

Bib. 64/90

Case No. 583/89

E du P

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

KOKO SINDILE

First Appellant

THAMSANOVA VENA

Second Appellant

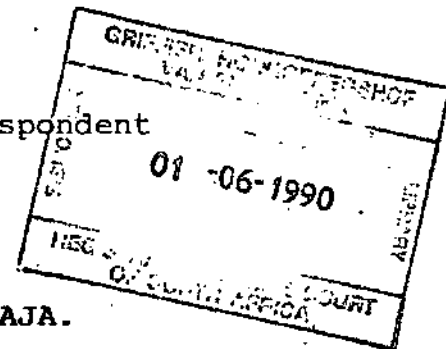
NZALISEKO PIENKIE SHUMI

Third Appellant

and

THE STATE

Respondent



Coram: JOUBERT, KUMLEBEN JJA et NICHOLAS AJA.

Heard:

Delivered

11 May 1990.

1 June 1990

J U D G M E N TNICHOLAS AJA:

In her lifetime Mrs Ethel Ackerman, an elderly widow, lived with her son Mr Mervyn Ackerman in a detached house standing in its own grounds at 51 Union Avenue, Walmer, Port Elizabeth. The yard and garden were surrounded by a vibracrete wall, through which steel gates provided access from the street. These were normally kept locked. The house was well burglar-proofed, and it was provided with a number of "panic-buttons". On the morning of 5 January 1988 Ackerman left the house in order to go to his video shop. His mother was at home. In the course of the morning he had several telephone conversations with her. The last was at about 12 noon. She cut that conversation short saying that the gardener was at the door asking for ice to put in his water. Ackerman returned at about 21h00 that evening. The house was in darkness. Unlocking the door, he entered

and found a scene of disarray. Cupboards were standing open in every room, and articles of clothing and other objects were strewn about the floor. Plainly, the house had been ransacked. Going through to the kitchen, he found his mother lying on the floor, apparently dead. He summoned the police, who quickly arrived and began their investigations.

At about 03h30 on 7 January 1988 Det W/O Joubert and a group of policemen entered a shack in Weslian St. in a black township near Walmer. They found there four men and a large quantity of goods and also two knives. The men were Koko Sindile, Thamsanga Vena, Pienkie Shumi and Boy Boy Tshali. The police took possession of the goods and arrested the men.

A post mortem examination on Mrs Ackerman was performed by Dr Krige. His conclusion was that the cause of death was a stab wound into the heart. Among the injuries which he noted were a laceration and other injuries in the neck, all of which he said were consistent with having been

caused by a spade. And there were stab wounds in the left and right lungs, in the left ventricle and the pulmonary artery.

A spade was found in the kitchen with blood on it. Another spade was found in the yard outside the kitchen, also with blood on it. Ackerman identified the spades as his. They were normally kept either in the toilet or the servant's room at the back of the house. He also identified as having been taken from the house some of the goods found at Weslian St. Their value was about R5 000 in total. They included a watch, a video machine, two suitcases and numerous articles of men's clothing (jackets, shirts, and pants) and sheets, blankets and towels.

Arising out of this occurrence the men arrested by the police were charged in the South Eastern Cape Local Division on three counts including (1) the murder of Mrs Ackerman, and (2) breaking into the house at 51 Union Road, Walmer with intent to rob, and robbery with aggravating

circumstances. Koko Sindile was charged as accused No. 1, Thamsanga Vena as accused No 2, Pienkie Shumi as accused No 3, and Boy Boy Tshali as accused No 4. The trial was heard by VAN REENEN AJ and two assessors. Accused Nos 1, 2 and 3 were each convicted on count 1 of murder without extenuating circumstances and sentenced to death. On count 2 they were each convicted of robbery, and sentenced to 15 years imprisonment. No 4 was convicted on a third count, and acquitted on counts 1 and 2.

The learned trial judge granted to Nos 1, 2 and 3 accused unrestricted leave to appeal in respect of their convictions and sentences. In this court however counsel for accused Nos 1 and 2 addressed no argument in support of their appeals against the convictions. It is unnecessary to say more than that the appeals were unarguable. I accordingly turn to accused No 3's appeal against his convictions for murder and robbery.

All three of the appellants admitted in their

evidence at the trial that they took part in pillaging the house and removing the stolen goods to No 2's shack in Weslian St., where they were found by the police. Each of them denied, however, that he was a party to the killing of Mrs Ackerman. Apart from the accused, there was no witness who knew anything about the circumstances of her death. Each of them sought to exculpate himself. None was a satisfactory witness. In addition to their evidence, each of them had made a statement, the admissibility of which was not disputed. It was largely on the basis of his statement that No 3 accused was convicted. Apart from this, the case against him was based on circumstantial evidence. It is to the circumstances that I now turn.

