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MANGOBE BEN MPONTSHANE APPELLANT

and

THE STATE RESPONDENT

CASE NO. 461/84 /CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MANGOBE BEN MPONTSHANE — APPELLANT

and

THE STATE — RESPONDENT

CORAM: TRENGOVE, CILLIé et BOTHA JJA

HEARD: 15 MAY 1985

DELIVERED: 28 MAY 1985

J U D G M E N T

TRENGOVE/ .....

TRENGOVE, JA

This is an appeal against a death sentence. The appellant was convicted by Shearer J and two assessors, in the Zululand Circuit Court, of the murder of Fikile Mkhabela - the 21 month old daughter of one Neliswe Tembe - at or near Kwambuzi, in the district of Ingwavuma, on 17 November 1983. The court found that there were no extenuating circumstances and the appellant was consequently sentenced to death. The facts are common cause and the sole issue in this appeal is whether the trial court erred in finding that there were no extenuating circumstances.

In my view there is no merit in the appeal.

In/ .....

In short, the relevant facts are as follows. By the middle of November 1983, the appellant and Neliswe Tembe had been living together as husband and wife, at his kraal in the Kwambuzi area, for about a month. He was not the father of Neliswe's baby daughter Fikile. On a day shortly before 17 November, and while they were still living together, Neliswe went with a friend who said that she wanted to consult "a diviner". She left Fikile in the care of her mother at the latter's kraal. The appellant was expecting Neliswe to be back at his kraal the same day, but she failed to return. After a few days had elapsed, he went out in search of her. This was on 15 November. He made enquiries at her

mother's kraal and elsewhere but he could not find her. He then brought Fikile back to his kraal, hoping thereby to induce Neliswe to return to him. On 16 November he went out again. He went from kraal to kraal looking for Neliswe, in vain. During the course of his going from kraal to kraal he consumed a substantial quantity of intoxicating liquor. And when he arrived back at his kraal at dusk he was still under the influence of liquor. That evening he was persuaded by his mother to take Fikile back to her grandmother the following day. Then, in the early hours of 17 November, the appellant went off with Fikile, intending to take her to her grandmother's kraal which was some considerable

distance/ .....

distance away. On the way there, he changed his mind. He decided to take revenge against Neliswe by killing her infant. He then took Fikile, he bashed her head against a tree stump, and he then threw her body into a nearby dam, in order to conceal his crime. He then returned to his kraal. When asked by the trial judge whether the liquor he had consumed the previous day still had any effect on him, when he committed the crime, the appellant said ".... at that stage I would say my body had almost got rid of the effects of liquor although I could feel that there was that slight effect." And then, in cross-examination, the appellant conceded that the liquor "did not play

any part" in his actions. Finally, as to the facts, the post mortem examination revealed that Fikile had died as a result of a head injury.

I now turn to consider whether the trial court erred in finding that there were no extenuating circumstances. Counsel for the appellant contended that the trial court failed to have sufficient regard to the cumulative effect of the facts relevant the question of extenuation, and that it over-emphasised the heinousness of the crime. In my view there is no substance in this contention. It is quite apparent from the judgment on extenuating circumstances, that the trial court had due regard to all the relevant

facts/ .....

facts and circumstances and their cumulative effect. The trial court gave due consideration to the following facts, namely, (a) that the appellant was upset because his relationship with Neliswe had just come to an end; (b) that there had been a minimal degree of premeditation and (c) that the appellant had consumed a substantial quantity of liquor the previous day. But, as against these circumstances, the trial court also took into account, as it was obliged to do (a) that this was a deliberate killing in which the appellant had an opportunity of reconsideration; (b) that he was taking the life of a defenceless infant simply to punish the mother; and (c) that the appellant

directed his mind to the concealment of the crime by throwing the child into the dam. I can find no fault with the approach of the trial court. This was a brutal and callous murder of an entirely innocent and defenceless infant, and the trial court was, in my view, fully justified in coming to the conclusion, on the evidence, that there were no extenuating circumstances.

In the result the appeal is dismissed.

TRENGOVE, JA

CILLIé JA)
)
BOTHA JA)