

112/00-JduP

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JUDGMENT

Sneller Verbatim/JduP

IN THE HIGH COURT OF SOUTH AFRICA


(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 112/00

2001.03.23

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In the matter between

THE STATE

and

MERVYN STANLEY JONES

First Accused

HEROLD GEORGE

Second Accused

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## JUDGMENT

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WILLIS, J: The two accused, Mervyn Stanley Jones and Herold

George, stand indicted on four separate counts:

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1. Count 1: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, it being alleged that upon or about 27 April 1999 and at or near Waterloo Supermarket, Florida, in the district of Roodepoort, the accused did unlawfully and intentionally assault Andreas Kyriakou Frangos and/or Georgia Christoforou and/or Denis George Styles and/or Estelle Esme

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Styles and with force and violence did take out of their possession an undisclosed amount of cash, their property or in their lawful possession and did thereby rob them of the same, aggravating circumstances as defined in section 1 of Act 51 of 1977 being present.

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2. Count 2: Murder, in that upon or about the date and at or near the place mentioned in count 1, the accused unlawfully and intentionally killed Andreas Kyriakou Frangos.

3. Count 3: Contravention of section 2 of Act 75 of 1969 of the Arms and Ammunition Act, in that upon or about the date and at or near the place mentioned in count 1, the accused did unlawfully possess a firearm without being the holder of a licence to possess such an arm.

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4. Count 4: Contravention of section 36 of Act 75 of 1969, it being alleged that upon or about the date and at or near the place mentioned in count 1, the accused did unlawfully possess ammunition without being in lawful possession of an arm capable of firing such ammunition.

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Accused 1 was represented by Mr Leisher and accused 2 by Mr Mateane.

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At the commencement of the trial accused 1 pleaded guilty to counts 3 and 4, that is the possession of arms and ammunition in contravention of the Arms and Ammunition Act. This plea of guilty was accepted by the state and duly noted by me, and the accused was then found guilty on counts 3 and 4.

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With regards to counts 1 and 2 accused set out a statement of

defence in terms of section 115 of the Criminal Procedure Act. The material portions of accused 1's statement in terms of section 115 are as follows:

"I was with accused 2, another friend Joey and a youth aged 13 years. Zaine was with his girlfriend Lesley Phillander when we drove to this house. The supermarket in question happened to be around the corner from this house.

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Zaine went into the house to try and get this firearm, and I went into the supermarket to buy some mineral water, which I did, and came back to the vehicle. When I arrived there accused 2 asked me if I had bought cigarettes, and I told him that I had not. I left the water in the car and turned to go back to the store to get cigarettes. As I reached the corner Zaine came behind me and told me he wanted to rob the store as the owner was an old man. I refused flatly and told him I wanted no part of his plan. I was also under the influence of liquor and Zaine was under the influence of drugs, namely Ecstasy and others. I was armed with an illegal firearm but had no intention of robbing any person whatsoever.

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As I entered the store again Zaine entered next to me and went to the other till whilst I wanted to order cigarettes at the other till. As I was about to take the money out to order the cigarettes I heard screaming from the other till, and next I saw Zaine run past me, shouting 'Mervyn let's run!' I realised he had just robbed the store. As I turned back to the owner at the till I noticed he was drawing his firearm. I knew he was associating

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me with the robbery and thought he would shoot me. I then drew my firearm and told the deceased to drop his firearm. He (inaudible) to his side, and in order to get away safely I grabbed the man he was talking to and put my gun to his head in order that I could use him as a shield and for the owner to drop his firearm. I left the scene and moved a few paces until I thought it safe to try and get away. As I did this the deceased raised his firearm, pointed it at me, and I panicked and fired at him as I genuinely thought he was going to shoot me. There was no other way I could avert this danger when I fired."

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In other words, it is common cause on the version of accused 1 that he was indeed at the scene at the critical time, and that he did in fact shoot and kill Mr Frangos the deceased. It is also common cause that a robbery did in fact take place.

Accused 2 declined to give any explanation of plea in terms of section 115 of the Criminal Procedure Act.

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Mr Mateane correctly accepted that during the course of this trial it became clear that the issue in so far as his client was concerned was whether it had been Zaine or accused 2 who had been the robber at the till of Georgia Christoforou.

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There were three witnesses who were eyewitnesses to the incident in the actual store itself. They were Estelle Styles, Georgia Christoforou and Denis George Styles. In addition there was the evidence of Zainodeen Green Thompson, who was warned as an accomplice in terms of section 204, and his girlfriend at the time Lesley-Ann Phillander.

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Mr and Mrs Styles were friends of the deceased and paid a visit to him at the store on 27 April 1999, which was a public holiday. It is common cause that accused 1, shortly before the shooting, came into the store and purchased a bottle of mineral water. It is common cause that Mr and Mrs Styles later identified accused 1 at an identification parade.

