

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALFRED GEBE SHANGASE Appellant

AND

THE STATE Respondent

Coram: TRENGOVE, HOEXTER et JACOBS, JJ A

Heard: 12 September 1986

Delivered: 25 September 1986

J U D G M E N T

JACOBS, J A :

Appellant, whose age was given as 28 years,

appeared before Broome J and two assessors in the Durban and

Coast Local Division and was convicted on three counts as

follows / 2

follows:

Count 1. Guilty of murder with extenuating circumstances.

Count 2. Guilty of assault with intent to do grievous bodily harm.

Count 3. Guilty of murder with no extenuating circumstances.

With leave of the trial judge appellant appeals only against the finding on count 3 that there were no extenuating circumstances and the death sentence which was passed as a result.

The incidents which gave rise to the charges on counts 1 and 2 took place on the 31st March 1985 on what was referred to as Majola's property at Amoati in the Inanada district. After the incidents appellant was arrested but was

released / 3

released on bail. The assault on Pitshana Bhengu (the deceased) which gave rise to the third count occurred on the 21st April 1985 in the same area, i e also on a portion of Majola's property, whilst appellant was out on bail. It appears from the evidence that on the latter date, which was a Sunday, the appellant was in the company of one Bhekinkosi Sithole from at least about midday until about 18h00 that evening. According to the witnesses for the State the assault on the deceased which caused his death took place between 19h00 and 20h00 that same evening inside a shack shop which belonged to the aforesaid Bhekinkosi. The shop is separate from, but apparently quite near to, Bhekinkosi's house. Bhekinkosi was a defence witness whose evidence was accepted by the trial Court. He testified that he, the

appellant and one Mgedesa shared half a bottle of spirits

at about midday on the day in question. Later the three of

them shared another half bottle of spirits while travelling

by bus to Durban to watch a football match. They did not

consume any further liquor after getting off the bus at the

football-grounds nor did they have anything further to drink

on their way back home where they arrived about 18h00.

According to Bhekinkosi they were at that stage not affected

in any way by the liquor they had taken earlier that day.

Appellant stated in his evidence, with which I shall deal

later, that on their return from Durban they went to Bhekin-

kosi's house where they watched TV. Bhekinkosi denied this

and stated that they stopped at appellant's brother-in-law's

house, which is also quite near to Bhekinkosi's shop, where

appellant asked for some food. However that may be, according to both appellant and Bhekinkosi the latter was called away shortly afterwards and the two of them did not see, or speak to, each other again until after the deceased had been fatally stabbed.

The medical evidence was to the effect that the deceased died of an incised wound on the left side of the chest which penetrated the chest cavity and entered the heart. There was also a vertical wound on the deceased's forehead. The State called three witnesses who testified that they were present when the deceased was assaulted by the appellant. They were the deceased's brother Zakaria, one Winnet Ngubo who stated that he happened to be in the shack shop when the assault on deceased took place and one Jabulani Majola

who worked in Bhekinkosi's shack shop as a shop-assistant.

All three these witnesses testified that the deceased was in the shop when he was stabbed by the appellant. In broad outline their evidence was to the effect that between 19h00 and 20h00 on the evening in question the deceased and his brother, Zakaria, entered the shop and bought cigarettes, matches and iJuba beer from Jabulani. They shook the cartons of beer and drank and were about to leave the shop when appellant entered with an open knife in his hand. Appellant went up to Jabulani and asked where the owner of the shop, Bhekinkosi, was. Jabulani told him that the owner was not there. Appellant then turned and walked towards the door. The deceased and Zakaria was at that stage still inside the shop and were also walking towards the door. Appellant

moved in between the two brothers and, without saying a word and for no apparent reason, stabbed the deceased on the left side of his chest and on his head. The deceased collapsed inside the shop and appellant left and stood outside at a window. Winnet went up to appellant and asked him "what is happening" to which appellant replied that he had not quarrelled with anyone "there", presumably meaning inside the shop. Appellant however pointed to a certain man who was sitting nearby and, pointing to his, appellant's, mouth from which some teeth were missing said: "I am like this because of this person who collided with me in the motor vehicle". It must have been very shortly after this that Bhekinkosi, who as I have stated earlier was called as a defence witness and who was called away soon after

they returned from the football match, arrived back. He

testified that he met appellant at the edge of his, Bhekinkosi's, yard. The following few lines are quoted from

Bhekinkosi's evidence as recorded:

"He (appellant) told me that he had quarrelled with some people at the shop.

Did he specifically mention the shop? --- Yes.

Yes? --- I then said that we should go in so I could see the people he had quarrelled with. I walked ahead, entered the shop, he did not enter it and I did not know what happened to him.

What did you find in the shop? --- I found deceased sitting down, leaning against the wall. There was a pool of blood on the floor.

Anything else? --- I then took my motor vehicle and I and deceased's brother took him by car and I rushed him to the police.

Was he still alive at that stage, the deceased?

--- Yes."

In reply to further questions by counsel for the State and by the Court, Bhekinkosi stated that he noticed

nothing wrong with appellant when appellant spoke to him.

