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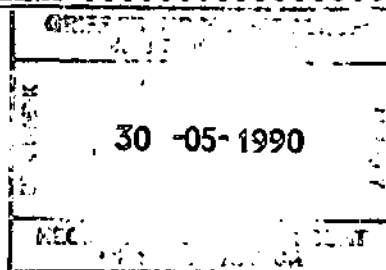
IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MAPELO CECIL SISILANA APPELLANT

and



THE STATE RESPONDENT

CORAM: JOUBERT, SMALBERGER et KUMLEBEN JJA

HEARD: 23 MAY 1990

DELIVERED: 30 MAY 1990

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

This appeal is restricted to the question whether the trial court was correct in finding that there were no extenuating circumstances.

The appellant was convicted of murder in the Witwatersrand Local Division of the Supreme Court (Irving Steyn AJ sitting with two assessors). He was sentenced to death. Leave to appeal against the finding that there were no extenuating circumstances was refused in the court a quo but granted by this court.

It is common ground that the appellant shot the deceased in the chest at close range with a 12 bore repeater shotgun. Death was instantaneous or virtually so. The appellant's defence was that the gun had been accidentally discharged during a scuffle as he

tried to wrest it from the deceased. This story was with good reason rejected. The conviction was based on the evidence of the State witness, Mr Joseph Phalandwa, who was the sole eye witness to the incident. Briefly, his evidence was to the following effect.

The three of them - the appellant, the deceased and Phalandwa - were members of a special unit of the S A Police. On the morning in question he was on guard duty at a gate. The other two were with him. The appellant left them to cadge a cigarette. Before doing so, he placed his shotgun against some sand bags. It was loaded with cartridges in the chamber and magazine and its safety catch was off. The deceased decided to render it safe. He removed all the cartridges and put them on a drum next to the sand bags. As he was doing so, the appellant returned. He asked the deceased what he thought he was

doing with his fire-arm, told him that he did not know how to use a gun and swore at him saying - indelicately and ungrammatically - "Die is die stront wat ek nie daarvan hou nie". With that the appellant reloaded the gun, cocked it and aimed at him (Phalandwa). He took avoiding action by diving to one side. The appellant then aimed at the deceased and shot him. He fell down. The witness ran away to report the matter. (According to the regulations one special constable is not permitted to handle or use another's fire-arm.)

The evidence of the appellant, as I have said, fell to be rejected where it was contradicted by other evidence. Nevertheless, certain facts testified to by him, which stand uncontroverted and are unrelated to his bogus defence, are acceptable and to an extent relevant. To become a special constable in the "Reaction Unit" he underwent a six week course intended

to train him to combat civil unrest. He was not, one infers, an experienced or well trained policeman. After the deceased had fallen, face down and fatally wounded, the appellant turned him over onto his back and took off the shoes that the deceased was wearing. The appellant made no attempt to run away from the scene but waited until the ambulance arrived. He had known the deceased for about three months before the incident and there had been no bad blood or problems between them.

In the main judgment on the merits the court, after accepting the evidence of Phalandwa, and in the course of recounting it, said the appellant:

"shouted as he was approaching them: 'Wat maak julle met my wapen?' Joseph stated that they did not reply and the accused then said: 'Dié is die stront waarvan ek nie hou nie' which indicated that he was very angry that the deceased was 'fiddling' with his gun."

(My underlining.)

Later in the judgment, as regards the reason for shooting, the court observed:

"According to his (Phalandwa's) evidence it is clear that the accused lost his temper because the deceased had unloaded the accused's gun, exhibit 1, and he, the accused, was not prepared to stand for that, so he picked up the cartridge from the drum and loaded the gun and shot the deceased."

(My underlining.)

The conclusion that the appellant in a fit of anger lost his power of self-control is fully borne out by the evidence. There can be no other reasonable explanation for his actions and choice of language. There was, as mentioned, no animosity between them and no other motive for killing him. The appellant did not attempt to run away or avoid detection. The most plausible explanation for his turning the deceased onto his back and taking off his shoes was that at that stage, that is, immediately after the shot was fired,

is that he was concerned about his victim. This suggests - and I put it no higher than that - that his anger was short-lived, and was followed by regret, if not contrition. Moreover, the fact that he first aimed the gun at Phalandwa, who was in no way involved with the handling of it, indicates that, though he was plainly accountable for his actions, he was, as a result of anger, not behaving rationally. I should add that the appellant, when giving evidence, denied that he was angry with the deceased. This is understandable bearing in mind his (false) defence that the shot was fired accidentally. The court, quite correctly, was not swayed by the appellant's ipse dixit from making a positive finding to the contrary despite his denial.

After conviction counsel for the defence predictably urged that the appellant's state of mind

and lack of motive ought to be taken into account as an extenuating factor. The court, however, in its judgment on extenuating circumstances, held that it was precluded from doing so. The reason for this volte-face being, so it was said, that the appellant had failed to give evidence after conviction, retracting his denial and confirming that he was in fact angry. This reasoning is, with respect, unsound. All the grounds for initially - and correctly - finding that anger prompted his action, still held: no further evidence was led to refute or cast any doubt on that finding. In the circumstances for the appellant to have re-entered the witness-box to state that he acted in anger would have been an act of supererogation. To discard the earlier finding because he failed to do so amounted to a misdirection.

Miss Marlow, who appeared for the appellant

at the trial and on appeal before us, again relied on the fact that appellant's anger accounted for his conduct and that, so she submitted, reduced his moral blameworthiness. Since the court a quo misdirected itself in this regard, this court is entitled - and in fact obliged - to make its own assessment of the significance of this factor. Bearing in mind all the considerations to which I have referred, I consider that this submission is well-founded. His temporary lapse of self-control, notwithstanding its fatal consequences, is in marked contrast to a case in which the killing is planned; is done for a selfish or reprehensible motive, or is callously executed.

In deciding on the sentence of imprisonment to be substituted, particularly three factors are to be taken into account. The appellant has no previous convictions, was apparently a conscientious and good

worker up until the time of this occurrence and has been in custody for over two years. Mr van Vuuren, who appeared for the respondent, when invited to do so, indicated that in the circumstances a sentence in the region of 12 to 15 years' imprisonment would be appropriate. Bearing in mind the time he has spent in prison, in my view, the ends of justice will be served if a 10 year term of imprisonment is imposed.

The appeal succeeds. The finding that there were no extenuating circumstances is reversed and the sentence is altered to one of 10 years' imprisonment.

M E Kumleben

M E KUMLEBEN
JUDGE OF APPEAL

JOUBERT JA) - Agree
SMALBERGER JA)