

121/84

MOHAMED EBRAHIM MOHAMED ABBAS

AND

THE STATE

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MOHAMED EBRAHIM MOHAMED ABBAS

Appellant

AND

THE STATE

Respondent

CORAM: Wessels, Jansen, Miller, JJA

HEARD: 21 September 1984

DELIVERED: 27 September 1984

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J U D G M E N T

WESSELS, JA

Appellant appeared in the Durban and Coast Local

Division before DIDCOTT, J., and two assessors on an indict-

ment .....

ment charging him with murder (two counts), attempted murder, assault with intent to do grievous bodily harm, unlawful possession of an unlicensed firearm and ammunition in contravention of the provisions of Act 75 of 1969. Be- fore appellant was called upon to plead the charges of attempted murder and assault with intent to do grievous bodily harm were withdrawn by the State.

On the first of the murder charges appellant pleaded guilty. On the second of the murder charges he pleaded guilty of attempted murder. On the two charges relating to contraventions of Act 75 of 1969 the appellant pleaded guilty.

A .....

A written statement made by appellant in terms of section 112(2) of the Criminal Procedure Code was handed in by appellant's counsel at the commencement of the trial. The circumstances surrounding the commission of the offences, relevant factors in extenuation and personal mitigating factors are dealt with in the aforesaid written statement. It is convenient to quote the following from the statement:

"C. THE CIRCUMSTANCES SURROUNDING THE COMMISSION OF THE OFFENCES

1. For some time prior to March, 1982, there existed in the Old Dutch Road area of Durban, a gang collectively known as the Duchene but which had two different sections known respectively as the 'top gully' and the 'bottom gully'.
2. The two deceased were the leaders of the 'top gully' and the accused, the

leader .....

leader of the 'bottom gully'.

3. The members of this gang operated at times outside the law in smoking dagga, opium, taking mandrax and the like.
4. There was great animosity between the two sections, which at times erupted into violence, bloodshed and death.
5. The leader of the 'top gully' one SHAUN LORTON was murdered by a member of the 'bottom gully', one LUCAS DRAAI and two others, sometime last year.
6. While LUCAS DRAAI was awaiting trial on this charge of murder, he in turn was murdered in February, 1982.
7. The two deceased in this case, PECHEY and SOLOMON, together with HILTON REDDY (the erstwhile complainant in Count 4) and two others were charged with the murder of LUCAS DRAAI, and were awaiting committal for trial, at the time of the events on the night of the 14th of March, 1982.
8. One VINCENT PAUL LEGGETT (witness number 4), a neutral go-between the two

sections .....

sections, thought it high time that peace was made between them. He thought a braaivleis, at his house in Newlands East would be a suitable social occasion for the conciliation he had in mind.

9. Many members of the 'top gully' were invited by LEGGETT, notably HILTON REDDY, MICHAEL AUGUST, (the erstwhile complainant on Count 3) and one BRUCEY.
10. From the 'bottom gully' four were invited by LEGGETT; they were the accused, one TONY SNYMAN (who brought a girlfriend as well) PAUL ABRAHAMS, JONATHAN REUBEN and one KENNETH PAUL.
11. The accused had been told of the party earlier that morning and had agreed to come. The party was to commence at about 7.30 p.m. The accused, who is a butcher by trade, had started work that day by 4 a.m. and fell asleep on his return that afternoon. He was still sleeping at about 10 p.m., when LEGGETT telephoned to remind him about the party.

12. The accused being wary and doubtful as to how negotiations with the 'top gully' would proceed, thought it wise to arm himself with the pistol which is the subject matter of Count 5. He left for the party with the said KENNETH PAUL.

On arrival at LEGGET's home, at about 10 p.m. the accused found various members of the 'top gully' already there and was invited to drink and smoke with them in the house.

13. The accused has been an inveterate dagga smoker and has also smoked opium. Indeed so were many others of the gang.

14. Dagga was smoked by the accused and others and an opium bottle pipe was passed around.

15. The accused, although he had imbibed liquor on occasions in the past had given up drinking, but was importuned that night by BRETT PECHEY (the deceased in Count 1) to show his good intentions by matching whiskeys with him. The accused had four or five

tots .....

tots of whiskey with PECHEY and then had to follow suit by drinking from the bottle. All in all the accused had consumed about six tots when a disturbance broke out outside.

