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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HEATHER SMITH APPELLANT

and

THE STATE RESPONDENT

CORAM : HEFER, KUMLEBEN JJA et FRIEDMAN AJA

HEARD : 7 NOVEMBER 1989

DELIVERED : 17 NOVEMBER 1989

JUDGEMENT

KUMLEBEN JA/...

KUMLEBEN JA

The appellant was charged in the Witwatersrand Local Division of the Supreme Court with the murder of Martin William Cornish. The court (Vermooten AJ) found her guilty as charged, though with extenuating circumstances, and sentenced her to six years' imprisonment. The appellant now appeals, with leave of the court a quo, against the conviction and sentence.

It was common cause that on 22 May 1987 the appellant fired three shots from a revolver, one of which penetrated the chest of the deceased in the region of his left armpit and proved fatal.

At the trial appellant pleaded not guilty. Her defence, as set out in her statement in terms of

sec 115 of the Criminal Procedure Act, No 51 of 1977, was that at the time the shots were fired she was "under extreme emotional distress" resulting in "a state of criminal incapacity".

There were few, if any, material facts in dispute (as opposed to the inferences to be drawn from them). The appellant recounted the history of her association with the deceased from the time they first met until his death. His wife and his sister, Mrs van der Merwe, who were called as witnesses for the State, described the shooting itself. A mutual friend of the appellant and the deceased, Mr Theron, also a State witness, told of certain remarks passed by the appellant before the fateful incident.

In this case, for the purpose of deciding on the correctness of the conviction and for a proper

consideration of the sentence imposed, it is necessary to refer in some detail to the evidence of the appellant. (In the course of the narrative I shall interpose some comment and some evidence of the other three witnesses to whom I have referred.)

The appellant and the deceased first met in June 1986. She was at the time a 19-year-old student at the University of the Witwatersrand. She had passed the first year course for a Diploma in Education and was midway through her second year. He was more than twice her age, 39 years old, and a black man at a butchery. He was married and had a young daughter. He had one child of a previous marriage and two as a result of an extra-marital relationship.

Initially she resisted his advances but soon became attracted to him. She visited him daily at the

butchery after her lectures. In due course she gave up her studies since, as she put it, she was totally in love with him. Her parents were unaware of the relationship until the deceased's wife came to their home and confronted them with the situation. On this occasion the deceased, in the presence of his wife, said that he loved the appellant dearly and wished to divorce his wife in order to marry her.

In October 1986 he left his wife and came to stay at the appellant's home. (She had threatened to leave home if her parents did not consent to this.) They spent a weekend on the South Coast of Natal together. He expressed his love for her and said that he wanted her to bear him a child. Notwithstanding all this, on their return to Johannesburg he said that he was going to see his daughter. For this reason, or on this pretext, he returned to his wife. By Wednesday of

that week he was again in touch with the appellant, saying that he loved her and had returned to his wife only to be with the child. A week later, on his return from a short holiday with his wife, he promptly arranged to see the appellant. At that stage the appellant was concerned about their relationship and sought counselling from a pastor of the Rhema Church. She was reluctant to renew the relationship because she had promised both his wife and her parents that she would not continue to see him. He, however, was persistent and professed his deep love for her. Her state of mind at that stage is best described in her own words: "I thought it in the best interests of all of us that I should not (see him again), but my heart did otherwise. I could not, I loved him so much I just went back to him."

In January 1987 he told the appellant that he

and his wife were going to consult an attorney to obtain a divorce. He moved out of their flat and went to live in a caravan. There the appellant visited him daily, often staying with him until the early hours of the morning, and cared for him by cooking for him and tending his daily needs.

On Friday, 13th January 1987, he did not turn up at the caravan. The appellant suspected that "it was the same old story" - as indeed it was. He had gone back to the flat and, when the appellant went there, she found him drinking wine with his wife and another couple. She was very upset. His wife told her that they had become reconciled and that she must stay out of their lives. Though distraught, she agreed to this. (Incidentally, the deceased had broken a promise to her that he would not return to his wife without first telling the appellant.) Nothing daunted, within a

short time he again telephoned the appellant and falsely explained that he had gone to the flat to discuss the divorce with his wife. They, the appellant and the deceased, continued seeing each other, expressing their mutual love and planning a future together.