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It immediately must be noted that there were a number of discrepancies and minor contradictions in the evidence of all the state witnesses. In my view this certainly does not affect any assessment as to their honesty. Highly traumatic events occurred very speedily, and it would be surprising if they exactly corroborate one another. Nevertheless,

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Mr and Mrs Styles were adamant that the first untoward incident that occurred after accused 1 had bought the bottle of mineral water was that accused 1 pointed a firearm at Mr Styles who was sitting near the sliding door. Miss Georgia Christoforou also confirms this important fact, although of course she was not able pertinently to say that it was accused 1, but in the circumstances it could only have been accused 1.

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In my view the likelihood that all three of these witnesses could be mistaken about this material fact is remote indeed. Furthermore all three of them were adamant that the person, who must have been accused 1, then demanded money. Mr Styles said that at about the same time accused 1 then demanded that Mr Fangos, the deceased, hand over his firearm. This was corroborated by Mrs Styles although she did not mentioned this fact in her witness statement. Mr Fangos,

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after some hesitation, proceeded to start to remove the firearm that was tucked behind his belt, and thereupon accused 1 shot and killed him. Mr and Mrs Styles were adamant that accused 1 thereafter, after he had shot Mr Frangos, proceeded to take money out of the till which had been managed by Mr Frangos.

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Clearly this version of events is inconsistent with that tendered by the accused. Although Mr and Mrs Styles eventually conceded under effective cross-examination by Mr Leisher that they may perhaps not have actually seen the physical removal of the cash by accused 1, they were adamant that this is what in fact happened. This evidence is corroborated by the evidence of both Zainodeen Green-Thompson and his former girlfriend Lesley-Ann Phillander. Both of them say, that after accused 1 and 2 had gone, at least in the direction of the shop, accused 1 returned, bringing with him money, which he then gave over to accused 2.

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It is highly improbable, so improbable as to be dismissed as a reasonable possibility, that all five of these witnesses could have cooperated to corroborate this material aspect of events.

Miss Georgia Christoforou was adamant that the person who came to her till, his face covered behind a jacket, that that person took money. In other words it is quite clear from the evidence of the three persons, who were eyewitnesses to the events that actually took place in the Waterloo Supermarket, that there were two robbers involved in this particular incident.

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I fully accept that Zainodeen Green-Thompson's evidence must be considered with great caution. He was after all warned as an

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accomplice and it seems that he may well indeed have been an accessory after the fact inasmuch as he shared, at a later stage, in some of the spoils of the robbery and sought, in my view, perhaps to distance himself. Nevertheless he was corroborated by Lesley-Ann Phillander, who was his girlfriend at the time and is no longer his girlfriend. She was a most impressive, if I may say, a "plucky" witness and, although there were minor discrepancies and contradictions in her evidence, I have no doubt that the general thrust of her evidence is the truth. She was adamant also that Zainodeen Green-Thompson had not taken any drugs on the day in question, she said that she had been with him throughout the day. She was also adamant that Zainodeen Green-Thompson had not been a member of any gang, and in particular had not been a member of the Majimbo gang. She also corroborated the entirely innocent explanation for why she and Zainodeen Green-Thompson happened to be in the motor vehicle which stopped outside the supermarket at the critical time, namely that they had obtained a lift with accused 1 and 2 after Zaine had returned his mother's motor vehicle to her.

Accused 1 gave a version of events in the witness-box that materially conforms to the statement which he gave at the commencement of the trial in terms of section 115.

I have three major criticisms of this witness' evidence.

1. He could give no satisfactory explanation for why, after he remonstrated with Zaine not to go into the supermarket to commit a robbery, he nevertheless continued to go with him into the supermarket.

2. It is common cause and accepted by accused 1, that Zaine did not at any stage on the day in question have in his possession a firearm. Quite how Zaine, then a 17-year old youngster, could seriously have contemplated perpetrating a robbery on a supermarket, without having at least a firearm in his possession, is a mystery to me. 5

3. He cannot explain why Mr Frangos, in the circumstances described by accused 1, would have associated accused 1 with the robbery being perpetrated, on accused 1's version of events, by Zaine. In other words, he cannot explain why Mr Frangos would have aimed to shoot at him rather than at the robber at the till being operated by Georgia Christoforou. 10

There are other criticisms that can be made against the evidence of accused 1, for example, I find his explanation as to how it happened that he happened to have a cocked firearm with a bullet in the chamber at the critical time was also unconvincing. 15

Accused 2 gave a version of events that in many respects contradicted that of accused 1. Essentially, however, it was this, that Zainadeen Green-Thompson went into the store, that by sheer coincidence after he (accused 2) had relieved himself in the vicinity, he happened to walk past the window and he noticed Zaine robbing the till, which must have been operated by Georgia Christoforou, and accused 1 pointing a firearm at Mr Frangos. Despite this evidence, he was unable to give any explanation for why he was convinced that accused 1 was not involved in the actual robbery. As I have mentioned, he also contradicted accused 1 as to the sequence of 20 25

events immediately before Zaine and accused 1 went into the shop.

