

/wlb

SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

Case No 589/88

In the appeal of:

SIBUSISO BETHWELL SINDANE

Appellant

versus

THE STATE

Respondent

CORAM: HEFER, MILNE et F H GROSSKOPF JJA

Date of Hearing: 18 August 1989

Date of Judgment: 5 September 1989

J U D G M E N T

MILNE JA/.....

MILNE JA:

The appellant was convicted of murder and attempted murder in the Durban and Coast Local Division. He was sentenced to death on the murder charge and to 5 years' imprisonment for the attempted murder. The trial court granted him leave to appeal against the finding that there were no extenuating circumstances and the sentence of death but refused leave to appeal against the convictions. Thereafter, this court on petition, granted leave to appeal against both the convictions.

The charges arose out of an attack which took place on the night of 1 January 1987 on the dwelling house of a councillor named Dlamini (the deceased). The evidence establishes that a number of persons, some of them armed with petrol bombs, went to the house of the deceased during

the night, that petrol bombs were thrown at and into the house, and that it was set on fire as a result. At the time the deceased and the complainants on count 2 namely, the deceased's wife Joyce, and his daughter Rejoice, and one Khulile Makhathini, were asleep in the house. One of the bombs was thrown through the window of the main bedroom where the deceased, his wife and daughter were asleep. Joyce Dlamini was awakened by a noise, and saw flames in the vicinity of the bedroom window and the deceased on fire on his bed. The deceased managed to beat out the flames with his hands. Thereafter the deceased and the other occupants of the house managed to escape from it. The deceased was taken to hospital, but died as a result of the burns which he sustained in the fire.

All this is common cause and, in fact, it was not in dispute that the deceased was killed by the person or persons who

set the house alight, and that the deceased's daughter suffered burns as a result of this attack.

The only evidence connecting the appellant with the attack was a statement which he made to a magistrate. The appellant contested the admissibility of this statement on the grounds that he made it as a result of duress in the form of threats of physical violence, and undue influence in the form of a promise by the investigating officer that if he made the required confession he would be released from custody, pending his trial. Those questions were considered in the course of a trial within a trial which culminated in the admission of the confession on the basis that the appellant had failed to discharge the onus of proving that it was not freely and voluntarily made, or was the product of undue influence. Although it was submitted in the appellant's heads of argument that the trial court should

have found that proviso (b) to s.217 of the Criminal Procedure Act No 51 of 1977 had not been complied with, this submission was (rightly in my view) expressly abandoned by the appellant's counsel, and the admissibility of the statement was attacked only on the ground that the trial court should have held that the appellant had discharged the onus. The trial court heard the evidence of the appellant, and of the investigating officer Dt.W/O Mabaso, and the magistrate who took the statement, Mr G M Sithole. It was found by the trial court that:

"Not only was the accused's evidence riddled with inconsistencies, contradictions and improbabilities; it was given with a patent lack of conviction, and if appearances are any guide he was clearly lying. As against that we have the clear and consistent evidence of the magistrate to the effect that the accused was asked each of the seventeen questions, gave the replies recorded on Exh G, and gave every appearance at the time of making the statement that he was doing so freely and voluntarily. There is also the clear, consistent and satisfactory evidence of the investigating officer, Mr Mabaso, to the effect

that no threats were made, no promises were made, and no influence was brought to bear on the accused to make any statement to the magistrate."

The judgment continues:

"Neither Mabaso nor Sithole were shaken in the slightest degree under cross-examination. Indeed, the evidence against the accused on the issues dealt with at the trial within a trial was completely overwhelming, so much so that counsel for the accused, rightly in our view, found himself in the position where he was unable to advance any argument in support of the contention that the statement, Exh G, was not freely and voluntarily made without undue influence."

