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Case No. 146/84
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GLADWIN MATSHOBA

- and -

THE STATE

VIVIER AJA.

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

Between:

GLADWIN MATSHOBA Appellant

- and -

THE STATE Respondent

Coram: MILLER JA et WESSELS, VIVIER AJJA.

Heard: 16 November 1984.

Delivered: 22 November 1984.

J U D G M E N T.

VIVIER AJA:-

The appellant, a Black man aged 35 years, was convicted by ACKERMAN J and two assessors in the Witwatersrand Local Division of murder (Count 2), theft of a firearm (count 1) and of unlawfully possessing a firearm and ammunition in contravention of ss 2 and 36 of Act 75 of 1969 (counts 3 and 4). He was found not guilty on a charge of malicious injury to property (count 5). On count 1 the appellant was sentenced to 2 years' imprisonment, on count 3 he was sentenced to 9 months' imprisonment and on count 4 he was sentenced to 6 months' imprisonment. It was ordered that the sentences on counts 1, 3 and 4 run concurrently. No extenuating circumstances having been found, the appellant was sentenced to death

on /

on the charge of murder. With the leave of the trial Judge he appeals to this Court against the finding that there were no extenuating circumstances.

The deceased, a Black man of the same age as the appellant, was the husband of the appellant's former girl friend, Joyce Sibeko. She told the trial court that she and the appellant were lovers for more than a year. She terminated the relationship, met the deceased a month or two later and married him on 24 June 1982, after a courtship of about two months. He was killed less than a month later, on 21 July 1982.

At about 5.45 that afternoon, the deceased and Joyce were at home in a converted garage of a house owned by one Gladys Mazibuko at No 1557, Dube Village. The deceased was sitting on a bench against the inside wall

directly /

directly opposite the door, while Joyce was preparing their supper. The appellant came into the room, pulled out a gun from under his left arm and pointed the gun at the deceased. According to Joyce the deceased was getting up when the appellant fired more than one shot at him.

She could not say how many shots were fired. The deceased rushed at the appellant and grabbed him with both hands by the shoulders. Joyce pushed the two men aside, ran out of the room and sought refuge in the bathroom of the owner's house. From there she heard the appellant shout: "Joyce, Joyce, come out, I have killed your husband. I want to finish you off." She saw the appellant in the passage between the house and their room, and, shortly afterwards, she heard more shots and a

sound /

sound like pieces of rock hitting the bathroom wall.

Joyce went into the diningroom where she and the other people in the house hid under the table until the police arrived. She then went outside and found the body of her husband lying just outside the door of their room.

One of the other tenants, Tobise Skele, testified that before 6 pm on the fateful afternoon, she was standing at the entrance to the premises, talking to a man, when a stranger came up to them and asked her whether the deceased had arrived home. She replied in the affirmative and showed him the door of the deceased's room. The stranger entered the room and very shortly afterwards she heard a loud sound, like that of a door being banged. This frightened her. Joyce came out of the room, crying and screaming /.....

screaming for help. As Joyce ran behind the house, the deceased and the stranger came out of the deceased's room, wrestling. Tobise asked the man with her to summon the police. She then heard a shot and ran into the house. From inside one of the bedrooms she saw a hand appear through the burglar proofing of the bedroom window. She hid under one of the beds in the room. She heard a man say that Joyce should come out, that he had already killed her husband and that he wanted to kill her as well. She also heard further shots being fired..

Gladys Mazibuko told the trial court that she was in the bedroom of her house when she heard Joyce crying and shouting for help. She looked through the window and heard

a shot /

a shot. She rushed to where the children were and forgot to close the window. A shot was fired through the open window which passed through the toilet door and lodged in the toilet wall.

According to the medical evidence the deceased died of multiple bullet wounds. One bullet entered the skull just above the left eyebrow, the second entered the left side of the neck in front, the third entered the chest cavity from behind and the fourth bullet hit the deceased just above the left shoulder blade. The first three were described as individually fatal wounds.

With regard to the events leading to the murder of her husband, Joyce testified that when she terminated her relationship with the appellant by writing him a letter and telling /.....

telling him personally that she no longer loved him, he

was unhappy at the news and reacted with some anger.

After her marriage to the deceased, she met the appellant

one day during the last week of June 1982 in Commissioner

Street, Johannesburg, in front of a school where she was

attending classes. He made an insulting remark about the

two wedding rings she was wearing, assaulted her, wrenched

the rings from her finger and broke them. He also took

her schoolbooks and her purse containing two photographs

of the deceased. She laid a charge of assault and theft

with the police.

Joyce testified that during May 1982 she moved

out of her sister's house in Klipspruit where she had been

staying, and went to live with the deceased in Dube

Village. Her sister gave evidence that the appellant subsequently came to her house on several occasions looking for Joyce and asking for her new address. He appeared to be angry at the fact that his relationship with Joyce had ended. She refused to tell him where Joyce was then staying. On one occasion he asked for his heater and radio which she returned to him.

