

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NUMBER 414/89

In the matter between:

THAMSANQA MAKIE

APPELLANT

and

THE STATE

RESPONDENT

Coram: BOTHA, VAN HEERDEN JJA et GOLDSTONE AJA.

Date heard: 23 February 1990

Date delivered: 8 March 1990

J U D G M E N T

GOLDSTONE AJA:

The appellant in this case was convicted by Williamson J and assessors in the Cape Provincial Division on one count of murder and one count of attempted murder. On the count of murder no extenuating circumstances were found to be present and the appellant was sentenced to death. On the count of attempted murder the appellant was sentenced to four years' imprisonment.

The trial was the sequel to events which occurred on the late afternoon of Sunday, 10 August 1986. The appellant and the deceased, who had been living together as man and wife, had an argument. The appellant walked off with their young child. The deceased ran to the home of one Albert Sogaxa. She told him that the appellant had taken her baby. She asked Sogaxa to help her. Sogaxa, his daughter, Yoliswa Ngulwana and the deceased

drove in the deceased's motor car to the home of the deceased's father, one Nyiki. The latter joined them in Sogaxa's motor car and they drove off in search of the appellant and the child. They soon came across the appellant who was walking along the road carrying the child. Sogaxa stopped the motor car and the deceased and Nyiki crossed the road and approached the appellant. According to the State witnesses, the appellant made a movement as if to hand the child to Nyiki. With that he stabbed Nyiki twice with a knife- once on the outer aspect of his left upper arm and once on the back of his neck. The appellant then proceeded to attack the deceased. At some point she was lying on the ground on her stomach. The appellant knelt next to her and stabbed her repeatedly. One of the wounds was fatal.

The version of the appellant was that he had taken the child with him with the consent of the deceased. Whilst he was walking down the road with the child he felt someone grab him from behind. He thought that he was being attacked and he took his knife out of his pocket. The attacker attempted to take his child from him. He stabbed at the person and in

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so doing dropped the baby. Whilst he was stabbing his still unknown attacker, the deceased ran between them and as a consequence he stabbed her.

The Court a quo, for good reasons, rejected the version of the appellant.

No evidence was led in an attempt to establish extenuating circumstances.

The Court was therefore unable to make any findings as to what had led up to the trouble between the appellant, the deceased and Nyiki. The learned Judge a quo expressed his regret that the appellant had not taken the Court into his confidence and, that being so, he held that no extenuating circumstances had been established. Hence, the death sentence.

Some months after the conviction, an application was made in terms of section 316 of the Criminal Procedure Act, 51 of 1977, for leave to appeal against the conviction and against the imposition of the death penalty. In terms of the provisions of section 316(3) of the Act, leave was also sought to lead further evidence relevant to the issue of extenuating circumstances.

The appellant was recalled to the witness stand. He testified about two

serious head injuries he had sustained when he was a youth- one in 1976 and the other in 1981. In the first incident, when he was about 15 years old, he was hit on the head with a hammer. He lost consciousness and required stitches in his scalp. In the second incident, when the appellant was about 21 years old, he was struck with a panga across the bridge of his nose. In the process, he received a head injury and lost his left eye. A glass eye was fitted. According to the appellant, these injuries, especially the second one, resulted in a change to his personality. In particular, he would easily lose his temper and become infuriated by petty matters.

The appellant also testified in some detail concerning the history of his relationship with the deceased and her father. The courtship began in 1983. He was strongly disapproved of by Nyiki. In particular, the latter objected to the fact that the appellant belonged to a different church. Eventually the deceased left home and moved in with the appellant in his parents' home. Some months later the appellant paid to Nyiki the sum of R1200 in respect of lobola. From that time the deceased and the appellant

regarded themselves as a married couple.

The relationship between the appellant and the deceased soon began to deteriorate. Nyiki attempted to intervene but to no avail.

During 1985 the couple had a child. After the arrival of the child the relationship between the appellant and the deceased worsened. The appellant made extended visits to her parents' home. On one occasion the appellant's mother intervened and arranged a meeting with Nyiki. The meeting was singularly unsuccessful and especially so when Nyiki alleged that the R1200 received from the appellant did not represent lobola but damages for having impregnated his daughter. The meeting ended with the appellant calling Nyiki a crook.

It would appear that Nyiki then reported the appellant's alleged misconduct to the "People's Court". The appellant appeared before the "People's Court" where he was not allowed to testify in his own defence. He was sentenced to 60 lashes. The punishment was carried out in front of Nyiki and the

deceased. After 45 lashes had been administered, the deceased intervened and stopped the beating. This was a very degrading and painful experience for the appellant.

On the day prior to the murder, ie. 9 August 1986, the deceased arrived at the appellant's home with their child. The latter was ill and they took him to a doctor. The medicine prescribed by the doctor did not help the child and on the Sunday morning the deceased suggested to the appellant that they take their child to a witchdoctor later that day. The appellant agreed.

