30/92

Case No 377/90
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PETER MAKUHULA — Appellant

and

THE STATE — Respondent

CORAM: NESTADT, MILNE JJA et HOWIE AJA

DATE OF HEARING: 12 March 1992

DATE OF JUDGMENT: 19 March 1992

J U D G M E N T

/MILNE JA.....

MILNE JA:

The appellant and four others were charged with two counts of murder and one count of malicious injury to property before Van Schalkwyk AJ sitting with two assessors. The appellant was Accused No 5 at the trial. The first murder charge related to the killing of one Colin Duncan and the second murder charge related to the killing of one Christopher Cozette. All the accused were acquitted on the second murder charge and the charge of malicious injury to property, but Accused No 4 and the appellant were found guilty on the first murder charge of murder with extenuating circumstances and each of them was sentenced to 12 years' imprisonment.

With leave of the court a quo the appellant appeals against his conviction of murder.

The evidence for the State relating to the

murder of Colin Duncan was summarized by the trial court as follows:

> "... Daar was gedurende die namiddag 'n bakleiery in the omgewing van beskuldigde 3 se huis. Dit het blykbaar ontstaan nadat ene Adam, wat voor die huis gesit het, die oorledene Cozette se bril afgeneem het toe hy by die huis verbygeloop het. Blykbaar het die oorledene se familie sowel as die oorledene Duncan na die toneel gegaan as gevolg van die bril insident. Hulle het daar verskeie persone aangerand. Volgens die getuienis, was die oorledene Duncan met 'n piksteel bewapen die middag.
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> Daardie aand tussen 8 en 9 namiddag het die vyf beskuldigdes hul opwagting gemaak by die huis van ene Maureen Adams in Vrygrond. Al vyf die beskuldigdes was gewapen. Beskuldigdes 1, 2, 3 and 5 het in die omgewing van die agterdeur van Maureen Adams se huis stelling ingeneem terwyl beskuldigde 4, wat luidens die getuienis in 'n jas gekleed was, by 'n vuur voor die huis van die bure, by name Carelse, gaan staan het. Beskuldigde 1 het blykbaar aan Maureen Adams gesê hulle kom om verskoning te kom vra. Hulle het haar ook uitgevra oor wat gebeur het die middag. In daardie stadium het die oorledene Duncan uit die Carelse se huis gekom en gestap in die rigting van Maureen Adams en die vier beskuldigdes wat met haar staan en praat het. Toe die oorledene feitlik by hulle is, kom beskuldigde 4 van die vuur voor die Carelse se huis aangehardloop en kap die oorledene met 'n byl teen die kop. Die oorledene het as gevolg van hierdie hou feitlik in die agterdeur van Maureen Adams se huis

neergeval.

Toe beskuldigde 4 die oorledene slaan, het ene Denise geskree en dit het veroorsaak dat sekere ander manspersone, Richard Marten, Rodney Adams en Barend Adams, uit die Carelse se huis kom en Maureen Adams se huis binnegaan. Die oorledene Duncan is intussen in die huis geneem waar hy verpleeg is. In hierdie stadium was die deure van Maureen Adams se huis toegemaak en een of meer van die beskuldigdes, dit is nie duidelik wie nie, het toe die vensters van die huis stukkend geslaan. Die mans in die huis, insluitende die oorledene Duncan, het toe wapens soos stokke en 'n hark en pikstele gegryp. Hulle is uit die huis om die beskuldigdes die stryd aan te sê. Hulle het die beskuldigdes gejaag en in 'n stadium, blyk dit, het die beskuldigdes omgedraai, die oorledene Duncan het geval en beskuldigde 4 het op sy rug gaan sit en het hom met die byl oor die kop begin slaan. Luidens die getuienis het beskuldigde 5 (appellant) kom hand bysit deur na die oorledene te slaan met 'n voorwerp wat soos 'n pange of sabel gelyk het. Die ander beskuldigdes, 1, 2 en 3, was nie by hierdie aanval betrokke nie. Die oorledene Duncan is later na die hospitaal vervoer waar hy aan sy wonde beswyk het.

