Record

IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: SS88/1992

DATE: 2 FEBRUARY 1993

In the matter of:

THE STATE

versus

1. MELVIN SWENI
2. JOHANNES WILLIAMS
3. SINDILE SWENI

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J U D G M E N T

BERMAN, J: The three accused stand before this Court on a charge of murder, with robbery with aggravating circumstances, with the unlawful possession of a firearm and the unlawful possession of ammunition. To these charges all of you pleaded not guilty.

This has been a long trial. It started in July last year in Knysna; it continued for a week there; it continued for a week in Knysna in November; and started again with argument by your advocates yesterday. It is now eight months since this trial started. For the delay you are not responsible. Many State witnesses have been called, some of them were recalled to give evidence. All three of you gave evidence on your own behalf and one witness in addition was called on behalf of one of you. What appeared to have been a complicated case was in the end a fairly simple one. This was because the main, if indeed only substantial defence advanced by all three of you, was the defence of an

alibi. I will deal with the alibi in due course.

There was of course always available to you, and in fact taken by your advocates, the line that the State had failed to prove its case beyond reasonable doubt and to this end lengthy cross-examinations were undertaken. Mr van Vuuren, who appeared for the State, advanced a formidable case against each one of you. I do not propose analysing the evidence of each of the many witnesses called on behalf of the prosecution. Mr Badenhorst, who appeared for accused number 1, adopted, in my view, a practical and sensible attitude in argument and did not really challenge the State evidence, but made a submission to the Court that on the evidence presented by the State, the Court should find his client guilty as an accessory to murder and not guilty of murder as such and should make the same finding as far as the robbery charge is concerned.

Indeed, the alibi defence apart, and it is to be disregarded in what I am about to say until I come to deal with the alibi specifically. The totality of the evidence presented by the State witnesses fully justified Mr Badenhorst's commonsensical approach. Accused number 2 was, or had until recently, been in the employ of the deceased. The evidence fully justifies a finding that all three of you were designedly intent on going to the home of the deceased with the set purpose in mind of stealing or robbing him of what they could find.

The deceased was at home at the time. He was apparently a person, no doubt like many others, living alone, fearful of intruders and he carried a firearm by way of protection. As I said accused number 2

was not only an employee or ex-employee of the deceased, but a homosexual relationship had existed between them. Accused number 2 looked after the deceased's home when the deceased went to Cape Town. It is perhaps not without significance that there were no signs of forceable entry into the home of the deceased. It is beyond dispute that the deceased was brutally hacked to death. There were a score or more stab wounds on his body. There was blood everywhere. It is unlikely in the extreme that all these stab wounds were inflicted by only one of the three of you and that the other two should have blamelessly stood apart.

Indeed, there is evidence that accused number 2 participated in the stabbing, albeit allegedly - that is allegedly by him - under duress. Not that he said this in the witness box in the trial itself, this being inconsistent with an alibi defence. Accused number 1 was found in possession of a musical instrument belonging to the deceased. Accused number 2 had the deceased's diamond ring; to use a colloquialism accused number 3 "spilt the beans" in their entirety to a fellow prisoner in the cells. There is an abundance of corroboration and participation in the death and in the robbery.

I have already said that it is unnecessary to analyse the evidence of each and every witness called on behalf of the State. Mr Ipser, who appeared for accused number 2, addressed the Court enumerating contradictions in such testimony and the unlikelihoods found therein. With no disrespect to Mr Ipser and to Mr Wilker, who appeared for accused number 3 and who had resort to the same procedure, this was an exercise in nit-picking. Many of the witnesses were, as one might

expect in the circumstances, relatively unsophisticated and absolute consistency on their part in their evidence could never have been expected. Indeed, had there been total consistency in their testimony, their evidence would very likely have been suspect.

Much of the story as to what happened is to be found in the confessions which were admitted. The allegations that they were obtained under duress, threats of brutality and violence are, I am satisfied, totally without foundation. There was a time it is true when police denials of this sort of thing was more often than not rejected on a basis of why should a policeman tell a lie. We know better today. There are indeed some policemen who lie and they may well threaten to torture people held in custody, for confessions. This cannot, in my view, however, be said of Mr Zeelie or Mr Oliver who were the police officers in charge of the investigation.