There is a further point of criticism against accused 2, and that is that accused 2 originally testified that the lady at the till, opened the till, took the money and handed it to Zaine and Zaine took it. When cross-examined regarding this aspect accused 2 conceded that he did not see any of it.

For the sake of completeness, by reason of the fact that the evidence of Zainodeen Green-Thompson and Lesley-Ann Phillander corroborates that of Mr and Mrs Styles and to some extent that of Miss Christoforou, I accept that initially it was accused 1 and 2 who went into the store and that later Zainodeen Green-Thompson, in order to purchase minor and some inconsequential item for his girlfriend, got out of the vehicle and followed them in the direction of the store.

The correct approach to an evaluation of evidence is to look at the totality of the evidence. It is no good to look at minor discrepancies here or there or minor contradictions here and there. As I have already indicated I cannot believe that all three of the witnesses in the store at the critical time could be wrong in their observation that before anything else happened, in so far as the actual robbery was concerned, accused 1 pointed the firearm at the head of Mr Styles. I also do not believe that all three of them can be wrong in their evidence that accused 1, before shooting and killing Mr Frangos, demanded money. I also do not believe that all three of them can be wrong in their impression that both accused 1 and accused 2 took money from the respective tills. As I have already indicated, they are in material respects corroborated in this regard by the evidence of

Zainodeen Green-Thompson and Lesley-Ann Phillander.

The version of the accused on the other hand has in my view fundamental flaws, which I have already alluded to. Accordingly, in my view there can be no reasonable possibility that the version of accused 1 and 2 is true, and these versions are rejected.

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It is therefore quite clear, and I do not believe that I need take the matter any further, that accused 1 and 2 both were involved in the robbery at the Waterloo Supermarket on the day in question.

With regard to the requisite intention, and the requisite legal elements as to the murder of Mr Frangos, I would wish to quote from the case of *S v Malinga and Others* 1963 (1) SA 692 (A) in which Holmes JA gave the judgment of the court. He said at 695:

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"In the present case all the accused knew that they were going on a housebreaking expedition in the car and that one of them was armed with a revolver which had been obtained and loaded for the occasion. It is clear that their common purpose embraced not only housebreaking with intent to steal and theft but also what may be termed 'a getaway', and they must have foreseen, and therefore by inference did foresee, the possibility that the loaded firearm would be used against the contingency of resistance, pursuit or attempted capture. Hence, as far as individual *mens rea* is concerned, the shot fired by accused 4 was in effect also the shot of each of the appellants. On the question of intention to kill they must have foreseen, and therefore by inference did foresee, the possibility that the use of the loaded firearm would have fatal consequences. Violence,

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firearms and death are ever an easy and sombre trinity, as I observed in *S v Mashiyana and Others*, and the appellants were clearly reckless whether death would in fact ensue or not. Hence the intention to kill must be imputed to each one of them. In the result all were rightly found guilty of the crime of murder."

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I accept that neither of the accused had a direct intention to kill. Nevertheless I accept that there must have been, by necessary inference, *dolus eventualis* on the part of both of them. I accept that accused 1 must have panicked, when seeing the firearm of Mr Frangos, and shot at him. Nevertheless that does not constitute a ground of self-defence. Mr Frangos, raising a firearm, would not have been acting unlawfully where he had armed robbers in his supermarket. Furthermore one cannot rely on an unlawful situation, which one has oneself created, in order to succeed with a defence of self-defence.

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On the basis of the decision in *S v Nkosi* 1998 (1) SA 284 (W) I accept that accused 2 cannot be found guilty on counts 3 and 4. I would wish to add that the evidence points to the fact that accused 2 did not possess a firearm on the day in question, and a common purpose to possess such a firearm cannot on the basis of *S v Nkosi* be imputed to him.

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Count 1: robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, both accused 1 and 2 are found guilty as charged.

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Count 2: the murder charge, both accused 1 and 2 are found

guilty as charged.

Count 3: contravention of the unlawful possession of a firearm,  
accused 1 is found guilty, accused 2 is acquitted.

Count 4: unlawful possession of ammunition, accused 1 is  
found guilty, accused 2 is acquitted.

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ON BEHALF OF THE STATE:

ADV P SCHUTTE

ON BEHALF OF ACCUSED 1:

ADV P T LEISHER

ON BEHALF OF ACCUSED 2:

ADV C N N MATEANE

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