On 5 January 1988 No. 3 was working at Mrs Ackerman's as a gardener. Ackerman saw him weeding the lawn at about 08h00. He had been employed on a daily basis during the preceding 4 years, but when he returned on that date, he had not attended for about a month. Upon arrival at the

home, it was his custom to ring the bell at the front door. He would be given the key to an iron gate and having unlocked it he would enter the property.

Nos 1 and 2 accused said in their evidence that they arrived at the iron gate at about 09h00 on 5 January. They were met by No. 3, who informed them that Mrs Ackerman had gone to the shop, and they were told to wait in the outside servant's room, which was next to a toilet. They did so. At some stage during the morning, Mrs Ackerman returned to the house. She gave bread to No. 3, who brought it to Nos 1 and 2. Later, No 3 went to the house and asked for cold water which he brought to them. After some time, he came and told them to go into the house. They found Mrs Ackerman lying bleeding on the floor of the kitchen. In his evidence No 3 said that he was not aware that Nos 1 and 2 had entered the premises or waited in the servant's room. He said that they did not even know that he was employed at the house. None of this could reasonably possibly be true. It would be

asking too much of coincidence that Nos 1, and 2 who were his friends, would arrive at No 3's place of employment without prior arrangement, gain access to premises which they had not previously visited, and without his connivance make their way to the servant's room and stay there for more than three hours. Moreover, after Mrs Ackerman was dead, No 3 left the house in the company of Nos 1 and 2, taking his share of carrying the loot, and spent the night with them in the bush and went with them to the shack in Weslian St. The inference is irresistible that the robbery was planned and that Nos 1 and 2 went to the house by arrangement with No 3, and that they acted in accordance with his directions.

On the afternoon of his arrest accused No 3 was taken to Capt. Oosthuizen, who gave evidence for the State and handed in Exh "R". In this he recorded that accused No. 3 was brought to him at an office at Louis Le Grange Square. Present as interpreter was Det. Sgt Mngxekeza. After he had been cautioned, No 3 told Oosthuizen that he wished to point

out certain places and things. The following are the notes made by Capt Oosthuizen of what then occurred.

"NOTAS

1988-01-07 15h18

Vraag: Waar is die huis wat u aan my wil gaan uitwys?

Antwoord: Die huis is by Walmer by 5de Laan. Verklaarder word meegedeel dat ons met voertuig sal ry tot by Walmer en wanneer ons daar arriveer hy daarna aan ons moet sê hoe om te ry om by die toneel uit te kom.

Antwoord: Hy sê hy verstaan en sal so maak. Van Tygerkloof pad draai links in 6de Laan, Walmer. Vanaf 6de laan links in Unionweg uit wat geleë is aan linkerkant van die pad.

Ons het by hierdie motorhek ingegaan. (Motorhek geleë aan linkerkant van erf.)

Ons het deur hierdie staalhek ingegaan. (Ook geleë aan linkerkant van huis)

Ons het by hierdie deur ingegaan. Hy wys n houtdeur uit wat bestaan uit n bo- en onderdeur. Bodeur het 9 glasruite in aan agterkant van huis. Ons gaan n vertrek in. Toe ek inkom in die kombuis, het die oumiesies klaar hier op die vloer gelê. Hy wys na die vloer voor die yskaste. Sy het op haar rug gelê met haar kop na die agterdeur en haar voete na die gangdeur. Sy het vir my gelyk of sy dood is."

(There followed a sketch plan of the kitchen)

"Ek was onder in die tuin. Ek hoor die oumiesies skreeu en het na die kombuis gehardloop om te kyk wat gebeur. By die huis in die kombuis kry ek die oumiesies lê en Koko en Tamsanga staan bo-op die miesies. Ek vra toe wat doen julle. Kom maak ook haar klaar was hulle antwoord aan my. Ek het toe ook my mes uitgehaal en die oumiesies een hou met die mes gesteek op haar liggaam aan haar boonste gedeelte van haar liggaam. Ek wys nou verder uit waarna ek gegaan het vanaf die kombuis. Ons loop by gangdeur uit en draai links in die voorhuis in en weer links deur h deur wat na h tweede sitkamer lei. Nadat ek ingekom het, het ek op die klavier gespeel en onder die bank se kussings geld gesoek. Ek het nie geld gekry nie en gaan ek uit. Ek het daarna in h slaapkamer ingegaan. Hy wys aan my die eerste slaapkamer aan linkerkant uit, maar sê dat hy niks gevat het nie. Ons beweeg in die gang af regs in nog h gang en links in by h slaapkamer. Hy sê dat Tamsanga h video in die kamer geneem. Ek het mansklere uit die kas geneem. Hy wys h klerekas uit en maak self die deur van die kas oop. Ek het ook geld gesoek ek het ook hierdie kas oopgemaak. Hy wys h tweede kas uit. Hier het ek ook klere gevat. Dit is al."