Volgens die getuienis van die Staats-patoloog, dr Fosseus, wat 'n regsgeneeskundige lykskouing op die lyk van die oorledene uitgevoer het, was die oorsaak van sy dood kopbeserings. Die beserings het uit veelvuldige kap- en/of snywonde bestaan en het hy getuig dat 'n groot mate van geweld gebruik is om die wonde toe te dien. Hy het die belangrikste wonde soos volg beskrywe in sy verslag wat ingehandig is:

'1. In the right side of the head above and in front of the ear was an extensive area of criss-crossing sutured lacerated wounds ranging in size from 2 cm - 5 cm. The underlying temporal bone was extensively fractured, there were large contusions of the right temporal lobe of the brain, the brain was oedematous and extensive pontine haemorrhages were present.

2. In the right forehead was a 4 cm oblique lacerated wound with underlying depressed fracture. The fracture in the outer table of the skull was roughly triangular in shape, the inner fracture was circular in shape.'"

Subject to what is said below with regard to the medical evidence, this correctly summarized the evidence of Maureen Adams and her daughter, Kashiefa, and Dr Fosseus, the State Pathologist.

Both Accused 4 and the appellant advanced the defence of an alibi but the court rejected their evidence as false and was satisfied

> "... dat die beskuldigdes (referring to Accused 4 and 5) die oorledene aangerand het soos beskryf\ deur Maureen Adams en haar dogter Kashiefa."

The finding of the trial court that the

evidence of Maureen Adams and her daughter and Dr Fosseus was truthful and accurate was not challenged.

The sole attack upon the conviction of the appellant was that, on the evidence of the State, it was not proved beyond reasonable doubt either (a) that the deceased was alive at the time the assault was perpetrated upon him by the appellant, alternatively, (b) that the injuries sustained by the deceased prior to the assault by the appellant were not fatal or that the appellant's participation had expedited the death of the deceased. In the light of the judgment in **S v Motaung and Others** 1990(4) SA 485 (A) it was conceded by the State that if it was reasonably possible that the deceased was already dead when the appellant joined in the attack upon him or that the deceased had already been fatally injured when the appellant commenced his attack and that the appellant's conduct did not hasten the deceased's death, then the conviction for murder could

not stand and would have to be replaced by a conviction of attempted murder. This concession assumed of course the absence of proof of a prior common purpose.

As already mentioned, the trial court found that the deceased died in hospital. The State Pathologist was able to say from his own examination of the body of the deceased that the deceased had received extensive hospital treatment. The possibility that such treatment would have been administered to a corpse is so remote that it can be excluded. It follows that the deceased was alive at the time the appellant joined in the attack on him, and indeed the appellant's counsel virtually abandoned this point.

The second leg of the argument, however, raises serious problems for the State. It is apparent that there were two separate attacks on the deceased. The first occurred when Accused No 4 hit him on the head with

an axe. No one else was found to have participated in this attack. On the contrary, the trial court found that there was no evidence of a common purpose to attack the deceased at that stage. It follows that if the blow which Accused No 4 struck him at that stage ("the first wound") was the cause of death and it was not proved that any subsequent blows struck by the appellant had hastened or contributed to the death of the deceased, the appellant could not have been convicted of murder. I shall return to this aspect of the matter in a moment. The second attack took place at a later stage. The deceased had recovered from the first wound sufficiently to launch an attack in company with Richard Marten, and Rodney and Barend Adams on the appellant and the other accused. During the course of the pursuit however, the appellant and the other accused suddenly turned round and chased the deceased and the other members of his party. The deceased then fell. Why he fell is unknown - conceivably because the first wound was taking its toll. Be that as

it may, when the deceased fell, Accused No 4 then having caught up with him, straddled the deceased or sat on him and again hit him on the head with the axe ("the second attack"). The appellant joined in the second attack. Counsel for the State submitted that the appellant's participation in the second attack commenced, for all practical purposes, simultaneously with Accused No 4's attack. It followed, so he argued, that the appellant must have formed a common purpose to murder the deceased either before or, at the latest, simultaneously with Accused No 4's commencement of the second attack.

