



IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WILLY JACOB MPIPI Appellant

AND

THE STATE Respondent

Coram: JOUBERT, JACOBS et SMALBERGER, JJ A

Heard: 1 September 1987

Delivered: 10 September 1987

J U D G M E N T

JACOBS, J A :

Appellant and four others were charged with murder in the Witwatersrand Local Division before Vermooten AJ and two assessors. Appellant was accused no 1 at the trial.

The allegations against the five accused were that on the 18th December 1984 at Leeukop prison they murdered one Johannes Modise (the deceased). Appellant and his four co-accused as well as the deceased were at the time inmates of cell 4 section C at the aforesaid prison, the deceased having been admitted to that cell at approximately 16h00 on the 18th. Some hours later he was dead.

Pro deo counsel was appointed for appellant but he refused to avail himself of such counsel's services and the trial Judge eventually ruled that appellant should conduct his own defence. Appellant and his co-accused all pleaded not guilty. Appellant was convicted of murder with dolus directus and, with one of the assessors dissenting, no extenuating circumstances were found. Appellant was sentenced to death but the trial Judge granted

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him leave to appeal to this Court against the majority finding that there were no extenuating circumstances and the death sentence which followed upon that finding. I may add that accused no 2 was found guilty of murder without extenuating circumstances and was also sentenced to death. An application by him for leave to appeal against his conviction and sentence was refused. As far as accused no 3 was concerned the trial Court found that he took part in the assault which led to the deceased's death but that he acted under compulsion from appellant and he, no 3, was acquitted. Accused nos 4 and 5 were both convicted of assault with intent to do grievous bodily harm.

The medical evidence, which was not challenged before this Court, showed that the deceased died of multiple injuries to his head which caused brain damage, and also

multiple injuries to his face, neck and upper parts of his chest.

As far as the neck injuries were concerned the doctor stated that there were clear indications of strangulation by means of a ligature such as a belt. These neck injuries were definitely ante-mortem and although the brain-and certain of the other injuries by themselves would in all probability have caused death the strangulation was probably the final act in the killing process. As it was put by the doctor, the other injuries would not have caused immediate death but

"this (i e strangulation) would have been the last thing to do to give the final blow, or rather pull, to kill the person."

In summary the following were the facts surrounding the killing of the deceased.

On the 18th December 1984 the deceased, who was

an inmate of cell 2 section C of the Leeukop prison, asked to be transferred to another cell because he, the deceased, stated that he had reason to believe that his life was in danger if he remained in cell 2. As a result the deceased was transferred to cell 4 and, as stated earlier, he was admitted to that cell at approximately 16h00. It appears that appellant and at least some of the other accused were at some stage or another also detained in cell 2 and that appellant knew the deceased before he was admitted to cell 4. Whether there was friction between appellant and deceased during the period they were both in cell 2 one does not know. Be that as it may, the evidence is clear that trouble started between the two very soon after the deceased entered cell 4. In his evidence, and this part of it was apparently accepted by the trial Court, appellant

stated that when the deceased was admitted to cell 4 by the prison warders he, the deceased:

"swore at me, he asked me why I was looking at him. I said to him 'why can't you be looked at?' He then swore at me again, he swore me by my mother."

Appellant went on to say that he then asked to see the man in charge of the section and told him that the deceased had sworn at him but this man told him to return to the cell which, according to appellant, he did. There is no suggestion that appellant or anyone else attacked the deceased at that stage or even shortly thereafter. Appellant stated that after the deceased had sworn at him and he had complained to the warder he went and sat down and "thought of the swearing words".

Now I may just pause here to say that it appears

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from the evidence that in the Leeukop prison, as in many South African prisons, many inmates belong to one or other gang.

In cell 4 which is here under discussion there were, inter alia the "Air Force 3" gang, to which appellant and accused nos 3, 4 and 5 belonged, the "Big 5" of which accused no 2 was a member and the "28" gang to which the deceased apparently belonged. The evidence which the trial Court accepted was that appellant held the rank of "colonel" in the "Air Force 3" gang and accused no 2 that of "chief inspector" in the "Big 5" gang.

