unreliable. That the appellant is a self-confessed liar brooks of no argument; that he played a more active role in the affair and that he knew that the deceased was to be attacked is highly probable. In particular it is unlikely that the robbers would have set out unarmed, and it is improbable that the appellant

would only have held the deceased so that he could be searched and no more. However, as the judge a quo pointed out, the trial Court had before it two versions - both from self-confessed liars. And inferences cannot be drawn only on probabilities in the absence of evidence to support them.

The guilt or innocence of the appellant must therefore be tested on the basis that it was Qekisi who attacked the deceased with the hammer. On that assumption, the questions to be answered are those succinctly set out by Nienaber JA in S v Majosi and Others, 1991(2) SACR 532(A) at 537 c - e:

> "That appellant No 2 was a party to a common purpose to commit armed robbery is undisputed. The real issue, therefore, is whether appellant No 2 foresaw and reconciled himself with the risk that any of his associates, in the course of the execution of their plan to rob, might cause the death of someone - in which case he would be guilty of murder - or, if he did not,

> that he ought reasonably to have foreseen that consequence - in which case he would be guilty of culpable homicide. (S v Nkwenja en 'n Ander 1985(2) SA 5 60 (A); S v Mbatha en Andere 1987 (2) SA 272 (A) at 283B.) The enquiry is directed to the state of mind of appellant No 2 at the time he embarked on the venture S v Shaik and Others 1983(4) SA 57 (A) at 62 G - H), although his act of association, for the purpose of his common purpose to rob, must exist at the time of the offence. S v Nzo (supra at 11H).)"

According to the appellant, he was unaware that Qekisi was in possession of the hammer and he denied that other members of the group were armed. The only evidence, apart from that of Qekisi, which contradicts the appellant is that of one Maputla. He testified on behalf of the State in both the earlier trial and that of the appellant. He said that prior to the night in question, at the request of Qekisi, he pointed out the home of the deceased. He said that Qekisi was

accompanied by five other men and that one of them dropped a hammer. Another was in possession of a long knife. He was unable to recognise any of the men other than Qekisi.

As the trial judge pointed out, in material respects, Maputla contradicted aspects of the evidence he gave in the earlier trial. He held that it would be dangerous to place much reliance on his evidence. Whilst there is a high probability that the robbers, or at least some of them, were armed, it would be speculative to make a factual finding as to the nature of such weapons let alone the appellant's knowledge thereof.

There is another consideration. Unless it was discussed, there is an inherent improbability that a common hammer would be likely to be used by a robber as a murder weapon against the victim of the robbery. The possession by a would-be robber of a hammer is at least equally open to the inference that its use would relate

the breaking of a lock or cupboard or some similar purpose. Furthermore, at the scene of the murder, the police found some cut electrical wire. Its presence there lends some support to the appellant's later version that the intention of the robbers was to tie up the deceased. That intention is not consistent with a prior agreement to kill the deceased.

In short, I have come to the conclusion that it was not proved beyond a reasonable doubt that the appellant knew the nature of the arms carried by any of his companions, or and more particularly, that Qekisi was possessed of a hammer. On his version, the attack with the hammer on the deceased was unexpected and after the first blow was struck he ceased to be a party to the inflicting of the remaining blows. Whether the appellant disassociated himself from the ensuing attack because of the pain he was suffering or for a more laudable reason matters not. He ceased to participate

therein. It cannot be found, therefore, that the appellant associated himself with the fatal attack on the deceased either before or, (save for the first blow), during its execution. The blood found on the appellant's shirt could well have been the consequence of the first blow struck by Qekisi. Furthermore, on the appellant's evidence, he did not associate himself with any of the conduct which followed the attack. In any event, that was limited to three of his companions continuing to search for objects to steal from the deceased's motor vehicle.

The Court a quo found the appellant guilty of the murder on the basis that he only released his hold of the deceased when he himself was hit and that after the attack he associated himself with the subsequent conduct of his companions. As I have attempted to demonstrate both of those findings are insufficient to support the murder conviction.

In the result the appeal is upheld and the conviction and sentence in respect of the murder count are set aside.

R J GOLDSTONE
JUDGE OF APPEAL

HEFER, AR:

In die lig van die meningsverskil tussen my kollegas ag ek dit raadsaam om aan te dui waarom ek die skuldigbevinding nie kan ondersteun nie.

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Aangesien die appellant na sy frontverandering toegegee het dat hy die oorledene vasgehou het terwyl Qekisi hom met die hamer toegetakel het, gaan die appél wesenlik oor die redelike moontlikheid van sy verdui-deliking dat dit nie vooraf beplan was om hulle slagoffer fisies leed aan te doen anders dan om hom vas te gryp, te deursoek en dan vas te bind nie; dat Qekisi se aanval

onverwags en onbeplan was; en dat hy nie eens bewus was van die hamer onder Qekisi se hemp nie totdat laasgenoemde dit tevoorskyn gebring en die oorledene te lyf gegaan het.