Despite some ingenious arguments advanced by the appellant's counsel I am quite unpersuaded that the trial court erred in finding that the appellant's evidence was riddled with inconsistencies, contradictions and improbabilities, and that the evidence of the witnesses who testified for the State on this issue was clear and satisfactory in all material respects. The only aspect of the matter that was not referred to in the judgment of the trial court on this

issue is the fact that one of the grounds upon which the appellant contested the admissibility of the statement was his allegation that the investigating officer promised that, if he made the required confession, he would be released from custody pending his trial. Reliance was also placed upon the fact that it appears from the evidence that 8 days after making the statement to the magistrate, the appellant was "released on warning" by the court. It is clear that the investigating officer was aware that the appellant had made the statement to the magistrate immediately after he had made it, but, nevertheless, when the appellant appeared in court for the first time two days later, and was joined as an accused, he was not released. This is against the appellant. Furthermore, while the point was certainly not fully canvassed in cross-examination of the investigating officer, such evidence as there is on record indicates that the release of the appellant occurred in the absence of the

investigating officer and, in all probability, without his concurrence. In my view there are no good grounds for interfering with the finding of the trial court that the appellant failed to establish that the statement was not made freely and voluntarily, or that he was unduly influenced thereto.

The next contention advanced on behalf of the appellant was that, even if the statement was admissible, it did not establish beyond reasonable doubt that the appellant was guilty of any offence save, at worst for the appellant, a common purpose to commit public violence.

The statement reads as follows:

"On 1/1/87 Siphwe Mzobe came to me at house No 788 KwaMakhutha Township. I asked him the whereabouts of Mduduzi Mkhize. After he had said that Mduduzi was at his home he asked me whether I had heard that a certain boy had been shot by a

certain councillor. He said he was going to the shops and he would return with Mduduzi.

On his return he came back with Mduduzi Mkhize and Mduduzi Nkukhu. They said we should pay revenge to the councillor who had shot that boy he talked about earlier. I do not know the name of that boy. We were not used to each other. I then asked them whether they had firearm. They said they had no firearms. They requested R5,00 for petrol and I gave the R5,00. We were on appointment to meet at Section 24 at Siphwe Mzobe's house at KwaMakhutha at 24h00 that day. But I was late. I came after they were not there. I was informed by Mnati of that house that they had left. I followed their direction and caught up with them on the road.

At that time there was another male who had joined us. He was a stranger to me. We were very close to Councillor Dlamini's house. They informed me that they had constructed four petrol bombs.

Mduduzi Mkhize and that stranger went towards the back of the house. I and Siphwe Mzobe and Mduduzi Nkukhu approached from the front of Dlamini's house. I did not have a petrol bomb but all my companions had one each. I was only watching in front of the house. I was watching for a person who could possibly appear approaching towards the house. I was standing towards the gate. If any person came there I would have warned them to run away.

Indeed after two explosions had taken place a person approached and I whistled to my companions and we all ran away. I did not see who that

person was. I also did not see who had caused those explosions as there was no lights. We ran away and separated. Councillor Dlamini's first names are unknown to me. I later understood that he died in hospital as a result of burns. His house's property also was damaged by fire. That is all."

Some light is thrown on the reference in the third sentence of the statement to the fact that "... a certain boy had been shot by a certain Councillor" by the evidence of the State witness Mzobe. This witness was discredited by counsel for the State in the court below with regard to his knowledge of the events on the day when the attack was made on the house of the deceased. No reliance can therefore be placed upon his evidence (or lack of it) regarding the events of that day. It was submitted by appellant's counsel, however, that there was no reason not to accept Mzobe's evidence about the events which had preceded, and, indeed, were said to be the cause of the attack upon the

deceased's house. Mzobe's evidence on the incident which allegedly gave rise to the attack was to the following effect: some time in November 1986, there was a meeting of "the youth" in section 6 of KwaMakhutha Township about the shortage of water in that section; the appellant and his two co-accused at the trial were present at the meeting; it was then agreed that they should go and see the "Councillor of that section", who was the deceased, and about 50 of them then went to the Councillor's house; when they wanted to tell the deceased about their problem there were many other men there, armed with sticks and assegais; these men attacked the group who had gone to see the Councillor, and the deceased fired shots towards them, which caused a superficial wound on the shoulder of one of them, named Zithulele Ncobo, and they then all ran away. Counsel for the State agreed that there was no reason not to accept this part of Mzobe's evidence. In fact, the summary of

substantial facts annexed to the indictment contained the following allegations which are in accordance with such evidence:

