

248/86/AV

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

F T MKHIZE

1st Appellant

S MZILA

2nd Appellant

AND

THE STATE

Respondent

CORAM: CORBETT, GROSSKOPF, SMALBERGER, JJA

HEARD: 21 November 1986

DELIVERED: 28 November 1986

J U D G M E N T

GROSSKOPF, JA

The two appellants were convicted in the Natal Provincial Division on a count of murder and one of attempted

murder

murder. The trial court (LAW J and assessors) found no extenuating circumstances in respect of the count of murder, and the appellants were accordingly sentenced to death. On the count of attempted murder they were sentenced to terms of imprisonment. With the leave of the trial judge they now appeal against the finding that there were no extenuating circumstances.

The facts found by the trial court were briefly as follows. The second appellant and some other persons, including one Vuzi Mkhize, had been charged with a robbery allegedly committed in March 1985 on one Mdubeni Magubane and his wife Julia Molo. Magubane was the deceased in the present case and Julia the complainant in the count of attempted murder. The second appellant had been a policeman

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at the time of the robbery. He said in evidence that he had become involved in the robbery through Vuzi, and that he had lost his work as a result thereof.

Towards the beginning of May 1985 Vuzi approached the second appellant. At the time they were both out on bail. He told the second appellant that he would arrange that the second appellant could get his work back, and in addition "claim from the State for being arrested". Vuzi stated that he would achieve these objects by having the deceased murdered by hired assassins. This would cause the prosecution of the robbery charge to collapse because the deceased's evidence was vital to the State case. Since the second appellant did not have any money to pay the assassins, his task would be to accompany the assassins to show them

where

where the deceased and Julia lived. The persons whom he was to accompany were one Mbambeni Mzila, one Mdletshe and the first appellant. Mdletshe was the owner of the car in which they were to travel.

During the evening of 18 May 1985 this plan was executed. Mbambeni, Mdletshe and the two appellants travelled to the Lilani location, also known as Ematimatolo, where Julia and the deceased lived. During the journey the first appellant, Mbambeni and Mdletshe discussed what they were going to do, and in the words of the second appellant, "they said no mistake must happen; Vuzi must have the money to pay them because they are going to commit a very serious offence". When they arrived at Ematimatolo, the second appellant showed them the house where the deceased and Julia lived.

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He took no further part in the proceedings.

The further events of the evening were recounted by Julia, whose evidence was accepted by the trial court. At about 9 p.m., when she and the deceased were already in bed, she heard people knocking at the window and calling the deceased's name. She got up, but did not recognize the people. They kicked the door, called upon the deceased to open up, swore at him and said: "We're going to see with whom you are going to try this case". The deceased did not open but armed himself with sticks and a cane knife and stood at the door which the attackers were kicking. Subsequently the attackers also kicked at a second door. One of the doors was kicked in and some of the attackers entered. Julia saw a flash of fire and at the same time heard the report of a shot.

A bullet struck her in the leg. She fell down and covered herself with a blanket. Thereafter she remained quiet. She heard one of the attackers telling another to come in, and heard one shouting: "The dog has hit me". This was apparently the first appellant, who, it appeared later, had sustained a large, deep scalp wound at the hands of the deceased. Other persons came in and many shots were fired inside the house. Julia thought that there were at least four attackers. Afterwards everything was quiet. The deceased was dead. An autopsy revealed that he had sustained four gunshot wounds, one of which had penetrated his skull and underlying brain.

The facts as set out above clearly demonstrate the guilt of the appellants on the charge of murder of the deceased,

and

and, as I have indicated, the only issue on appeal is whether the trial court erred in finding that there were no extenuating circumstances. The case of the first appellant on this aspect was that the court should have found that the consumption of liquor by the appellant on the day in question, combined with the lesser role which, so it was contended, he played in the attack on the deceased, constituted extenuating circumstances. The first difficulty with this submission is to ascertain what the facts relating to this issue are. The first appellant did not testify during the trial on the merits. At that stage his version of the events appeared only from a statement made to a magistrate and explanations of plea presented pursuant to section 115 of the Criminal Procedure Act, No 51 of 1977. The effect of these statements

was

was, briefly, that the appellant had consumed a great deal of liquor on the day in question. and had been persuaded by Mbambeni to accompany him and the others to Ematimatolo on the pretext that they were going to fetch a roof carrier for the car. On arriving at the house of the deceased, the first appellant, so he said, entered the house in all innocence with the others and was wounded by the deceased when the appellant put out his hand to greet him. This version was rejected by the trial court when convicting the first appellant. After conviction he gave evidence in extenuation in which he repeated the same version.

In considering whether the first appellant's evidence relating to intoxication should be accepted for the purposes of extenuation, the court a quo said the following:

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"The evidence that he gave was that he consumed a considerable quantity of alcohol on that day and was substantially under the influence of liquor. The difficulty which confronts the Court in deciding whether or not his version is true lies in the persistence of Accused No 1 to deny his complicity in the crime. He was clearly untruthful in that respect and it may well be that he was untruthful in respect of his consumption of alcohol. I did mention in the main Judgment that we regarded it as unlikely that even if Accused No 1 had consumed alcohol, that he was as much under the influence of liquor as he would have the Court believe. A person who was under the influence of liquor to such an extent would not be able to remember the events which occurred in the minute detail with which the Accused professed to be able to remember those events. We are accordingly of the view that Accused No 1 in his evidence and in the statement which he made to the Magistrate greatly exaggerated the extent to which his faculties were impaired by liquor."

