181/70

G.P.-S. J. 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

MAGUBANE MKONTO

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Pro Deo
Prokureur van Appellant

Respondent's Attorney A.G. (Pmburg.)
Prokureur van Respondent

Appellant's Advocate S. Berman
Advokaat van Appellant

Respondent's Advocate M.M.Beukes, S.C. & ~~D.Marais~~
Advokaat van Respondent

Set down for hearing on 16-2-1971
Op die rol geplaas vir verhoor op 3.6.7.

(D.C.L.D.)

9.45 vm. – 10.45 vm.
10.45 vm. – 11.00 vm.
11.00 vm. – 11.02 vm.

C.A.V.

APPEAL DISMISSED.

REGISTRAR.
26.2.1971

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between -

MAGUBANE MKONTO ..... Appellant

AND

THE STATE ..... Respondent

Coram: Holmes, J.A., Diemont, A.J.A., et Miller, A.J.A.

Heard: 16 February 1971.

Delivered: 26 February 1971.

J U D G M E N T

HOLMES, J.A.:

This grisly case from Zululand illustrates the dread influence of witchcraft which still holds in thrall the minds of some Bantu, notwithstanding the coming of Western civilisation to Natal some 150 years ago.

The appellant, a young Zulu in his early twenties, was charged with the crime of murder. He was tried by Harcourt, J., sitting with assessors in the Zululand and

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North Coast Circuit Local Division. He was represented by counsel. He pleaded guilty, but added; "I killed her because she was a witch, and on that day she said I won't see the setting of the sun, and by that I took it she was going to kill me". Counsel requested that a plea of not guilty be entered. The record contains the following note -

> "HARCOURT, J.: I take it that the defence is one of self-defence?
>
> MR. LAPPING: That is correct, M'Lord.
>
> HARCOURT, J.: With the possible alternative that there be extenuating circumstances, if self-defence is found to have been .... (Mr. Lapping intervenes)
>
> MR. LAPPING: Yes, on the basis of Dikgale's case. (1965(1) S.A. 209 (A.D.))
>
> HARCOURT, J.: Very well, there will be a plea of not guilty entered."

The State led its evidence, and the appellant testified in his defence. The unanimous verdict of the Court was that the appellant was guilty of murder with extenuating

3/... circumstances

circumstances. The latter were held to consist of the appellant's belief in witchcraft, and his belief that the deceased was a witch who had been weaving her evil spells upon him, and upon his two brothers who had died as victims thereof. The appellant was accordingly spared capital punishment, and was sentenced to imprisonment for five years. He appeals with the leave of the trial Judge.

As to the facts, the deceased, who was a woman in her late fifties, lived with her daughter-in-law Thembani Manzini in the rural district of Ingwavuma. Thembani gave evidence to the following effect. Towards the last day of December 1969 she was at her kraal, together with her child and the deceased. About noon the appellant arrived. He was carrying a cane-knife and a plain stick. He sat down. The deceased asked him what had happened. In reply he addressed her by name and said, "I have come to face you, let us go and divine". She asked, "Who are you to send me?" (At one stage the witness said that what the deceased asked was "Who sent you?"). The appellant

4/... answered,

answered, "I am sent by my heart. I say to you, let us go and divine". She enquired whether he had reported to the induna that he was coming to take her to a diviner. He replied in the negative. She then said, "I am not going there if you have not told the induna". With that, the appellant rose up and smote her with the cane-knife, saying, "You are eating people, because you want the induna to be informed". Thembani fled in fear. When she returned, the deceased was already dead. Her head had been almost cut off. The district surgeon also noticed that both her hands had been severed at the wrists.

A matter upon which Thembani was pointedly cross-examined was whether the deceased had uttered the grim threat to the appellant, "You will not see the setting of the sun today". The witness replied that she heard no such words and that she would have heard them if they had been uttered, for the deceased and the appellant were speaking in normal voices. The appellant was sitting opposite her and the

5/... deceased

deceased, six or seven paces away. Indeed, the appellant, in asserting in evidence that the threat was made to him, conceded that the witness Thembani could have heard it.

The investigating officer, Constable van Jaarsveld, who was stationed at Ingwavuma at the relevant time, gave certain formal evidence. Questioned by the trial Judge he said that he knew the area very well, as he had worked there for three-and-a-half years in another department. He said that some of the inhabitants definitely had a strong belief in witchcraft. During his stay there he had frequently encountered the belief that sickness or death could be caused by the activities of an "umthakathi" (witchdoctor). Under cross-examination he added that he had heard of the custom that a person suspected of being a witch is asked to go to a witchdoctor to be divined.

