IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GASANT ISAACS ..... Appellant

AND

THE STATE ..... Respondent

Coram: RABIE, A C J, JACOBS et VIVIER, JJ A

Heard: 22 September 1987

Delivered: 29 September 1987

J U D G M E N T

JACOBS, J A :

Appellant was convicted in the Cape of Good Hope Provincial Division of the Supreme Court by Howie J and two assessors of the murder of his wife (the deceased) to whom he

was .... / 2

was married by Muslim rites. The trial Court found that there were extenuating circumstances and appellant was sentenced to twelve years' imprisonment. An application for leave to appeal against both the conviction and sentence was refused by the trial Judge. This Court granted leave to appeal against the sentence but refused leave to appeal against the conviction.

It is not disputed that the deceased died of multiple injuries occasioned by blows to the head with some unidentified hard object and by strangulation with the deceased's dressing-gown cord. It is common cause that appellant carried out the physical acts which caused the injuries of which the deceased died. His defence, which was rejected by the trial Court, was that by reason of the combined effect of severe

provocation ... / 3

provocation and certain medication he did not have criminal capacity and hence cannot be held criminally liable for the deceased's death. The trial Court, however, found that immediately prior to the killing the deceased made a statement, to which I shall later refer more fully, which severely provoked the appellant. The trial Court also found that there was a feeling of jealousy on appellant's part because he had reason to believe that the deceased had become interested in a man nicknamed Manie, who worked for the same firm as she did and, to quote from the Court's judgment on extenuating circumstances:

> "what we find is that there was extenuating effect constituting extenuating circumstances in the accused's state of mind at the time of the killing, engendered by a combination of jealousy and rejection and generally his response by way of a combination of emotions to

the .... / 4

the provocation to which I have referred."

The defence of possible drug intoxication due to an overdose of Nitrazepan (better known to the layman as Mogadon) tablets which appellant allegedly took during the afternoon and evening before the killing, was rejected by the trial Court.

Dr van Ieperen, Senior State Pathologist who conducted the post-mortem examination on the deceased's body, described the injuries to both the head and neck of the deceased as "very serious". According to him the head injuries must have been inflicted first and the strangulation must have taken place afterwards and whilst the deceased was still alive. He expressed the opinion that the assault on the deceased was a fairly protracted one which must have lasted for at least five to ten minutes.

The .... / 5

The matrimonial history of the appellant and the deceased, and the facts which preceded the killing of the deceased, as told by appellant in evidence, may be summed up as follows.

The parties were married by Muslim rites in 1977. Appellant did not love the deceased. He had, as it was put by him, "no feelings" for her, but was forced by her family into marrying her because she fell pregnant during the time he was courting her. According to appellant the matrimonial relationship between himself and the deceased had been unhappy during the initial years of the marriage even after the first child, a girl, was born. In 1979 the parties lived apart for a couple of months because of "disagreements". During this period appellant had a relationship with another girl whom he

wanted .... / 6

wanted to marry. (Apparently it is permissible in a Muslim marriage for the husband to marry a second wife if the first wife consents.) Appellant stated that the deceased initially consented to his marrying the other girl but later withdrew her consent. However that may be, the deceased later returned to appellant and they decided, for the sake of the child, to give the marriage another try. A second child, also a daughter, was born early in 1980, but even at that stage, according to appellant, he had no love for the deceased. In fact it was his contention that, just as happened in the case of the conception of the first child, he was trapped into her second pregnancy. There was a second separation in 1981 and a third one in 1982, but on each occasion the deceased returned to appellant after a couple of months. There was strong evidence

of .... / 7

of continuous quarrels between the parties up to the stage when the deceased left appellant for the third time, and he admitted that on at least two occasions he physically assaulted the deceased. There was evidence that assaults on the deceased continued until shortly before her death, but for present purposes I shall not dwell on this aspect. Appellant further testified that when the deceased returned to him after the 1982 separation, the relationship between them improved dramatically and, for some reason or another which to me is not quite clear, he suddenly, for the first time during the marriage, came to love his wife. According to appellant the two children became the focal point of his life and there was ample evidence that he really loved his children. Some of the witnesses were of the opinion that he unduly spoilt them.