The appellant's defence on the merits that, at the time of the murder, he was in Mafikeng, looking for work, was rejected by the trial court. The trial court also rejected his version of the meeting with Joyce in front of her school, as well as his evidence that Joyce refused to return his possessions which he had given her. The trial court accepted the evidence of an attorney,

Mr Wadee, who testified on the appellant's behalf, that he was instructed by the appellant on 14 June 1982 to sue Joyce for breach of promise and for payment of certain monies which he had expended on her behalf. On that occasion the appellant did not know Joyce's new address but he gave this to Mr Wadee on 1 July 1982. Another defence witness, the appellant's sister, Lilian Matshoba, testified that at the end of June 1982 or the beginning of July 1982, the appellant gave her a bag, containing his clothing, to keep. He told her that he had lost his job and that he was leaving Johannesburg to find work elsewhere. He also told her that Joyce had broken off their relationship and that she had married someone else. Lilian formed the impression that the appellant's heart was /.....

was broken and that he was hurt by what had happened.

Lilian later found the letter, in which Joyce had terminated the relationship, among the appellant's clothes.

In finding the appellant guilty of murder, the trial court held that he went to the deceased's house on the day in question with the intention of killing him, and that he acted out of jealousy and envy.

After his conviction the appellant did not testify or lead any evidence on the question of extenuating circumstances. In its judgment on this issue, the trial court found that there was no evidence that the appellant was in any way emotionally disturbed or in a distressed state of mind when he killed the deceased. Such evidence

as /

as there was, suggested the contrary. The trial court held that, whatever emotional distress may have resulted from the breakup of the relationship with Joyce, this could not be regarded as sufficient to abate the appellant's blameworthiness in killing the deceased, in view of the lapse of time and also the fact that the killing was deliberately planned.

It is well established that this Court will not interfere with a trial court's finding that no extenuating circumstances exist, unless such finding is vitiated by misdirection or irregularity or is one to which no reasonable court could have come. See S v Ndlovu 1970(1) SA 430(A) at 434 A and S v Mongesi en Andere 1981(3) SA 204(A) at 207 H.

Counsel for appellant submitted that the trial court misdirected itself in finding, in effect, that the appellant committed a coolly planned murder. It was submitted that this finding was inconsistent with the state case that the appellant acted in anger and out of jealousy. The state case, however, was that the appellant did not act in anger at the time of the murder. The fact that he was angry at the time of receiving the news of the termination of his relationship with Joyce or even when he heard of her marriage to the deceased, does not mean that he acted in anger when he killed the deceased. That he acted out of jealousy, as found by the trial court, is not inconsistent with the finding that the murder was deliberately planned.

As far as that finding is concerned, it is clear from the incident in front of Joyce's school when the appellant ripped her wedding rings off her finger, that the appellant deeply resented her marriage to the deceased. Thereafter, between 4 to 9 July 1982, the appellant stole the firearm with which he shot the deceased. This theft formed the subject of counts 1 and 3. On 21 July 1982 the appellant went to the deceased's address with the fully loaded firearm and after ascertaining that the deceased was at home, he entered the deceased's room, immediately produced the firearm, and shot the deceased, who was sitting peacefully in the room. According to the evidence of Joyce, which was accepted by the trial court, nothing was said before the appellant fired the

first shot. In the absence of any explanation from the appellant, the trial court was, in my view, fully justified in drawing the inference that the murder was a deliberately planned one.

Counsel for appellant submitted that the appellant may have gone to the deceased's home to get his belongings and that, upon finding the deceased and Joyce together, he was enraged or emotionally upset and so shot the deceased. There is no basis in the evidence for this submission. The fact that the appellant carried a gun, is a clear indication that his visit was not an innocent one. When he entered the deceased's room, he already knew that the deceased and Joyce were inside the room, and nothing further happened inside the room which could /.....

could have enraged or upset the appellant.

Counsel for appellant further submitted that, because of his deep feelings for Joyce, the appellant was so consumed with jealousy and rage when she terminated the relationship and subsequently married the deceased, that even at the time of the murder he was still emotionally disturbed. I am unable to agree with this submission. Joyce testified that she terminated the relationship with the appellant during February or March 1982. This was a considerable time before the murder, and it must have given the appellant sufficient time to accept the fact that Joyce no longer loved him. Similarly, he learned of her marriage to the deceased at least three weeks before the murder. It cannot be said that the

appellant /.....

appellant was then in a state of emotional conflict.

The breakup in their relationship was final and her marriage an accomplished fact.

There is no indication in the evidence of either Tobise or Joyce that the appellant was emotionally upset on the day of the murder. After his conviction the appellant chose not to place any evidence before the trial court as to his state of mind during and prior to the murder. In his evidence before his conviction, he was asked about his reaction to receiving the letter terminating the relationship, and he replied as follows :-

"And you must have been extremely upset when you saw that she had terminated the relationship?--- Yes, that was but for a short time because I had experienced such things before, it was not the first time.

So /

So for how long did the pain last after termination of the relationship? --- It did not take a long time.

Well, I am asking you how long? --- A week or so. "

The appellant's own evidence, therefore, does not support the submission that he was emotionally distressed or unbalanced when he killed the deceased.

In my view there are no grounds for interfering with the finding of the trial court that there are no extenuating circumstances. The appeal is dismissed.

W. VIVIER, AJA.

MILLER, JA.) Concur.
WESSELS, AJA.)