I return now to the cause of death. The State Pathologist in his **post mortem** report gave the cause of death as "head injuries" (my emphasis). In cross-examination, however, he said that any one of the head injuries which he observed could have caused death. He included the first wound despite the fact that between receiving it and the injuries received in the second

attack he, the deceased, had himself launched an attack on the appellant and the other accused. It was put to him that this was "very unlikely" but he declined to agree, saying "Well, one often, one sees of course one sees patients come wandering in with severe head injuries. I mean it does happen and they presumably are conscious enough to get to hospital". He also conceded that any one of the wounds he saw could have been the first wound and, as I have already mentioned, that that wound may have caused the death of the deceased. There is no evidential basis for finding it proved that the wounds which were inflicted subsequent to the first wound hastened or in any way contributed to the death of the deceased. On this ground alone the trial court should, with respect, have found that the charge of murder had not been proved against the appellant.

In any event, assuming in favour of the State that it was proved that the first wound was not the fatal

wound or that it was proved that the wounds inflicted by the appellant did hasten the death of the deceased the result is the same. The trial court did not find that at the time he assaulted the deceased the appellant had a common purpose to murder. In fact it seems that the matter was not approached from this angle at all. What the learned Judge said was the following:

> "Die Hof is gevolglik oortuig dat beskuldigdes 4 en 5 (the appellant) die oorledene aangerand het, dat hulle moes besef het dat die aanranding die dood van die oorledene kon veroorsaak, dat hulle nietemin met die aanranding volhard het en dat die oorledene as gevolg van die aanranding dood is."

One must bear in mind that at that stage the case of **S v Motaung & Others, supra,** had not yet been decided. Indeed the remarks of the learned Judge dealing with sentence indicate that he found that there was no common purpose to murder until Accused No 4 had commenced the second attack. What he said was this:

> "Ten gunste van beskuldigde 5 (appellant) kan daar darem gesê word dat hy eers reageer het nadat beskuldigde 4 blykbaar <u>op eie houtjie</u> al die aanranding begin het." (My emphasis).

In the absence of a finding of common purpose at the relevant stage it is difficult for this court to arrive at such a conclusion. It may be that on a balance of probabilities such common purpose was established. It must be borne in mind, however, that the trial court expressly found that the appellant's attack did not commence until after Accused No 4 had sat astride the deceased and commenced his second attack. One certainly gains the impression from the evidence that the appellant's attack followed almost immediately on Accused No 4's attack. The evidence is however not sufficiently clear to exclude the reasonable possibility that when the appellant joined in the chase of the deceased and his party he intended to do no more than to chase them away and that he formed the intent to kill only after Accused No 4 had already commenced the second attack. Assuming in favour of the State that it was not the first wound alone that caused the death of the deceased then it may

well have been Accused No 4's first blow in the second attack that did. A common purpose to murder on the appellant's part at that stage was not proved beyond reasonable doubt.

In the result the conviction of murder cannot stand. It was common cause, and rightly so, that the evidence clearly warrants a conviction of attempted murder.

I deal now with the question of sentence. The appellant has a wife and two children and also a child in Transkei, whom he supports. What counts against him is the fact that some four and a half years before he committed this particular offence he was convicted of culpable homicide involving the use of a knife in respect of which he was sentenced to 3 years' imprisonment of which half was suspended conditionally. He also has a conviction for escaping in March 1983. In all the

circumstances I consider that a sentence of 8 years' imprisonment would have been an appropriate sentence had it been imposed on 3 June 1988 (which was when the trial court sentenced the appellant). Since then the appellant has served close on four years of his sentence and as this court's sentence cannot be antedated I shall deduct that period of four years from the sentence which I would have imposed. See **Motaung's** case, **supra**, at 527J - 528C.

The appeal is allowed to the following extent. The conviction of the appellant for murder is altered to a conviction for attempted murder. A sentence of 4 years' imprisonment is substituted and this period of 4 years will run from the date on which this judgment is delivered.

A J MILNE
Judge of Appeal

NESTADT JA]
] CONCUR
HOWIE AJA]