194/55.

194/55.

G.P.-S.384-1932-3-10,000.

U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

[illegible]

Appellant.

versus

THE [illegible]

Respondent.

Appellant's Attorney / *Prokureur van Appellant* .... *Respondent's Attorney* / *Prokureur van Respondent* ....

Appellant's Advocate / *Advokaat van Appelant* .... *Respondent's Advocate* / *Advokaat van Respondent* ....

Set down for hearing on:— / *Op die rol geplaas vir verhoor op:—* [illegible] 1955

EDL (3, 4, 5, 6, 11)

Appeal dismissed, - sentence confirmed.

[illegible] Regr. 3/12/55.

vd Heever, Hoexter, Fagan, Steyn, & Hall JJA

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

FREDERICK STEPHEN COCKERAN
Appellant

and

REGINAM Respondent

Coram:- Van den Heever, ~~XXXXXXX~~ Fagan, Steyn, de Beer et Hall, JJ.A.

Heard:- 28th November, 1955. Delivered:- 5/12/1955.

VAN DEN HEEVER, J.A. J U D G M E N T.

Appellant was tried in the Cradock Circuit Local Division before Jennett, J., and assessors on an indictment for murder. He was convicted of culpable homicide and sentenced to three years imprisonment with compulsory labour. Leave having been obtained he appealed to this Court against the severity of the sentence.

The appellant is 42 years of age and his wife, whose death was the subject matter of the charge against him, was 40. At the time of her death they had been married for some 9 years. During their marriage, it would appear, appellant had had an affair with

2/ another .....

another woman, but it is clear from the evidence and the trial Court found that at the time of the death of deceased the couple were on good terms with each other.

Appellant was station master at Dassiedeur, a rather isolated spot. Shortly before her death deceased was bitten by a dog, as a result of which she had to go to hospital at Cradock with a septic foot. She stayed in hospital for nine days and returned home on the 14th of February, 1955. Appellant who had to fend for himself in the meantime, was overjoyed and welcomed the idea of eating well again. Another ground for satisfaction was that he was on the point of being initiated in a masonic lodge, something to which he had aspired for years.

The next evening before he went home from work he and some other railway workers had their hair cut by one Meyer. They adjourned every now and then for a drink in a neighbouring empty house, but appellant was not noticeably under the influence of liquor. After the hair-cut Meyer asked for a loan of appellant's saloon rifle. The whole party then proceeded to appellant's home where his wife was busy serving the evening meal.

Appellant served some wine to celebrate his wife's return. He went into an adjoining room, came back and handed Meyer some cartridges. His wife, the real owner of the rifle, objected to his lending it to Meyer, who, she said, became irresponsible when drunk. Both Meyer and appellant denied this. All this was done and said in good spirit; the atmosphere was jovial. In order to reassure his wife before handing the gun to Meyer appellant brought the rifle out of an adjacent room and said something to the effect that it could not even shoot. It would appear that he withdrew the bolt once or twice, satisfied himself by a cursory glance that it was not loaded, pushed the bolt home, drew back the firing-pin, said "Amy, look here", held the gun in an aiming position and pulled the trigger. A shot went off and his wife, who was sitting at the table dishing up, slumped forwards over the table. She was killed instantly, the bullet having passed through her brain. Appellant had shot her at a distance of about ~~three~~ six feet.

The men all ran out and did not return to that dining-room until the police arrived. I do not think there is any point in referring to

appellant's actions after the tragedy save to say that he was distraught. He reproached himself that he, a trained soldier who had been taught never to point a gun towards a human being, should have done so and killed his own wife.

There is evidence, not denied by appellant, that a month before these events he went through exactly the same procedure with his wife. On that occasion, however, the incident closed with a harmless click of the rifle. The deceased regarded it as a joke and laughed.

It is clear from the evidence that the rifle had been defective for some time prior to the accident. It did not consistently withdraw the cartridge from the breech. Appellant used that rifle more than anyone else. He should have been aware of its vagaries, but may have had more practice than others in overcoming them.