By ons oorweging van die aanvaarbaarheid van die verduideliking kan die verhoorhof se bevindings natuurlik nie buite rekening gelaat word nie. Die getuienis is deurspek met leuens aan beide kante en die appellant het selfs na sy frontverandering klaarblyklik nog steeds gelieg in 'n poging om homself in 'n beter lig te stel. Dit was die taak van die verhoorhof - en tans

is dit ons s' n - om die kaf van die korrels te probeer skei. Ons taak word boonop bemoeilik deur die gebrek aan eksplisiteit in die verhoorhof se uitspraak en ons moet versigtig wees om nie bevindings te impliseer bloot op grond van ons eie oordeel oor die waarskynlikhede nie. Daardeur word die gevaar geskep om bevindings ten koste van die appellant se geloofwaardigheid aan die verhoorhof toe te dig waartoe daardie hof self nie bereid was nie. Die verhoofhof het appellant se finale weergawe slegs gedeeltelik verwerp en wat ek probeer sê, is dat ons nie ligtelik verdere gedeeltes kan verwerp op grond bloot van ons eie oordeel oor die waarskynlikhede nie. Geloof-waardigheid kan immers nie aan die hand van waarskynlik-hede alleen beoordeel word nie.

Daarom is dit belangrik om daarop te let dat die verhoorhof die bewering nóg uitdruklik nóg implisiet verwerp het dat geen fisiese leed beplan was ander dan dit wat reeds genoem is nie. Trouens, die feit dat die

verhoorhof twyfel uitgespreek het oor die aanwesigheid van direkte opset om te moor en die skuldigbevinding op dolus eventualis gebaseer het, dui juis daarop dat die verhoorhof nie bereid was om daardie gedeelte van appellant se getuienis te verwerp nie. Dit sal gewaagd wees om dit nou te doen.

Dit kom my dus voor dat die beslissende vraag is of 'n onbeplande aanval deur een van die ander rowers wat tot die dood van die slagoffer kon lei, voorsien is. Die verhoorhof se onuitgesproke gevolgtrekking dat appellant so 'n aanval inderdaad voorsien het, word gemotiveer deur die bevinding dat -

> "... (ons) glo nie die beskuldigde dat hy nie kennis gedra het van die wapens wat saamgeneem was op die rooftog nie."

Die woorde wat ek gekursiveer het, skep ' n probleem. Watter wapens het die verhoorhof in gedagte gehad en watter getuienis is daar dat enigiets saamgeneem is ander dan die hamer wat blykbaar toevallig as wapen gebruik is?

Met betrekking tot die laaste vraag is Maputla se getuienis van geen hulp nie; hy het getuig oor twee geleenthede waarop hy saam met Qekisi en sy trawante na die oorledene se huis is. Sou sy getuienis waar wees, moes die aanval klaarblyklik op die tweede geleentheid geloods gewees het en hy het beweer dat hy by die eerste geleentheid 'n hamer en 'n mes geslen het. Sy getuienis is in elk geval nie aanvaar nie en is as van blote "historiese belang" beskou. Die enigste ander getuienis oor wapens is Qekisi se bewering dat hy persoonlik 'n vuurwapen gehad het en appellant die hamer terwyl die ander gewapen was met pangas en ' n mes. Maar die verhoorhof was nie, soos ek die uitspraak verstaan, bereid om Qekisi se getuienis te aanvaar behalwe in soverre dit gestaaf was nie. Daarom: word gelet op die formulering van die bevinding - "ons glo nie die beskuldigde....nie" - en op die feit dat appellant herhaaldelik beweer het dat hy nie geweet het dat Qekisi

'n hamer gehad het voordat hy dit inderdaad gebruik het nie, is ek geneig om te dink dat die verhoorhof slegs die hamer in gedagte gehad het. Enige ander vertolking van die bevinding sou impliseer dat die hof 'n ernstige wanopvatting gehad het van die strekking van die getuienis.

Op die basis dan dat die verhoorhof bevind het dat appellant bewus was van die hamer in Qekisi se besit meen ek nie dat sonder redelike twyfel aanvaar kan word dat appellant voorsien het dat dit as aanvalswapen gebruik sou word nie. Dit was ' n doodgewone klouhamer en, in al die omstandighede van die saak, regverdig die besit van so 'n stuk gereedskap deur een van die rowers nie die gevolgtrekking - as die enigste redelike afleiding - dat appellant voorsien het dat dit gebruik sou word om die kop van die voorgenome slagoffer te ver-morsel nie.

Gevolglik ondersteun ek Goldstone AR se bevel.

J J F HEFER