In .... / 8

In 1984 appellant, who was a teacher, went to Hewat college for a year's further studies. The deceased at that time was working for a firm in Athlone and she was to all intents and purposes supporting the family. It appears from the evidence that appellant was entitled to, and was in fact drawing, a salary during the first eight months of his period of study, but he apparently falsely brought the deceased under the impression that he was without income until one day she discovered a pay-slip in one of his pockets. His excuse for deceiving his wife in this way was that he wanted to keep his money back during the first four months because

> "I didn't trust my wife all the way. She could just pull another stunt as she did in '81 and '82."

This meant, so he explained, "in case she again left him."

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I should point out that this deception by appellant took place when there was not yet even a suggestion of an affair between the deceased and Manie and at a time when, if his earlier evidence is to be believed, the relationship between him and his wife was excellent. Early in 1984 Manie, referred to earlier, also started to work for the firm in Athlone where the deceased was employed. Appellant knew Manie and they seem to have been quite close friends at one stage. Appellant stated that about April 1984 the relationship between himself and the deceased again became strained. According to appellant the deceased started coming home late from work and for various reasons he became suspicious about her friendship with Manie. One day he found a certificate in deceased's handbag to the effect that Manie and his wife had been divorced according to Muslim

laws .... / 10

laws. He confronted the deceased with this but her explanation did not satisfy him. Manie was called as a witness by the State and he denied that there had been a love affair between himself and the deceased, but the trial Court found that, on the probabilities, there had in fact been such an affair in existence between them. Appellant testified that during the last few months before the deceased's death they discussed the affair almost daily. At some stage the deceased made it quite clear that she was seriously considering leaving him and taking the children with her.

The deceased was killed on a Tuesday morning. The previous night the deceased had slept on the couch in the diningroom, whilst appellant and the children slept in the main bedroom. He testified that when he woke the deceased

at .... / 11

at about 6h00, as he normally did, she told him that it was too early and that he should wake her again at 7h00. He then got dressed and when he woke her again at about 7h00, she said that she wasn't going to work because she was taking the eldest child, who had up to that stage been attending school in Mitchell's Plain, to another school in Surrey Estate. The deceased's parents lived in Surrey Estate. He asked her why, and she said that she was leaving him. According to appellant the deceased spoke in Afrikaans and added:

> "Manie gaan die pa van jou kinders wees. Nie jy nie, nie my ma nie, nie Sharine sal ons stop nie. Ons sal vir julle wys, ons sal dit maak."

I may just mention that "Sharine" was the name of Manie's ex-wife.

According to appellant the next thing he recalls

is .... / 12

is that there was blood all over the place and that a pair of eyes were staring at him. In his opinion the deceased was dead at that stage.

Appellant accepted that he inflicted the injuries which caused the deceased's death, but he maintained that he acted involuntarily and not knowing what he did. As stated earlier, this defence was rejected by the trial Court. The events which took place after the appellant, on his version, regained his senses, so to speak, may be summed up as follows. His eldest daughter came into the diningroom and she saw her mother's body lying on the floor, covered with a blanket. Appellant sent her back to the bedroom and told her not to tell anyone what she had seen. Thereafter the appellant put the dead body in the second bedroom or in the bathroom, changed his

blood-stained .... / 13

blood-stained clothes, dressed the children and took the eldest child to school. The youngest child he left with a woman friend. In the meantime, when the deceased did not turn up for work, her fellow-workers started telephoning the house and later telephoned the deceased's sister. The evening before her death the deceased had told her sister that she was afraid to go home. After hearing that the deceased had not arrived at her work, her sister went with her mother to the deceased's house just after 9h00 on the Tuesday morning. They knocked on the door and after some considerable delay the appellant opened the door for them. He told them that the deceased had left for work, as usual, that morning. One of the ladies wanted to use the toilet, but it was locked and appellant stated that the deceased had locked the door before she left and had taken the

key .... / 14

key with her. Appellant must by that time have done quite a bit of cleaning up in the diningroom because the deceased's mother and sister apparently saw nothing which aroused their suspicion. The mother and sister thereafter left. During the day appellant hid the deceased's body in the attic of the house where it was found by the police during the early hours of Thursday morning. Up to that stage appellant had told everyone, including his attorney and the police that his wife had disappeared. A plastic bag containing appellant's blood-stained clothing, some blood-stained curtains and other blood-stained articles were found next to the body. The weapon used to inflict the injuries to the deceased's head which, according to what appellant told the police, was a piece of iron, was never found.