In regard to the events immediately before the shooting, the following observations in the judgment of the Court a quo:

"In the diningroom the accused withdrew the bolt and

5/ closed .....

closed it again.. He admits that he did not look again to see whether any bullet remained in the chamber or had been withdrawn into the channel behind the chamber. He admits that had he looked he would have seen if wither of these things had happened. There was a bright light in the diningroom. He relied for the belief that the rifle was unloaded upon an action which, he must well have known, provided, to put it mildly, a most uncertain test in the case of this rifle."

This statement is fully borne out by the evidence; there can be no quarrel with it.

Appellant says that he merely pointed the rifle at deceased's head. He admits to being a fair shot. The following questions were put to, and the corresponding replies elicited from appellant in cross-examination.

"When you pulled the trigger, as you must have done, the rifle was pointing directly at your wife's head? - In that direction.

Right between her eyes? - I didn't take aim but I pointed it at her.

You told us you can remember seeing her blue eyes behind her glasses? - Yes.

Did you point the rifle at her eyes? ..... At her head - not at any particular spot."

Appellant admits that in a jocular way

6/ he .....

he intended to frighten his wife. He had asked her to look. Except for inserting a cartridge into the breech he had taken every step to make the play as realistic as possible, even to cocking the rifle. The inference seems to me inescapable, therefore, that he took deliberate aim right between her eyes, exactly where he hit her at a range of six feet. I am confirmed in this view by appellant's conduct after the shot went off. He knew without looking that she was dead because he knew where he had aimed and where he had hit her.

Mr. Addleson, who appeared for appellant, maintained that there were a number of strong mitigating factors which the learned trial Judge failed to take into consideration or to which he did not give sufficient weight in assessing punishment. Counsel mentioned: the loss and grief suffered by appellant at the ~~lo~~ death of his wife to whom he was happily married; the shock he received because of the circumstances of his wife's death; the social stigma and humiliation consequent upon his arrest and trial; the effect of a sentence of imprisonment upon appellant's career; the financial loss; his clean record; his relative lack of culpability in bringing

about the death of his wife.

It was put to Counsel during argument that these considerations were presumably advanced in the Court a quo. That was not disavowed. The learned Judge states that he had carefully considered all that was said in mitigation by Counsel and all the circumstances of the case. In fact the circumstances advanced as mitigating stare one in the face upon reading the record and could hardly have escaped the learned Judge's attention.

I must confess my inability to understand Counsel's reference to appellant's relative lack of culpability. That he might have committed a more heinous crime is no mitigating circumstance. During argument reference was made to R. v. Nsele, (1955 (2) S.A. p. 145). Counsel seemed to assume that constructive intent can no longer support a charge of murder. That is to misunderstand the reasons for judgment in that case. What was said was that "stupidity lack of foresight, negligence ..... cannot be a substitute for the intent, actual or constructive, which is requisite to support a charge of murder". My brother

Schreiner (at p. 148) put it very clearly when he said:

> "a man should not be found guilty of murder unless he had the intention to kill either in the form of an actual will to kill or in the form of an intention to do an act known to be dangerous to life, reckless whether it causes death or not ....."

The Court a quo did not expressly deal with the question whether the Crown had succeeded in establishing such constructive intent. On the evidence it could reasonably have come to that conclusion, for the trial Court found that, appellant must have known that the test he applied to ensure that the rifle was harmless was most uncertain. Presumably, therefore, the Court found in appellant's favour that although the steps he took to ensure that the rifle was unloaded were hopelessly inadequate, he was in fact so assured and therefore did not contemplate that his act was dangerous to life.

In a case like this it is difficult to assess the extenuation which should be ascribed to the remorse and shock suffered by the person whose act caused the death of one near and dear to him. In the nature of things it is usually one of the family circle who falls a victim to the reckless driver of a motor car or the reck-

less handler of firearms. If natural affection has failed as a deterrent in advance it goes to show that external sanctions are necessary. There is force in Mr. Barrett's statement that so many tragedies are sought to be explained by the phrase: "I did not know it was loaded," and remorse may be poignant, but always too late.