The appellant spoke and walked normally. He noticed

no injuries on appellant nor did appellant complain of

any injuries. Appellant also did not tell him what the

"quarrel" to which he referred was about. He thought

he would hear all about the alleged quarrel inside the shop

but then appellant did not accompany him into the shop and

just disappeared.

Appellant also gave evidence of their visit

to the football match and the liquor which they consumed

before arriving at the grounds. At no time did he suggest

that he drank any liquor after their return from the match

or that he was in any way affected by liquor when the de-

ceased was injured. According to him, they went to

Bhekinkosi's house where they watched TV until Bhekinkosi was called away. Later in the evening he wanted to go home and as he was leaving Bhekinkosi's house he saw a large number of people outside. This crowd shouted: "Catch him, this is the person who kills people." According to appellant he understood the crowd to refer to the death of the person referred to in count 1. Appellant went on to testify that he was then assaulted by this crowd and, amongst other things, struck on the head with an axe which caused an open wound. He took out his knife and stabbed at his attackers to defend himself. According to him the deceased, who was one of his attackers, got injured during this unlawful attack on him, the appellant. All this, according to appellant, happened outside Bhekinkosi's house. In fact,

appellant denied that he ever entered the shack shop that evening. He also denied that he was ever run over or injured by a motor vehicle.

The trial Court accepted the version of the State witnesses as to where and how the deceased was stabbed. The Court was particularly impressed with the independent witnesses Winnet and Jabulani. The Court described them as excellent witnesses. The appellant on the other hand was described by the Court as quite a hopeless witness and his evidence was rejected as false beyond reasonable doubt. The Court found that count 3 was "the clearest possible case of dolus eventualis" and found appellant guilty of murder. The Court then specially adjourned to afford Mr Parker, who appeared for appellant, an opportunity to explain the findings

of the Court on count 3, and its implications, to the appellant and to afford appellant an opportunity, should he wish to do so, of placing further information before the Court which might have a bearing on the question of extenuating circumstances on this count. When the Court resumed Mr Parker informed the Court that appellant had nothing further to say and no further evidence was led. After hearing counsel on the question of extenuating circumstances the unanimous finding of the Court was that no extenuating circumstances existed. The Court found that "on all the evidence this was a cold-blooded senseless, totally unwarranted stabbing of an innocent man." The Court went on to say that

"In the absence of any further information it is quite impossible to speculate that there were in fact circumstances which rendered this evil deed morally less reprehensible."

In granting leave to appeal when this was applied for some time later, the trial judge said the following:

"In the present case it seems to me that I should grant leave to appeal on the basis that despite the rejection by the Trial Court of the accused's version of the circumstances in which the second deceased (the Court was here referring to the deceased referred to in count 3) got stabbed, another court might find that it must be assumed that something did happen outside the shop before the accused entered which excited or angered the accused and which operated on his mind at the crucial time."

Before this Court Mr Parker conceded that the version of self-defence given by appellant was clearly untrue and was rightly rejected by the trial Court. He submitted however that the evidence of the State witnesses that appellant entered the shack shop with an open knife in his hand shows that "something" must have happened outside

which caused him to open the knife. Although, therefore, the trial Court quite rightly rejected that portion of appellant's version as to where and how the deceased came to be stabbed, it should not, so the argument went, have rejected the whole of appellant's evidence about the attack on him before he entered the shop. Mr Parker submitted that the trial Court should have found that appellant was in fact attacked or at the very least molested by people outside. It should also have found that when appellant entered the shop he was still in a state of excitement and anger as a result of what happened outside and that whilst appellant was still in this state the deceased and his brother were, by chance of fate so to speak, in his path. That, Mr Parker submitted, is the only possible explanation for

appellant's irrational and impulsive act. Had the trial Court considered the matter in this light it should and probably would, so it was argued, have held that appellant's acts inside the shop were morally less blameworthy and that extenuating circumstances were present. We were invited to make such a finding.

The difficulty that I have with the above submission is that the version which appellant put before the trial Court and which was rejected by that Court as false can hardly be split into a number of separate compartments and that is exactly what Mr. Parker tried to do. He conceded that appellant's version that the deceased was stabbed in self-defence during the alleged attack was false and that the allegation that the stabwounds were inflicted outside the

shack shop was also false. The story that he, appellant, was hit on the head with an axe was obviously false because neither Bhekinkosi nor any of the State witnesses who saw appellant inside the shop after the alleged attack, saw an open wound on appellant's head. If these falsehoods are taken out of appellant's version very little, if anything, of the whole story remains. The most that one can then say is that "something" might possibly have happened before appellant entered the shack shop which influenced his state of mind in doing what he did and that his influence possibly was of such a nature as to reduce the moral blameworthiness of appellant in doing what he did. But mere possibilities constitute an insufficient basis to support a finding of extenuating circumstances. Appellant had an opportunity,

even after the Court had rejected his version of self-defence and that the stabbing of the deceased had taken place outside the shack shop, to take the Court into his confidence and tell the truth. He chose not to do so.

In my opinion the trial Court was quite right in the first instance in saying that it was "quite impossible to speculate that there were in fact circumstances which rendered this evil deed morally less reprehensible", and in finding that no extenuating circumstances had been proved.

The appeal is dismissed.

H R JACOBS J A

TRENGOVE,	J A)	
HOEXTER,	J A)	concur