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DAVID MADIAKGOTLA

APPELLANT

and

THE STATE RESPONDENT

H H NESTADT

CASE NO. 440/87

CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

DAVID MADIAKGOTLA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: GROSSKOPF, NESTADT JJA et BOSHOFF AJA

DATE HEARD: 5 MAY 1988

DATE DELIVERED: 17 MAY 1988

J U D G M E N T NESTADT, JA:

Appellant was found guilty by

M J STRYDOM/

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M J STRYDOM J and assessors, sitting in a circuit court of the Transvaal Provincial Division, on two counts of rape and two of murder. On each occasion, the victim was a young girl who was raped and then al-most immediately thereafter murdered. Appellant was sentenced to 10 years' imprisonment on each of the convictions for rape. It was directed that these sentences run concurrently. No extenuating circumstances were found to exist in relation to either of the murders. Accordingly, in respect of each of them, the death sentence was imposed. This appeal, brought with the leave of the trial judge, is against such death sentences. In particular, it is directed against/

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against the finding that no extenuating circumstances were proved.

Both series of crimes occurred at appellant's home in the Black township of Daveyton, in the Benoni district. However, they occurred many years apart. The first took place on 15 September 1977. Appellant was then aged 26. J.K. lived about four houses away from appellant. She was 9 years old. He knew her. On the morning in question he saw her returning from school. What then happened is described by appellant in a written confession which he made on 10 July 1986 (shortly after his arrest on the second rape and murder charges).

Appellant stated the following:

"Ek/

4.

"Ek roep toe die kind en verkrag haar. Ek het haar in die eetkamer verkrag. Ek het haar broekie uitgetrek en bo-op haar gelê en my privaatdeel in haar privaatdeel ge-sit. Daarna het ek die kind dood-gemaak. Ek het die kind verwurg. Die kind het op 'n rusbank gelê. Ek het bo-op haar gesit en met my hande gewurg. Toe ek sien sy is dood sit ek haar onder 'n bed wat in die eetkamer was. Na 5 dae het ek 'n slegte reuk in die huis geruik en toe vat ek die lyk en gooi dit in die veld by 'n bos. Toe is ek terug huis toe."

Deceased's body was found the following day. According to the

post-mortem report, the cause of death was "asphyxia probably

due to throttling". Some deep

bruising/

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bruising of the neck muscles was observed.

The second series of crimes took place about 9 years later, viz on 27 June 1986. Appellant was then aged 35. This time, his victim was 16 year-old B.M.. She was in fact appellant's niece. She stayed in the vicinity of where appellant was living. Again, the only evidence of what actually happened stems from a statement made by appellant to a magistrate. It is simply that:

"Ek het haar eers verkrag en nadat ek haar verkrag het het ek haar gewurg totdat sy dood was ... en onder die bed versteek".

Actually, according to another statement by appellant, he raped her twice. From the evidence of his mother,

it/.....

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it is clear that what happened took place in the bedroom of his house. But under what circumstances the de-ceased came to be there is not explained. Two days later, in appellant's absence, the body was discovered under the bed. The post-mortem report gives the cause of death as "asphyxia due to strangulation and suffocation". A face cloth was found tightly stuffed in the mouth and a pair of panties in the vagina. A number of bruises, abrasions and wounds were found on the body. In particular, there was a gross haemorrhage into the tissues surrounding the oesophagus and trachea, as also haemorrhage into and bruising of the muscles of the neck and the sternomastoid muscles. The hyoid bone was fractured.

Appellant's/

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Appellant's case that there were ex-tenuating circumstances was founded on his alleged psychiatric condition at the time of the commission of the crimes. Two psychiatrists, Drs Porten and Catherina le Roux, gave evidence in this regard. They had examined appellant consequent upon his. having, on 28 July 1986, in terms of sec 78(2) of the Criminal Procedure Act, 51 of 1977, been referred for observation. Their testimony confirmed the written report they had previously given. In summary, it was to the following effect: at the time of the commission of the crimes, appellant, an "infantile, very passive" . person, was able to appreciate the wrongfulness of his/

his act; however, because of certain long-standing abnormalities, he probably had a diminished capacity to act in accordance with such appreciation; he suffered from an excessive sex drive; it took the form of paedophilia; this meant that it was directed towards young girls; he was also a sexual sadist; he obtained gratification not from the sexual act per se, but from the humiliation of and infliction of physical violence to his victims; afterwards he felt remorse for what he had done; he required long-term treatment; the chances of his being rehabilitated were good.

It is, I think, to be inferred from

this/

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this evidence that appellant's abnormal sex drive and diminished responsibility played a role in the commission of the rapes and, in relation to them, constituted a mitigating factor. This much the State conceded. What it contested was whether appellant's psychiatric condition also influenced the commission of the sub-sequent murders. Appellant's case was that it had. I shall assume, in his favour, that if it did, then his moral blameworthiness was thereby reduced to an extent sufficient to justify a finding of extenuating circumstances. The State, however, contended that there was no causal connection between the two and that appellant had killed for a different reason, viz to prevent his victims from identifying him/

10.

him as their assailant. It is clear that if this was so, there was no extenuation. The trial court held that appellant had failed to rebut this as having been the motive for the killings. This was the reason for its conclusion that extenuating circumstances had not been established.

