

KHETHOKUHLE STEPHEN MCHUNU

Appellant

and

THE STATE

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

KHETHOKUHLE STEPHEN MCHUNU

Appellant
(Accused No 1 in Court
a quo)(In custody)

and

THE STATE

Respondent

CORAM: RABIE, ACJ, JANSEN et STEYN, JJA

HEARD: 26 February 1988

DELIVERED: 18 March 1988

J U D G M E N T

STEYN, JA

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Appellant was condemned to death on February 13, 1987 by WILSON, J sitting with assessors in the Durban and Coast Local Division, for the murder of Zithulele Antony Ngcobo, (the deceased) at Ezinyathini Reserve in the district of Umbumbulu, the Court having found that there were no extenuating circumstances. Appellant now appeals with leave of the learned trial Judge against that finding and also against the death sentence imposed in consequence thereof. Leave to appeal against the conviction was refused.

At the trial appellant was the first accused and one Vincent Skotshi Shoji, the second. They were jointly charged on two counts with having respectively robbed and murdered the deceased at the aforementioned place on June 27, 1986. On the first count it was alleged that they robbed the deceased of approximately R154,00 in cash,

and

and of meat, groceries and cigarettes, under aggravating circumstances. Both pleaded not guilty on both counts and each was represented by pro deo counsel. At the conclusion of the trial accused no 1 was convicted on the murder count and accused no 2 acquitted, but both were convicted on the robbery count as charged and sentenced thereon to 10 years' imprisonment each. Neither of them sought leave to appeal against the robbery convictions or sentences.

The trial Court's findings of fact upon which appellant's conviction was based are not in issue in this appeal and can be summarised as follows:

On the 27th June 1986 both accused were 26 years of age and unemployed. They were assisted in the robbery by a then 18 year old youth, Michael Nkomo (Michael), who gave evidence for the State at the trial. He was then also unemployed. The three of them and the deceased lived in the same area within the reserve and were known to each

other

other. To the knowledge of both accused the deceased was employed by the South African Transport Services. He was so employed at Rossburgh at a monthly salary of R305.12 and was paid on the aforementioned date, a Friday. For some or other reason he was nicknamed "the Plumber" although that was not the capacity in which he was employed.

A tarred main road passes through the Ezinyathini Reserve. There is a bus service along that road with a number of stops in the reserve for the benefit of the travelling public. The deceased used that service to come home from work for week-ends and it was his wont to alight at the nearest bus-stop and to walk home along an untarred side-road branching off from the main road at or close to that stop.

At about 11h00 on Friday the 27th June 1986 the witness Michael arrived at a shebeen in the reserve. There he found appellant and Vincent Shoji (accused no 2).

The

The shebeen is at a place called Dayimani. The three of them lived nearby. At the request of the shebeen's owner they assisted in the slaughtering and skinning of four head of cattle and in the cutting-up of the meat. They were so engaged from about 12 noon to about 5 pm at the shebeen owner's dwelling which shares a common yard with the shebeen. He provided them with a container of Zulu beer to drink and a quantity of meat to roast and eat. They did so at intervals throughout the day. At about 6 pm they left the shebeen and went to appellant's kraal. Despite the beer they had imbibed during the course of the day, none of them was to any marked extent under the influence of liquor.

At appellant's kraal the three of them listened to music from cassettes. After a while appellant, who is a strikingly tall and obviously very strong man, said to his two companions that he knew deceased was paid on the 27th of each month and suggested that they waylay him near the

bus-stop

bus-stop where he usually alights and rob him. Accused no 2 and Michael were willing to do so and appellant then armed them with a plain stick and a knobstick respectively. Appellant was not visibly armed and when asked about that by Michael, replied "no, I am alright". Appellant did not say how the deceased was to be robbed but when asked by Michael replied that they would grab him and take his money away from him.

The three of them then went to the vicinity of the aforementioned bus-stop and hid in the long grass next to the side-road. At about 7.15 pm, when it was already dark, the bus arrived at the stop and only the deceased alighted therefrom. He was carrying a plastic bag and an empty beer bottle. He then proceeded along the side road. Appellant and his fellow malefactors allowed him to walk past them and then pounced upon him from behind. The deceased resisted but appellant and accused no 2 held him and Michael removed money from