16. The said SNYMAN had a row with his girlfriend and bundled her into his car. She jumped out and ran away. SNYMAN then caught her and proceeded to slap her around. KENNETH PAUL tried to separate them. BRETT PECHEY for no apparant reason assumed the role of peacemaker and told PAUL to mind his own business. SNYMAN then drove away with his girlfriend.
17. It would appear that PECHEY was affected by liquor at that stage and again for no apparant reason instructed one of his henchmen, the said BRUCEY, to 'cool' PAUL off. BRUCEY did so by clouting and punching PAUL several times on the face.
18. The accused intervened on PAUL's behalf by asking PECHEY why he had instigated BRUCEY to assault PAUL. PECHEY's re-

action .....

action was violent. He called the accused a 'fucking bastard' and drew a knife from his side pocket.

19. He lunged at the accused's stomach with his knife and but for the fact that the accused stepped back would have done him far more serious injury than simply grazing him across the front of his stomach.
20. PECHEY's actions had been so wild and unexpected that the accused felt that his life was in danger at the hands of PECHEY. Several of PECHEY's friends were close by. There was no place for the accused to run. In that situation he felt that he had no option but to draw his firearm and shoot PECHEY. He did so in fear of his life.
21. The shot caught PECHEY in the stomach (see paragraph 13 of Annexure "A" to Exhibit "A"). PECHEY staggered and fell down a slope and fell down at the rear of the neighbours house some ten paces away.
22. PECHEY's friends headed by MICHAEL AUGUST thereupon rushed at the accused

shouting .....

shouting that they should finish him off. The accused fired two warning shots over their heads and dashed towards the front door of the house to call LEGGETT.

23. The house is Flat 28 and the front door is to be seen on the photograph Exhibit "C". The house faces on to Merma Road where the accused's car was parked in the driveway facing the front door. The accused had noticed that another car in the street had boxed him in and was trying to secure LEGGETT's attention to move that car so that the accused could get away.
24. Hardly had the accused rushed to the doorway of the house than SOLOMON (deceased in count 2) appeared at the doorway brandishing a knife and lunged with it at the accused.
25. It would appear that SOLOMON was as drunk at the time, as PECHEY; both were found to have had 0,20. grams per hundred millilitres alcohol in their blood) and his actions were as unprovoked and ferocious as PECHEY's.

26. The accused again felt his life to be in danger and in the situation he found himself, of being virtually alone in the enemy's camp fired three shots in rapid succession at SOLOMON.

One caught him in the upper left arm, another in the neck and the third in the stomach (these are respectively set out in paragraphs 12, 11 and 6 of Annexure "A" to Exhibit "B").

27. What happened thereafter is not fully remembered by the accused but he does not dispute that he must have gone berserk by attacking both PECHEY and SOLOMON with a knife he can only assume was that dropped by PECHEY when he was shot. The accused had not brought a knife with him.

28. According to onlookers the accused rushed from the front door to where PECHEY had fallen. (See point G on Exhibit "C").

29. The accused accepts that he rained a number of lethal blows with a knife on PECHEY who was lying on the ground in the course of dying from the bullet

injury .....

injury he had already sustained.

30. More than twenty such injuries were inflicted by the accused on PECHEY with the knife and the accused accepts, as indeed he must that his intention in so stabbing PECHEY was to kill him.
31. The accused was then seen to rush back to the front door where SOLOMON's body was lying. The probabilities suggest that SOLOMON was at that stage dead as a result of a massive haemorrhage he must have suffered when his carotid artery and jugular vein were severed as a result of the bullet wound mentioned in paragraph 11 of Annexure "A" to Exhibit "B".
32. Again the accused rained several blows with the knife on the recumbent body of SOLOMON. Yet again more than twenty such blows were inflicted.
33. As many of these blows were inflicted on vital areas of SOLOMON's body (See wounds 1,2,3,4,5 and 6 on Annexure "B" to Exhibit "B") the accused accepts that he had the intention to kill SOLOMON, albeit that SOLOMON was dead

at .....

at the time.

34. As in the case of the earlier attack on PECHEY the accused has no clear recollection of stabbing SOLOMON but does not deny from the nature of the wounds that he must have had and did in fact have the intention to kill him.
35. The accused immediately left the party in company with LEGGETT and JONATHAN REUBEN in his car. The accused was so affected by the liquor and drugs he had taken that his driving was erratic and he lost his way home. He realised, however, that he had shot the two men and asked LEGGETT to throw away the pistol into the bush, which he did.
36. The accused was arrested later the same morning and on the Monday thereafter was taken to the district surgeon who found on his stomach the scratch wounds, which, as stated earlier, had been inflicted by PECHEY.
37. The accused has pleaded guilty to Count 6 to the unlawful possession of five rounds of ammunition. This is a reference to the shots he fired at the scene of the crime. The accused states however .....

however that he fired six shots and not five only as set out in the indictment.