The issue before us is whether this finding was correct. In order to resolve it, it is necessary, in the first place, to examine the psychiatric evidence in a little more detail and to quote certain passages from the doctors' testimony. Dr Porten dealt with the connection between appellant's disorder and the killings as follows:

"(M)urder/

11.

"(M)urder and sex in such situation is so interwoven that it is really difficult because sexual and aggressive drive it is like the brothers, they are always going together ... (S)exual aggression, namely rape, obviously did not satisfy the aggressive component of the impulse. And hence he carried further ... I mentioned before that usually rapists they have a very over-powering hatred towards the women and I presume the ultimate of any hatred is elimination of the object of their hate."

Dr le Roux's evidence on the point reads:

"Kan u vir die Agbare Hof enige aanduiding gee volgens u waarnemings van die beskuldigde, waarom hy, as dit die geval is soos u nou getuig het, ook ander misdrywe sou pleeg, soos byvoorbeeld moorde wat beweer word dat hy gepleeg het? – Ek sou sê dat die moord 'n deel is van die seksuele sadisme. Is dit 'n spekulasie of is u seker daarvan? – Ek kan sê dat dit waarskynlik so is, maar ek kan nie met sekerheid sê dat dit so is nie ... Ek beskou dit as deel van die hele handeling wat daar plaasgevind het die betrokke dag."

12.

She explained this as follows:

"Wel, basiese seksuele sadisme waar 'n persoon seksuele plesier of genot ervaar daarin om iemand te beseer of te verneder, en die besering kan dan te ver gevoer word, dat dit uiteindelik in die dood van die persoon eindig."

She says that she asked appellant why he had killed his second victim (in 1986). Her evidence in this regard was:

"Ek het hom gevra of dit was dat hy bang was sy sou hom weggee, maar hy het dit ontken. Hy het gesê hy weet nie. Hy het gesê hy het net die drang gehad om haar dood te maak ... Hy beskryf dit amper as a drang, dat hy dit ook nog moet doen. Hy het haar nou verkrag, maar hy moet haar ook nog doodmaak."

Obviously/

13.

Obviously, the pair of panties that was found in the vagina of appellant's second victim was placed there by him. Dr le Roux would seem to have regarded this as an example of his sexual sadism.

Clearly, this evidence goes a long way to show that appellant's alleged sexual aggressiveness and his diminished ability to control it, were factors in the commission, not only of the rapes, but also of the murders. What has been stated, however, does not give the whole picture. When appellant appeared before a magistrate under sec 119 of Act 51 of 1977 on the charges which he later faced in the court a quo, he made certain statements. Asked about the murder of J.

K. /.....

14.

K. (in 1977) he stated:

"Ek het toe nadat ek haar verkrag het gewurg totdat sy dood was sodat sy nie teen my kon getuig nie. Ek het bedoel om haar te vermoor. Ek het geen rede gehad om haar dood te maak nie."

His explanation for killing B.M. (in 1986) was:

"Hoekom het jy haar vermoor? Ek weet nie hoekom ek dit gedoen
het nie.

Ek het haar eers verkrag en nadat ek haar verkrag het het ek haar gewurg tot sy dood was sodat sy nie kon praat oor die voorval nie. Het jy bedoel of haar dood te maak? Ja."

It is obvious that these statements strongly militate against

the contention that appellant

killed/

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killed pursuant to his psychiatric condition. And they were, naturally, taken into account by the trial court in finding that no extenuating circumstances had been established. Before us, however, it was argued on behalf of appellant that too much weight had been placed on them; appellant was of sick mind and mentally disturbed when he gave those answers; there were, moreover, indications in the evidence that appellant's motive was not to silence his victims; thus he had (at least in the one case) merely hidden the body of the deceased under his bed; and, after the second murder, he had, having attempted suicide, surrendered himself to the police and confessed to both series of crimes;/

16.

crimes; this was inconsistent with a motive to conceal detection. Indeed, so it was stressed, in his one confession the magistrate noted the following:

"David deel my op hierdie stadium mee dat hy nie weet waarom hy sulke goed doen nie want hy het nou net weer iemand anders doodgemaak. Dit is sy broer se kind. Hy sê hy dink daar is iets fout met sy kop. Hy is nie seker nie."

In all the circumstances, appellant's statements to the magistrate should, it was finally submitted, have been held to have been false.

The argument is not without some substance. There do seem to be aspects of appellant's behaviour, and there are statements that he made, which could be said to support a finding that, not only the rapes, but also

the/

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the murders, were committed pursuant to an abnormal personality and whilst his ability to control himself was diminished. Indeed, according to the argument on extenuation, this would seem to have been the initial view of the trial judge. The following testimony of Dr Porten supports it. He said:

"But he by himself came to the police, confessing to the present crime and bringing up by himself crime which was committed nine years ago. Therefore logically for me it does not make sense to kill somebody, to conceal the crime and to confess to it."