Prior to the visit to the witchdoctor, the appellant drank some beer and brandy. Whilst waiting to see the witchdoctor he drank gin and more beer. On the way back after the consultation it began to drizzle. The appellant invited the deceased to spend the night with him. She refused, saying that she had a choir practice. The appellant had heard that the deceased had been seeing another man at choir practices and he was jealous of that association. He became annoyed and grabbed the child from the deceased.

The deceased ran off to find help. It was shortly after that the deceased returned with her father, Sogaxa, and Yoliswa Ngulwana. When Nyiki called the appellant and attempted to take the child, he lost his temper and stabbed Nyiki. He lost control of himself and attacked and stabbed the deceased. He said he intended to hurt her but not to kill her. He then went home. When he had heard that the deceased had died, he gave himself up to the police.

Insofar as the events were within her knowledge, the appellant's mother, Mrs Thelma Makie confirmed them. In particular, she spoke of the appellant's changed personality after the panga attack. She described it as a "drastic change in his behaviour". With little provocation, he would become angry. That evidence was also corroborated by a family friend, Miss Fialiwe Lusa.

Evidence was led also of a psychiatrist and a clinical psychologist. Both were of the view that there was a probability that the appellant had suffered brain damage and more particularly to the frontal lobe area. Dr Richard Oxtoby, a clinical psychologist, adopted the view expressed in a textbook

by William Lishman that persons who had sustained that type of injury

"fail to maintain satisfactory relationships, lack perseverance, were sometimes demanding, disinhibited, interfering and aggressive...

Typically, the patient is subject, under minor provocation, to sudden explosions of violent behaviour which sometimes brings him repeatedly before the courts."

The psychiatrist, Dr Adriana Loen, is employed by the State at Weskoppies Hospital in Pretoria. After the conviction and sentence of the appellant he was referred to Dr Loen by the Department of Justice. Dr Loen agreed with the general approach of Dr Oxtoby and said that it was probable that the stress factors operating on the appellant on the evening in question resulted in an explosive situation in which the appellant lost control of himself.

In a report to this Court, Williamson J states that he found appellant's further evidence to have been substantially truthful. He states also that

if the evidence had all been before him at the relevant time he would have found extenuating circumstances to be present and would have not imposed the death sentence. He suggests that if he were to pass sentence afresh, he would impose a sentence of the order of 12 years' imprisonment, and order it to run concurrently with the sentence imposed on count 2, ie. 4 years' imprisonment.

In terms of section 316(4) of the Criminal Procedure Act, 51 of 1977, the further evidence received by Williamson J is deemed, for the purposes of this appeal, to be evidence taken or admitted at the trial. The result is that this Court is now obliged to consider afresh the question of extenuating circumstances in the light of the further evidence.

The evidence discloses that there were very stressful factors in the life of the appellant. Some of them, it is true, were of his own making. He would appear to have remained attached to the deceased and was jealous of her relationship with another man. There was long-standing conflict with his father-in-law and the wounds, literally and figuratively, of his

experience with the "People's Court". The evidence indicated further that when he stabbed the deceased, the appellant had lost complete control of himself. He was unable to cope with the situation. That inability would appear to have been, at least in part, the result of the brain damage which had been sustained by the appellant. The liquor he had consumed on the day in question may well have contributed to his loss of control. His perception of the provocative behaviour of the deceased and her father was not unreasonable. The cumulative effect of these circumstances, in my judgment, do constitute extenuating circumstances which make the death sentence inappropriate: see S v Meyer 1981 (3) SA 11 (A) at 16G-17B; S v Shoba 1982 (1) SA 36 at 41A-B. Indeed, that was properly conceded by counsel who appeared on behalf of the State.

In my judgment, the sentence proposed by the learned Judge a quo is too harsh. In any event, the appellant has been in the death cell for about three years. The provisions of section 282 of the Criminal Procedure Act, 51 of 1977 do not permit a sentence of imprisonment in the circumstances of this case to be antedated: S v Mgedezi and Others 1989 (1) SA 687 (A)

at 716H- 717C; S v Petersen 1989 (3) SA 420 (A) at 426I- 427B. In order to avoid gross unfairness to the appellant, the period already served by him in prison should be deducted from the period already served by the period of imprisonment to which this Court considers the appellant should originally have been sentenced.

In all the circumstances, I am of the opinion that a sentence of 10 years' imprisonment would have been appropriate. Having regard to the period already served by the appellant that period must be reduced to seven years. That sentence shall run concurrently with that of 4 years' imprisonment imposed in respect of the count of attempted murder.

The order of the Court is as follows:

The death sentence imposed on the appellant in respect of his conviction for murder is set aside and in place thereof he is sentenced to seven years' imprisonment, such sentence to be served together and concurrently

with the sentence of 4 years' imprisonment imposed on the count of
attempted murder.

A handwritten signature in dark ink, appearing to read 'R. J. Goldstone', is written over a horizontal line.

GOLDSTONE AJA

BOTHA JA)

VAN HEERDEN JA) Concur.