

122/89
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

LESLIE BASIL SIMONS

Appellant

and

THE STATE

Respondent

SMALBERGER, JA :-

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In the matter between:

LESLIE BASIL SIMONS

Appellant

and

THE STATE

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CORAM:

VAN HEERDEN, SMALBERGER,

et EKSTEEN, JJA

HEARD:

29 August 1989

DELIVERED:

4 SEPTEMBER 1989

J U D G M E N T

SMALBERGER, JA:-

The appellant was convicted in the Durban and Coast Local Division by WILSON, J and two assessors of murdering his wife (the deceased) and raping his 8 year

old daughter. No extenuating circumstances were found and he was sentenced to death on the murder charge. On the rape charge he was sentenced to 10 years imprisonment. With leave of the judge a quo he appeals against his conviction and sentence on the murder charge only.

It is common cause that the deceased died on 29 July 1987 as a result of multiple injuries inflicted upon her by the appellant. She had been subjected to a severe and brutal beating. The chief post-mortem findings revealed that she had multiple scalp lacerations; a fractured skull with subdural haemorrhage and contusions of the brain; multiple bruises over the body with subcutaneous haemorrhages; multiple rib fractures; a lacerated liver and contusion of the mesentery. According to the district surgeon who testified, the injuries were caused by the

application of blunt force, and for the infliction of certain of the injuries a severe to extreme degree of force would have been required. Death would have occurred shortly after the infliction of the injuries.

The deceased's death occurred on a Wednesday. There were no eye-witnesses to the assault upon her, and the State's case against the appellant was based on circumstantial evidence. The appellant claims to have been drinking heavily over a period of days preceding the Wednesday. There had been a series of arguments between himself and the deceased, whom he suspected of having an affair with another man. This suspicion had taken root the previous Saturday when the appellant, the deceased and a Miss van der Westhuizen, a friend of the deceased, had gone dancing. At the dance the deceased spent most of the time dancing with another man. This prompted the appellant to speak to the man

in question about his conduct. Despite this the man later resumed dancing with the deceased. The appellant then told the deceased that they must leave, which they did. On the way home he went to a nearby cafe to buy cigarettes. There he was involved in an altercation with the same man who had earlier danced with the deceased. This led to the man and some of his friends assaulting the appellant.

According to the appellant, he left the common home the following Tuesday evening after an argument with the deceased, and went and spent the night at his father's house. The next morning he returned home at about 7 a m. On entering the house he discovered the deceased in bed with the man she had danced with the previous Saturday night. The man was only wearing a pair of short pyjama trousers. The man got up and attacked him with a piece of electric cord.

The appellant picked up a pick-handle, which he kept in the kitchen, and hit the man. He was felled by the blow. As the appellant was preparing to deliver a further blow at the man the deceased grabbed hold of him (the appellant) from behind. This enabled the man to get up and make good his escape through the back yard. The appellant proceeded to testify as follows:-

"As I was losing control I turned round and I struck her a couple of shots. I wouldn't know how many shots I struck her, but I did give her a good couple of shots. Not knowing that I did kill her I left the house. I just pulled the door closed and I disappeared. I was fully in my temper at that time. I was very cross. I just thought maybe that I will be teaching her a lesson, not knowing that I would kill her.

This passage from the appellant's evidence gives the impression that he launched an unpremeditated assault upon the deceased in a jealous rage occasioned

by considerable provocation - an assault which was not of long duration. He further testified that he left the house without locking the door. He also claimed that he was under the influence of liquor at the time.

