REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case Number: 493 / 98

In the matter between **:**

LUVUYO LUNGILE
First Appellant
SIYANDA MTULU
Second Appellant

and

THE STATE
Respondent

COURT : **Hefer JA, Harms JA, Olivier JA**

DATE OF HEARING : **16 November 1999**

DATE OF JUDGMENT : **30 November 1999**

Murder - defences : compulsion; absence of common purpose; absence of *dolus*; dissociation; refusal to order separation of trials; lawfulness of death of the deceased in cross-fire between accused and police. Sentences.

JUDGMENT

OLIVIER JA

[1] On the morning of 2 August 1996, at approximately 09:00, a robbery occurred at Scotts, a shop in Main Street, Port Elizabeth. A policeman (De Reuck) arrived on the scene. Several shots were fired between De Reuck and one of the robbers, the Second Appellant. At the end of the meleé an employee of Scotts, Maggie Jacobs, was dead, killed by a gunshot wound through the lungs and heart; De Reuck and the Second Appellant were injured; another robber, Toboshe, made good his escape, and the First Appellant was captured by a policeman on the pavement outside the front door of Scotts with the stolen money and jewellery in his possession.

[2] At the trial, Kroon J convicted the Appellants of robbery and murder. The Second Appellant was also convicted of being unlawfully in possession of an unlicensed firearm and ammunition.

[3] They were sentenced as follows:

First Appellant:

1 On count 1 (robbery) seven years' imprisonment. It was ordered that four years thereof run concurrently with the sentence imposed on count 3.

2 On count 3 (murder) twelve years' imprisonment.

Second Appellant:

1 On count 1 (robbery) seven years' imprisonment. It was ordered that four years thereof run concurrently with the sentence imposed on count 3.

2 On count 3 (murder) fourteen years' imprisonment.
3 On count 4 (possession of firearm) eighteen months' imprisonment.
4 On count 5 (possession of ammunition) six months' imprisonment to run concurrently with the sentence imposed on count 4.

[4] Kroon J gave the Appellants leave to appeal to this Court against the convictions and sentences.

[5] At the trial De Reuck as well as another policeman who captured the First Appellant and several of the employees of Scotts who were on the scene of the robbery and murder, gave evidence, The Appellants did not testify.

[6] I do not intend any discourtesy to counsel for the Appellants in not traversing all the arguments put forward. They readily conceded that the learned judge *a quo* did not misdirect himself on any factual issue. Indeed the judgment is commendably thorough and speaks of a careful approach. I will deal only with the major issues raised before us.

[7] The defence of compulsion raised by First Appellant

The crux of this defence was stated by Mr Bursey, who appeared for the

First Appellant at the trial, in the latter's plea explanation as follows:

> "He was given instructions by this one Toboshe [the robber who escaped] to collect various items that were being robbed. Toboshe was in possession of a firearm and accused no 1 was not in a position to refuse to carry out his instructions as he feared that Toboshe might then shoot him for failing to obey."

To Mrs Meavers, one of the State witnesses, it was put :

> "He says that he was told by Toboshe to collect the money and the jewellery whilst Toboshe was holding the gun."

[8] What was said in the plea explanation and what was put to the State witnesses do not amount to a defence of compulsion. It was never put that First Appellant was in fact threatened or that threatened harm was imminent or had commenced. These are essential elements of the defence of compulsion (see ***S v Kibi*** 1978 (4) SA 173 (EC) at 181 B - H; *Snyman* ***Strafreg*** *3rd edition* p 125 and authorities quoted in footnote 29). Even if the State witnesses had agreed with what was put to them (which they did not do) the defence would have come to nought.

[9] In any event, it is clear from the evidence of the State witnesses that the First Appellant was one of the group of four would-be robbers that entered the

premises of Scotts. Once inside the shop, he associated himself with the acts of the other robbers by guarding over some of the employees who were lying on the floor, obviously having been ordered to lie down by either himself or one of the other robbers. It was never part of the plea explanation or put to the State witnesses that in this conduct First Appellant acted under duress. A person who voluntarily joins a criminal gang or group and participates in the execution of a criminal offence cannot successfully raise the defence of compulsion when, in the course of such execution, he is ordered by one of the members of the gang to do an act in furtherance of such execution. As was said by Holmes JA in ***S v Bradbury*** 1967 (1) SA 387 (A) at 404 H:

> "As a general proposition a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on compulsion as a defence or fear as an extenuation."

