

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HENRY ELLIOT Appellant

AND

THE STATE Respondent

Coram: TRENGOVE, JACOBS et SMALBERGER, JJ A

Heard: 28 August 1986

Delivered: 15 September 1986

J U D G M E N T

JACOBS, J A :

The appellant appeared before King A J

in the Cape of Good Hope Provincial Division charged with

murder. The charge alleged that he unlawfully caused the

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death of his wife. Margaret Elliot (the deceased), by throwing petrol over her on the 29th March 1984 and setting her alight as a result of which she died on 21 May 1984. Appellant pleaded not guilty but was convicted of murder with extenuating circumstances and sentenced to three years' imprisonment. With leave of the judge a quo he appeals against the conviction of murder only.

The medical evidence established, and this is not in dispute, that the deceased sustained extensive burns over a large part of her body and that she died from these burns, and infection which set in as a result thereof, in the Tygerberg Hospital approximately two months later. There were apparently no eye-witnesses who saw how the deceased got burnt. The State called a Constable van Rhyn

who testified that on the morning of the 29th March he was on duty at the Elsie's River police station when appellant entered the charge office and made a report to him. He actually testified as to what the appellant had said but Mr Slabbert, who appeared for the appellant before the Court a quo, objected to this evidence as being inadmissible and the contents of appellant's alleged statement was eventually "struck from the record by agreement". I may just add that Constable van Rhyn was at a later stage recalled at the request of Mr Slabbert and he then confirmed that at some stage or another later that day, after the appellant himself had been to the hospital where the deceased had been taken, he saw appellant again and that one of his hands was then bandaged. Appellant on this occasion told van

Rhyn that his hand was burnt when he tried to extinguish the fire on the deceased's clothes.

The deceased's mother with whom appellant and the deceased were staying at the time, testified that on the morning of the 29th March, the day the deceased got burnt, appellant left for work early. Later the deceased also left for work. Shortly afterwards she, the mother, was called from her house and she found the deceased lying in some school grounds near her house. The deceased was badly burnt but was still alive. Not long afterwards appellant arrived on the scene accompanied by a policeman. The mother asked appellant why he had done "that" (obviously referring to the burns on the deceased) to her child, a question which she later repeated at the hospital where the

deceased was taken. On neither occasion did appellant offer any explanation.

A statement made by appellant, which was taken down in writing, to C/Sgt Syms of the Elsie River police on the 30th March, i e the day after the deceased was injured, was by consent placed before the Court. Mr Slabbert did not question the voluntariness of the statement nor was it suggested that it did not correctly reflect what appellant had told Syms. Mr Slabbert however objected to the admissibility of the statement as evidence against appellant on the ground that it amounted to a confession and was inadmissible by virtue of the provisions of section 217(1)(a) of the Criminal Procedure Act 51 of 1977. The statement, Exhibit C, reads as follows:

"ONDERHOUD GEVOER MET HENRY ELLIOT te ELSIESRIVIER

1. Jy is nou in die teenwoordigheid van S/Sers Syms.
2. Die klagte wat ondersoek word is Poging tot moord.
3. Dit word beweer dat jy op 1984-03-29 die Klaagster met brandstof aan die brand gestee het.
4. Voordat jy enigiets sê moet ek jou waarsku dat dit 'n ernstige saak is en dat dit nie nodig is om enigiets te sê wat jou mag benadeel nie. Wat jy egter sê, sal afgeneem word en mag in getuienis in die Hof gebruik word.
5. Ek het jou nou behoorlik gewaarsku - is jy bereid om 'n verduideliking te gee en verstaan jy wat die waarskuwing beteken?

Antwoord: Ek verstaan die waarskuwing. Ek en die klaagster is wettig getroud. Vir die afgelope maand was ons van bed en tafel geskei. Ons huwelik was op die rotse. Ek wou toe op 1984-03-29 weer met haar praat in 'n poging om ons huwelik te red. Sy het my geïgnoreer. Ek was al raadop en het haar toe met die petrol verbrand wat ek by my gehad het. Ek wou haar net skrikmaak. My bedoeling was nie om haar te verbrand nie. Toe sy brand het ek geskrik en die vlamme met my hande probeer blus. Nadat die vlamme geblus was het ek na die Polisiestasie gekom en myself oorgegee. Ek het nie met my vrou voor die voorval gestry nie. Ek het mooi met haar gepraat, maar sy wou nie luister nie."

After hearing argument the Court a quo admitted Exh C as evidence, holding that appellant's statement, as recorded, was "intended to be exculpatory" and did not amount to a confession of the offence charged or any lesser offence of which appellant could properly be convicted on the indictment before the Court. The State then closed its case.