- "1. The deceased was a councillor in KwaMakhutha and a member of the Inkatha Organisation.
2. During November 1986 the young men of KwaMakhutha, including the accused, held a meeting concerning the water shortage which had been experienced in KwaMakhutha. It was resolved that the people present at the meeting would proceed to the deceased's home, and lodge their complaint with the deceased.
3. On arrival at the deceased's home the spokesman for the group spoke to the deceased. However, whilst this was happening, a group of armed men appeared, and chased the protestors away.
4. The accused were aggrieved at the manner in which they had been treated, and decided to petrol bomb the deceased's home as a form of revenge."

I turn now to consider the effect of the appellant's statement. It was submitted that it was consistent with no more than an intention to join, to a limited extent, in an attack upon the deceased's property, which might not even

involve an attack on the house itself; that it was not the only reasonable inference from the statement either that (a) the appellant intended to participate in an attack on the deceased or (b) that the appellant foresaw that an attack upon the deceased's house might result in his death.

In my view, when considered against the background of Mzobe's evidence, it is quite clear from the statement:

- a. that the appellant agreed with Siphiwe Mzobe, Mduduzi Mkhize and Mduduzi Nkukhu to participate in an act of revenge upon the deceased for his conduct in shooting at their group;
- b. that this act of revenge would take the form of petrol bombing the deceased's house in KwaMakhutha Township, shortly after midnight on 1 January 1987;
- c. that the appellant did participate in such an

attack because:

- (i) he provided the R5,00 for the purchase of petrol for the petrol bombs;
- (ii) when he arrived late at the appointed meeting place and found his co-conspirators had already left, he made a successful effort to catch up with them (a further unknown man having joined them by that stage);
- (iii) he knew that they had obtained the petrol, and had made four petrol bombs;
- (iv) he went with the other four to the deceased's house, and saw that each of them had a petrol bomb, and that two of them were stationed at the front of the house and two at the rear of the house;
- (v) he stood guard in order to warn his

companions if any one approached the house, so that they could escape;

- (vi) after two explosions had taken place, a person approached, whereupon the appellant warned his companions by whistling, and they all ran away.

The trial court viewed the statement as follows:

"It is clear from the statement that there was a common purpose among the accused and his fellow attackers to attack and set fire to the house of the deceased in the middle of the night, with petrol bombs. It is clear that the object of the attack was a dwelling, not a garage or commercial property, the attack taking place in the middle of the night. The accused and his companions must have foreseen, and the only reasonable inference is that they did foresee, the possibility that there would be people occupying the house at the time of the attack, and that those people might succumb as a result of their setting the house on fire over their heads. Notwithstanding that they had the foresight that I have adverted to, they persisted with the attack and set the house alight with petrol bombs with the fatal consequences that

I have already described."

I agree. In my view it is inescapable that the appellant knew that at that time of night it was highly probable that the deceased and others would be present in the house, and that if petrol bombs were thrown at the house it was, at least, reasonably possible that the deceased might be burned to death, and it is equally clear that the appellant acted with a reckless disregard of whether or not such death might ensue.

It follows that the appellant was, therefore, rightly convicted on both counts.

I deal now with the question of extenuating circumstances.

It is clear from the record that the only grounds advanced in the court below as constituting extenuating circumstances were the following:

- "1. The fact that the accused was twenty five years old at the time he committed the murder and (so we were informed from the Bar) has no previous convictions.
2. An absence of dolus directus, the accused having been found guilty on the basis that the intention to kill took the form of dolus eventualis.
3. His relatively minor degree of participation in the attack and assault which resulted in the death of the deceased."

