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Case No 521/1984

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ZWELINZIMA GOODWILL SMITH — Appellant

and

THE STATE — Respondent

CORAM: TRENGOVE, BOTHA JJA et NICHOLAS AJA

HEARD: 30 AUGUST 1985

DELIVERED: 20 SEPTEMBER 1985

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

The appellant was convicted of murder in the Supreme Court of Ciskei. The trial Court (PICKARD J and two assessors) found that there were no extenuating circumstances. Consequently the appellant was sentenced to death. The trial Judge refused an application by the appellant for leave to appeal against the sentence imposed upon him. Thereafter, pursuant to a petition addressed to the CHIEF JUSTICE, the appellant was granted leave to appeal against the finding that there were no extenuating circumstances and against the sentence of death. Hence the present appeal.

The deceased in this case died as a result of a stab wound inflicted upon him by the appellant during the evening of 17 January 1983 in the house of one Wezile Nqaba, who was called as a witness for the State, and whose account of what happened in the house can be sum= marised briefly as follows. Present in the house with

Nqaba were the deceased and the latter's brother. The appellant entered the house and spoke to the deceased. Inter alia the appellant asked the deceased why he had gone to the appellant's house with witches, and whether he had gone there to bewitch him. The appellant then verbally abused the deceased. He said also that he could not be arrested by boys who were "Sebe policemen". (The deceased was a student policeman.) The appellant produced and displayed a "zoll" of dagga and said that the deceased wanted to take that away from him. After further reviling the deceased, the appellant produced a weapon from under his belt. To Nqaba it appeared to be an assegai with a blue handle, about 45 cm in length (as indicated). In the meantime one Ndumiso had also come into the house. He tried to intervene between the appel= lant and the deceased, but to no avail. The appellant went towards the deceased and with an underhand motion stabbed him once in the abdomen. A scuffle ensued,

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during which a table was overturned, causing the lamp in the room to be extinguished. All those present hurriedly left the house. On searching for the deceased, Nqaba found him in a certain yard and arranged for him to be taken to hospital.

The deceased'd brother was also called as a witness for the State. He confirmed the evidence given by Nqaba, save in respect of some minor details which are of no consequence.

The appellant in his evidence admitted his stabbing of the deceased, but in contradiction of the State witnesses put up a different version of the events in Nqaba's house, which was directed at casting the deceased in the role of the aggressor and himself in the role of one who was acting in self-defence. The trial Court rejected the appellant's evidence in this regard. It was not contended on appeal (nor could it successfully have been contended) that the trial Court was not justified

in rejecting the appellant's evidence in this respect. There is accordingly no need to refer to the details of it.

The appellant also testified about certain events that occurred prior to the episode in Nqaba's house. In brief, he said the following. At his own house, whilst he was outside, he noticed three men standing at his gate. He knew them to be policemen. One of them, who was the deceased, entered his house. After a while the appellant followed him. He found that the deceased was searching the house. On being asked why he was doing so, the deceased gave an obscene and insulting reply. He proceeded to search the appellant's jackets. On again being questioned, the deceased told the appellant that he, the deceased, was not Muningiselele. The latter, so the appellant explained, was a policeman who had on a previous occasion killed a person in the presence of the appellant, and who would have killed the

appellant as well, had he not succeeded in escaping. The appellant took this remark of the deceased to be a threat against his life. He grabbed the deceased by the shoulders. The deceased struck at the appellant with his fist, the appellant retaliated, and there was a fight. Ultimately the appellant succeeded in forcing the deceased out of the house and out of the gate, but the deceased returned and was again expelled from the appellant's premises. When the appellant went into his house, the deceased followed him once again. The appellant was "annoyed", took a bread-knife from the house, went outside, and chased the deceased, who ran out of the gate. The deceased and his two companions "called" the appellant, who then chased after them. He first pursued the deceased's two com= panions, then turned back to look for the deceased. He went to a kraal in the direction of which the deceased had run; the deceased was not there, and someone at that place told the appellant to leave the deceased alone. On

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leaving the place the appellant noticed that Nqaba's house was open. He went in, looking for the deceased, because he was "annoyed" and wanted to demand an expla= nation for the deceased's conduct. The appellant's version of what happened inside Nqaba's house need not be recounted, for, as I have said, it was rejected by the trial Court in so far as it sought to show that the appellant acted in self-defence. What must be mentioned, however, is that the appellant was emphatic in his evi= dence that, when he stabbed the deceased, he did not in= tend to kill him. He did not execute the stabbing motion "with great force". The appellant also said, however, that when he left the house he saw the deceased running away and that he threw the bread-knife at him. In cross-examination he said that he did so because he was "annoyed"; for that reason, he admitted, he "wanted" the knife to hit the deceased and he did not care where it would strike him.