The approach to an appeal against the severity of a competent sentence presents a notoriously difficult problem. As has often been stated, the assessment of the punishment to be imposed is peculiarly within the discretion of the trial Court and a Court of appeal should be slow to interfere. In the present case there has been no misdirection on the facts or on the law and, as I have said, it would appear that the learned trial Judge has taken into consideration all the factors now suggested in extenuation to us.

In Rex v. Zulu and Others, (1951 (1) S.A. 489, 494) Selke, J., has usefully collected a number of judicial dicta as to when a court of appeal would be justified in reducing an unduly severe sentence. In the present case it cannot be said that the sentence "is out of all proportion to the magnitude of the offence".

In Zulu's case the learned Judge ~~sat~~ came to the conclusion that the various phrases used all amount to much the same thing, namely "is the sentence so severe that it ought not to have been imposed". In certain types of cases it would be relatively easy to conclude that the sentence is unduly severe in that sense, for example where an accused person with a bad record has stolen a pound of sugar. Whatever terms we use, one element must always be of a subjective nature namely the appeal court's own notion of what an appropriate sentence would be. But that cannot be the only criterion, for it has often been said that a court of appeal cannot substitute its own discretion for that of the trial court. Before it can interfere it must be satisfied that the trial court was wrong in imposing so severe a sentence. In other words the disparity between its own estimate of a fit punishment and that imposed by the trial court must be so great as to exceed a difference attributable to the exercise of reasonable discretion. ~~[In the last resort it comes down to this, then, that the appeal court considers the sentence so severe that no reasonable man ought to have imposed it.]~~

If I had sat as Judge of first instance

it is ~~pmx~~ probable that I would have imposed a lighter sentence, but it would have sounded in imprisonment, not in a fine. I do not think there would have been any point in suspending a portion of the sentence, as the only reasonable condition to impose would have been that the appellant is not convicted of pointing a firearm at any person during the period of suspension. Such a condition to deter the appellant should hardly be necessary and would not be conducive to deterring others.

I cannot say that the sentence awakens in me a sense of shock or outrage. A comparison with sentences imposed on reckless drivers who cause the death of their passengers is not quite satisfactory. A driver who takes a chance on the road takes a risk that ~~xhm~~ an accident might occur. Fortunately such accidents are not always fatal. The appellant, when he played a kind of "Russian roulette" with his wife, must have realised that if he made a mistake, the consequences must almost inevitably be fatal. ~~[As I have pointed out the appellant is not almost innocent of murder.]~~

The consequences of the sentence of imprisonment to appellant may have induced me to impose a

lighter sentence. The learned trial Judge may have considered that the imposition of an effectively deterrent sentence was called for. In that case I cannot say that he did not exercise his discretion in a judicial manner. South Africans are fast becoming trigger happy. Emotion should not be a guide in a case such as this and I can find no rational ground upon which I can interfere with the sentence imposed by the Court a quo.

In my judgment the appeal is dismissed and the sentence confirmed.

J.H.D.H. de Beer JA.

Fagan, J.A. — dissents
Steyn, J.A.
de Beer, J.A.
Hall, J.A. } concur.

At 9.30 a.m. - 25.8.1955.

Mr. Addleson: Does your lordship wish the accused to be in the dock for the verdict?

JENNETT, J.: Yes, Mr. Addleson.

JUDGMENT AND VERDICT.

JENNETT, J.:

On the evening of Tuesday the 15th February of this year in the station master's house at Dassiedeur, the wife of the accused was killed instantaneously by a .22 bullet which entered her skull on the inner side of the left eye and caused contusion of the brain. The shot that caused her death was fired by the accused from a spot about six or so feet from the deceased on her left hand side.

Before dealing with the actual circumstances of the shooting it would be as well if I review shortly the relationship between the accused and the deceased prior to the tragedy as disclosed by the evidence.

The accused is 42 years of age and the deceased was 40 years old. They got married in 1946 and had lived at Dassiedeur since 1949. According to him their married life had been happy. Botha, a relieving foreman at Dassiedeur, had had his meals with them for about six months preceding the tragedy, and had at some earlier time boarded with them; according to his evidence they appeared to be a couple on good terms with each other. We see no reason to disbelieve his evidence.