In March 1987 he again left his wife and went to live at the caravan park to demonstrate, as he said, his love for the appellant. At this stage she was mentally and physically worn out by his conduct and vacillation but she was still in love with him. During this stay at the caravan she maintained him by paying for his food and other expenses, which included some form of drugs he was taking at the time. (According to Theron, at about this time on a Saturday morning the three of them (Theron, the deceased and the appellant) were at Theron's place of business where the

deceased was working. His wife unexpectedly arrived. He and his wife went out onto the pavement and an argument between them ensued. The appellant remained with Theron in his office. She was obviously put out by the arrival of his wife and the fact that she was trying to persuade him to return to her. The appellant remarked to Theron that if she could not have him, nobody would.)

The 18th of March was the deceased's 40th birthday, which he celebrated with the appellant. He nevertheless, according to what the appellant was told, telephoned his wife and falsely said that he had spent a lonely birthday and was missing her. The appellant was very distressed at this duplicity but still did not see her way clear to severing their relationship. During that month he took her to Durban for a weekend and, as previously, on his return went back to his

wife. Before the end of that month the deceased's wife, in his presence, yet again told the appellant that they had become reconciled and that she should leave him alone. She agreed, on the strength of which the deceased's wife drove the appellant to her parent's home and the deceased packed up at the caravan park and returned to the flat. But, in the words of the appellant, "by then it was too far gone, we were, I was totally in love, I was engrossed in him, he was my whole world."

In April 1987 the deceased's brother died. He telephoned the appellant at her work, affirmed his love for her and expressed the need to be consoled by her. She once again weakened and agreed to see him. In May 1987 she went with him to the Eastern Transvaal. They left on a Thursday or Friday and returned only on the Monday. Her failure to be at work on that day, and

the poor quality of her work arising from her problems with the deceased, caused her to be dismissed from her employment.

Things came to a head. On Thursday 21 May 1987 she had made arrangements to meet the deceased at his place of employment that afternoon. Once again he stood her up. When he did not arrive, she suspected that he was still with his wife as he had told her that he was going to see her about the divorce and would then come to her to keep their appointment. She thought that they had again become "reconciled". She expressed her concern to Mr Theron, whom she knew well and trusted. (Theron said that they discussed the deceased's fickle and dishonest behaviour towards her and that the appellant told him that on one of the occasions when he had let her down she had a gun in her handbag and, had she had the "guts", she would have shot him.) He did,

in fact, arrive later that evening.

The next morning, Friday 22 May 1987, they arranged to go to the home of Mrs van der Merwe for lunch. As they arrived in the deceased's car, his wife unexpectedly pulled up in hers. She told the appellant that they were reconciled and, using abusive language, said that the appellant must stay out of their lives. The appellant was taken aback ("flabbergasted") and did not reply. Mrs van der Merwe persuaded them to go into the house to discuss the matter. In the kitchen the deceased's wife repeated the assertion that they had come together again. No doubt to confirm it, the deceased and his wife kissed and embraced. With that the appellant asked the deceased to drive her back to her car. (At this stage she clearly wanted to leave and, had the deceased complied with her reasonable request, what happened

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that day would have been averted.) Instead, the deceased left the house with his wife. The appellant asked Mrs van der Merwe to call the deceased back as she wanted to find out from him whether he had genuinely returned to his wife and why he had not told her of his change of attitude since, as far as she knew, he was in the process of obtaining a divorce. Mrs van der Merwe returned to the house to say that he refused to come and speak to her. In fact, she bore a message from his wife saying that, if the appellant did not come promptly, she would have to walk back to her car. She then left the house only to see the deceased and his wife again in an embrace. She could not believe what she saw and felt humiliated. She has no recollection of how she reacted but remembers "two loud bangs". (According to deceased's wife, they had just separated from their embrace when the three shots were fired. The deceased turned and ran. The

appellant was heard to say "I will kill him and go to jail for him." She saw her put the revolver in her handbag, take the keys of his car, which she had on her, and drive off. The deceased ran across the road into a garage where he was found dead. Mrs van der Merwe explains that, as she came out of the house, she saw the shots being fired and the deceased run away. When she told the appellant to put the gun away, her reply was: "Go and fetch him, I will shoot him, I will go to jail, I do not care".)

At some stage shortly after she had driven off, she realised that she had fired shots with the revolver. She returned to the scene to be told by Mrs van der Merwe that the deceased was dead or bleeding, she cannot remember which. She was shocked and drove to the home of her sister in Durban. On arrival, she was told that the deceased had died. She gave herself

up to the police.