There was before the trial Court nothing to gain=

say the appellant's evidence of what had transpired between him and the deceased before their encounter in Nqaba's house; the trial Court did not reject that part of the appellant's evidence; and it is upon that footing that the question of extenuating circumstances falls to be considered.

In the Court a quo the main fact relied upon as an extenuating circumstance was that the appellant had acted under provocation when he attacked the deceased. The trial Court held:

> "The provocation here, if any, was so little that we cannot consider it to be a factor to reduce the blameworthiness of the offence."

On appeal it was argued on behalf of the appellant that it was open to this Court to re-assess the effect of the appellant's provocation by the deceased on the appellant's moral blameworthiness in killing the deceased, and to come to its own conclusion in regard thereto, because the trial Court had misdirected itself in respect of the

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related question of the form of dolus with which the appellant killed the deceased. In convicting the appel= lant, the trial Court found that there was dolus directus on his part. It was contended that this finding was not justified on the evidence; that the trial Court should have found dolus eventualis; that the latter form of dolus was a factor to be weighed together with the provo= cation in assessing the cumulative effect of possible ex= tentuating circumstances; that the trial Court had wrong= ly precluded itself from doing so; and that a considera= tion afresh of all the relevant facts would justify a finding that extenuating circumstances were present. In my opinion the argument on behalf of the appellant is well founded, for the reasons following.

At the commencement of the trial it was formally admitted on behalf of the appellant that the deceased's death was caused by the stab wound inflicted upon him by the appellant. However, the precise manner in which the

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wound led to the deceased's death is shrouded in mystery. The State did not call the district surgeon who performed the post mortem examination on the deceased; instead, a written report of that examination was handed in as an exhibit, with the consent of the defence. According to the report, the examination was conducted on 25 January 1983. In the indictment it is alleged that the deceased died on 23 January 1983, some 6 days after he had been injured. The report gives as the cause of the deceased's death the following: "Septicaemia arising from stab wound of the abdomen". It records a "5 cm sutured incised wound to the left subcostal region of the abdomen". It appears from the report that the deceased was probably subjected to surgical treatment whilst in hospital; reference is made to a "laparotomy scar left side" and a "drain to abdomen". The cause for, and nature of, the treatment are not explained. The report records a number of puzzling observations; I do not propose to mention

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them, for in the absence of explanatory expert evidence it is not possible to draw any relevant inferences there= from. On the whole it suffices to say that the report fails to disclose any self-explanatory information on significant questions such as the following: whether the stab wound was a superficial or a deeply penetrating one; the degree of force likely to have been used in inflicting the wound; the reason for the supervening septicaemia; and whether the stab wound, by itself, could appropriately be described as a serious or dangerous injury, or as a relatively slight injury that would not have resulted in death but for the chance supervention of septicaemia.

It will be recalled that the appellant testified that he did not intend to kill the deceased and that he did not use a great deal of force when he stabbed him. From what has been said above it is clear that there was no medical evidence before the trial Court to controvert the appellant's evidence in this regard. The trial

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Court nevertheless disbelieved the appellant's evidence that he did not intend to kill the deceased. In this connection the trial Judge, in the judgment on conviction, mentioned two facts: first, the nature of the instrument used (I shall assume this to be a reference to the assegai-like weapon described by the State witnesses, rather than the bread-knife mentioned by the appellant); and second, the fact that the appellant subsequently threw the instru= ment at the deceased with the intention that it should stab him. As to the nature of the weapon, I consider that to carry but scant weight in the absence of evidence about the exact nature of the wound inflicted by means of it. As to the throwing of the weapon, I consider that that shows that the appellant must have been extremely angry, but that his conduct does not justify the inference of a direct intention to kill, in the absence of evidence relating to the distance between the appellant and the deceased at that moment, of which there was none. In

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the judgment on extenuating circumstances the trial Court went further. Dealing with an argument based on the fact that the deceased died from septicaemia some time after he had sustained his injury (a fact apparently ac= cepted by the trial Court), the learned Judge observed:

> "that is purely a fortuitous situation, when one considers the nature of the stab wound in the abdomen, and the weapon used to inflict it."