his

his back trouser pocket. Having done so Michael said to his companions "here is the money; I have taken it out; let us run away." He then ran away followed by accused no 2. Appellant remained behind. As they were running away Michael heard the deceased say "Stephan, what are you doing to me? Stephan, it is me, the Plumber". Stephan is a name by which appellant is known. Michael did not, however, see what was happening between appellant and deceased. He and accused no 2 ran into a canefield next to the side-road and hid there. Shortly thereafter Michael heard appellant whistling at the spot where they had robbed the deceased. He and accused no 2 then left the cane field and went in the direction of that spot. On the way they met appellant who had in his turn moved towards them. He then had an open and bloodstained Okapi clasp knife in one hand and the deceased's plastic bag in the other. When asked by Michael where he had been all the time, appellant replied "Brothers, I have killed Zithulele because he

called

called me by my name. He would have had me arrested at any time, that is why I chose to kill him." When then asked by Michael and accused no 2 why he killed deceased as they had already taken the money from him, appellant explained "there was nothing I could do about it, he had already called me by my name."

They then returned to appellant's home where they divided the money, each receiving R49.00. There remained a balance of R7.00 which they used to buy liquor for themselves. They also examined the plastic bag for its contents. It was found to contain, bread, Rama margarine, meat and two twenty-cigarette packets of Peter Stuyvesant. The three of them spent the night at appellant's place. They consumed the edible contents of the plastic bag, the meat being eaten the next morning by the three of them and appellant's brothers. Michael left appellant's kraal at 09h30 next morning. He was arrested during July 1986.

Deceased's

Deceased's body was discovered shortly after he had been murdered. His brother was on his way home and found the corpse lying in the side-road about 50 - 60 metres from the main road. It was then about 7.30 pm. The deceased lay about 200 metres from his home.

At the post mortem examination, the report whereof was admitted, deceased's corpse was found to have 24 penetrating stab wounds, most of which were concentrated around the left nipple. Four of them penetrated the heart and caused the death.

Accused no 2 was acquitted of the murder because it was found that no common purpose to kill had been proved and that it was clear that neither he nor Michael had anticipated such a consequence.

The finding of the trial Court that there were no extenuating circumstances was set out by WILSON, J in these terms:

"WILSON, J

"WILSON J Accused No 1 has been convicted of the crime of murder. Your counsel has contended that there are extenuating circumstances present on two bases. The first is your consumption of liquor, and the second is that you only killed the deceased after he recognised you, and if he had not said he recognised you, you would not have done it.

As regards the consumption of liquor, three of the persons who were there gave evidence - the witness, Michael, yourself, and accused no 2. None of you suggested that your judgment was influenced or clouded by the consumption of liquor. We accept the fact that you had been drinking liquor that afternoon at the beer hall, that you had been drinking Zulu beer. We are aware of the fact that this is an intoxicating liquor, and it is likely that you would have consumed a fair quantity having regard to the time that was spent there. We are aware of the effect that liquor may have on a person's self-control. But we are not satisfied that the consumption of liquor on the day in question in any way affected your judgment, your appreciation of the factual position, or could in any way constitute a factor which reduces your moral blameworthiness.

You and the other accused deliberately planned to rob an acquaintance, a person who lived in the same neighbourhood as you, as he returned from work. This in itself is a despicable act, but the moral aspects of that do not concern us at the moment.

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What does concern us is that as soon as it became clear that this man had recognised you, even though it was along a dark path, with no lighting, you took steps to shut his mouth forever. Apparently without any hesitation or scruples you immediately decided to kill him, and did so. This was to save your skin. And we do not think that your decision to do this was in any way as a result of the liquor you had consumed. We accept that the reason why you killed the deceased was because he had recognised you. This does not, in our view, constitute an extenuating circumstance. We recognise that it was a decision that you came to at the time. You did not have time to consider or ponder over it. It was not premeditated. But nevertheless, it showed a total disregard for the life of a fellow human being, a complete callousness. And we do not accept ^(that) the fact that you killed a man to save your own skin can in itself constitute extenuating circumstances.

You are a man of twenty six. There is no suggestion that you were provoked in any way by the deceased. There is no suggestion, in our view, of any other factors being present which could constitute extenuating circumstances.

Your conduct after the event does not indicate any remorse on your part for what you had done. This strengthens our belief that your decision to kill him was a deliberate decision, firmly made by you.

We are accordingly unanimously of the decision that there are no extenuating circumstances present."

In

In arguing the appeal on appellant's behalf Mr Rand, who also represented him at the trial, again contended that the appellant was "strongly under the influence of liquor on the day he stabbed the deceased", and, as I understand the real intention of counsel, clearly also at the time of the stabbing.