The revolver belonged to her mother and was regularly lent to the appellant for her own protection. There is no suggestion that she had placed it in her handbag that morning for any other reason. This was the first and only occasion that she had ever fired it or any other fire-arm.

Thus these facts tell the lamentable story of a young woman becoming increasingly infatuated and beguiled by a much older man of lower education and social standing. She was in fact in thrall to him. He was unable, or unwilling, to make a choice between his wife and the appellant, causing deep distress to both of them. The appellant realised that he was dishonest, indecisive and unreliable but lacked the strength of will to terminate the association. The attraction was,

in more senses than one, fatal.

The question on the merits is whether the above facts warranted the conviction.

On this issue the defence called a clinical psychologist, Mr Redelinghuys, as a witness. He put forward three propositions which bear upon, or purported to relate to, the question of liability. Two were first stated in his clinical report compiled before the trial, the third was raised by him for the first time towards the end of his evidence-in-chief. They were the following:

First, that in all probability she did not plan the killing. This is plainly so: it was no part of the State case that it was premeditated.

Second, that in firing the shots it was not her intention to kill the deceased: "dat dit ook nie haar motief was om haar vriend te dood nie". If by this it was intended to imply that she acted deliberately in aiming at the deceased but had some other intention in mind, this proposition is untenable. The only reasonable inference to be drawn from the fact that three shots were fired at him is that she intended killing him. If, on the other hand, it was intended to presage his evidence in court in support of his third proposition, it could not have been more obscurely stated.

The third proposition, though variously expressed in his evidence, amounted to this: As a result an "emotional storm" arising from humiliation and frustration, the appellant acted involuntarily or without intent or, if conscious of her conduct, was

unable to distinguish between right and wrong. Her emotions, as he put it at one point, "het haar bewussyn oorspoel." This conclusion, if correct, would - one may assume - support the defence raised, but it was in no way substantiated by the evidence and the reasons for his opinion are unconvincing. This defence counsel, Mr Witz, readily, and wisely, conceded in argument before us. He placed no reliance on this evidence and no more need therefore be said about it.

The State, after the close of the defence case, called, with leave of the court, a psychiatrist, Dr Berman, in rebuttal of the evidence of Mr Redelinghuys and to give his views on the appellant's criminal responsibility (also termed "criminal capacity" and in Afrikaans, "toerekeningsvatbaarheid").

It was common cause that the appellant suffered from no mental illness or mental defect at the relevant time or ever. Lack of criminal capacity, if it existed, is thus to be attributed to some non-pathological cause. As this court has recently said in S v Laubscher 1988(1) S.A. 163 (A) 167 F - G:

"Afgesien van statutêre ontoerekeningsvatbaarheid kan h mens ook nie-patologiese ontoerekeningsvatbaarheid van h tydelike aard ten tyde van die pleeg van die misdaad kry wat aan h nie-patologiese toestand, dws nie aan h geestesongesteldheid of geestesgebrek in die vorm van h patologiese versteuring van sy geestesvermoëns toe te skryf is nie, te wyte sodat hy nie die onderskeidingsvermoë of die weerstandskrag (wils-beheervermoë) gehad het nie. Vir doeleindes van hierdie appèl is dit nie nodig om die vorme wat h nie-patologiese toestand kan aanneem, te omskryf nie."

I assume for present purposes that what was described as an "emotional storm" or "emotional flooding of the mind" can result in loss of criminal capacity, that is, that such an emotional disturbance

could result in a person being, in the words of sec 78 of the Criminal Procedure Act incapable of appreciating the wrongfulness of his act or of acting in accordance with an appreciation of such. However, on this assumption, in my view the court a quo correctly held that criminal responsibility on the part of the appellant was proved, and correctly relied mainly on the evidence of Dr Berman in reaching this conclusion.

Dr Berman was at the time the principal psychiatrist at Sterkfontein Mental Hospital and had since 1979 been involved in numerous court cases of this nature. He has a wealth of experience in the field of mental illness and instability. He advanced a number of persuasive reasons for his opinion that the appellant was criminally responsible. It suffices to refer to the main ones.