(There follows a sketch plan of a room)

"Daarna is ek saam met die ander twee weer by die agterdeur uit op dieselfde roete wat ons by die huis ingekom het. Daarna is ons links in Unionweg af en het by die stopstraat regs opgestap terug na Walmer Lokasie.

(Geteken M.E. MNGXEKEZA (Geteken) J.OOSTHUIZEN

Regterduimafdruk van P.N.SHUMI

L.L. Grange Plein

1988.01.07

16h25"

(The underlining is mine)

No 3 formally admitted that what he told Capt Oosthuizen was said freely and voluntarily and without having been unduly influenced thereto. It was put to Oosthuizen in cross-examination, however, that the passages in Exh R which I have underlined in Exh "R" did not emanate from accused No. 3, and that in minor respects errors had been made. Thus, an insertion should be made at the place indicated by a dagger, "en gesê, 'Dit is die plek waar Thamboy klere uitgehaal het'"; and the penultimate sentence should read, "Daarna is ek saam met die ander twee weer by die agterdeur uit op dieselfde roete wat ek by die huis ingekom het."

Both Oosthuizen and the interpreter were subjected to a searching cross-examination, and the heads of argument filed on behalf of No 3 contain a detailed analysis of what

were said to be defects and shortcomings in the evidence of Oosthuizen and the interpreter; in summary, discrepancies between the evidence of the two of them; improbabilities on some points; the suggestion that the warning given to the accused was inadequate; the charge that the interpreter was ill-qualified and possibly biased ; and the slips and ambiguities in his notes which Oosthuizen admitted.

It is not necessary to make a detailed examination of counsel's submissions in this regard. The reason is that Oosthuizen's record is disputed only in regard to the passages underlined, and the other two respects mentioned above.

If these passages did not come from the accused, there would be no room for an honest mistake on the part of Oosthuizen: these parts must have been deliberately fabricated by him. In this context the fact (if it be a fact) that Oosthuizen, or the interpreter, was guilty of honest error in parts of his evidence would not be relevant to show

that he was guilty of fabrication (Cf S v Oosthuizen 1982(3) SA 571 (T) at 577 B-D).

The trial court held that it could accept the statements made by No 1, 2 and 3 as accounts of what they did respectively on 5 January 1988. Not only did they not produce proof that the statements were wrong in any respect, but the facts as reflected therein were consistent with the independent evidence and the probabilities. In the case of No 3 accused, with whom I am now concerned, I have no doubt that the finding was correct.

In his evidence at the trial, No 3 said that he was acting under duress exercised by Nos 1 and 2 when he assisted in pillaging the house and when he accompanied them afterwards. The trial court had no difficulty in rejecting this evidence. In my view it was correct in so doing. In the light of all the circumstances, it is clear that the explanation for his admitted conduct was fatuous.

In my opinion the inferences to be drawn are clear.

No 3 participated in the robbery. He enabled Nos 1 and 2 to gain access to the premises and to arm themselves with spades. He provided them with sustenance. He told them when it was opportune for them to enter the house. He was the only man in possession of a knife. On his own admission he inflicted upon Mrs Ackerman a stab wound in the chest. The probabilities are overwhelming that he inflicted the other injuries to her heart and lungs. He was well-known to Mrs Ackerman. He must have intended to kill her - if she lived to tell the tale he would have been a lost man. He participated in the robbery.

His appeal against the convictions must accordingly be dismissed.

In regard to the question of extenuating circumstances there was little to be said for any of the appellants.

In regard to Nos 1 and 2 accused Mr Gess relied on a number of circumstances.

"There was apparent a lack of planning and premeditation." On the contrary, it is clear that the robbery was planned. That is why the two accused went to the house and the robbery was committed. Having regard to the fact that their accomplice Pienkie was well-known to Mrs Ackerman, they must have foreseen that the death was a necessary condition if they were to escape the consequences of their acts.

"Nos 1 and 2 took a lesser role". This is not so. It is probable that they were the first to enter the house and make a brutal attack on Mrs Ackerman with spades.

"Both Nos 1 and 2 were in their twenties at the time." There is nothing to suggest that youth or immaturity played any part in these crimes.

In the case of No. 3, it was argued that the trial court misdirected itself in a number of respects. I do not think that the argument is well-founded. It is not necessary to go into detail, because even if had been anything in this

argument and this court were free to make its own finding, there is no basis on which we could find extenuating circumstances. No. 3 was probably the master-mind, and he was the author of Mrs Ackerman's death. There was before the trial court nothing which could tend to reduce his moral guilt.

The appeals are dismissed.

NICHOLAS AJA.

JOUBERT JA

KUMLEBEN JA Concur