[10] The defence of absence of common purpose

On behalf of the First Appellant it was argued that there was no proof on the basis of common purpose that First Appellant was an accomplice to the robbery or to the murder.

[11] It is clear that the conviction of robbery was not based on the doctrine of common purpose, but on the direct acts of the First Appellant alluded to

above: he was a member of the gang that entered Scotts, obviously with the intention of committing a robbery; he actively participated in the robbery, guarding over some of the employees, taking money from a drawer and removing watches and jewellery from the employees and trying to make off with the spoils.

[12] As far as the murder charge is concerned, the First Appellant's conviction was based on common purpose. It was not proved that he was armed or that he fired any shot, but he was part of the gang of four of which at least two were armed with firearms and he actively participated in the execution of the robbery. According to his own plea explanation he was aware that Toboshe was in possession of a firearm. Neither in his plea explanation nor in what was put to any witness was it suggested that he was not aware that Second Appellant was armed. In fact, the State witnesses all say that Second Appellant brandished his revolver from the outset of the robbery. The trial court found that First Appellant knew that Second Appellant was armed.

[13] It could be argued that First Appellant's flight from the shop when he saw De Reuck enter with a firearm demonstrated his lack of association with any criminal common purpose. This argument would not be based on dissociation from a common purpose, but would be aimed at creating doubt whether there had ever in fact been an association with a criminal common

purpose. This distinction is subtle, but real, and has been made by this Court before (see ***S v Singo*** 1993 (1) SACR 226 (A) at 232 g - h per EM Grosskopf JA;) ***S v Nomakhlala and Another*** 1990 (1) SACR 300 (A) at 303 g - d).

[14] Had there in the present case not been a prior agreement to commit a crime this might have been a valid argument (see ***S v Mgedezi and Others*** 1989 (1) SA 687 (A) at 705 *I - 706 C and* ***S v Jama and Others*** *1989 (3) SA 427 (A) at 436 D - I). But, in view of the prior agreement to commit a robbery and his participation in the execution thereof as set out above, the fact that the First Appellant left the scene before the shooting started cannot avail him.*

[15] The defence of absence of *dolus* on the part of the First Appellant

On behalf of the first Appellant it was argued that, even if he shared the common purpose of the gang to commit the robbery, the State had not proved that he had the necessary *dolus* in respect of the murder.

Counsel for the State, on the other hand, argued that in participating in the robbery the First Appellant could not but have foreseen the likelihood of resistance by the employees of Scotts, or by the security guards, or the police, or by armed passers-by who became aware of the robbery. Well-knowing that at least two of the gang members were armed with firearms, he must have foreseen that someone might be injured or killed in a confrontation. Nevertheless, he persisted in associating himself with the robbery. In such circumstances our Courts very often draw the inference that an accused foresaw the possibility that a killing might ensue and, because he persisted, reckless of such consequences, he had the necessary *mens rea* in the form of *dolus eventualis* (see *inter alia* ***S v Mkhwanazi*** [1998] 2 All SA 53 (A) at 56 b - d per FH Grosskopf JA; see also ***S v Maritz*** 1996 (1) SACR 405 (A) at 415 a - f for the general approach).

[16] But this Court has cautioned, on several occasions, that one should not too readily proceed from “ought to have foreseen” to “must have foreseen” and hence to “by necessary inference in fact did foresee” the possible consequences of the conduct inquired into. *Dolus* being a subjective state of mind, the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances of the case (see ***S v Ngubane*** 1985 (3) SA 677 (A) at 685 A - F*;* ***S v Stigling en ‘n Ander*** 1989 (3) SA 720 (A) at 723 C- D; ***S v Bradshaw*** 1977 (1) P.H. H 60 (A); ***S v Sigwahla*** 1967 (4) SA 566 (A) at 570 A*;* ***S v Sephuti*** 1985 (1) SA 9 (A) at 121; ***S v Maritz,*** *supra,* at 417 b- e; ***S v Mamba*** 1990 (1) SACR 227 (A) at 236 j - 327 e).

[17] In the present case, the crucial question therefore is whether the State proved beyond reasonable doubt that the First Appellant in fact did foresee (“inderdaad voorsien het”) that the death of a person could result from the armed robbery in which he participated. In this case, as in many others, the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. Because such reasoning can be misleading, one must be cautious. Generally speaking, the fact that the First Appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery

and that he was reckless as regards that result.