The appellant, in his evidence, admitted having chopped and killed the deceased. He cut off her head so that she could not rise up again and bewitch him; and he

6/... severed

severed her hands because they had handled the "muti" (medicine) with which she had caused the death of his two brothers. He said that, about a month previously, he and his two brothers had gone to visit the deceased's daughter, Mosotso. One of his brothers was in love with her. The deceased, however, opposed the match because she wanted Mosotso to marry someone else. Accordingly she remonstrated with the visitors, saying, "Don't you want to leave this girl alone? You are all going to die". Within a month, one of his brothers did die, having been struck down by a motor vehicle. The appellant and his father consulted a diviner to ascertain why this had come about. The diviner stated that an "umthakathi", to wit, the deceased, had pronounced that they were all going to die. The diviner predicted that disease would befall them; and he warned that there was some creature at their kraal "which is finishing off our brothers". Some days thereafter, the appellant's second brother fell ill of a headache which lasted nearly a

week and proved fatal. His two brothers having, as he believed, thus been brought to their death by the deceased's evil powers, the appellant wept in his distress and said to himself, "Let me go to this 'umthakathi' (witch) and let me go to a diviner". Thus spurred, he sallied forth to confront the witch, taking with him his cane-knife and a plain stick. What occurred when he arrived at her hut has been told by Thembani, supra, save that the appellant is positive that the deceased, in refusing to accompany him to a diviner, uttered the fell threat, "You will not see the setting of the sun today". The record proceeds -

> "What did you think she meant by that? - I knew she was going to kill me, because whatever she said would take place. What happened then? - I chopped her. What do you think would have happened if you hadn't killed her? - I would not be here.
> HARCOURT, J.: Why not? - She had told me so. But what did you expect to happen? - She was going to kill me. How? - With the same thing with which she killed my brothers".

In this Court, counsel for the appellant advanced the following contentions -

(a) The deceased, before she was struck by the appellant, threatened him with the dire pronouncement, "You will not see the setting of the sun today".

(b) The appellant, knowing that the deceased

8/... had

had threatened him with death, and believing that she possessed effective supernatural powers as a witch, slew her in self-defence; and therefore he should have been acquitted.

(c) Alternatively to (b), the deceased's threat provoked the appellant; and the verdict should have been one of culpable homicide.

As to (a), this factual issue was canvassed at the trial and the unanimous finding of the Court was that the words in question were not uttered. In coming to this conclusion the Court relied strongly upon the evidence of Thembani. She was the daughter-in-law of the deceased. The trial Court regarded her as a very good witness, who gave her evidence well and whose account of the verbal exchanges between the deceased and the appellant appeared to be extremely probable. However, in view of the evidence of Constable van Jaarsveld, referred to above, the trial Court regarded her as "less than frank with the Court" in her evidence that there

9/... were

were no witchdoctors in the area, nor any diviners; that the people in the district did not believe in witchdoctors; that she had never heard of anyone being bewitched; that she did not believe that people could be bewitched at all; and that she had never heard it suggested that the deceased was a witch or took part in supernatural activities of any sort. As to that, the trial Court rightly pointed out that "it is a not unusual proclivity on the part of Bantu witnesses to deny any such activities in persons closely related to them". Indeed, one's experience is that sometimes a witness, such is his chilling dread of witchcraft, will stedfastly assert that he has never heard of the subject. Admittedly this would not per se destroy the credibility of a witness in toto, as the trial Court rightly pointed out, relying on the unreliability and illogicality of the maxim falsum in uno falsum in omnibus, as indicated in R. v. Gumede, 1949 (3) S.A. 749 (A.D.) at 756. But the point which causes us some anxiety is that Thembani's understandable inhibition as aforesaid might equally have deterred her from admitting that her mother-in-law uttered the

dire threat, "You will not see the setting of the sun today". It must have been plain to her, when it was put to her in cross-examination that the deceased had uttered this threat, that the implication in the question was that the deceased had certain supernatural powers. Indeed, the trial Judge, in granting leave to appeal, said that the unanimous finding was that she was less than frank with the Court "in relation to her late mother's activities in regard to supernatural functions". That was also the appellant's view. Asked by the trial Judge what he had to say about Thembani's denial in regard to the threat, the appellant said, "She is saying that because this matter concerns her mother".

Thus there is a coherent link, which it seems to us the trial Court overlooked, between (a) that part of Thembani's evidence in respect of which she was rightly found to be "less than frank with the Court", and (b) her denial as to the utterance of a threat by her mother-in-law. This link weakens her credibility in respect of (b).

In these circumstances we have some reservation

11/... as

as to the truth and reliability of Thembani's denial that her mother-in-law uttered the threat in question. Of course, one must also bear in mind what the trial Court had to say about the appellant's evidence on the point, namely -

> "We do not accept his evidence in this regard; it was not well given and we would classify it as an embellishment of his version. There would appear to be no probability suggesting that such a threat should then be made, bearing in mind the conversation which was taking place between the two participants at the time and the extreme improbability of a frail and aged woman threatening an armed and truculent young man".

I pause here to observe that the latter improbability, though of general physical validity, loses significance in the context of this case, in which it is said that the woman professed to practice the sombre arts of witchcraft.

Weighing all the foregoing considerations, we have come to the conclusion that the fairest basis upon which to proceed is to hold that, at the least, there is a reasonable possibility that the words were uttered.

12/... On

On that footing, I turn to counsel's second contention, namely that the appellant should have been acquitted on the ground that he slew the deceased in self-defence, because of her threat against his life, and his belief that she possessed effective supernatural powers. The basic principle in regard to self-defence was succinctly stated by this Court in R. v. Attwood, 1946 A.D. 331. Watermeyer, C.J., said at page 340 -

> "The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on the evidence that accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury ..."

