IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

Record.

In the matter between :-

EMLYN AUBREY OWEN Appellant

and

R E G I N A Respondent

Coram:Schreiner, Fagan, de Villiers, Brink et Beyers, JJ.A.

Heard:7th December, 1956. Delivered: 13-12-1956

J U D G M E N T

SCHREINER J.A. :- The appellant was convicted of murder by a court consisting of THERON A.J. and two assessors and, no extenuating circumstances being found, was sentenced to death.

A special entry was made in the following terms :-

"Whether the proceedings at the trial were irregular and not according to law in as much as

(a) Immediately after the accused was found guilty of murder the Crown proved his previous convictions.

(b) Thereafter the accused gave evidence on these previous convictions and arguments were addressed upon the issue of whether any extenuating circumstances were proved.

(c) That only thereafter the Court considered the issue of extenuating circumstances and found none proved."

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The learned judge also granted leave to appeal generally but, although counsel for the appellant did not abandon the appeal on the merits, he rightly recognised that it was barely arguable and advanced no arguments beyond those contained in his written heads of argument. The Crown was not heard on the merits. The reasons for the verdict given in the judgment of THERON A.J. are entirely convincing and call only for the comment that there does not seem to have been any good ground for granting leave to appeal.

The special entry stands on a different footing. In Regina v. Ndhlovu (1954(1)S.A.455) the trial court had already come to the conclusion,provisionally, that there were no extenuating circumstances when the presiding judge enquired of the prosecutor whether there were any previous convictions, with the idea that if there were none it might still be possible to find extenuating circumstances. Previous convictions were then proved, after which the court found that there were no extenuating circumstances. A special entry was made but this Court dismissed the appeal, holding that the appellant had not in any way been prejudiced . That case was, of course, very different from the present one. Here the record of previous convictions was put in by the Crown without any invitation by the trial judge to do so,

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and the appellant was then recalled by his counsel to explain how he had come to commit some thirteen offences in seventeen years. But at the end of the judgment in Ndhlovu's case CENTLIVRES C.J. said, "During the course of the argument the "question was raised whether it is permissible in every case "for the prosecutor to prove the criminal record of a person "convicted of murder when the question of extenuating cir- "cumstances is raised. We leave this question open for fur- "ther consideration. We may, however, add that youthful "inexperience has been taken into consideration in consider- "ing whether extenuating circumstances exist and that if this "has been correctly done it may follow that the character "of a person convicted of murder is also a relevant factor. "If it is, then convictions both before and after the date "of the murder might be relevant."

The Crown's contention on appeal was that, whenever in the exercise of the discretion which he possesses (see Regina v. Malopi, 1954(1)S.A.390 at page 395) the trial judge has allowed the question of extenuating circumstances to be investigated separately after a verdict of guilty has been returned, the Crown is entitled as of right to prove the accused's criminal record. For this contention

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counsel relied upon section 301 of Act 56 of 1955.

The genefal rule is stated in section 300 as follows:-

"Except where otherwise expressly provided by this Act, no evidence shall be admissible during the trial of any accused for any offence to prove that he has been previously convicted of any offence, whether in the Union or elsewhere, and no accused shall, if called as a witness, be asked whether he has been so convicted."

Then section 301, so far as material, provides -

"Where a person indicted before a superior court for any offence, has been previously convicted of any offence..... the prosecutor may, if the accused has.....admitted that he has been so previously convicted.....and if he has pleaded guilty to or has been found guilty of the offence, before sentence is pronounced, tender the admission in proof of the previous conviction....."

Sections 302, 303 and 304 provide for the manner of proof of previous convictions where these have not been admitted by the accused.

The Crown's contention was that once a plea or verdict of guilty has been returned the Crown is entitled forthwith to prove previous convictions, regardless of whether or not the case is one of murder and an issue of extenuating circumstances remains to be decided.

I do not think, however, that -

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this contention is valid. No doubt section 301 and the following sections do give the prosecutor certain rights and powers and there is not any express limitation upon the time when they may be exercised save that it must be after the plea or verdict of guilty and before sentence. The sections are concerned principally with the manner in which previous convictions may be proved and not with the precise conditions under which proof of the convictions may be used by the Crown. Substantially identical sections existed in Act 31 of 1917 before the procedure relating to extenuating circumstances was introduced. They were not designed for use in relation to that procedure but their application must be fitted into it. Now whenever the question of extenuating circumstances is dealt with at the same time as the question of guilty or not guilty there is no room for the proof of previous convictions until after there has been a finding on whether there are extenuating circumstances or not. It is only when the two issues have been separated that there will be an opportunity for proof of previous convictions after the conviction and before the decision on extenuating circumstances. According to the decision in Regina v. Malopi (supra) the trial judge in the exercise of his discretion decides whether the issues shall be tried separately or together; so that

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on the Crown's present contention it would depend on the judge's ~~discretion~~ decision whether or not the Crown could lead evidence of previous convictions before the issue of extenuation is decided. This would certainly be an awkward result.