[18] In my view the inference is inescapable that the First Appellant did foresee the possibility of the death of an employee of Scotts: he knew that at least two of his co-conspirators were armed with firearms; he knew that Scotts is in the main street of Port Elisabeth, and that it is immediately opposite a police station; and he knew that the robbery would take place in broad daylight. He nevertheless participated in the robbery, helping to subdue some of the victims. The State has consequently proved the necessary *mens rea* in the form of *dolus eventualis* beyond reasonable doubt.

[19] The defence of dissociation

On behalf of First Appellant it was submitted that the fact that he had left the scene before the shooting started was an indication of an effective dissociation with the robbery and its further *sequelae*.

[20] The present case differs from ***S v Singo***, *supra*, where there was no prior

agreement and the common purpose was manifested simply by conduct (see 233 a - c). It may well be the correct position, as was stated in ***S v Beahan*** 1992 (1) SACR 307 (ZS) by Gubbay CJ, that where there had been a prior agreement to commit a crime, and participation to some substantial degree in its execution, that something more than a mere withdrawal is

required to establish a legally effective dissociation, *e.g.* a notification to the co-conspirators and a nullification or frustration of the further implementation of the enterprise. Whether the *dictum* in ***Beahan's*** case applies in our law, and whether it is a rule of law or a rule of thumb, have been left open by this Court in ***S v Nduli and Others*** 1993 (2) SACR 501 (A) at 504 d - j and 506 j - 507 b. The matter need not be decided in the case now before us, because it is clear that, on whatever view one takes of the matter, there was no effective dissociation. The First Appellant's mere departure from the scene is a neutral factor. It is more likely that he fled because he was afraid of being arrested, or of being injured, or to make good his escape with the stolen money and goods. It has, therefore, not been established as a reasonable possibility that the First Appellant dissociated himself from the planned enterprise and its *sequelae* (*cf* ***S v Nduli and Others****, supra*, at 506 j).

[21] The application by First Appellant for a separation of trials

Immediately after the close of the State case, Counsel for the First Appellant applied for a separation of the trials of the two accused. The application was opposed by Counsel for the second accused (now Second Appellant) and the State. It was discussed by the court *a quo* on the basis of the decision in ***S v Shuma and Another*** 1994 (2) SACR 486 (E). On appeal it was submitted on behalf of the First Appellant that the court *a quo* had misdirected itself in refusing the application, to the prejudice of the

applicant.

[22] The *ratio* of the application was sketched as follows by Kroon J in his judgment:

> "Mr Bursey advised me as follows. At that stage it was accused no. 1's intention not to testify in the trial. He desired, however, to place certain evidence by accused no. 2, details of which follow later, before this court. Mrs Crouse had, however, advised him that accused no. 2 was not prepared to waive his entitlement not to testify in the trial accorded to him in terms of section 196 (1) (a) of the Criminal Procedure Act, No 51 of 1977. In terms of that section accused no. 2, being a co-accused of accused no. 1, was a competent but not a compellable witness on the latter's behalf. A separation of trials would result in the position where accused no. 1 could compel accused no. 2 to testify in the former's defence. Accused no. 1, presumably as a result of some conversation that had taken place between the two accused, had advised him, Mr Bursey, that accused no. 2 will be able to confirm his, accused no. 1's version as it was put to a large extent, namely in respect of accused no. 1's denial that he was in possession of a firearm or knew that a robbery was to take place and his claim that he, the accused, had been taken by surprise in the shop,

presumably, so it was to be inferred, when Toboshe had set the robbery in train. I was advised further that it was not within accused no. 1's knowledge, presumably at present, whether the firearm in Toboshe's possession was a real one or a toy.

In essence it was Mr Bursey's submission that the evidence in question would be material in the matter of the case against his client; that its exclusion would be prejudicial to accused no. 1 and would constitute a denial of his constitutional right as contained in section 35 (3) (1) of the Constitution to have evidence adduced on his behalf as an accused in a criminal trial; and accordingly, to prevent the accused being deprived of a fair trial, the separation of trials should be granted so as to result in the situation where accused no. 2 was a compellable witness on behalf of accused no. 1."

[23] Section 157 (2) of the Criminal Procedure Act reads as follows:

"Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any

of such accused."