Later

Later the court dealt specifically with the question whether intoxication was an extenuating circumstance in respect of the first appellant. The court said:

"I have already mentioned that we are not satisfied that Accused No 1 was as intoxicated as he would have the Court believe. However, that is not an end to the matter. The overwhelming probabilities are in accordance with the evidence of Accused No 2 that the assistance of Accused No 1 in the murder of the deceased was solicited some time before the day in question. We regard it as probable that he agreed to assist in the murder of the deceased before the day on which the crime was committed. There is no direct evidence as to the motivation of Accused No 1 in participating in the crime. However, in view of the fact that the deceased presented no problem to him personally, the probabilities are that he agreed to participate for gain.

In these circumstances, if his faculties were impaired by the consumption of intoxi-

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cating liquor on the day in question,
that circumstance has no bearing upon
his participation."

Mr. Seegobin, who appeared for this appellant, did not
contend that the court had misdirected itself in any way,
and in my view rightly so. Moreover, the finding of the
trial court is, in my view, fully supported by the evidence.
Apart from the first appellant's own unreliable evidence
there was nothing to suggest that he was under the influence
of alcohol. The only other witness to testify on this aspect
was the second appellant, who did not take notice on that day
to see whether the first appellant had been drinking. And
the finding on the probabilities that the first appellant had
agreed to assist in the murder of the deceased before the

day

day on which the crime was committed also accords, in my view, with the evidence mentioned by the court a quo, which I have summarized above. In all these circumstances I agree with the finding of the court a quo that the first appellant has not shown that consumption of liquor by him amounted to an extenuating circumstance.

Mr. Seegobin also contended that the lesser role played by the first appellant constituted an extenuating circumstance. This contention cannot prevail. It is trite law that the onus of establishing extenuating circumstances upon a balance of probabilities is upon the accused. In this case it is clear that the appellant participated in the fatal attack upon the deceased with sufficient vigour

to

to sustain an injury at the hands of the deceased. It is also probable, as I have said, that the appellant agreed before the time to assist in the murder, and, judging from the discussion en route to the deceased's home, that he was to do so for reward. Everything therefore points to a substantial degree of participation on his part, and there is nothing to gainsay this. All that the first appellant placed before the court were lying denials that he participated in the attack at all.

In the result the court a quo was, in my view, fully entitled to hold that no extenuating circumstances had been shown in relation to the first appellant.

On behalf of the second appellant Mr. Bezuidenhout

contended

contended that the influence which Vuzi exerted on the appellant, together with the minor role played by the appellant, constituted extenuating circumstances. Vuzi's influence could hardly be regarded as extenuating. The appellant was a man of 27 who had had been a policeman for four years. He was consequently not young or inexperienced. Vuzi exerted no pressure on him but only pointed out that he would benefit by the death of the deceased. In addition Vuzi arranged the means for disposing of the deceased. There is nothing to suggest that the second appellant was in any way reluctant to take part in the murder and to enjoy the benefits expected to flow therefrom.

The second point raised by Mr. Bezuidenhout was the

limited

limited degree of participation of the second appellant.

The same contention was advanced in the trial court, and in

that court counsel relied on certain dicta in the judgments

in State v Smith and Others 1984 (1) SA 583 (A), particu-

larly that of SMUTS AJA at p. 617 F. The court a quo dealt

with this aspect by first quoting certain extracts from the

judgment of SMUTS AJA including the following at p. 617H-618B:

"In the present case the act of the second appellant in luring the deceased out of the house to a spot where he knew the hired killer was waiting, was so closely connected with the death of the deceased that his degree of moral blameworthiness is practically indistinguishable from that of third appellant. I see no difference worth mentioning between the man who stabs and the man who places a knife in the hand of the killer with knowledge that it will inevitably and immediately be used to kill the victim.

Second

Second appellant's position in regard to third appellant and the deceased was for all practical purposes the same as the supplier of the knife in the above example. The fact that second appellant did not do the actual killing accordingly does not, in the circumstances of the case, constitute an extenuating circumstance."

The court a quo then said the following:

"The situation and participation of Accused No 2 in this case is to all intents and purposes the same as that of the second Appellant in the passage which I have just quoted. He was one of the people who stood to benefit most from the death of the deceased. He took the people who actually did the killing of the deceased to the deceased's house which he pointed out to them. He knew that they were armed with guns and he knew that their intention was to immediately kill the deceased.

In these circumstances, I am of the view that no extenuating circumstances exist in the case of Accused No 2."

Mr

Mr. Bezuidenhout contended that the court a quo erred in applying the judgment of SMUTS AJA, which was a minority one, rather than that of the majority in Smith's case (supra) which found that there were extenuating circumstances in respect of the second appellant in that case. This argument seems to me to be misconceived. The Smith case was important for the principles which it applied; and the facts of that case were relevant only to the extent to which they illustrated these principles. The correctness of the judgment of the court a quo depends likewise on the manner in which it applied legal principles (including those discussed in the Smith case) to the facts of the instant case. The comparison which the court made between the facts of the present

present case and those in the Smith case could consequently assist the appellant only if such comparison caused the court a quo to apply a wrong principle or to commit some other misdirection. This has not happened - in truth the court's reasons for holding that the second appellant's degree of participation in the offence was not such as to amount to an extenuating circumstance seem to me to be persuasive and convincing, and I agree with them.

In the result I agree with the finding of the court a quo that no extenuating circumstances were shown by either appellant. The appeal of both appellants is dismissed.

E M GROSSKOPF, JA

CORBETT, JA
SMALBERGER, JA } Concur