The trial Court found that at about 19h00 the deceased was attacked by appellant and the four other accused. The Court found, and appellant really admitted this, that appellant started the attack. Now two State witnesses, Harry

Rabie and Max Moyo, who were at the time also detained in cell 4, stated that before the deceased was attacked the five accused held a "skumba" or meeting where they sat in a circle and had a discussion. After the discussion appellant called the deceased and as the deceased reached him the appellant attacked the deceased by grabbing him by the throat and the other four accused immediately joined in the attack. The trial Court found it unnecessary to decide whether a "skumba" was in fact held where the attack on deceased was formally discussed and agreed upon but it found that before the deceased was called and attacked by the appellant and the other four, appellant had discussions with certain of his co-accused, and the way in which the other accused immediately joined in the attack strongly pointed to appellant having beforehand

canvassed for their support. The evidence showed that during the attack the deceased fell on the floor where he was kicked, trampled on and jumped upon by the appellant and his co-accused who all had their prison boots on. After a while the deceased was lying still. The deceased was put on a sleeping mat and the witness Max Moyo was ordered to cover him with a blanket which Moyo did. In his evidence appellant admitted that at that stage the deceased was unconscious. After a while the deceased made a sound which the witness Rabie described as a "roggel". Appellant went to where the deceased was lying, lifted the blanket and called accused no 3 and ordered him to trample the deceased on his head and neck which no 3 did after which the deceased again became quiet. The trial Court referred to the happenings which I have just

described as "phase one" of the assault on the deceased. After

a while there was again this "geroggel" from the deceased.

Appellant asked the witness Moyo for his belt which appellant

put round the deceased's neck. Appellant then called accused

no 2 and with the belt round the deceased's neck and through

the buckle they both pulled at the end of the belt. One of

them had his foot on the deceased's neck. The deceased became

quiet again and appellant left him. The trial Court described

this putting of the belt round the deceased's neck and pulling

it tight by appellant and accused no 2 as "phase two".

After appellant had left the deceased and had gone back to his

sleeping place, accused no 2 fetched his blankets and spread

them next to the deceased and lay down beside the deceased.

The witness Moyo lay down next to accused no 2 and according

to him, accused no 2 put his hand under the deceased's blankets and kept pulling at the belt which was still round the deceased's neck. The trial Court referred to this as "phase three". In the middle of the night accused no 2 removed the belt from the deceased's neck and gave it to accused no 5 who flushed it down the toilet. When the prison warders entered the cell the next morning they found the deceased's dead body on the mat near the door where he was put by Moyo after the attack by the five accused and where he was later strangled with the belt by appellant and accused no 2. Warrant Officer Mkhathshwa, who was in charge of section C of the Leeukop prison and who went to cell 4 after deceased's body had been discovered, testified that when he asked that those who had taken part in the killing of the deceased should come forward,

the five accused stepped to one side. He asked them why they had killed the deceased and appellant replied:

"Father Mkhathshwa, we have killed the dog."

Appellant further said that members of the "28" gang to which deceased belonged "looked down upon us", presumably referring to members of the other gangs. He made no mention of any swearing by the deceased.

After appellant's conviction he elected to again give evidence but the only relevant point he raised in extenuation was that the deceased had sworn at him by his mother's private parts. He persisted in his denial in his evidence on the merits that he took part in "phase two" of the assault i.e. the strangling of the deceased with the belt or that he knew anything about it.

In the trial Court's judgment on the presence or absence of extenuating circumstances Vermooten AJ stated that the Court accepted that appellant was sworn at as stated by him. The Court found that this was a fact or circumstance which at the time of the commission of the offence, could have influenced and probably did influence the appellant's state of mind. The trial Judge and one of the assessors however found that this influence was not of such a nature as to reduce the moral blameworthiness of the appellant in doing what he did and the majority of the members of the Court therefore found that there were no extenuating circumstances. In this connection Vermooten AJ inter alia referred to the fact that a fairly long time elapsed between the alleged swearing and the beginning of the attack on the deceased and also the fact

that it was not one continuous attack but that it was carried out in phases with intervals in between. He also made mention of the fact that the appellant persuaded the others to join him in the attack on the deceased.

The principle is of course well settled that the question as to the existence or otherwise of extenuating circumstances is essentially one for decision by the trial Court, and that, in the absence of misdirection or irregularity, the Court will not interfere with a finding that no extenuating circumstances were present, unless it is one to which the trial Court could not reasonably have come.

Mr Oosthuysen, who appeared on behalf of the appellant before this Court, could point to no misdirection or irregularity on the part of the trial Court nor could he

persuade me that the majority finding of that Court was
wrong.

The appeal is accordingly dismissed.

H R JACOBS, JA

JOUBERT, JA)
SMALBERGER, JA) concur