Mr Rand relied upon the following facts as indications thereof. (I quote from his heads of argument):

- "(a) appellant was drinking intoxicating liquor off and on from about 11h00 to about 18h00;
- (b) he stated that he stabbed the deceased once with a knife;
- (c) he stated that he stabbed the deceased once with a knife on the stomach in the vicinity of the navel."

Counsel contended that the location and number of wounds found on the deceased at the post-mortem examination clearly prove that appellant was "mistaken as to the number of stab wounds inflicted and the position of the stab wounds"

and

and that "these circumstances indicate that the appellant was strongly affected by the liquor he had consumed."

This is not, however, borne out by the evidence. There is in fact no indication thereof. The trial Court accepted Michael's evidence that they were not heavily under the influence of liquor and appellant himself tellingly refuted any suggestion that he was so affected. He did this during cross-examination by counsel for accused no 2. (I give both question and answer):

"Mr Mchunu, you told the Court that during that morning you were drinking? ---

Yes. We drank very little though"

Counsel referred to "that morning", but from further exchanges it is clear that appellant was referring to his consumption of liquor at Dayimani during the slaughtering of the cattle, of which he was aware but denied participating in.

Faced with these difficulties, Mr Rand adopted a more modest line of approach and contended during oral

argument

argument that appellant bungled the operation by bad planning in not realising that they should have been masked in order to prevent recognition by the deceased and that this ineptness must have been due to his being then at least "to an extent under the influence of liquor." There is no merit in this contention. Appellant never said so and there is nothing in the evidence justifying such an inference. Being cloaked in darkness when assailing the deceased appellant could very well have thought that he was thereby sufficiently protected against recognition.

Appellant's "mistakes" in describing the way he stabbed the deceased acquire a particular significance when regarded in the context of his evidence as a whole. He in fact sought to exculpate himself at the expense of his colleagues. His version of the occurrence (which was rejected by the trial Court) was that deceased, with whom he had had serious trouble in the past, attacked him with a knife

knife as he was hurrying on his way along the side-road to catch a bus; that he disarmed the deceased by kicking the knife out of his hand and then stabbed him once only, and in the stomach, in self-defence. Accused no 2 and Michael, who incidentally happened to be close behind appellant when he repulsed the deceased and who were each carrying a stick, then grabbed the deceased, whom he heard screaming whilst rushing off to the bus. On the following morning accused no 2 told him "we killed that man yesterday because he recognised us. I wanted money so as to support my children; I am unemployed and I have been unemployed for a long time." Accused no 2 and Michael brought appellant some meat that morning and laughed at him when he asked where they had obtained it. Accused no 2 then also gave him R45.00 and later that day told him the money came from the deceased whom they had robbed and killed. Appellant nevertheless used the money. He apparently thought he could not extricate himself entirely from the occurrence, and clearly strove to satisfy

satisfy the trial Court that it was not he but accused no 2 and Michael who fatally wounded the deceased and that all the injuries but one had been inflicted by them. Why appellant chose to say that he had stabbed the deceased in the stomach is unclear. There may be various reasons therefor. But to my mind it is quite clear that appellant's version and so-called "mistakes" are not the products of a recollection clouded by alcohol but of a sharply perceptive mind seeking to extricate itself from grave trouble by the device of transferring the blame for the murder to accomplices in the robbery.

The suggestion by Mr Rand that the robbery and the murder so closely interwoven therewith, had been the result of hardship and dire financial need suffered by the appellant and his two associates as a result of being unemployed and that such hardship and need constitute an extenuating circumstance has no foundation of fact. The

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only mention thereof is by appellant in recounting what accused no 2 allegedly said to him on Saturday morning, the 28th of June. But the trial Court did not believe him and he did not say that he himself suffered any such hardship or need. There is, therefore, no merit in this contention.

The only other fact from which Mr Rand sought to extract extenuation is the excessive wounding of the deceased, which, so he contended, indicates that appellant was so shocked at being unexpectedly recognised by the deceased that he lost all control of himself and impulsively "embarked upon a frenzy of unnecessary excessive stabbing", thus killing the deceased without any premeditation. There is also no merit in this contention. I have nothing to add to what was said by the learned Judge in this respect except to say that appellant's report to his accomplices immediately after the murder was clear, concise and

and to the point and contained no indication of any loss of control or frenzy, and that the gross wounding of deceased was, if anything, an indication of appellant's determination to kill him at all costs.

The finding of the trial Court cannot be faulted in any way.

The appeal is dismissed.

M T STEYN, JA

RABIE, ACJ)
JANSEN, JA) Concur