LL Case No 497/1984

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

EDWARD DAVID CELE Appellant

and

THE STATE Respondent

CORAM: JANSEN, VAN HEERDEN et GROSSKOPF, JJA

HEARD: 6 SEPTEMBER 1985

DELIVERED: 16 SEPTEMBER 1985

JUDGMENT

/VAN HEERDEN, JA ...

VAN HEERDEN, JA:

The appellant, an adult male, was convicted on seven counts in the Durban and Coast Local Division. On the second count he was found guilty of murder. The trial court held that there were no extenuating circumstances and consequently the capital sentence was imposed. Thereafter the trial judge (Thirion, J) granted the appellant leave to appeal to this Court against his conviction and sentence on the second count.

On 25 April 1983 Detective Sergeant Zungu and a police assistant took the appellant to premises in Westville. The appellant managed to escape from custody and fled into a servant's room. After a while Zungu entered the room and closed the door behind him. A witness then heard sounds of a struggle coming from the room. These were followed by the report of a firearm. Thereafter the door opened and the appellant emerged with

Zungu's pistol in his hands.

The dead body of Zungu was found lying in the servant's room. A post-mortem examination revealed that the deceased had died of a bullet wound in his head. The entrance of the wound was to the left of the midline at the base of the occiput. A burn mark indicated that the muzzle of the firearm was held no further than ten inches from the back of the deceased's head when the shot was fired.

The appellant was the only eye-witness to the killing of the deceased. According to his testimony a scuffle ensued after the deceased had followed him into the room. During the course of the struggle both fell down on the floor. When he was back on his feet the appellant noticed the deceased's pistol on the floor and picked it up. They then grabbed hold of each other. The deceased held his hands round the waist of the appellant who in turn had his arms round the upper part of

/the ...

the deceased's body. Whilst holding the deceased the appellant's left hand clutched the pistol round the butt. His left index finger was folded over the hammer and his left thumb was inside the trigger guard. The appellant says that his only reason for so holding the pistol was to deprive the deceased of possession thereof. However, whilst he and the deceased were still clutching each other the pistol went off accidentally and the deceased fell down.

The trial court rejected the appellant's explanation and held that he intentionally shot and killed the deceased. One of the court's reasons for disbelieving the appellant was that in a written statement made to a magistrate prior to the trial, and also when questioned in proceedings under s 119 of the Act, the appellant said that during the course of the struggle he had cocked the pistol. According to his testimony, however, the weapon was already cocked when he picked it up from

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The trial court rejected the appellant's explanation and held that he intentionally shot and killed the deceased. One of the court's reasons for disbelieving the appellant was that in a written statement made to a magistrate prior to the trial, and also when questioned in proceedings under s 119 of the Criminal Procedure Act, the appellant said that during the course of the struggle he had cocked the pistol. According to his testimony, however, the weapon was already cocked when he picked it up from

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the floor.

In the statement the appellant gave a rambling account of his movements subsequent to the killing of the deceased. In regard to a conversation with a friend he said: "I further explained to him that my brother and myself had committed murder in our own area". At the hearing of the appeal it was common cause that the appellant was referring to the killing of a civilian.

Before handing in the statement counsel for the respondent requested the trial judge, in the absence of the assessors, to excise the quoted sentence. Counsel for the appellant objected and submitted that because it contained the sentence in question the whole statement was inadmissible. However, the trial judge acceded to the request and ruled that the sentence be excised or suitably covered so that it would not be brought to the attention of the assessors. The basis of the ruling was that excision of the sentence would not distort the

/relevant ...

relevant facts related in the statement, and that the assessors should not be faced with the task of excluding from their minds evidence which might be prejudicial to the appellant. The trial judge made it clear, however, that the sentence could be reintroduced as part of the defence case.

At the trial counsel for the appellant also raised an objection when the prosecution proposed to hand in part of the record of the s 119 proceedings in the magistrate's court. It appears that the appellant was required under that section to plead to most of the charges on which he later stood trial in the court a quo. However, he was also required to plead to a charge (count 6 in the magistrate's court) pertaining to the murder of the aforesaid civilian. For reasons which need not be set out, the appellant was later in a separate summary trial indicted on that charge. In the magistrate's court the appellant was questioned with

regard to all the alleged offences and a number of informal admissions were made by him. During the course of the trial in the court a quo counsel for the respondent sought to hand in (in terms of s 235 (1)) that part of the record of the proceedings which had a bearing on the charges preferred against the appellant in that court. Since his replies to the questioning by the magistrate on count 6, although irrelevant, might be prejudicial to the appellant, counsel proposed to detach the pages of the record which related to that count. Counsel for the appellant objected on the ground that the record contained inadmissible material (concerning count 6) and that hence no part of it was admissible. The trial judge ruled, however, that it was permissible to hand in only the relevant part of the record.

On appeal the main contention advanced by counsel for the appellant was that both the statement made by the appellant and the record of the s 119 proceedings were

/inadmissible ...

inadmissible. The contention was based on the same grounds as the objections in the court a quo. On analysis the submissions made by counsel amount to no more than that if part of a document is inadmissible the whole document is tainted with inadmissibility. I cannot agree. No doubt proof of a document which contains admissible and inadmissible matter does not change the nature of the inadmissible matter. Nor, however, is the whole document rendered inadmissible because it also happens to comprise objectionable material. If such a document has been placed before a court, the most that can be said is that an irregularity may have been committed by the introduction of inadmissible evidence.

In principle there is no reason why in criminal proceedings part of a document may not be tendered in evidence. This does not detract from the rule that an accused is entitled to insist that the whole document be proved if another part thereof is favourable to his case.

/Thus ...

Thus, if incriminating matter appears in a portion of a statement, the accused is entitled to have another part, containing an exculpatory explanation, heard as well. But if a document contains matter which has no bearing on the charge(s) against the accused, it is permissible to prove only the relevant part thereof. If such matter may be prejudicial to the accused, the prosecution should indeed be at pains to ensure, if possible, that it does not come to the court's attention.

In the present case it is common cause that the sentence excised from the appellant's statement and that part of the s 119 proceedings relating to count 6 were wholly irrelevant in regard to the charges against the appellant in the court a quo. The basis of each of the defence's objections was not that the whole document should be handed in, but that no part thereof was admissible. It was accordingly necessary to place the documents before the trial judge in order to obtain

rulings as to the admissibility of the relevant parts thereof. Having rightly rejected the objections, the trial judge followed the proper course by ruling that the irrelevant, but potentially prejudicial, material should not come to the notice of the assessors. Cf S v Hlatshwayo and Another 1976 (3) S A 814 (D).

Counsel for the appellant also submitted that the trial court erred in rejecting the appellant's explanation that his thumb accidentally pressed the trigger of the pistol. There is no substance in this submission. Apart from the fact that the appellant was in the view of the court a poor witness whose evidence was contradictory, it is inconceivable that whilst facing the deceased the appellant would have held the pistol in such a position that the muzzle pointed at the back of the deceased's head, unless he intended to fire the weapon. Furthermore, the fact that the appellant cocked the pistol is a very strong indication that he intended to fire it.

/Counsel ...

Counsel for the appellant wisely refrained from assailing the finding in regard to extenuation. It is indeed clear from the evidence before the trial court that there were no extenuating circumstances.

The appeal is dismissed.

H.J.O. VAN HEERDEN, JA

JANSEN, JA

CONCUR

GROSSKOPF, JA