D. FACTORS IN EXTENUATION:

1. Concerning the offences themselves:

- (a) Although the accused had armed himself with a firearm that night he had not gone to LEGGETT's party to seek trouble. The trouble was caused by his rivals.
- (b) The two deceased were the authors of their own undoing, for had they not attacked the accused unlawfully, he would not have shot at them. Had the accused desisted there and then he would not have been guilty of any offence vis-a-vis the two deceased.
- (c) As a result of the provocation accentuated by the drugs and liquor which he had taken earlier it would appear that the accused lost complete control of himself.
- (d) The bizarre feature of this case is that PECHEY would have undoubtedly died from the bullet wound he suffered, inflicted by the accused in lawful circumstances, and so too, in the case of SOLOMON. It is submitted that the knife wounds on both deceased which

ground .....

ground the verdicts should be seen as an irrational eruption by an accused who was not in his sound and sober senses.

- (e) There seems no doubt that both deceased were men, of singularly evil reputations, who would not stop short of murder.
- (f) The accused had come to the party to effect a peace which, due to the very calibre of the people involved, would have been destined to fail, as indeed it did.

E. PERSONAL FACTORS IN MITIGATION:

- (a) The accused is 23 years of age and has been married since 1979 and is the father of one child, a boy, aged four years.
- (b) He attained Standard 9 at school in Durban and since leaving school has worked as a Manager of the family butchery business.
- (c) The accused lost his left hand when he was aged 9 when his arm was caught up in a mincing machine in the butchery.

(d) .....

- (d) At the age of 6 he lost the sight of his right eye when a piece of iron was accidentally poked into his eye.
- (e) Living as he did in the 'Casbah' area of Durban, the accused unfortunately became involved with other young men whose activities were not always lawful.
- (f) He is the product of a rough environment. Youngsters would dice with the law rather than respect it.
- (g) It cannot be denied that the accused will have been found guilty of very serious offences, but it should not be overlooked that all the offences were inextricably linked with each other both as to time and circumstances."

In view of appellant's plea and the facts detailed.

in par. C of his written statement (which were not contested by the

State) he was found guilty of murder with extenuating circum-

stances in respect of the first count. In so far as the

second .....

second charge of murder was concerned he was found not guilty of murder but guilty of attempted murder. As to the verdict, the judgment of the Court a quo reads as follows:

"On count 2 the reason why you are found guilty of attempted murder and not of murder is that it is accepted by counsel on both sides, after full discussion with various medical experts, that at the time you inflicted these multiple knife wounds on Dudley Edward Solomon he was in fact already dead, having been killed by you when you shot him. One cannot murder someone who is already dead but one can in law attempt to murder someone who is already dead, and it is plain that, as you had the intent to kill him by inflicting these stab wounds, you are guilty of attempted murder. Indeed all that

stopped .....

stopped you from carrying out what you intended was that he was already dead.

The question may arise in the minds of persons interested in this case why you are not convicted of murder on count 2 when it is agreed and admitted by you that in fact you killed Solomon by shooting him. The reason for that is your defence, accepted by the State, that at the time of the shooting you were acting in self-defence because he was attacking you. At the later stage, the time of the stabbing, you plainly were not acting in self-defence as Solomon was already disabled, indeed already dead.

With regard to count 1, once again it is accepted that the initial shooting was in self-defence because the victim on that count, Brett Basil Pechey, had attacked you and was attacking you and that you were acting in self-defence when you shot him. You again, as in the case of Solomon,

attacked .....

attacked him later by stabbing him frequently. He, however, was not dead. He would have died inevitably from one of the bullet wounds that you had inflicted, but he was still alive and the stabbing inflicted further mortal injuries. That makes you, as you have pleaded, guilty of murder on count 1."

Appellant was also found guilty of the two statutory offences relating to his unlawful possession of a firearm and ammunition.

On the question of extenuating circumstances, the judgment of the Court a quo reads as follows:

"With regard to extenuating circumstances, again the facts are common cause as is the conclusion that should be drawn from them, namely that there are extenuating circumstances. All I wish to say in this regard is that

one .....

one of the circumstances mentioned is not one that rates very strongly in my estimation as an extenuating circumstance, and that is the fact that you were under the influence, to some extent at least, of liquor and drugs. I think it would be unfortunate if members of the public came to the conclusion or got the impression that being under the influence of liquor or drugs or both is necessarily or always or even often, on its own and in itself, an extenuating circumstance because that is a proposition which I would subscribe to with the greatest reluctance.

I think that the public have got to realise in short that, when one kills a fellow human being, to say that one did so because one was high on dagga or liquor is not going to be regarded as any sort of acceptable excuse.

