

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

DAVID MOFOKENG APPELLANT

AND

THE STATE RESPONDENT

CORAM: JANSSEN, TRENGOVE et VILJOEN, JJA

HEARD: 1 MAY 1984

DELIVERED: 17 MAY 1984

J U D G M E N T

VILJOEN, JA

The /.....

The appellant was convicted on a charge of murder and, no extenuating circumstances having been found, he was sentenced to death by Phillips AJ sitting without assessors in the Witwatersrand Local Division. Leave to appeal was refused by the learned Judge a quo but was granted by this Court which, at the same time required a report from the learned trial Judge in terms of s 320 of Act 51 of 1977 on the function of extenuating circumstances and the Judge's failure to summon assessors to his assistance. To this report, which was duly furnished, reference will be made hereafter..

In relating the evidence given in the Court a quo, I shall refer to the appellant as the accused or by

his /.....

his name, Koatsheng, as used by the State witnesses.

It is alleged in the charge sheet that on 11 October 1982 the accused murdered one Johannes Ramahuma ("the deceased"). It was at all material times common cause that the deceased met his death as a result of a stab wound inflicted by the appellant but the circumstances under which the wound was inflicted, are in dispute. In the post mortem report the cause of death was described as a "penetrating incised wound of the subclavian vessel".

The State witnesses who testified to the circumstances referred to were Sonnyboy Adolashe, John Ramahuma (the father of the deceased) and Lulu Ramahuma (the mother of the deceased). Sonnyboy told the Court that

while /.....

while he was on his way home on the day of the deceased's death he met Koatsheng and one Pule in the street, not far, I deduce, from the deceased's parents' home. The appellant requested him to go and call the deceased. Sonnyboy went to the deceased's parents' house where he was told that the deceased was not there. He then went home. Some time later a young man called Moses arrived at his house and told him that the deceased wanted to see him. He went once more to the deceased's parents' house where the deceased enquired from him why he had called at his house. Sonnyboy told the deceased that Koatsheng (the appellant) and Pule wanted to see him. According to Sonnyboy he did not see the appellant and Pule again and he went home.

Lulu /.....

Lulu Ramahuma, the mother of the deceased, told the Court that when Sonnyboy arrived at their house to look for the deceased, she explained to him that the deceased was not at home. When the deceased did arrive shortly thereafter she sent the children to go and call Sonnyboy. When Sonnyboy arrived she enquired from him who it was who wanted to see the deceased. Sonnyboy made a report to them and left. The Ramahuma family sat down to have their evening meal. Some time thereafter one of the children who had been to the toilet entered the house and made a report to them about Koatsheng whereupon Johannies Ramahuma, her husband, followed by herself, went outside to speak to the accused. In spite of the deceased being

warned /.....

warned by her husband not to go outside, he followed them.

Outside she saw the accused and Pule. Her husband told

the accused to get out of his yard. She asked the accused

why he wanted to see the deceased. The latter did not

answer her but spoke to the deceased, saying:- "You

Mudla, Sonny, you think you are better. You told your

parents that we drew knives for your." (Mudla was the

deceased's nickname). Thereafter the deceased and the

accused talked to each other but she could not hear what

they were saying. As they were talking to one another she

said to the accused, "I will let you be arrested because

you wanted that he push a motor car." While they were arguing

the deceased was waving his hands as if he "was speaking

with /.....

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with his hands". Suddenly she saw the accused come up to the deceased "nearer the gate". She did not see him stab the deceased but only heard a sound and saw the deceased placing his hand on his chest. She grabbed him and walked with him to the stoep where he made a report to her and where he fell down and died. The accused and his companion walked away. When cross-examined she said they ran away.

In spite of certain discrepancies (between their evidence), her husband, John Ramahuma, gave substantially the same evidence as his wife. It appears from his evidence that he was aware of only one appearance of Sonnyboy at their house. He said that shortly after he had arrived home from work, Sonnyboy arrived at their house and made

a report to them. It is obvious that he was referring to Sonnyboy's second appearance at their house. He did not testify about his wife sending the children (Moses obviously being one of them) to call Sonnyboy after the deceased had arrived home to establish from Sonnyboy why he had been looking for the deceased. When Sonnyboy had left he spoke to the deceased advising him not to leave the house again "because it was at night already", he said. While they were sitting in the house thereafter "the children" came and made a report to them about Koatsheng. This evidence coincides with Lulu's evidence that one of the children came in from the toilet and made a report to them. John proceeded to tell the Court that he thereupon went outside

and /.....

and found, standing in the yard, Koatsheng who told him that he wanted to see the deceased. At that moment the deceased came out of the kitchen and the two of them went and stood at the gate where they had a conversation in the course of which the deceased made certain movements with his hands as if the deceased was demonstrating something to the accused. Suddenly the accused took his hand out of his trousers pocket, raised it and stabbed the deceased once. The deceased ran towards the kitchen, fell on the stoep and died. When cross-examined he said that he did not see any weapon in the accused's hand because it was a little dark. The next morning at the mortuary he saw the wound on the right side of the

neck /.....

neck. This is in conflict with the medical evidence which is to the effect that the wound was on the left side. He said the two were talking in low voices; he did not hear what they were talking about. His wife Lulu was near the scene of the stabbing, he said, because she even spoke to the accused. She said to the accused that she would "cause him to be arrested for killing her son, because he was killing her son because her son had refused to assist in pushing a stolen car." Just after his wife had said that the accused killed his son, he testified.

