

500/89

N v H

MZIMPHLE JAMES PAPI MBHELE

Appellant

and

THE STATE

Respondent

SMALBERGER, JA :-

500/89

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MZIMPHLE JAMES PAPI MBHELE

Appellant

and

THE STATE

Respondent

CORAM:

SMALBERGER, KUMLEBEN, JJA,

et FRIEDMAN, AJA

HEARD:

9 MARCH 1990

DELIVERED:

16 MARCH 1990

J U D G M E N T

SMALBERGER, JA :-

The appellant was convicted of murder in the Natal Provincial Division by BROOME, J and two assessors sitting on circuit in Scottburgh. The

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majority of the court held that there were no extenuating circumstances, and he was sentenced to death. The present appeal lies, with leave of the judge a quo, against this finding and the sentence imposed upon the appellant.

The evidence establishes that the appellant fatally stabbed Mungwe Stephen Zobonele Khumalo ("the deceased") in the following circumstances. The deceased was in the company of his sister, Nomsa, in Ixopo. They were approached by the appellant. The appellant deliberately trod on the deceased's foot. He called the deceased "a dog", grabbed hold of him and shook him. The appellant then produced a knife from his pocket which he brandished in front of the deceased's face, saying that he would "get him". When asked by Nomsa why he was behaving in this fashion the appellant responded by saying "You know". The

appellant then closed and pocketed his knife and walked away. The deceased thereafter proceeded to a shop to buy paraffin. He later returned to the bus stop where Nomsa was waiting for him. There they were again approached by the appellant. He had a knife in his hand. The deceased retreated in front of the advancing appellant. The appellant stabbed the deceased twice on the left side of his body. Nomsa asked the appellant why he had stabbed the deceased, but received no reply. The deceased collapsed and Nomsa ran away. She was chased for some distance by the appellant. After the appellant gave up the chase Nomsa returned to where the stabbing had taken place, and assisted in the deceased's removal to hospital. According to Nomsa, she was not aware of any enmity between the appellant and the deceased, and she could provide no reason for the assault upon the deceased. There is no

suggestion that liquor played any part in the appellant's behaviour.

The post-mortem report revealed that the appellant had stab wounds of the left arm and the left chest in the vicinity of the clavicle. The latter injury had penetrated the left lung, and the cause of the deceased's death was haemorrhage from a lacerated subclavian artery and vein.

The appellant is a relatively unsophisticated person. He was 28 years of age at the time of the incident. His claim that he had acted in self defence was rejected by the trial court. The appellant did not provide the court with any acceptable explanation for his seemingly irrational behaviour.

The majority of the trial court found that the appellant had not taken the court into his confidence, and had provided no explanation for his

stabbing of the deceased. He had deliberately stabbed an unarmed person. There was no indication of what he was alluding to when he said "You know" to Nomsa after his first encounter with the deceased. In the absence of any acceptable explanation for the appellant's conduct there were no factors present to abate his moral blameworthiness. They accordingly held that he had not discharged the onus upon him of proving extenuating circumstances.

I am mindful of the fact that this Court can only interfere with the majority finding of the trial court if such finding is vitiated by misdirection or irregularity, or is one to which no reasonable court could have come. The latter two grounds do not arise in the present matter. There remains to be considered whether there was any misdirection.

As I have previously mentioned, the appellant is a relatively unsophisticated person. He is perfectly sane. He stabbed the deceased in a public place in full view of others, seemingly for no apparent reason. He was not under the influence of liquor at the time. On the face of it his behaviour was totally irrational. If his conduct was purely an act of thuggery he could have stabbed the deceased on the first occasion. Yet he refrained from doing so. When asked about his threatening behaviour by the deceased's sister he replied "You know". This must be taken as a reference to something that had happened in the past - something known to the deceased and his sister. He then left but later returned to stab the deceased. It is true that the appellant failed to take the trial court into his confidence. None the less, the probabilities suggest that something operated

on his mind, that he nurtured some deep-seated grievance against the deceased of sufficient moment to cause him to act as he did. His conduct is not reasonably explicable on any other basis.

Significantly the appellant did not stab the deceased at their first encounter, as he presumably would have done if his conduct had been premeditated. On the probabilities there would seem to have been some building up of resentment or anger between the first and second encounters, to which the appellant ultimately gave vent by stabbing the deceased. These were essentially the views of the dissenting member of the trial court. The majority do not appear to have given due weight to these considerations, and were in my view unduly influenced by the appellant's failure to explain his conduct. To that extent they misdirected themselves. We are therefore at large to come to our

own conclusion on the question of extenuation.

Although very much a border line case, on an overall conspectus of the evidence, and with regard to the considerations mentioned plus the fact that, as found by the trial court, "this was a clear case of dolus eventualis", I am of the view that extenuating circumstances were present.

In the result the appeal must succeed, and the sentence of death must be set aside. In my view an appropriate sentence, having regard to all relevant considerations, would be one of 10 years' imprisonment.

The following order is made:

The appeal is allowed. The finding of the court a quo that there were no extenuating circumstances is set aside, as is the sentence of death. There is substituted for such sentence one of 10 years' imprisonment.

JUDGE OF APPEAL

J W SMALBERGER

KUMLEBEN, JA)
) CONCUR
FRIEDMAN, AJA)