The trial court found the appellant to be an unimpressive witness and rejected his evidence. Its findings in this regard cannot be faulted. The appellant's evidence was refuted in a number of important respects by witnesses who were patently honest and reliable. In addition, there are aspects of his evidence which are totally lacking in probability. His suggestion that the deceased was having an affair, and his evidence concerning the events which allegedly occurred on the Saturday night, were obviously intended to set the scene for his later allegation that he caught the deceased in flagrante delicto. The evidence establishes that the deceased

had only recently been discharged from hospital after prolonged treatment for tuberculosis. The probabilities are strongly against her having formed a liaison since her discharge; if she had she is unlikely to have flaunted that fact in front of the appellant, whom she apparently feared, at the dance on the Saturday night. Equally improbable is the fact that when the appellant left the common home on Tuesday evening she would have summoned her paramour knowing full well that the appellant could return home at any time. The appellant's evidence of the compromising situation in which he found the deceased is further given the lie by the fact that, despite his claim that the man concerned ran away wearing only a pair of short pyjama trousers, no clothes belonging to such a person were ever found in the house either by the appellant or anyone else. Add to this the fact that Miss van der

Westhuizen, whose evidence was accepted by the trial court, denied that the deceased had danced with another man on the Saturday night, and the inevitable conclusion is that the appellant lied about the situation he claims he encountered at his house on the Wednesday morning.

The appellant's evidence that he lost control of himself and assaulted the deceased in a jealous rage is further refuted by the evidence of his neighbour, Craddock, and the witness, Miss Michaels. From the former's evidence it is apparent that the appellant embarked upon a persistent and prolonged assault on the deceased - one that extended over a period of approximately 45 minutes. The latter, who went to the house of the deceased shortly before 8 a m, and heard the deceased's cries for help, testified that the appellant opened the front door in response to her

knocking. Her evidence paints a picture of the appellant being fully rational and in control of both himself as well as the situation inside the house. Although the appellant later sought to deny Miss Michael's evidence, it was never challenged under cross-examination. The appellant's denial that the deceased was dead, or that he knew she was dieing, when he left the house conflicts with the medical evidence that she would have died very soon after the assault. One has but to look at the photographs of the deceased taken at the scene to realise that the appellant could not other than have appreciated that the deceased, if not dead, was at least in a critical condition when he left the house. He was further untruthful in claiming that he had left the door unlocked when leaving. The evidence clearly establishes that the door was locked, and that later entry into the house to reach the

deceased was thereby impeded. In all the circumstances the appellant was quite clearly an untruthful witness whose version of the events was rightly rejected by the trial court.

The State case established the following:

The deceased had laid a charge against the appellant for raping their daughter. The trial date had been fixed for 13 August 1987. The appellant had threatened that he would kill the deceased before standing trial. The deceased was subjected on the day of her death to a severe and brutal assault over a prolonged period. She was small of stature and was struck, inter alia, with a pick-handle, which is an inherently dangerous weapon. After the assault the appellant left her, dead or dieing, in a locked house as he went his way. If the appellant had consumed liquor, a matter to which I shall revert later, it was not to the extent where he

was incapable of forming the requisite intention to kill. In the absence of any acceptable explanation for his conduct the only reasonable inference to be drawn from the proved facts is that the appellant assaulted the deceased with the actual intention of killing her. In the result he was correctly found guilty of murder.

The onus of proving extenuating circumstances rested upon the appellant. It was argued that he was under the influence of liquor when he killed the deceased. It can be accepted that he drank heavily for some days preceding the assault. However, there is no evidence that he drank any liquor on the morning of the crime before its commission some time after 7 a m. He himself never specifically claimed that he did so. Neither Miss Michaels (who saw him at about 8 a m) nor Miss van der Westhuizen (who saw him approximately two

hours later) suggested that he was under the influence of liquor. His conduct, apart from the assault, was rational throughout. If he was under the influence of liquor, it was not to the extent that it can be said to have amounted to an extenuating circumstance. The fact that his emotions may have been clouded by the pending rape case (which charge against him was fully justified) cannot serve to reduce his moral blameworthiness. In my view it has not been shown that the trial court misdirected itself in any respect in concluding that there were no extenuating circumstances, and no basis exists for interfering with its finding in that regard.

In the result the appellant's appeal against his conviction and sentence is dismissed. /

dismissed.

JUDGE OF APPEAL

J W SMALBERGER

VAN HEERDEN, JA)
) CONCUR
EKSTEEN, JA)