Another consideration which lends support to a finding of sexual sadism is that appellant admitted to having, in 1978, committed a similar series of crimes, viz the rape and murder of a young girl. And the fact that

there/

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there was no evidence that when, in 1977, he raped two other women (he was found guilty of these offences in 1979 and sentenced to a total period of 12 years' imprisonment) his violence went beyond that required to gratify his sexual lust, is not, as" was argued by the State, against appellant being a sexual sadist. The exact circumstances of these crimes are not known.

I have, however, come to the conclusion, for the reasons which follow, that the argument cannot be sustained. As the trial court correctly appreciated, the views of the psychiatrists, though at first blush positively expressed, are substantially speculative. A few quotations from their evidence will illustrate this. Dr Porten was asked why appellant's aggression

should/

19.

should manifest itself in the form of murder, rather than an assault. He answered:

"Okay it might be his, I can only speculate of course about that. It could be just an assault, it could not be called so far but it depends on the power of the impulse ... Aggression is aggression. It can be taken in different forms. It is possible that sexual aggression per se did not satisfy the aggressive impulse which constitute part of this attack on the deceased... (W)e cannot predict the degree of the severity of the impulse."

Dealing with the suggestion that appellant killed in order to silence his victims, the doctor said:

"If the accused has satisfied his sexual drive and he knew that the witnesses well knew him was that not a reason for him to kill the women or the children? - Theoretically it could have been of

course/

20.

course.

COURT: But you cannot rule that out in the present case can you? — In present case it is unlikely but it is possible."

Dr le Roux was similarly hard-pressed to refute this having been appellant's motive. The pith of her evidence in this regard is:

"'n Mens kan van die standpunt uitgaan dat hy moontlik sommige van die gevalle gedood het om te voorkom dat hulle dit bekend sal maak. Daarom dat ek sê dit is moeilik om te sê of dit definitief so is dat die moorde voortge-spruit het uit die seksuele sadisme ... Dit is 'n moontlikheid dat dit die motivering was, dit is ook 'n moontlikheid dat hy wel deur die daad van aggressie ook seksuele opwinding be-leef het en bevrediging ervaar het, wat dit dan in die kategorie van die sek-suele sadisme sou plaas ...

Want/

21.

Want ek wil die verband kry tussen die seksuele sadisme en h
handeling wat tot die dood lei. – Ek het dit basies gestel as
'n moontlikheid dat die moord kon voortgespruit het uit
hierdie versteuring vanwee die wyse waarop hy dit vir my
vertel het, dat hy twee keer met haar gemeenskap gehad het en
toe het hy net die drang gehad hy moet haar ook doodmaak."

These concessions must seriously detract from the forcë of

the doctors' opinions that appellant was a sexual sadist.

Moreover, such diagnosis is open to the further criticism

that it would seem to be founded merely on the fact that

appellant murdered his victims. But this is circuitous

reasoning. It assumes what is really the issue, viz, did he

kill because he was a sexual

sadist?/.....

22.

sadist? Apart from the fact of the panties having, in the one case been found in deceased's vagina, there is no evidence to support an affirmative answer in this regard. On the contrary, there are factors which tend to show that the doctors' hypothesis was not well-founded. As I have indicated, both girls knew appellant. This is some substantiation of the case that he killed them so that they would not expose him. There was evidence that appellant did not display any sadism towards his girlfriend. This was despite the apparent existence of a strong sexual relationship between them.

Most important, appellant did not give evidence at his trial.

His admissions to the magistrate

have/

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have, therefore, neither been explained nor controverted. More specifically, there is no evidence from the one person who was able to say why the deceased was killed. At the least, he could have testified to his alleged sadism. But he did not. The factors referred to in the previous paragraph remain undealt with. And the submission that appellant told the magistrate what he did because he was then mentally disturbed, is without foundation. On the contrary, in his written sec 112 statement to the court a quo, at the commencement of the trial, he said that he adhered to the statements he had made to the magistrate (although he added, in conflict with this, that he committed the offences "because

of/.....

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of a psychiatric condition which manifests itself in my having irresistable sexual urges which I cannot control". In any event, I agree with Mr van den Berg, who appeared for the State, that appellant's failure to effectively dispose of the bodies and his confessions of guilt, are no indication that his statement to the magistrate was not true. It is clear that he was not indifferent to being caught. Appellant did, of course, as I have indicated, give a different version to the doctors and in his confession, why he killed. This, too, does not, in the absence of a satisfactory explanation for having told the magistrate that he killed to avoid being identified, avail him.

On/.....

On a conspectus of all the evidence I am of the opinion that it cannot be said that the trial court's finding that no extenuating cir-cumstances were proved, was wrong.

It follows that the appeal must be, and is, dismissed.

NESTADT, JA

GROSSKOPF JA)

) CONCUR

BOSHOF, AJA)