But of more importance is, I think, the factor of the relevancy of previous convictions to extenuating circumstances. In Rex v. Mfoni (1935 O.P.D. 191) KRAUSE J.P., referring to the then new extenuating circumstances provisions, said, at page 193, "Generally speaking, "however, I am of opinion that only such circumstances as "are connected with or have a relation to the conduct of the "accused in the commission of the crime should have any "weight at all and care should be taken to eliminate any "factors which may be either of a purely sentimental charac-"ter, or which are only remotely connected with the crime." In Rex v. Fundakubi (1948(3)S.A. 810 at page 818), this Court expressed substantial agreement with this statement. The legislature has not defined what are extenuating circumstances and the courts must accordingly be careful not to treat as hard and fast rules what may be no more than indications of the kinds of factors which the triers of fact

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should generally regard or disregard as the case may be (see Rex v. von Zell,1953(3)S.A.303). Nevertheless what was said in Mfoni's case, substantially approved as it was by this Court, should be borne in mind in considering whether previous convictions are ordinarily to be treated as relevant to the existence of extenuating circumstances. If the passage quoted above from Ndhlovu's case means that, if in any case evidence of good character, based for example on youthful inexperience has, rightly or wrongly been received on the issue of extenuating circumstances, the Crown should be allowed to meet such evidence by proof of previous convictions, it would, I apprehend, be unexceptionable. But if it is intended to suggest that, if youthful inexperience is admissible in favour of the defence on the issue of extenuating circumstances, then by analogy bad character, as shown by previous convictions, may also always be provable by the Crown, I would not be disposed to agree with the suggestion. One difficulty in the way of accepting the analogy is that what may be permissible in favorem vitae can hardly be a safe guide to what the Crown may prove contra vitam. When it comes to the imposition of the sentence the judicial officer is no doubt entitled to take a wide range of factors into account, including the accused's bad or good character, his apparent reform-

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-ability and the like. But where the matter is still in the hands of the triers of fact, as it is at the stage when the issue of extenuating circumstances is under consideration, I do not think that such vague and elusive factors as the character of the accused should be regarded as sufficiently closely related to the commission of the crime to be taken into account. One has to bear in mind that the triers of fact may be members of a jury, who might well fail to appreciate that there may be extenuating circumstances even in the case of an accused who has previously been found guilty of another murder.

Apapt from cases where the defence has put the accused's character in issue there may be other situations in which the Crown should be permitted to prove previous convictions in order to meet a particular line of defence evidence or argument put forward on extenuating circumstances after conviction. In the present case counsel for the Crown submitted that only two factors could be suggested which might operate in extenuation, namely, the mental immaturity of the appellant, of which there was medical evidence, and the effect upon him of the liquor that he had consumed; it was argued that in regard to these factors, and especially in regard to the former, it was relevant to

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show that the appellant had committed a number of crimes over a long period of years. There may be some force in this argument but a sufficient answer to it is that the Crown did not advance it to the trial judge as a reason why the record should be before the court, and the learned judge in fact made no order admitting the record in the special circumstances of the case. The record was simply put in by the Crown and placed before the full court of judge and assessors as part of the material for deciding whether there were extenuating circumstances. It was not suggested that if this was irregular the appellant lost his right to complain as a result of any acquiescence on his part.

The offences disclosed by the record of previous convictions were not of so trivial a nature that they could not have influenced the trial court in relation to extenuating circumstances. Indeed the fact that, although most of the convictions were for theft, one was for robbery was remarked upon by the learned judge. One effect of the Crown's production of the record was, as I have stated, that the appellant gave further evidence in which he attributed all his previous misdeeds to having been under the influence of liquor when he committed them.

The learned judge remarked in this connection that punishment had not taught him the lesson that when he consumes liquor he is apt to commit crimes. There is the further factor that the legislature has recently, by Act 29 of 1955 section 51, expressly provided that it is permissible for a court, in a proper case of course, to treat intoxication as an aggravating circumstance in imposing punishment. Conceivably the court might, rightly or wrongly, have treated his evidence regarding intoxication as a factor unfavourable to the appellant. It is for these reasons impossible to be satisfied that the proof of the appellant's previous convictions and the appellant's evidence thereon had no effect on the conclusion of the trial court as to extenuating circumstances.

On the whole I have come to the conclusion that an irregularity in relation to the procedural step of finding on extenuating circumstances was committed and that the appeal on the special entry must therefore be allowed. The appeal against the conviction is dismissed but the sentence is set aside. The case is sent back to the trial court to be resumed from the stage after verdict. The court will decide the question of extenuating circumstances after hearing such evidence and argument as

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may be placed before it, but without regard to the appellant's previous convictions or to the evidence given by him after verdict at the former hearing. After the decision on extenuating circumstances has been given the trial judge will pass sentence afresh. Should a finding of extenuating circumstances be returned, the trial judge will befofe passing sentence receive such evidence, including evidence as to previous convictions, as may be properly tendered by either party.

Fagan, J.A.
de Villiers, J.A. } Concur
Brink, J.A.
Beyers, J.A.

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