On Monday, the 14th of February of this year the deceased had returned from the hospital at Cradock where she had been for about nine days with a septic foot. The accused says he visited her there from time to time as often as he could and he took her presents on those visits. Sister Nel gave evidence which supports his testimony in

this regard. According to her evidence they appeared to be a perfectly happy couple.

On this evidence we can come to no other conclusion but that the accused and deceased lived happily together. Moreover, again according to the evidence, accused had been granted leave commencing about the 1st of March which he and the deceased had planned to spend together.

After six o'clock on the evening of the shooting one Meyer, a railway patrolman living at Dassiedeur, had performed the services of barber for the accused, Botha and Wright, a learner foreman recently arrived at the station. While Meyer was busy with the haircutting the deceased had come to the group at the station and after some friendly words had arranged that accused, Botha and Wright would have supper at her home at about 8 p.m. Accused and Meyer had some three brandies during the haircutting operations and when these operations were over the four men had gone to the accused's home. Meyer had gone with the others because he had asked the accused for a loan of a .22 rifle and accused had agreed to lend it to him there and then.

Botha arrived at the house a few minutes after the others. While they were all in the diningroom accused had opened a bottle of wine to celebrate his wife's return home. Accused then entered upon the process of handing over the rifle to Meyer. He first handed Meyer some bullets which Meyer put into his pocket, and he then took the rifle into his hands. Accused says he fetched the bullets from the bedroom and then took the rifle by reaching for it into a spare room that leads into the diningroom. Meyer says accused went into the spare room where he obtained the rifle and the bullets. Botha's

evidence is that he saw accused emerging with the rifle from the bedroom.

The Crown does not rely on Meyer's evidence where it conflicts with that of the other witnesses. With that attitude the Court has no reason to disagree for reasons which I do not think it necessary to detail now.

At that stage the deceased was seated at the diningroom table and had already placed food on three plates. When she realised that accused intended lending the rifle to Meyer she voiced an objection, alleging that trouble would result as she claimed that Meyer had on a previous occasion shot at some coloured youngsters. Meyer denied the allegation and accused supported him. The accused then manipulated the bolt mechanism of the rifle in the manner normally used to eject any bullet in the chamber, pulled back the cocking pin, raised the rifle, aimed it at deceased's head and stated. "Kyk hier, Amy, die geweer kan niks maak nie" or "die geweer kannie skiet nie". His wife looked up, he pulled the trigger and the fatal shot was fired. Deceased slumped over the table and it is clear she died instantaneously. Accused exclaimed: "O, God, ek het nie my vrou geskiet nie". All the men went out of the room at once. The police were telephoned for and also a doctor. They arrived an hour or so later.

Accused according to some of the evidence was crying and upset when they arrived. To one or two of the persons who arrived he said he had been in the Special Service Battalion and whilst in the Army he had been taught not to point a gun at anyone and that in spite of that he had done so to his wife.

Before I consider the Crown's main contentions I should say a word about the rifle. It is one that was used at times by the accused, the deceased, Botha and

Meyer. Head Constable Nel, the firearms expert, stated that it was not a good rifle. It has no safety catch. It cannot be fired if the bullet machanism only is operated. It can only be fired if the cocking pin is specially drawn back. When that is done a slight turn of the end of that pin will put the rifle on safety. The trigger pull is lighter than that of the usual rifle of the same calibre. In addition the ejector mechanism is defective. The retraction of the bolt mechanism generally withdraws the bullet from the chamber but very often it does not eject it out of the channel behind the chamber and on occasions the bullet lies in that channel in such a position that the closing of the bolt will re-insert the bullet in the chamber. On most occasions, however, it falls out of the chamber and lies in the channel in such a position that closing the bolt will not effect the re-insertion of the bullet into the chamber. In view of the weight of the lead of the bullet the feature just described is what one would expect. According to Botha on about one occasion in twenty the withdrawal of the bolt does not move the bullet from the chamber. Botha says he and the accused had discussed that feature. Botha says he did not know of the safety position created by turning the end of the cocking pin as described by Head Constable Nel. Accused says he too did not know of it.

