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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FUNUYISE MAJOLA ..... Appellant

AND

THE STATE ..... Respondent

Coram: CILLIé, VILJOEN et HEFER, JJ A

Heard: 14 May 1985

Delivered: 29 May 1985

J U D G M E N T

CILLIé, J A :

During the evening of 24 January 1984 the appellant killed the deceased in his hut in the Ndukende Location near Kranskop. He removed meat, half a loaf of bread,

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some stamped mealies and a radio set from the hut. At his trial in the Natal Provincial Division of the Supreme Court about nine months later, he was convicted of murder without extenuating circumstances and of robbery with aggravating circumstances. On the first conviction he was sentenced to death and on the second to seven years imprisonment. With the leave of this Court he now appeals against the finding of the trial Court that there were no extenuating circumstances and against the sentence of death.

In order to decide whether this Court should come to his assistance it is necessary to relate shortly the evidence given at his trial and then to examine all the facts and circumstances relevant to the presence of

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extenuating circumstances. In this examination special attention will be given to the following suggested extenuating circumstances: the effect of the intoxicating liquor drunk by the appellant prior to the commission of the crime, the absence of premeditation in the perpetration of the crime and the personal circumstances of the appellant. Although the onus rested upon the appellant to prove the existence of extenuating circumstances on a balance of probability, he did not testify during the investigation into the existence of such circumstances. Nevertheless the trial Court was and this Court is obliged to examine all the evidence, including that given by him during the investigation into his guilt, for the presence of any factor which could be extenuating.

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The State case was that the appellant and his son who was ten years old, had visited two kraals in the neighbourhood of their own dwelling on the afternoon of the murder. At both places, so it was said, he had drunk intoxicating liquor. They then went to the hut of the deceased, a fragile old man who apparently lived alone. The appellant asked the deceased for money and when he learned that the old man had none, he assaulted him and removed the articles already mentioned. At the post mortem examination it was established that the cause of death was brain damage caused by a "fairly full" blow with a heavy object, probably a knobkerrie, that two more blows were struck and that death was "fairly instantaneous". The appellant's denial that he had visited the three huts and

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had assaulted the deceased was correctly rejected by the trial Court in view of clear and acceptable evidence by the police that the deceased's radio set was found in the appellant's possession, by the appellant's son that he had accompanied his father to all three huts, and by the owner of the first two huts that he with his son had been to their huts and that he had drunk intoxicating liquor with each of them.

When the appellant and his son arrived at the kraal of Yo Mpungose, Yo had one carton of beer; he poured some beer into a mug for the appellant who apparently shared it with someone else. As to the appellant's condition when he left Yo's kraal, Yo testified as follows:

> "He was under the influence but not so much because you could understand what he was saying ....

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> He walked straight .... he just drank once from that mug."

The appellant and his son also visited Mpiyakhe Zulu at his kraal. It was about six o'clock in the evening. According to Mpiyakhe his neighbour, the deceased, passed by a short while before on his way to his own dwelling place. About the appellant's drinking he said the following:

> "No, we just drank a little bit .... That stuff that's like water .... It was that stuff that the Bantu people make. Gavini .... it was just a nip. We both drank from it but he didn't finish it .... He paid two bob for it ... I got it from a lady who was passing by selling it."

When asked about the appellant's sobriety his reply was:

> "No, he was normal. I did not see anything on him to indicate that he was drunk."

During cross-examination it was put to this witness that

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the appellant would deny he had ever drunk alcoholic liquor with him, but the witness affirmed his previous statements. The appellant later testified that he had not visited Mpiyakhe's kraal on that afternoon. As he did not give evidence about extenuating circumstances the Court a quo was never told by the appellant whether he had anything to drink that afternoon, and if he had, how it had affected him. On the evidence before the trial Court it cannnot be said that he was affected by liquor to such an extent that his condition constituted an extenuating circumstance.

On the question whether this was a premeditated crime the evidence of the appellant's son was the following. On the way from Mpiyakhe's kraal his father said to him that he was going to the deceased to look for money.

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At the hut his father asked the deceased for money but the old man said that he had none. The son's evidence continued:

> "Mkhawanazi (the deceased) said to my father he must forgive him because he has no money."

Thereupon, he says, his father gave him his (the father's) radio set to hold, went into the room and hit the deceased with the knobkerrie he was carrying with him. His father came out of the hut with some meat, half a loaf of bread, stamp mealies and the deceased's radio set. There is no further evidence about the commission of the murder and the appellant never testified that his actions were not premeditated, or that he did not think the frail old man would be killed by the severe blows with the knobkerrie, or that he acted on a sudden impulse, or that he lost control of himself when

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the deceased said he had no money. A consideration of the stated facts does not lead me to the conclusion that they constitute an extenuating circumstance.

It was argued in the Court a quo and here that the appellant's personal affairs should also be taken into account when his moral blameworthiness was being considered. He was a married man with six children; the oldest was 10 years and the youngest less than a year. His wife had deserted him and was living with another man in a different area. At the time of the murder he was out of work. It was contended that the need of the children had influenced the appellant in committing the robbery and the murder. The trial Judge deals with this argument as follows:

> "The only piece of evidence which really points in that direction is the fact that the Accused, apart

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> from the radio, also took half a loaf of bread and some other groceries from the deceased's house. As against that there is the evidence of Bheki (the son) that the accused when he went towards the deceased's house said that he was going to look for money. There is no evidence before the Court that the children were in indigent circumstances but even if they were in need there is no evidence that the need was so pressing that the Accused felt himself compelled to commit a robbery to provide for their need. It is not without relevance to point out that the Accused made no effort to borrow money from Zulu or from Mpungose, and no questions were put to Bheki to indicate that they were in urgent need of food. If the need to provide for his children was uppermost in his mind then one would have expected of the Accused that he would have mentioned that fact to Mpungose and Zulu or that he would have asked them for assistance."

I agree with the trial Court's finding that the appellant's personal circumstances did not constitute extenuation. The particular circumstances may evoke pity for the appellant, but he has not shown that they had influenced him in the

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commission of the crime, or, if they had influenced him perhaps subconsciously, that that would reduce his moral blameworthiness in these circumstances.

The conclusions on these three sets of circumstances do not, however, bring the investigations to an end. The three sets must, with any other possible extenuating factor, be considered together for a final assessment. I should add that, apart from the three sets dealt with, no other extenuating factor was brought to the notice of this Court or found on a close scrutiny of the evidence. After a consideration of the three sets of circumstances together, I am still not convinced that, on a balance of probabilities, there were extenuating circumstances present in this case. Therefore

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the appeal connot succeed.

The appeal is dismissed.

P.M. CILLIé, J A

VILJOEN, J A)
HEFER, J A) concur