[24] Kroon J held that the possible prejudice to the First Appellant if the application were refused did not weigh up against the probable prejudice of the State and Second Appellant, and the resulting inconvenience, if the application were to be granted. But he refused the application for an additional reason, which he formulated as follows:

> "There was an additional feature. From accused no. 2's professed attitude that he did not want to testify in the present proceedings, it was fair inference that he would have been an unwilling witness in any trial in which accused no. 1 was the only accused unless and until his own case had been disposed of. He could well, and probably would, have refused to testify pending the finalisation of his own case. Mr Bursey's counter thereto was that the accused could not have lawfully refused to testify; he could only have refused to answer any questions which might have tended to incriminate him. The answer thereto was twofold. I considered that an accused, who has a criminal case actually pending against him and refuses, by reason of that circumstance, to testify in other proceedings on any matters connected with the subject of the pending case against him until same has been disposed of, would

> probably have raised a lawful excuse for not testifying. Alternatively, he could contend that he is not really in a position to say what answers he may give, might, in the result, prove to be incriminating in the sense of detracting from or having an adverse bearing on the validity of any defence he would raise in his own case. It would therefore be unfair to require him to testify until his own case had been disposed of. Such a contention would have had much to commend itself. It might well have been therefore that the case against accused no. 1 would have been ordered to stand postponed until accused no. 2's own case had been finalised. Delaying the finalisation of both cases would have been the result. In the event of accused no.2, in his case, seeking to secure the benefit of evidence by accused no. 1, a likelihood which could not be excluded, the latter might well have adopted the attitude that he should not be required to testify until his case has been finalised. An impasse would have resulted which could only have been resolved by the court ordering one or other case to proceed whether with or without the evidence of the other accused."

I cannot fault the refusal of the application by the learned judge *a quo* for the reasons stated by him. I wish only to add that the right of an accused to *subpoena* a co-accused as witness cannot override the right of the latter not

to incriminate himself or to remain silent at his trial.

[25] On behalf of the Second Appellant:

It was argued that if the fatal shot came from De Reuck's revolver, and the Second Appellant cannot be held liable because De Reuck's action was not unlawful. Alternatively it was argued that De Reuck's action was a *novus actus interveniens*, unforeseeable by the Second Appellant.

[26] The trial court was unable to find from whose gun the fatal shot came. Second Appellant had fired one shot only; De Reuck five. On behalf of Second Appellant it was submitted that he must be given the benefit of the doubt on this aspect. I will, in what follows, assume that in the cross-fire between Second Appellant and De Reuck, the latter fired the fatal shot.

[27] It stands to reason that, in causing the death of the deceased, De Reuck acted neither unlawfully nor intentionally. But it also follows that factually the Second Appellant, as well as De Reuck, caused the deceased's death.

[28] That De Reuck's act was not unlawful, does not bring about that Second Appellant also acted lawfully. De Reuck acted in necessity ("noodtoestand"), whereas Second Appellant acted in the execution of a crime. The acts of the former are justified in law; not so the acts of the

latter (see *Snyman,* ***Strafreg****, 3rd edition* 109 - 110).

[29] It follows that it does not avail Second Appellant to rely on the lawfulness of De Reuck's acts : the death of the deceased was brought about by an unlawful act or acts of the Second Appellant, *viz* the implementation of the robbery, the physical assault on the deceased and the participation in the gun battle.

[30] Neither can it be said that the intervention of de Reuck was a *novus actus interveniens*. In our law, a *novus actus interveniens* is an event which is, in the context of the act that was committed, abnormal, and completely independant of the acts of the accused (see ***S v Grotjohn*** 1970 (2) SA 355 (A) at 364 A*;* see also ***S v Mokgethi*** 1990 (1) SA 32 (A) at 40 A).

[31] The death of the deceased caused by a gunshot fired in the course of a gun battle between the Second Appellant and De Reuck was not abnormal, unforeseeable or independant of the acts of the robbers. As indicated earlier, it was foreseeable that a policeman could enter upon the scene, that a gun battle could ensue (why else did the robbers take firearms with them?) and that an innocent party might be injured or killed in the crossfire, whoever fired the harmful shot or shots. The *novus actus* defence cannot be upheld.

[31] No other arguments having been put forward, the convictions of both

the

Appellants must be upheld.

[32] Sentences

It was not submitted that the court *a quo* misdirected itself in imposing the

sentences referred to above. Nor can it rightfully be said that the sentences were such that no reasonable court could have imposed them. In the light of the circumstances of the case and the prevalence of armed robberies in our country, the sentences are not so severe that this Court ought to interfere.

[33] In the result, the appeals of the Appellants against their convictions and sentences are dismissed.

PJJ OLIVIER JA

CONCURRING :

HEFER JA

HARMS JA