Appellant testified and sketched the background of the whole tragic occurrence. He stated that he and the deceased had been living together since about 1974. A child, who was at the time of the trial about 7 years old, was born of the relationship. The parties were eventually legally married in 1981. According to appellant, during virtually the whole of their relationship the deceased had a succession of boy-friends and this continued after their

marriage. This, and the deceased's extravagance as far as money matters were concerned, caused many arguments between the parties and during 1983 appellant instituted divorce proceedings but these had not yet been brought to finality, presumably because appellant still hoped that the marriage could be saved. At the time of the incident under discussion, the parties were living in deceased's mother's house but occupied separate bedrooms. According to appellant the deceased was at that stage secretly meeting one Bestman, a former friend of appellant, who had been warned by appellant through a lawyer's letter to stay away from the house where the parties were living. Appellant stated that the night before the event under discussion he made certain advances to the deceased which she rejected in a rather rude way. He then

decided to move out of the house the following day after work.

The next morning he was picked up by a fellow-worker but on

their way to work he suddenly made up his mind to go back and

move his belongings from his mother-in-law's house. He

told the driver of the vehicle to stop. He got off and start-

ed to walk back. On the way a friend stopped and gave him a

lift as far as a garage not far from the place where he lived.

(This was confirmed by the friend who was called as a witness.)

At the garage he obtained some petrol contained in two 1,5

litre mineral water bottles which the friend had given him.

According to appellant he got the petrol for his car which

two days previously had run out of petrol and was still stand-

ing not far from his mother-in-law's house. His intention

was to get his car going and to go and pick up his belongings

and leave. Appellant went on to testify that on his way to his car, and not far from his mother-in-law's house, he met his wife. He said he decided to make one last attempt to save the marriage so he stopped his wife and spoke to her nicely and asked her to give the marriage another try. She however started swearing at him and, what the learned trial judge described as probably the last straw from the appellant's point of view, the deceased looked at her watch and said "You'll make me late for my date. My other man is waiting for me." Appellant's evidence following on that, is summarised by the Court a quo as follows:

"He says 'I just went blank. It was as if clouds were falling on me. I took one bottle of petrol and emptied some of the contents. I had no intention to burn her, just to frighten her. I wanted her back'. The accused took out a cigarette

lighter. First of all, in his evidence he said he could not say whether it was his finger or his wife's which activated the lighter because the deceased rushed at him and was in the act of grabbing him, apparently to try and restrain him, but later on in his evidence he was more adamant about it and indicated that he was quite sure in his own mind that it was not he who had actually lit the lighter. When his wife caught alight she turned and ran a few steps. He ran after her intending to put out the flames and in fact succeeded in doing so and in the course of this he himself got burnt. The fact that he was burnt is also confirmed by the evidence of the policeman who investigated the incident (he was then a policeman), Constable Van Rhyn. The accused went immediately to the police station where he told the police what had happened."

The learned trial judge stated in his reasons for convicting the appellant of murder that appellant's evidence did not particularly impress him. He however did not reject appellant's version except in one important respect namely appellant's explanation that after he had thrown petrol

over the deceased and had taken out the cigarette lighter from his pocket the deceased rushed at him and grabbed, or tried to grab, his hand in which he was holding the lighter and that it was during this action on the part of the deceased that the lighter was activated and ignited the petrol on the deceased's clothes. The learned judge however went on to say that in rejecting appellant's evidence on this aspect he was "influenced a great deal by the fact that in the statement that he made the next day he made no mention whatsoever of his wife rushing onto him, no mention whatsoever in his statement of the possibility that it was his wife and not himself who activated the lighter causing the petrol to ignite". Appellant, during cross-examination, gave all sorts of explanations for the omission but I fully agree with

the learned judge a quo that the omission to mention this version, which is absolutely crucial to his case and to his defence, in his statement, is inexplicable on any other basis than that in fact it did not happen in that way. The trial Court accordingly found that what appellant said in his statement namely "Ek het haar toe met petrol verbrand wat ek by my gehad het" is what in fact happened. The trial Court accepted that there was no direct intention on appellant's part to kill his wife or cause her any fatal injury but that on his own evidence, to which I shall refer a little later, appellant subjectively foresaw the possibility that if he set the deceased's petrol-bespattered clothes alight she might sustain burns which could cost her her life.