The learned trial judge dealt carefully with each of these factors, and considered their cumulative effect. There are no grounds for saying that he misdirected himself in considering these aspects nor can it be said that no reasonable court could have come to the conclusion which he did, namely, that the circumstances relied on did not, on the facts of this particular case, constitute extenuation.

That is, however, not an end of the matter because, having

dealt with the circumstances referred to above the learned trial judge concluded his remarks on extenuating circumstances as follows:

"We have considered whether there are any other facts which might be relevant to extenuation, but there is no evidence to suggest any. It is not suggested that the accused was intoxicated or provoked or that any external influence of emotional stress induced him to participate in the murder. On the contrary, his statement to the magistrate makes it clear that he did not know the boy whom the deceased had allegedly shot and was not personally involved in that incident. With no personal axe to grind, and in cold blood, he participated willingly and deliberately in the planning and execution of an atrocious crime. Notwithstanding the absence of proof of dolus directus, and giving due consideration to the nature and extent of the accused's participation in the commission of the crime, we are unanimously of the opinion that there are no extenuating circumstances in this case."

It was submitted that the trial court had misdirected itself in this passage because it failed to take into account that, on the undisputed evidence of Mzobe, the deceased had been guilty of provocative and, indeed, criminal conduct in

shooting at the group (which included the appellant) instead of listening to their complaints about the water supply in the township. The court a quo, so it was submitted, erred in finding that the appellant "... was not personally involved in that incident." This refers, of course, to the incident when the deceased shot at the group of youths which included the appellant. There may be circumstances when a murder, committed in order to avenge what was believed to be a wrongful act on the part of the deceased, will constitute extenuation. See for example, S v Ndwalane 1985(3) SA 222 (A). This will obviously not always be the case, see S v Namane 1977(4) SA 240 (A). In the circumstances of this particular case the appellant and his partners in crime were no doubt outraged by what, on the undisputed evidence, was the aggressive, high-handed and criminal conduct of the deceased in causing and participating in an attack on the people who had come to discuss a legitimate grievance with

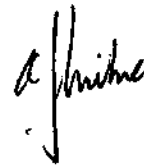
him, and who had every right to expect him, as their councillor, to at least hear them out. It is true that it appears from the statement that the appellant did not know the boy whom the deceased had shot, but he was personally involved in the incident in the sense that he was one of those who went to see the deceased, and who was chased away by the deceased's cohorts. It hardly needs to be stated that this conduct on the part of the deceased does not mean that the appellant, or any one else, was entitled to take the law into his own hands and wreak revenge on the deceased - still less to participate in the petrol bombing of the deceased's house late at night, when the deceased and his family were in all probability asleep inside the house. The fact that the appellant had a legitimate grievance against the deceased does, however, in my view, diminish the moral blameworthiness of his conduct. It is reasonably clear that this aspect of the matter was not fully considered by the

trial court - no doubt because it was not even raised in argument by the appellant's counsel (who was not the counsel who appeared for him in the appeal). In these circumstances there was a misdirection of a sufficiently material nature to vitiate the finding that there were no extenuating circumstances. In my view there were such circumstances.

The trial court referred to the crime as an "atrocious" one. I have no doubt that this is a correct description of it. It is clear that the appellant deserves a severe punishment. Taking into account his relative youthfulness, the fact that he has a clean record and that there was no proof of dolus directus I have come to the conclusion that an appropriate sentence on the murder charge would be one of 12 years' imprisonment. It was not submitted that there were any good grounds for disturbing the sentence of 5 years' imprisonment imposed on the second count, and it

accordingly stands.

In the result, the appeal against the convictions fails, but the appeal against the sentence imposed on count 1 is set aside, and the appellant is sentenced to 12 years' imprisonment on that count. It is ordered that this sentence will run concurrently with the sentence imposed in respect of count 2.



A J MILNE
Judge of Appeal

HEFER JA	]	
	]	CONCUR
F H GROSSKOPF JA	]	