

(APPELLATE DIVISION)

In the matter between:

MESHACK MZIWENKOSI SHEZI Appellant

AND

THE STATE Respondent

Coram: CILLIÉ, HEFER, JJ A et GALGUT A J A

Heard: 8 March 1985

Delivered: 28 March 1985

J U D G M E N T

CILLIÉ, J A :

The appellant was found guilty in the

Zululand Circuit Local Division of the Supreme Court

on a count of murdering Mhawukaleni Nzuzu on Saturday,

24 December 1983. The Court found that there were no extenuating circumstances present in the commission of the crime and sentenced the appellant to death. He was given leave by the trial Judge to appeal against the sentence imposed on him.

It is unnecessary to state or discuss the well-known rules which apply when this Court is asked to interfere with a trial Court's finding that no extenuating circumstances were present in a particular case. In the matter under consideration the question arises whether the Court in scrutinizing the evidence in search of extenuating circumstances should have regard to certain facts which might have been extenuating but the existence and influence of which

had been denied by the appellant. The particular facts relate to a fatal attack by the deceased some months before on a man connected with the appellant's family.

On arraignment in the Court a quo the appellant pleaded not guilty; he admitted that he was responsible for the deceased's death but said that he had acted in self-defence when the deceased had attacked him. This statement is in accordance with what he said in the magistrate's court when, in terms of sections 115 and 119 of the Criminal Procedure Act, 51 of 1977, he pleaded to the charge and explained his defence. The explanation, which was given three days after the killing of the deceased, contains the following sentence: "Deceased had killed another person

earlier in 1983". There is no allegation that the killing by the deceased was related to the later killing of the deceased. It may be mentioned that the matter is also referred to in the "Summary of substantial facts" annexed to the charge sheet. The first paragraph of the summary reads as follows:

"A few months prior to 24 December 1983 the deceased killed one Mjuju Majola who was in love with the accused's sister."

The evidence given at the trial about Mjuju and his death is meagre; it amounts to the following. Mjuju was the lover of the appellant's sister and he is referred to in the record as the appellant's brother-in-law. During September 1983 the deceased stabbed him to death. It is possible that a radio-

set was taken from him when he was killed. The deceased was tried in the Regional Court in Eshowe on a charge of culpable homicide; he was acquitted. The appellant did not attend the trial and it is not known whether he knew on 24 December 1983 of the trial or of its result. It is also not known whether he had seen the deceased at any time after the trial until the day of his death.

During the Saturday on which the deceased died a number of people congregated at the kraal of Basheshile Ntuli in the Mbongolweni Reserve in the district of Eshowe. A relative had died and Basheshile expected members of her family and some of her friends to come to her kraal. She therefor brewed what was

called "Zulu" beer for her visitors. The deceased who was her neighbour, arrived during the morning and drank with the other guests. At about midday the appellant who lived quite a distance from this kraal, joined the guests. He was the last arrival. He testified that he bought "shimiyane" for forty cents at the party and drank it. There was evidence, however, that only "Zulu" beer was available for the visitors and that it was supplied free of charge. Apparently "shimiyane" is a potent drink and according to the appellant the witnesses would rather lie about his behaviour than admit that "shimiyane" was sold to the guests.

One of the guests who testified at the

trial, Mhlelewa Sithole, said that the appellant had two drinks and left the party. When he returned after a short absence he "all of a sudden leapt and stabbed the deceased" who was sitting at that moment. The deceased jumped up and fled but the accused followed, intercepted him and stabbed him again. The witness could see that the appellant was speaking but could not hear what he said. The appellant threatened the visitors and they ran away. One of them reported the stabbing to the hostess who was busy elsewhere in the kraal. She went to investigate and witnessed the second part of the appellant's attack on the deceased.

Basheshile saw the appellant dragging the deceased along the ground. When she asked him

what he was doing, he did not reply but stabbed the deceased again, saying: "Where is Mjuju?" The witness said that a "second stab was accompanied by the words 'Give me my brother's radio'". She spoke to the appellant again; he told her to go home and added that he was "killing a dog". She left the scene and as she entered the hut in which her kitchen was, she heard the appellant say: "Don't you want to listen to what I have asked you to do? I said give me my brother's radio, and you must produce Mjuju."

The appellant told the trial Court a different story. He said that he was sitting down and having a drink when the deceased approached him and drank his, the appellant's, drink. When the appellant

asked him to buy some liquor for the two of them, the deceased refused and became aggressive. He slapped the appellant in the face. He took out a knife and threatened the appellant. The latter kicked him on the chest and the knife fell to the ground. The appellant's evidence is that he then picked up the knife and tried to escape but that the deceased prevented it. They struggled. He was struck at least three times and in his own defence he inflicted three knife wounds on the deceased. He denied that he dragged the deceased or injured him in the manner described by the state witnesses.

The trial Court correctly rejected the evidence of the appellant as false and found him

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guilty of murder on the evidence of the two state witnesses. In the next stage of the trial when the Court investigated the probable presence of extenuating circumstances, the appellant declined to testify. The trial Court's function and duty in such a case is set out by HOLMES J A in S. v. Ndlovu, 1970 (1) S A 430 (A) as follows:

"The onus of establishing the existence of extenuating circumstances rests upon the accused. This means that there must be a factual foundation for a trial Court's finding of such circumstances, on a preponderance of probability. This does not necessarily mean that the accused must give evidence: in a proper case the trial Court may be able to find the required degree of probability from the evidence as a whole or from so much thereof as it has accepted. But there must always be a foundation of probability before the Court can exercise what is in effect a

moral judgment in the matter of extenuating circumstances."