What is of importance is that this was not a planned or premeditated crime. Liquor sometimes serves to explain a crime, to give an alternative

explanation .....

explanation for the crime. An unpremeditated, wholly unplanned murder or act of violence may take place because the person concerned is under the influence of liquor. There may be extenuating circumstances in that case, but not because his drunken or drugged state mitigates his conduct. What does is that it was not planned or premeditated murder. That mitigates his conduct. This plainly was not a planned or premeditated murder. I accept that you went to this party with the intention of contributing towards a peace treaty between the two warring factions. The most important factor, as far as extenuation is concerned, is that on the facts, which I have been told are indeed the facts of the case and are agreed between the State and the defence, you did not start the trouble. You were not, as we say in these matters, the initial aggressor. These two men who died came at you with knives. It

is .....

is quite true that you did not suffer any serious injury. But it would be quite unrealistic for a Court to say that in circumstances like this the threat which you faced was not a real one, because quite apart from the circumstances of that very evening there was a history in this case of murderous gang warfare which would make it quite unrealistic to suppose that these two deceased people would have stopped at merely frightening you. On both sides men had been killed before for little apparent reason, and there was every prospect that on this evening another person, yourself, was going to be killed for little apparent reason. I do not suggest for one moment that the other gang had a monopoly of violence, blood-thirstiness and aggressiveness. Your gang seems to have behaved in exactly the same way itself on other occasions. Be that however as it may, one certainly has a situation here where the deceased were the original

aggressors .....

aggressors, where they started all the trouble, where you had every reason to believe, until you had disabled both of them, that your life might well be in danger, and when what you did after that, while brutal and bloodthirsty, was not premeditated, was not planned and was a reaction to a situation which had got out of control through the fault of the other side."

A registered medical practitioner and psychiatrist, Dr. Levisohn, testified on appellant's behalf on the question of sentence. In my opinion, it serves no useful purposes to deal with his evidence in this judgment, since it appears highly likely that appellant misled him in certain respects. Form SAP 69 was handed in which deals with appellant's previous convictions. It appears from that form:

1. ....

1. That on 4 July 1975 he was convicted of assault with in-

tent to commit grievous bodily harm. A knife was used

and the complainant was a 24 year/old Coloured male.

He was sentenced to 5 cuts with a light cane.

2. On 17 February 1978 appellant was convicted of attempted

murder. A fire-arm was used and the complainant was

a 24 years old Coloured male. He was sentenced to

2 years imprisonment, which was conditionally suspended

for 3 years.

3. On 5 July 1978 appellant was convicted of malicious

injury to property. It appears that he damaged a

motor vehicle. He was sentenced to a fine of R1 000,00

or 12 months imprisonment.

Appellant .....

Appellant was sentenced as follows:

1. Count 1: 15 years' imprisonment.
2. Count 2: 10 years' imprisonment.
3. The two counts relating to offences in terms of the provisions of Act No 75 of 1969 were taken as one for the purpose of sentence, and a sentence of 2 years imprisonment was imposed. It was ordered that the sentence on count 2 and that imposed in respect of the two statutory offences run concurrently with the sentence imposed on count 1. I.e., the effective term of imprisonment was 15 years.

In sentencing the appellant, the presiding Judge remarked as follows in his judgment:

1. "I .....

1. "I do not agree that your guilt is technical at all and, while I agree that the circumstances I have just described are somewhat unusual, I do not consider that they mitigate your offences to any real extent, for this simple reason. You did not know at the time that your one victim was already dead and that the other was dying. This was not a case of the kind one sometimes comes across when, often in a frenzy of anger or under some powerful emotion, the killer kills his victim. He knows that the victim is dead, but in a senseless frenzy continues stabbing inflicting injury, venting his rage on a dead body. That is not the explanation for your stabbings at all. As far as you knew, both these men were still alive, neither of them was yet mortally wounded. You intended to kill them by stabbing them.

You intended to kill them, possibly for a combination of reasons.

One .....

One necessarily speculates somewhat here. It is strongly suggested by Dr Levisohn's evidence of what you told him that your reason was a pretty cold-blooded one, the fear that they would be in a position to take revenge against you and the desire to put an end to that threat by putting an end to their lives. But I shall accept in your favour that anger was a very powerful emotion in the stabbing and that, if it did not account solely for the stabbing, it accounted for the ferocity of the stabbing."

2. "There is only one circumstance in this case which, in my view, can be described as mitigating at all. That is the circumstance which has already been taken into account in the finding of extenuating circumstances. It is that you were not the instigator of the trouble that night."

3." While .....