In the first place they both impressed me as truthful and credible witnesses. In the second place, threats to induce confessions were totally unnecessary as accused number 1 and number 2 were found in possession of the deceased's property and accused number 3 had recounted the full story to one Jack Quire(?), a person in the cell with him. I accept the evidence of that witness, how else and from where could he have obtained so detailed an account or one so consistent with objective evidence. In the third place, both Zeelie and Oliver were frank in admitting to the commission of an assault on accused number 2 when they pounced on him at the time of his arrest. After all, the deceased's firearm was still missing and so was the ammunition. Obviously an

assault of that kind does not render their evidence untrustworthy.

Mr Badenhorst, who placed no reliance on his client's alibi, submitted, as I have indicated, that his client was guilty only as an accessory. This submission raises the question of the application in the present circumstances of the well-known doctrine of common purpose. That - and I am dealing with accused number 1 and number 2 only for Mr Ipser, in my view, very wisely contented himself with no more than the submission that his client was insistent on the acceptance of the alibi. As far as accused number 3 is concerned, subject of course to his counsel's persistence in a defence of his alibi, that, as I say, the three of you had planned to rob the deceased and went to his home with the settled intention of doing so, is beyond dispute.

It is a fair inference that the murder preceded or was contemporaneous with the robbery. Certainly it must have preceded the taking of the deceased's motor vehicle. It is, to my mind, clear that in order to prevent subsequent identification of the three of you by the deceased, certainly the identification of accused number 2 whom he knew well, that he had to be silenced permanently if they were to evade arrest and prosecution. There is nothing in the evidence to suggest that accused number 2 or, for that matter, numbers 1 or 3, wore balaclavas or stockings over their faces, so the deceased had to be killed, an activity which they all participated in the gruesome manner in which he was killed.

It is no doubt true that not all three of you stole the firearms and ammunition, or that all three of you were in possession of them, as that

was part and parcel of the incident. That all three of you participated in a murder and in robbing the deceased on the basis of common purpose, is established beyond reasonable doubt. That finding is, of course, subject to the alibi defence. As I have already said , Mr Badenhorst sensibly made no mention of this defence raised by his client. Mr Ipser for accused number 2 equally sensibly did, as I have already observed, no more submit that his instructions were that his client persisted in the alibi. Mr Wilker, for accused number 3, apart from highlighting what he considered to be serious defects in the State's case, seriously persisted in the alibi defence of his client.

It is true that the *onus* rests upon the State to prove the presence, if not the participation, of an accused at the scene of and in the commission of a crime. I am satisfied that the State has discharged this *onus* on the requisite basis. This finding is fortified, if fortification is called for, by the poor performance of all three of the accused in the witness box. It is sufficient to say that your evidence in support of the alibis is nothing more or less than a tissue of lies from beginning to end. It is rejected by the Court as false outright. That goes too for the evidence of the elderly lady called in support of these fabrications.

The presentation of a false alibi has been authoritatively stated, amounts to no evidence at all. I do not and I need not go so far as to say that the falsity of the alibis lends credibility to the State's case and what it does do is to leave the State's case unanswered save for any successful attack on the credibility of that case and the witnesses called by the State to make it out. I hold that the attacks made in this respect

by Mr Ipser and Mr Wilker in pointing out defects and inconsistencies in the State case does not constitute so successful an attack as to justify a reasonable doubt being raised insofar as the strength of the State's case is concerned. I have already said that on a totality of the State's evidence your guilt on the charges of murder and robbery with aggravating circumstances is established beyond reasonable doubt. Mr Ipser in fact concedes the robbery charge, or so I understood him to do.

Insofar as the third or fourth charges are concerned, that is relating to the unlawful possession of a firearm and the unlawful possession of ammunition is concerned, I do not recall that any submissions, arguments or contentions as to the innocence of any one of you on these charges, save by Mr Ipser in his heads of argument when dealing with the evidence of the person he refers to as Wellington Tutu. Nothing was heard on this aspect from either Mr Badenhorst or Mr Wilker. In fact, the State's case as to what transpired with the firearm does find some support in the evidence of the defence witness Evan Williams, for whatever little that is worth. A finding of guilty on these charges is called for.

In short and in summary it is the unanimous finding of this Court that each one of you is guilty as charged, that is that you are guilty of murder; you are guilty of robbery with aggravating circumstances; you are guilty of the unlawful possession of a firearm; and you are guilty of the unlawful possession of ammunition.

JUDGMENT

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BERMAN, J

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