

Saaknommer: 389/83
WHN

WILSON MCHUNU First Appellant

CHRISTOPHER MCHUNU Second Appellant

and

THE STATE Respondent

JOUBERT, J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

WILSON MCHUNU First Appellant

CHRISTOPHER MCHUNU Second Appellant

and

THE STATE Respondent

Coram: JOUBERT, TRENGOVE, JJA et GROSSKOPF AJA.

Heard: 11 May 1984

Delivered: 24 May 1984

J U D G M E N T

JOUBERT, JA. :

/Appellant

Appellant no. 1 and appellant no. 2 were charged in the Witwatersrand Local Division before HUMAN J. and two assessors with having murdered the deceased Joseph Mahlangu on 14 March 1982 at Pimville in the district of Johannesburg (count 5). They were also charged with other offences which are, however, not relevant to the present appeal. They were convicted of murder without extenuating circumstances and were sentenced to death. They were granted special leave to appeal to this Court only in respect of their death sentences. The sole question which arises on this appeal is whether the trial Court should have found

/that

that extenuating circumstances existed.

The relevant circumstances relating to the
perpetration of the murder may be briefly summarized
as follows. The appellants, who are half-brothers,
on Saturday afternoon, 13 March 1982, visited a shebeen
in Zone 6 of Pimville where they drank some beer. I
shall revert to this aspect again later. At one stage
appellant no. 2 went outside the shebeen where he was
assaulted by two Black men (Boy and Jabulani) who
robbed him of his reference book and money. He ran
back to appellant no. 1 in the shebeen. The appellants
left the shebeen together early in the evening

/at

at approximately 8 p.m. While they were walking in a street Jabulani from near by shouted at appellant no.2 to come to fetch his reference book. When appellant no.2 endeavoured to recover his reference book he was again assaulted by them. Appellant no. 1 struck one of the assailants with a broomstick and unsuccessfully chased the other one (Jabulani). From the accepted evidence of the State witnesses it appears that after midnight the appellants were assisted by several other Black men as a group. They were all armed with deadly weapons such as pangas, kieries or iron bars. The

/appellants

The appellants accompanied by their associates embarked upon a house to house search for Boy and Jabulani.

Their modus operandi followed virtually the same pattern in regard to three houses. The appellants would wake the occupants of a house by the breaking of windows.

They would then loudly demand access to the house for the purpose of finding Boy and/or Jabulani. Despite

assurances from the occupants that Boy and/or Jabulani were not there the appellants would persist in conducting

their search of the house in question. Their associates would either wait outside the house or some of them would

/assist ...

assist the appellants in searching the house. Having failed to find either Boy or Jabulani the appellants, accompanied by their associates, would depart and proceed to the next house. In this manner the appellants with the support of their associates searched two houses. At about 1 a.m. the appellants and their associates reached the third house where Betty Nakutsi and her daughter Eugenia Nakutsi were sleeping with the children in the big bedroom while the deceased and Shawell were sleeping in the dining-room and the kitchen respectively. The appellants again adopted the same procedure. After the

/initial

initial breaking of windows four Black men gained entry into the house. They claimed that they were looking for Jabulani. The deceased ran from the kitchen into a small bedroom. They started to assault the deceased with their pangas in the small bedroom. The deceased told them that he was not the wanted man. Eugenia also told them that the deceased was not Jabulani. They took no heed of the warning regarding the identity of the deceased and they proceeded to chop him with their pangas. Having executed their vicious attack on him they departed from the house.

/According.....

According to the evidence of Dr Holden who conducted on 17 March 1982, a post-mortem examination on the body of the deceased the latter sustained about 13 incised wounds. These wounds were mainly directed at the head of the deceased. His skull was severely fractured with underlying brain damage which was the cause of his death. A great deal of force must have been used in inflicting the compound fractures of the skull. The wounds could have been caused by a chopper or a panga. They were indicative of a prolonged attack upon the deceased who probably died within 15 minutes after the wounds had been inflicted.

/The

The trial Court found that the appellants had a common purpose to find Boy and/or Jabulani. In the execution of their common purpose they had armed themselves with deadly weapons with which they launched a prolonged and vicious attack on the deceased with the clear intent of killing him (dolus directus).

It was submitted on behalf of the appellants that the trial Court had misdirected itself on the issue of extenuating circumstances by its failure to consider the cumulative effect of the following factors viz.

1. The appellants consumed liquor which impaired their mental faculties.
2. The appellants were provoked by Boy and/or Jabulani

/3. the

3. The motive of the appellants was to recover the reference book of appellant no. 2 .
4. There was no premeditation on the part of the appellants to murder the deceased.

The onus is on the appellants to establish the existence of extenuating circumstances on a balance of probabilities. In order to do this, there must be a factual basis for the trial Court from which the existence of the extenuating circumstances can be deduced.

In his defence on the merits appellant no. 1 gave the following evidence under cross-examination as to his state of mind after he encountered Boy and Jabulani:

/"And

"And you were very annoyed because of the fact that these robbers took your brother's reference book and money? - - - I was not annoyed, there was nothing I could do, it was the first time I had run away. Were you not annoyed at all? - - - I was not because being annoyed wouldn't have helped anything there is nothing I could have done."

Appellant no. 1 testified that from 5 p.m. to 8 p.m.

they drank beer at the shebeen. Under cross-examination

he testified as follows:

"After eight you had no other drink? - - - No. You said in your evidence that you were 'just all right'? - - - Yes, I had consumed beer, I was just all right. You weren't affected by the liquor? - - - I was not affected so that I could do wrong to

/people

people because I did nothing to the people
who were sitting with me."

When appellant no. 2 testified on extenuation he claimed
that he had shared four beers with other men at the
shebeen. As to how the intake of the beer affected him
he testified as follows:

"What was the state of your sobriety? - - -
I cannot say I did not feel how I was,
because I went out to go and pass water."

And:

"COURT; Were you affected by liquor at all?
- - - No. I did not feel that yet, because
I was still thinking about the money that
I brought.
So the liquor didn't affect you? - - - I
did not notice that."

/Appellant

Appellant no. 2 also testified that after he had been assaulted by Boy and Jabulani he did not drink again.

He claimed that he was upset because they had robbed and assaulted him but he was not annoyed with them although he was eager to recover his reference book.

From the aforementioned evidence of the appellants it is clear, contrary to what their counsel contended for, that their mental faculties were not impaired by the intake of liquor. Nor can the submission prevail that they were provoked by Boy and Jabulani. It should also be borne in mind that a period of approximately 4 hours

/elapsed

elapsed after the departure of the appellants from the shebeen and the commencement of their search for Boy and Jabulani. On a balance of probabilities this time factor of approximately 4 hours should have been conducive to further a more self-controlled and level-headed approach by the appellants in the circumstances. Their reaction, however, was to seek revenge by arming themselves and by enlisting the support of their armed associates in their house to house search for Boy and Jabulani. Moreover, they deliberately proceeded with their murderous attack on the deceased despite

/the

The appeals of the appellants against the
death sentences passed on them in respect of the
murder (count 5) are dismissed.

C.P. JOUBERT, J.A.

TRENGOVE, J.A.)

Concur.

GROSSKOPF, A.J.A.)