Having .... / 15

Having set out the facts of the case I turn to counsel's submissions as regards the sentence passed by the trial Judge. The principle is, of course, well settled that a Court of appeal does not, as was stated by Holmes J A in S v De Jager and Another 1965 (2) SA 616 (A) at 629, "have a general discretion to ameliorate the sentences of trial Courts." The learned Judge of appeal went on to say:

> "It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."

Counsel .... / 16

Counsel who appeared on behalf of appellant before this Court submitted that the trial Court failed to give due consideration to the effect of certain medication taken by appellant prior to killing the deceased. It was not disputed that appellant hurt his back during a game of rugby on the Thursday preceding the Tuesday morning on which the deceased was killed. It was also not disputed that on the Friday appellant went to see a doctor and received an injection for pain, and that Acupan and Tolectin tablets, which are both mainly pain relieving agents, and Nitrazepan (Mogadon), a sleep-inducing agent, were prescribed. On Monday appellant went back to the doctor and was given a further supply of Acupan and Tolectin. During the trial, albeit at a late stage thereof, the question of the effect which the

prescribed .... / 17

prescribed medication might have had on appellant when he killed the deceased was raised. Thereafter a considerable volume of evidence was given on this aspect by Dr Straughan, a pharmacologist who did not interview the appellant, and whose evidence mainly centred around the question of the probable effect which the number of Mogadon tablets taken by appellant, on his version, would have had on a normal person. The appellant's evidence on this aspect, was to the effect that he took a large overdose of Mogadons but, as I have stated, his evidence was rejected. During his evidence Dr Straughan touched upon the possible side-effects of Acupan, Tolectin and Mogadon, but it was not suggested that these tablets, taken at the recommended dosages, would have had any

effect .... / 18

effect on appellant of which he himself would have been unaware. In its main judgment the trial Court fully dealt with the question of the medication and the possible effect it might have had on the appellant. I think the following extract from the Court's judgment bears that out. After pointing to "the clearly discernible shift" in the appellant's evidence when the question of the medication was highlighted, the judgment proceeds:

> "There was nothing in accused's evidence-in-chief to suggest, much less allege, that he took an overdose of Mogadon on the Monday, or that he felt at all below par on the morning in question."

The words I have underlined are borne out by the following extract from appellant's evidence when he was asked by the Court how he felt on the Tuesday morning:

Court .... / 19

"Court : And on the Tuesday morning, well from six o'clock onwards did you - prior to the argument with your wife .... Yes.

Did you feel any different that morning from what you normally felt? .... I cannot say so, my Lord."

There was therefore nothing to suggest that the medication, taken at the recommended dosages, would have had any effect on appellant's actions on Tuesday morning. There was, in my view, therefore no misdirection on the part of the trial Judge as was argued before this Court.

In his judgment on sentence the learned trial Judge referred to the fact that the appellant had not on the morning in question for the first time learnt of the deceased's infidelity and of her intention of leaving him. Problems had been building up over many months and from the evidence, so

the .... / 20

the learned Judge stated,

> "it would seem that it was nearly inevitable that she would have left anyway"

and would have taken the children with her. Her statement on the Tuesday morning that she intended leaving him on that day could not have come as such a shock to him as appellant tried to make out. Counsel submitted that the evidence did not support the learned Judge's findings in this regard and that

> "in any event these were not factors which should have been considered in imposing sentence and that the Court a quo misdirected itself in doing so."

As to the submission that the learned Judge's findings are not borne out by the evidence, I need only refer to one passage of appellant's evidence under cross-examination:

> Q: "But you knew she was going to leave you, you knew she was taking the children along .... so what was the surprise that morning when she just told you that this is the situation again? .... I do not know."

I certainly cannot agree that this was a factor which the learned Judge was not entitled to take into account and that he misdirected himself in doing so.

Counsel also submitted that the fact that the assault on the deceased was a protracted one was wrongly taken into account for the purposes of sentence and that the learned Judge misdirected himself in this regard. I do not think I need say anything more than that, in my view, the gruesomeness of the deed and the amount of force used were very relevant factors in this particular case and were properly taken into account by the learned Judge in passing sentence.

I have therefore come to the conclusion that it has not been shown that the learned trial Judge's discretion was not judicially exercised. The offence is, of course, a

serious .... / 22

serious one, the more so since murders of this type where domestic differences end up in one party being killed, appear to have become only too common. There is, in my view, no ground upon which this Court would be entitled to interfere with the sentence imposed by the trial Judge.

The appeal is dismissed.

H R JACOBS, JA

RABIE, A C J)
VIVIER, J A) concur