Mr Mitchell, who appeared for the appellant

before this Court, conceded that if Exh C was rightly admitted as evidence against appellant, he had great difficulty in arguing that the trial Court's rejection of appellant's version in Court that the deceased unexpectedly rushed at him and grabbed at the lighter and that it was this unexpected action on her part which activated the lighter, was wrong. He also conceded that if this portion of appellant's evidence in Court was rightly rejected he found it difficult to argue that the trial Court was wrong in its conclusion that appellant had the required intention (in the form of dolus eventualis) to cause his wife's death. Mr Mitchell however submitted that the statement contained in Exh C amounted to a confession and as such it was inadmissible as evidence. With this I cannot agree. The test to apply to determine

whether or not a statement is a confession under section 217

(1) of the Criminal Procedure Act as laid down in R v Becker,

1929 AD 167 still applies. Referring to Becker's case,

Trollip JA in S v Grove Mitchell 1975 (3) SA 417 (A) at 419

E-F said that the test "is simple and straightforward: is it

an unequivocal acknowledgment by the accused that he is guilty

of the offence in question, the equivalent, in other words,

of a plea of guilty thereto?"

I shall assume, as was done in Rex v Ahmed and

Another, 1940 AD 333 at 343 and Visasie v Rex 1955 (2) PH H 124

(A) (a full extract of the relevant portion of the judgment ap-

pears in S v Swartz 1964 (3) SA 757 (O)) dealing with sec 273

of Act 31 of 1917, that sec 217 (1)(a) of the present Criminal

Procedure Act, also covers a confession of a lesser offence, of

which an accused could properly be convicted on the indict-

ment before the Court. It is of course quite clear that in his statement (which was made at a time when the charge against him was one of attempted murder) appellant did not admit and never intended to admit that he had any intention to kill the deceased or even cause her grievous bodily harm. The words used by him in Exh C "ek het haar toe met die petrol verbrand wat ek by my gehad het. Ek wou haar net skrikmaak. My bedoeling was nie om haar te verbrand nie", were clearly intended to be exculpatory in the sense that he was denying any legal intention to cause injuries to his wife. Mr Mitchell submitted however that in his statement appellant admitted, by implication at least, that he threw petrol over his wife which in itself, so it was argued, amounted to a confession of an assault upon her. I shall assume that in

Exh C there is an implied admission by appellant that at some stage or another petrol which he had with him landed on the deceased's clothes, but I cannot agree that this can be construed as a confession of assault. Assault consists in unlawfully and intentionally applying force to the person of another, or inspiring a belief in that other that force is immediately to be applied to him. (See Hunt, South African Criminal Law and Procedure. Vol II p 629.) Although I accept that the force applied may take the form of, for example, throwing some liquid over a person, it must be accompanied by subjective mens rea in the sense of actual or legal intention, and that, i e an unequivocal acknowledgment on the part of the appellant that he intentionally threw the petrol over the deceased, is, in my view, lacking in the

statement Exh C. The statement, read as a whole, certainly does not exclude the possibility that the petrol may have landed on the deceased's person by accident (cf Visagie's case (supra)). Mr Mitchell also argued that the words used by appellant in Exh C "ek wou haar ... skrikmaak" should, in the context in which the words were used, be interpreted as an admission by appellant of a threat on his part of immediate personal violence to be applied to the deceased. This too, so it was argued, amounted to a confession of an assault. Again I cannot agree. For the so-called "assault by threats", it is necessary to prove that the person threatened reasonably believed that the other intends and has the power immediately to carry out the threat. Even accepting that in Exh C appellant admits that he threatened the

deceased with personal violence in some form or another there is certainly no indication in that statement that she took any such threats seriously or that she believed that physical aggression was imminent. In the result I respectfully agree with the Court a quo's ruling that Exh C was admissible as evidence against appellant

The question was raised whether, in view of appellant's evidence which the trial Court accepted, that when the deceased's clothes caught alight and she started running away he immediately ran after her intending to put out the flames and in fact succeeded in doing so, it was not reasonably possible that appellant, although intending to injure his wife, did not subjectively foresee that his action might possibly cause her death? I am of the opinion that the

answer to the above question was given by appellant himself when he answered questions put to him by the Court. I quote from the record:

"You accept the fact, I presume, that if you throw petrol over somebody and set that person alight it can have fatal consequences? --- Yes, your Worship.

Do you understand what I'm saying? I mean, if you set someone alight they can die from it. Did you realise that? That if you had done it it would have those - could have those consequences? --- Yes, your Worship, because all our family - both of our family is burnt. She herself had a mark.

Was? --- Was burnt. She herself had a mark.

Previously. No, I'm thinking - I want to know what was in your mind, you see? You realise that if you set alight - somebody alight that person can die from the burns? --- Yes, your Worship."

Later on prosecuting counsel again put the following question to the appellant:

"And you agree that if you throw petrol over a person and set fire to that person that he may die? --- Yes, yes."

Although, therefore, it may well be that appellant did not desire the death of the deceased and may even have hoped that his intentional act would not result in her death this, in law, is in the circumstances however of no avail.

In my view, therefore, appellant was correctly convicted. The appeal is dismissed.

H R JACOBS, JA

TRENGOVE,	JA	) concur.
SMALBERGER,	JA	