He added:

> "It was an extremely brutal attack, which could only lead to death."

In my view it is clear, with respect, that the trial Court misdirected itself. Concerning the nature of the wound, the brutality of the attack, and the inevitability of death, there was no factual basis in the evidence for the trial Court's findings. It follows, in my judgment, that the trial Court's finding of dolus directus cannot be sus= tained. It should have found dolus eventualis and it

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should have addressed the question of extenuating circum=stances upon that basis.

That brings me to a reappraisal of the nature of the deceased's provocation of the appellant and its effect on the latter. In rejecting provocation as an extenuating circumstance the learned Judge expressed the trial Court's view that the appellant believed that the policemen were searching his house in the course of their police duties. A perusal of the record shows that this is not an accurate and fair reflection of the appellant's evidence. The appellant did say, in answer to a question by the trial Judge, that

> "it came to my mind that they were doing their job"

but his evidence following immediately thereafter makes it clear that he did not believe that the policemen were carrying out their official duties in a routine and normal way, or in a due and proper manner. On the contrary, as

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has been mentioned, he thought that his life was being threatened because of the deceased's reference to Muningiselele. The trial Court misunderstood the ap= pellant's evidence on this point. In the judgment on conviction the trial Judge said that the deceased's state= ment that he was not Muningiselele should have been com= forting to the appellant because it indicated that the deceased did not intend to kill people. But that is obviously not how the appellant interpreted the deceased's remark. He explained that on the occasion when Muningi= selele killed people in his presence, he, the appellant, had managed to escape. The implication is plain: had he not succeeded in escaping, he, too, would have been killed. And in that fact lay the sting of the deceased's remark: since the deceased was not Muningiselele, the appellant would not succeed in escaping from him, but would be killed. The learned Judge said in his judgment that the deceased's reference to Muningiselele was "really

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very insignificant." With respect, I do not agree. It provoked the appellant into action; he grabbed the de= ceased, and a fist-fight ensued; and the other events followed as summarised earlier. It was in fact the de= ceased's implied threat to kill the appellant that trig= gered off the entire course of events that eventually led to the fatal attack on the deceased.

The trial Court was of the view that when the appellant entered Nqaba's house,

> "he came in revenge and retaliation of the fact that the police had searched his home and his clothing, presumably for dagga ..."

With respect, I consider that view to be an over-simplified and inaccurate assessment of the appellant's conduct. The deceased had entered his home when he was absent from it. On being questioned, the deceased gave the appellant an obscene and insulting reply, and then impliedly threatened to kill him. The appellant was justified in regarding the deceased's conduct as unlawful, and it is plain that

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he was angered by it. The events that followed could only have heightened the appellant's anger. The appel= lant was not asked to explain in what manner he was "called" by the deceased and his colleagues from outside his yard, but it is clear that he was provoked by them into chasing after them. He must have been very angry, for he persisted in looking for the deceased in spite of being admonished to leave him alone. His anger persisted when he entered Nqaba's house, as is evidenced by the way in which he berated the deceased, by the way in which he assaulted the deceased despite the attempted intervention of Ndumiso, and by the way in which he thereafter threw the weapon at the deceased.

In my judgment the considerations mentioned above serve to reduce the appellant's moral blameworthi= ness for the murder of the deceased, so as to constitute extenuating circumstances. It follows that the trial Court's finding that there were no extenuating circumstances

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must be set aside, as also the death sentence imposed on the appellant.

Having regard to all the relevant circumstances, I consider a sentence of 8 years' imprisonment to be appropriate.

The appeal is allowed. The appellant's con= viction of murder without extenuating circumstances and the death sentence imposed upon him are set aside, and there is substituted therefor a conviction of murder with extenuating circumstances and a sentence of 8 years' im= prisonment.

A.S. BOTHA JA

TRENGOVE JA

CONCUR

NICHOLAS AJA