The accused, testifying in his own defence, said he knew the deceased as a member of the Damaras gang who used to assault and rob people who frequented shebeens.

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On one occasion, some time prior to the death of the deceased, he and his brother were sitting with other people at the house of Julius Mafaso when members of the Damara gang, including the deceased, arrived there and, shouting from outside, told him, Koatsheng, that the black Damaras had arrived and threatening to injure him. The gang broke the windows, broke down the door and entered the house. They did not find him because he hid behind a door.

During the afternoon on the date when the deceased met his death, he and others sat drinking beer and Martell brandy at Nelson Pongela's house. They commenced drinking at about 16h00. He left Nelson's house with Pule at about 18h00 - 18h30. When they reached

Shilakwe /.....

Shilakwe street they met the deceased who announced:-

"Here is the black Damara; he has arrived." The deceased put his hand in his right trousers pocket and he, the accused, thought that he was taking a knife out of his pocket. He asked the deceased what he wanted from him to which the deceased replied in Zulu, saying: "We won't hear about everything from you." The deceased thereupon advanced towards him still having his hand in his pocket and he then produced his own knife from the inside pocket of his jacket and stabbed the deceased once. Thereafter the deceased ran up the street and entered a certain house. Whether it was the deceased's home or the house next door he could not say. He and Vusi thereafter, walking normally, went home. When

he /.....

he heard the next day that the deceased was dead he went to the police station, surrendered himself and explained to the police what had happened. Sonnyboy, he said, gave false evidence against him because he, the accused, had once injured a member of the soccer club, the Sheffield All Stars, of which Sonnyboy was a member; he never saw Sonnyboy that night. He never spoke to either the deceased's mother or his father; as a matter of fact, he never saw them, he said.

The deceased accosted him in the street some distance from the latter's parents' house. He did not aim particularly at the chest or neck of the deceased, he said under cross-examination. He just saw his hand going down to that spot. He directed his hand towards the front of the deceased's

body /.....

body, he said, because the deceased was facing him. In

this regard he further testified as follows:-

"At that stage you knew what was going on? ---

Yes, I could see what was happening.

In other words, you weren't drunk or sick so
that you weren't able to defend yourself? --- Yes,
I was not drunk that I could not defend myself
because I could see what was going on and I could
walk."

Asked why he did not run away when the deceased
put his hand in his pocket, he replied that the deceased was
in front of him, he was in the direction in which they were
walking.

The explanation which he gave the police when
he surrendered himself, was taken down in the form of a

statement /.....

statement which was handed in. He also made a statement before a magistrate. Both statements were roughly consistent with the evidence he gave in Court.

The learned Judge concluded his judgment on the conviction as follows:-

"Now the State evidence consisted of three very good witnesses who made an extremely favourable impression on me. There were inevitably minor discrepancies between Mr Ramahuma and his wife, as there must always be between honest witnesses who are telling the truth, but they are of little consequence and they in no way affect my opinion of the witnesses, nor does the fact that they were the parents of the deceased. Despite that fact and their evident sorrow at the death of the deceased at the hands of the accused, they were eminently fair witnesses who did their very best to give evidence only of things that they themselves had seen or heard.

Sonnyboy /.....

Sonnyboy Adolashe showed that their evidence was the truth, and he himself told the story that he did freely and frankly and without any hesitation. As he said himself, why should he say that the accused told him to fetch the deceased if it did not happen. The suggestion that the accused made for Sonnyboy's motives in fabricating a story against the accused is too fantastic and absurd to merit dealing with. The accused's story amounts to a complete denial of everything these three witnesses said except for the fact that he stabbed the deceased to death. On his own version he was not entitled to stab the deceased as he did, but I emphatically disbelieve the accused's whole story. In my opinion, the stabbing took place inside the yard of the deceased's home, the deceased was unarmed and had not threatened the accused in any way. The deceased's parents were eye witnesses and Sonnyboy had conveyed the accused's message to the deceased.

I, therefore, entirely disbelieve the accused's evidence and reject it. This leaves me no option but to find the accused GUILTY OF MURDER."

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The appellant did not give evidence in extenuation. The accused's counsel's address on extenuation has not been reported. From the record it appears that counsel for the State, when called upon by the learned Judge to address him "about the accused drinking that evening, or that afternoon" argued that, even though the accused might have had something to drink, there was no actual evidence that it particularly affected him; the accused simply chose not to explain how the liquor affected him. The learned Judge, it seems, agreed with this submission because he held:- "You leave me no option but to find that there are no extenuating circumstances." He thereupon imposed the death sentence.

Relying /.....