Her comments before the occurrence were rightly taken into account. I refer to her statement that if she could not have the deceased nobody would, and, on the day before the shooting, that she had previously contemplated dispatching him in the very manner in which she subsequently did. In the circumstances it is reasonable to infer that such actions were contemplated by her at times when she was frustrated and distraught at his behaviour. Dr Berman pointed out that the shooting involved unzipping her handbag, aiming the revolver at him and firing the three shots, one of which found its mark. These were deliberate acts and, according to Dr Berman, could not have been executed in a state of automatism or unconsciousness, particularly since she had never before used a fire-arm. Though she was obviously under great emotional stress, Dr Berman also considered that there were no grounds for concluding that she was

unable to appreciate the wrongfulness of her conduct or to exercise self-control. These views are confirmed by what took place after the shooting. According to the two eye-witnesses, she appeared calm. After the shooting she did not realise that the deceased had been injured. Her instruction to Mrs van der Merwe at that stage to "go and fetch him etc." indicates determination and persistence on her part to carry out a settled intention. In the light of this evidence it cannot be said that at the critical time the appellant was bereft of her senses or was not on any other ground criminally responsible for her actions.

Having said this, it is nevertheless clear that her shooting of the deceased was the final result of a prolonged period of sustained and mounting mental strain, of which the deceased was the cause. Whether

it was the result of anger, frustration or humiliation, or more than one of these emotions, is immaterial. What is plain is that they must have substantially reduced her power of restraint and self-control. This fact, though highly relevant to the question of sentence, cannot affect her criminal liability. The conviction of murder was, in my view, fully justified.

Dr Berman, as I have said, gave evidence after the defence case had closed. When counsel for the State sought leave to call him in rebuttal, the application was opposed. The court in the exercise of its discretion allowed him to give evidence. Mr Witz submitted that this ruling was irregular and amounted to a misdirection. This argument has no substance. The sec 115 statement, to which I have referred, gave no indication of the nature of the evidence which would be led in support of this

defence. The fact that Mr Redelinghuys was to give evidence was made known to State counsel, and a copy of his report furnished, at the earliest on the day before he was called as a witness. Moreover, it must be borne in mind that a proper assessment of the appellant's mental state and criminal capacity could properly be made only after the appellant had given her evidence. Any conclusions reached by Dr Berman before such stage would in the nature of things have been provisional and it would therefore in any event have been necessary to recall him after her evidence.

After conviction two witnesses were called on the question of sentence. Brigadier Lesley Whitehead, the head of the Security Division of the Soweto City Council, was her employer at the time he testified. He said that, as his private secretary, she was trustworthy and proficient. Her father,

that before she met the deceased, the appellant was a responsible and caring daughter. He and his wife were totally opposed to their relationship but were unable to persuade their daughter to put an end to it. On one occasion he took the trouble to go to the deceased's place of work and ask him to refrain from seeing her until he was divorced from his wife. He was rewarded with a flippant and evasive reply.

The appellant is a first offender and on all the evidence has never, apart from on this occasion, acted violently. One can safely conclude that there is no need for a sentence to be imposed to serve as a personal deterrent. There is little or no likelihood of this experience repeating itself.

In the course of the judgment on sentence

the learned Judge said:

"There are your home circumstances which your father described to me as harmonious and apparently the three daughters and the father and mother lived happily together until this man came into your life, from when you started becoming completely stubborn and did not want to take any advice from your parents. In fact, you told me so yourself. You were completely infatuated by this person and although you knew you were doing wrong by going around with a married man, and although your moral values told you that you should stop, you did not do so and you would not listen to your father and mother. So your home circumstances were beneficial but you did not heed and you did not try to benefit from it."

To my mind this stricture does not sufficiently take into account the prolonged persistence of the deceased and the numerous attempts the appellant did make to put an end to their relationship. Be that as it may, it was not argued that the court had misdirected itself in this or any other respect. On the contrary, the court considered the relevant factors relating to

sentence and the feasibility of imposing an alternative form of punishment. Having regard to the seriousness of the offence, it concluded, correctly in my view, that a term of imprisonment was the only option. But, having regard to the special circumstances of this case, I consider a sentence of 6 years' imprisonment to be unduly harsh. Since the appropriate sentence - as I see it - ought to have been one of 3 years' imprisonment, the disparity warrants a reduction of sentence on appeal.

The appeal is allowed in part. The conviction is confirmed but the sentence is set aside and one of 3 years' imprisonment substituted.

M. E. Kumleben
M. E. KUMLEBEN
JUDGE OF APPEAL

HEFER JA)
 FRIEDMAN AJA) - Agree