3. "While you suffered no serious injury, the background to the whole case is such that I accept that there was a real danger you would suffer injury, if not worse, unless you defended yourself, and it would be unrealistic to suppose that an understandable anger at being attacked would not carry over into your subsequent conduct and play its part in the later stage of the evening when you intended to kill, in the case of one of your victims did kill, in the case of the other would have killed had he not been dead already."

4. "You killed these men in order to protect yourself against reprisal or because you were very angry or for a combination of both reasons. There is no question that the fact that you were not the aggressor, the fact that you were angry, the fact that at least to some extent, if not entirely, anger explains your

behaviour .....

behaviour, is a mitigating circumstance. It is the only mitigating circumstance, I repeat, in this case. Had it not been for that factor it is improbable that extenuating circumstances could or would have been found. If they had been, it is improbable that you could have got any sentence less than one of life imprisonment, without that factor. Indeed without that factor, bearing in mind your appalling record, the State's request that the Court, in the exercise of its discretion, should impose the death penalty would have had very considerable substance."

5. "It is an important factor, the factor that these were not murders you planned, that the murder and attempted murder both happened on the spur of the moment as a result of a situation of aggression and counter aggression which you had not started. It is an important factor, and I shall take

due .....

due account of it."

6. "Your record is an appalling one."

7. "You have not learnt from the apparent leniency with which you were treated for your most serious crime, the one of attempted murder, when you were given a wholly suspended sentence. And I do not believe that anything that is now done to you is going to teach you to learn by experience, except to throw the book at you with such severity as is consistent with the only mitigating feature in this case."

It was contended by appellant's counsel that in the circumstances of this case the presiding Judge failed to make a proper assessment of the various factors bearing on the question of sentence, and this failure caused him to impose a sentence which is so unduly severe as to warrant interference

by .....

by this Court. In my opinion there is substance in counsel's argument.

The presiding Judge refers more than once to appellant's "appalling record". On the information contained in the record, I am of the opinion that the adjectival qualification "appalling" is not warranted. From what has been set out above, it is, in my opinion, clear that in none of the three convictions did the court which heard the matters regard the position as sufficiently serious to justify a sentence of imprisonment. Appellant's first conviction for assault with intent to do grievous bodily harm took place when he was a juvenile offender aged 15 years. At the age of 18 years he was convicted of attempted murder

for .....

for which he received a wholly suspended sentence. Later during the same year he was convicted of malicious injury to property. Despite his previous convictions he was given the opportunity of paying a fine. In my opinion, the presiding Judge over-emphasised the importance of appellant's so-called "appalling" record.

While, generally speaking, I share the presiding Judge's views regarding the weight to be given to an accused's state of intoxication in determining whether or not it can be regarded as an extenuating or mitigating circumstance, I am nevertheless of the opinion that in the circumstances of this case greater weight should have been given to the effect alcohol and

drugs .....

drugs had on appellant's state of mind. It was not  
disputed by the State that sometime prior to the night  
in question appellant had given up drinking. On arrival  
at Legget's home appellant was importuned by Pechey (the  
deceased in count 1) to show his good intentions by matching  
whiskeys with him. It was not disputed by the State that  
appellant consumed about six tots of whiskey. He also  
smoked dagga and opium. It was not disputed by the State  
that appellant was so affected by the alcohol and drugs that  
his driving of his motorcar was erratic and that he lost his  
way home. In my opinion, the fact that appellant was  
pressed to drink alcohol distinguishes his case from those  
cases where an accused voluntarily imbibes liquor knowing  
that .....

that he will be affected by it and became violent.

In my opinion, the Court a quo correctly held that the fact that the murder of Pechey was not premeditated constituted an extenuating circumstance. This finding authorised the presiding Judge to impose a sentence other than death. In exercising his discretion as to an appropriate sentence, I am of the opinion that the presiding Judge ought to have given far less weight to the appellant's record and more weight to the fact that appellant's mind had been markedly affected by intoxicating liquor which Pechey had persuaded him to drink and drugs. In addition, appellant was subjected to a great degree of provocation; he came to discuss peace but was suddenly and without warning assaulted by the deceased, who would

have .....

have inflicted serious injury on him but for the fact that they were both shot by appellant.

In my opinion, a sentence of 10 years imprisonment in respect of the first count and 6 years imprisonment in respect of the second count would have been appropriate.

The degree of disparity between the sentences imposed by the presiding Judge and those which this Court regards as adequate punishment entitles this Court to interfere.

In the result the appeal is allowed to the extent that in respect of the first count the period of imprisonment is altered to 10 years and in respect of the second count the period of imprisonment is altered to 6 years. The order that the sentences run concurrently still applies.