Relying upon certain discrepancies in the evidence of the State witnesses counsel for the appellant argued that the learned trial Judge erred in finding that the State witnesses were very good witnesses. It was urged that he erred, consequently, in rejecting the appellant's version as not reasonably being true. The appellant should, on the facts testified to by him, have been convicted of culpable homicide only, he argued. After carefully considering all the discrepancies relied upon by counsel I have come to the conclusion that the learned Judge a quo was fully justified in describing such discrepancies as there were, the most important of which appear from my summary of the evidence above, as minor discrepancies. The learned

Judge /.....

Judge correctly, in my view, rejected the evidence of the appellant. The appeal against the conviction cannot, therefore, succeed.

On sentence it was submitted that the learned trial Judge wrongly failed to find extenuation in the intoxicated state the appellant was in as a result of the consumption of liquor at Nelson Pongela's place from 16h00 to 18h30 and in the provocation by Lulu who told him shortly before the stabbing that she would cause him to be arrested for having requested the deceased to help push a stolen car. It was further submitted that the learned Judge perpetrated an irregularity by imposing the death sentence in failing, in compliance with the requirements of s 145(2)

of Act 51 of 1977, to summon assessors to his assistance.

These were the factors relied upon by the appellant in his petition to the Chief Justice for leave to appeal. At the request of this Court previously referred to, the learned Judge a quo furnished the following report in terms of s 320 of Act 51 of 1977:-

"(1) As I recall, the only factor that was urged in extenuation of sentence was that of intoxication. There did not appear to me to be any reliable evidence of intoxication to such a degree as to reduce the accused's moral blameworthiness, and I had rejected the accused's evidence entirely, so I found that the accused had not proved on a balance of probabilities that he was so intoxicated as to constitute extenuating circumstances.

It does not appear to me that Lulu's telling the accused before the stabbing that she

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would cause him to be arrested because he had wanted the accused (her son) to push a stolen motor-car constituted any provocation at all. The murder appeared to me a particularly revolting one, being deliberately committed, as it was, in front of the deceased man's father and mother. The accused had first made certain that the deceased would be at home.

- (2) Before embarking on the trial, I enquired of the State prosecutor, as I always do, whether it was necessary to have assessors in this case. I was assured that it was not necessary. I was therefore of the opinion that, in the event of a conviction, the accused would be able to prove extenuating circumstances that would not make it obligatory upon me to impose the death sentence. I first became aware that the death sentence would have to be imposed when I realised that the accused had not proved that extenuating circumstances existed."

There is, in my view, no substance in

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the intoxication combined with the provocation submission.

The onus was upon the appellant to prove extenuation. I

agree with the learned trial Judge that there was no re-

liable evidence of intoxication to such a degree as to

reduce the accused's moral blameworthiness. As for the

provocation, it was at no stage the appellant's case that

he was provoked by any utterance by Lulu. His evidence

was that she was not near him and the deceased. Even

assuming, in view of his lying evidence, that she was

there and that he heard what she said, this Court cannot

speculate as to the effect that utterance had in reducing

his moral blameworthiness. In this Court counsel for the

appellant added a further argument, to wit that on the

State's /.....

State's own version the deceased immediately before the stabbing made peculiar upward and downward movements with his hands which were consistent with a threatening attitude. Again, it was not the evidence of the accused that he regarded these movements as a threat. The impression made upon the parents of the deceased, as appears from their evidence, was that the deceased demonstrated with his hands to emphasise a point made in argument. If they were right, and there is no evidence to the contrary, the movement of his hands by the deceased could never constitute, or appear to the appellant to present, a threat to his safety.

On the matter of the Judge sitting without assessors counsel for the appellant submitted in his heads

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of argument as follows:-

"On the 27th May 1983 counsel for the State informed the appellant's counsel that he had declined to express an opinion to the presiding Judge as to whether assessors should be summoned or not. The Court a quo thus irregularly relied upon assurances which obviously had never been given."

This is a hearsay statement. Counsel for the State was reluctant to give his version as to what happened because he felt that it was not proper for him, while appearing for the State in this Court, to become embroiled in a dispute. It seems, however, that there was room for a misunderstanding. Counsel for the appellant very properly admitted that he was at fault in not

imposition /.....

imposition of the death sentence. If he had done that, the events which occurred would still have been fresh in the memory of all concerned and the terms of a special entry could very easily have been settled between the trial Judge and counsel. The failure of counsel to apply in good time for a special entry to be made obliged the learned Judge to have to cast his mind back to the events of three months earlier. This Court cannot act on a mere hearsay statement by counsel. In any event, we have a report from the learned Judge that he did consider whether it was necessary to have assessors in the case and no purpose would be served, in my view, in remitting the matter

for /.....

for the learned Judge to consider making a special entry..

The expression by the learned Judge, "You leave me no option but to find that there are no extenuating circumstances", seems to confirm, in my view, that, in spite of his initial opinion that this was not a case for the death sentence, he was reluctantly compelled, in view of the appellant's failure to prove extenuating circumstances, to impose the death sentence. The appeal against the finding that no extenuating circumstances existed cannot therefore be disturbed.

The appeal is dismissed.

JUDGE OF APPEAL

JANSEN, JA)
TRENGOVE, JA) CONCUR