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Case nr 346/86

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M. DLAMINI and M.H. MNCUBE

and

THE STATE

JANSEN JA.

Saak nr 346/86
MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MPIKAYIPHELI DLAMINI

Appellant No 1

MBUKENI HEZENKIA MNCUBE

Appellant no 2

and

THE STATE

Coram: JANSEN, VIVIER JJA et BOSHOFF AJA.

Heard: 27 February 1987

Delivered: 20 March 1987.

J U D G M E N T

JANSEN JA:-

Vincent Ngobese, a headman, lives in
the Magongoloza Reserve, in the district of Nqutu, Natal.

During/.....

During the late afternoon of Saturday 15 June 1986

a group of 3 men (with, perhaps, a fourth who kept out of sight) approached his home. Vincent Ngobese became aware of their arrival and he went out to speak to them.

One of the men produced a firearm and fired at him: the bullet passed through his scrotum and left buttock.

Vincent Ngobese's wife, Mabel, set upon the group with a panga and managed to strike one of them on the head. The group turned upon her and brought her to the ground. Whilst two of them held her down the third (the man with the firearm) shot her through the head and she died.

The two appellants were subsequently charged with and convicted in the Natal Provincial Division (per BROOME JP and two assessors) of attempted murder upon

Vincent/.....

Vincent Ngobese and the murder of Mabel Ngobese. For the attempted murder the first appellant was sentenced to 10 years imprisonment and the second appellant to 5 years. In respect of the murder extenuating circumstances were found to be present in the case of the second appellant but not in respect of the first. The first appellant was accordingly sentenced to death and the second appellant was sentenced to 10 years imprisonment (of which 2 years were suspended upon certain conditions). The sentences imposed upon the second appellant were ordered to run concurrently.

By leave of the court a quo the first appellant appeals against the finding that there were no extenuating circumstances in his case and the consequent sentence

of death, whereas the second appellant appeals against his convictions.

It is clear that the first appellant was the man with the firearm who shot both Vincent and Mabel Ngobese. He had been hired by members of an opposing faction to kill Vincent Ngobese and had been promised R100,00 for his services. It is argued that the following circumstances are extenuating in his case: his purpose was to kill Vincent Ngobese and not the deceased; her death was neither premeditated nor desired - it resulted from a sudden reaction provoked by her attack on the group. It is, however, difficult to see how these considerations can make the first appellant's conduct morally less blameworthy. He was not the man struck

on the head by the deceased - at most he was at one stage chased by the deceased. Moreover, an assassin can hardly be less blameworthy in circumstances such as these when he kills not the intended victim but someone who intervenes on behalf of the intended victim. In my view the court a quo cannot be faulted for finding that there were no factors present making the first appellant morally less blameworthy.

The convictions of the second appellant rest upon his identification by Vincent Ngobese and his sister, Nomathemba Ngobese, as being one of the group in question. The appellant lived nearby and was well known to both. Vincent Ngobese claims to have recognised the appellant when he spoke to the group shortly before he was shot.

However, /

However, he obviously did not disclose this to the police when they brought the first appellant and another (with an injury to the head) to him that very night in the hospital. Nomathemba does not claim to have recognized the appellant at the scene of the shooting. She says she followed the group as they left the scene until at a certain point they sat down on the way to the bus stop. It was then dark. One of the group got up and came to her. It was the second appellant. He had a bottle of beer with him. He accompanied her to where the deceased was lying. The second appellant explained in evidence that he had been drinking at Mthembu's place. He heard crying coming from the direction of his home and went out to investigate. He had the bottle of beer he was drinking with him. He met

Nomathemba /

Nomathemba Ngobese and accompanied her to where the deceased was lying. After the deceased had been taken away by car, he went home.

The court a quo found the second appellant to be a poor witness and drew an adverse inference from the fact that he did not call as witnesses two persons who could have testified to his movements on the Saturday in question. It accepted the identification by Vincent Ngobese and his sister of the second appellant as being one of the group, inasmuch as they corroborated each other. The fact remains, however, that the second appellant was only arrested on the Monday and there is no suggestion that he could not have been picked up sooner by the police if he had in fact been identified at the

time. The possession of the beer bottle by the appellant is also difficult to reconcile with his guilt. The State was fully justified in not pressing that the convictions of the second appellant should be upheld. There must be a reasonable doubt as to his guilt.

The appeal of the first appellant is dismissed; the appeal of the second appellant is allowed and his convictions and sentences are set aside.

E.L. JANSEN JA.

VIVIER JA) Concur.
BOSHOFF AJA)