In accordance with that directive this Court will examine all the proved and relevant facts in order to establish whether the trial Court's finding that there were no extenuating circumstances is a misdirection. The following factors will be appraised, separately and collectively, in the investigation of such circumstances.

The first and most important factor to consider is whether the killing of Mjuju by the deceased was relevant to the killing of the deceased by the appellant. The appellant's own evidence is that he was not affected by the previous killing, that he was on friendly terms with the deceased and that, when he stabbed

the deceased, he did not use the words attributed to him. However, sight must not be lost of the fact that he was, by the nature of his defence, virtually precluded from admitting the relevance of the previous killing. It is not uncommon that an accused will under oath deny a true fact or set of facts because of a fear that an admission may lead to an assumption that he had a motive for committing the crime with which he is charged. In this case the appellant may well have thought that an admission of relevance could affect his defence that he was attacked by the deceased. It is also not uncommon to find that a convicted accused will, during the consideration of extenuating circumstances, refuse to admit that his evidence during the

first part of the trial was untrue even where such evidence had been rejected by the Court. On a consideration of all the relevant issues I am of the opinion that it has been proved on a balance of probability at least, that he used the words as testified to by Basheshile when he stabbed the deceased. It must therefore be accepted, firstly, that when he stabbed the deceased he was well aware of the fact that his victim had killed his brother-in-law and, secondly, that he was probably affected by that knowledge. The evidence does, however, not show that he had planned the murder.

It may well be asked whether revenge can or should ever be regarded as an extenuating

factor. The answer depends, in my opinion, on the facts of each particular case when all the relevant evidence, the inferences and the probabilities are considered as a whole. (See S. v. Namane 1977 (4) S A 240 A.) In the matter under consideration all the facts relating to and surrounding the previous killing must form part of the "foundation" on which a court's finding that there are extenuating circumstances must rest.

Evidence about the amount of liquor taken by the appellant before the stabbing was given by him and by the witness Sithole. The latter said that the appellant drank two "pots" of "Zulu" beer. There was no evidence about the size of the "pots".

The appellant testified that he had two portions of a different kind of liquor; he was not asked whether he had anything to drink before he arrived at the party. On the available evidence, it seems to me, the Court cannot come to a definite conclusion about the amount of liquor taken by the appellant before the stabbing. The following facts are important on the question of the effect which the liquor he did drink, had on him.

The witness Basheshile said in her evidence in chief that the appellant appeared to her to be sober. She added: "But he was so angry that he did not want anything to come anywhere near him."

This remark she confirmed under cross-examination but

added, in answer to further questions, that he was not in a frenzy and gave her the impression, when he spoke to her after the stabbing, that he was very angry but was thinking rationally. His actions before and during the stabbing certainly do not appear to have been rational at all. When he stabbed the deceased he was excessively violent; he continued the stabbing even after his victim was lying on the ground and obviously dying. The post mortem report shows that he inflicted six serious stabwounds and numerous incised wounds on the body of the deceased and not only the three stabwounds about which he testified. He kept the other visitors away from the scene and threatened to attack them. This evidence is an indication of

his mental state and must also be taken into consideration in the present investigation.

These are the factors which form the necessary "foundation of probability" or "factual foundation" for a finding that extenuating circumstances were present at the murder of the deceased. The appellant went to the kraal of Basheshile to drink with other visitors. He did not go there to seek revenge for the killing of Mjuju by the deceased. He had some intoxicating liquor to drink. He left the gathering and when he returned he suddenly found himself face to face with the person who had killed his brother-in-law and was now apparently a free man. He lost his temper. Possibly because of the liquor he had taken he became

extremely angry. In these circumstances he lost control of himself; he stabbed the deceased with a knife. His inability to restrain himself is clear from the excessive stabbing of the deceased and the threatening of all the visitors and of his hostess. To come to a final conclusion these factors must be considered, not separately, but comprehensively. Such a consideration leads to the following conclusion.

The facts and circumstances existed at the time of the commission of the crime, they influenced the appellant in his conduct, and they are, in my opinion, when viewed as a whole, sufficient to make his actions morally less blameworthy. In coming to a different conclusion the trial Court erred and committed

a misdirection. The result is that the trial Court's finding and, consequently, the trial Judge's sentence must be set aside.

It was suggested by counsel that in the event of a conclusion such as that to which this Court has come, this Court should impose a proper sentence. Both counsel were given the opportunity of addressing this Court on sentence. The Court has come to the conclusion that a prison sentence of 12 years would be appropriate. Therefor the Court makes the following order.

The appeal is upheld.

The trial Court's finding and conviction are amended to read:

Guilty of murder with extenuating circumstances.

The trial Judge's sentence is amended to read:

The accused is sentenced to twelve years' imprisonment.

P.M. CILLIÉ, J A

HEFER, J A)
GALGUT, A J A) concur