For the Crown it is claimed that the accused committed murder when he fired the shot. The defence on the other hand claims that the necessary intention to kill has not been proved and that the proper verdict is one of guilty of culpable homicide. The Crown is handicapped by the complete absence of any evidence disclosing a motive for the accused to effect the death of the deceased.

Counsel for the Crown contends that the accused loaded the rifle or knew it was loaded. Support for that contention is claimed on four grounds: Botha saw accused emerge from the bedroom with the rifle; the bullets were kept in the bedroom and the rifle in the spare room. It was not necessary for the accused to take the rifle to the bedroom and, so the Crown submits, from the fact that he did so must be inferred the fact that he took it there to load it. In our view Botha may well be genuinely mistaken but in any event it is highly unlikely that the accused would have risked loading the rifle - an operation accompanied by a distinct noise in the case of the rifle concerned - with so many people near and in a position to hear that noise. Then says the Crown the accused without ascertaining that his wife was dead, telephoned to obtain a doctor alleging that she was. Accused says he asked Botha whether she was dead and that Botha replied affirmatively. Botha says that his reply was that he did not know. It seems to us to be a slender ground for inferring that the accused intended to kill her that he assumed, if he did, without verifying the fact, that his wife was dead.

The third ground relied upon by the Crown is that the accused's actions designed to ensure that the rifle was unloaded were so inadequate, having regard to the defects of the rifle, that he could not have meant to ensure that it was unloaded. I shall later describe those actions. It seems to me that this argument is answered by what is probably the strongest feature in favour of the defence, namely, the fact that the accused did take a step that had at least a fair chance of effecting the unloading of the rifle if it was loaded.

Finally it is said by the Crown that to account for the presence of a bullet in the rifle the accused invented a false story. According to the accused he had gone to Meyer's house on the previous evening with the rifle. On the way he had seen a big hawk, he had loaded the rifle and approached the hawk with a view to shooting it, but it had flown off before he could effect a shot. He had released the cocking pin but did not remember unloading the rifle. Accused says he told Meyer he had seen a hawk; Meyer says accused said he had shot a hawk. It is necessary only to say that in this conflict we cannot be sure that the accused's version is not the true one. In any event there is the possibility that the deceased, who used the rifle frequently, had loaded it during the Tuesday and failed to unload it.

In the result it seems to us that the grounds relied upon by the Crown are not singly or cumulatively capable of sustaining the burden of providing an irresistible inference that the accused either loaded the rifle that evening or knew when he took it up that the rifle was loaded. In that view the onus of proving that the accused had the necessary intention to kill has not been discharged.

In the diningroom the accused withdrew the bolt and closed it again. He admits he did not look to see whether any bullet remained in the chamber or had been withdrawn into the channel behind the chamber. He admits that had he looked he would have seen if either of these things had happened. There was a bright light in the diningroom. He relied for the belief that the rifle was unloaded upon an action which, he must well have known, provided, to put it mildly, a most uncertain test in the case of this rifle. While it is clear, therefore, that the Crown cannot possibly succeed on the charge of

murder, it is equally clear that the accused is guilty of culpable homicide in accordance with his plea.

In the result a verdict of guilty of culpable homicide is now entered. To that verdict will be added the words: assault with intent to do grievous bodily harm is not involved.

Mr. Rogers: The accused has no record, my lord.

Mr. Addleson: I do not wish to tender any further evidence, my lord, but I wish to address the Court briefly in mitigation.

Mr. Addleson addresses the Court.

JENNETT, J.: We would like to adjourn for a short while to consider the points that have been raised by Mr. Addleson.

Court adjourns at 10 a.m.

At 10.10 a.m. - 25.8.1955.

JENNETT, J.:

We have carefully considered all that was said in mitigation by the accused's Counsel. I have earlier this morning described how the accused caused the death of his wife. I am afraid that I have taken a very serious view of this case. The pointing of a firearm without more is penalised by Law by imprisonment that may extend to six months.

My assessors have persuaded me to reduce the sentence I had decided to impose. I willingly yield to their persuasion because it is not a pleasant task at any time to sentence anyone. I must frankly confess that I found the decision as to the sentence in this case the most difficult one in respect of sentences I have ever had to make.

Having regard to all the circumstances in this case I feel compelled to sentence the accused for his