See also R. v. Patel, 1959 (3) S.A. 121 (A.D.) at 123. I emphasise the words "had reasonable grounds" for thinking that he was in danger of death or serious injury.

In the latter regard, as a matter of interest this

13/... Court,

Court, in R. v. K., 1956 (3) S.A. 353 at 359, and S. v. Jackson, 1963 (2) S.A. 626 at 628, in fin., referred with approval to the dictum of an eminent American jurist, Holmes, J., in Brown v. United States, 256 U.S.R. 335 at 343, namely -

> "Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and if he kills he has not exceeded the bounds of lawful self-defence ... Detached reflection cannot be demanded in the presence of an uplifted knife". (My italics).

Thus the criterion is whether the appellant's belief that his life was in danger would have been shared by a reasonable man in his position; see South African Criminal Law and Procedure, by Burchell and Hunt, Vol. I., page 279, note 77, in fin.

A plea of self-defence is usually raised in the context of immediate danger, such as that posed by an upraised knife. That physical situation is absent here, the apprehended danger being that of supernatural death. As to that, the common law of South Africa in regard to murder and self-defence reflects the thinking of

14/... Western

Western civilisation. Hence, in considering the unlawfulness of the appellant's conduct, his benighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the Dark Ages. It follows that the appellant's plea of self-defence and counsel's contention in favour of an acquittal cannot be upheld.

Of course, in considering the moral blameworthiness of an accused's conduct, as distinct from his legal culpability, his subjective belief in witchcraft may, depending on the circumstances, be regarded as an extenuating circumstance; see the decisions of this Court in R. v. Fundakabi and Others, 1948 (3) S.A. 810, and S. v. Dikgale, 1965 (1) S.A., 209 at 213/4. That was the approach of the trial Court in the present case.

I turn finally to the third and alternative contention, namely that the appellant was provoked to anger by the deceased's threat, and that therefore the appropriate

verdict should be one of culpable homicide and not murder, with a correlative reduction of sentence.

Provocation and anger are different concepts, just as cause and effect are. But, in criminal law, the term provocation seems to be used as including both concepts, throwing light on an accused's conduct.

According to the Roman Dutch writers referred to in Die Suid-Afrikaanse Strafreg by De Wet and Swanepoel, second edition, page 118, "toorn", i.e. anger, is not a defence. At most, and only if it is justified by the provocation, it mitigates punishment.

But Roman Dutch law did not differentiate between homicide and intentional homicide. The question of the seriousness of the homicide was taken into account in the matter of punishment; see R. v. Attwood, 1946 A.D., 331 at 339, and R. v. Hercules, 1954(3) S.A. 826 (A.D.) at 832. In South Africa, on the other hand, at an early stage murder and culpable homicide evolved into distinct substantive crimes; see South African Criminal Law and Procedure, Vol. II,

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by Hunt, page 322 at (d). And the distinction is recognised by statute; see section 196 of the Criminal Procedure Act. The difference, of course, is that intention to kill is required in murder.

This distinction created some difficulty in applying the pure Roman Dutch law of provocation to an alleged crime of murder as it is known in South Africa. Inasmuch as intention to kill is an element of the crime itself, and provocation is relevant to such intention, provocation could no longer be restricted to mitigation of punishment.

Confronted with this difficulty, the South African courts [redacted] sought to solve it by holding that section 141 of the Transkeian Penal Code (Act 24 of 1886, Cape) correctly reflects our common law in regard to provocation; see R. v. Butelezi, 1925 A.D. 160 at 162, in fin., to 163. The Section reads, in so far as here relevant -

> "Homicide which would otherwise be murder may be reduced to culpable

> homicide, if the person who causes death does so in the heat of passion caused by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool".

As to that, I agree with the learned authors De Wet and Swanepoel, SUPRA, at page 121, that the section does not reflect the Roman Dutch Law, the effect of which has been set out earlier herein. See, too, the remarks of this Court in S. v. Mangondo, 1963 (4) S.A. 160 at 162, B - E. Furthermore, with its objective criterion of "any ordinary person" the foregoing section is not in harmony with the subjective approach of modern judicial thinking in this country. On the other hand, some development or evolution of the Roman Dutch Law as to provocation is necessary, because of the South African law that intention to kill is an element of murder; and because provocation is relevant

18/... to

to intention. How should such development be formulated? The matter is extensively discussed by De Wet and Swanepoel, ibid, pages 117 et seq; and, more recently, by Burchell and Hunt in South African Criminal Law and Procedure, Vol. I, pages 240 et seq. It seems to me that the direction of the development has already been indicated in comparatively recent judgments of this Court. For one thing, it is now judicially recognised that intention to kill is purely a subjective matter; see the cases collected by Burchell and Hunt, ibid, at page 121. And the old maxim that a person is presumed to intend the reasonable and probable consequences of his act is no longer regarded as a criterion of intention; see S. v. De Bruyn, 1968 (4) S.A. 498 at 514 E - F. This maxim came to us from England. It has recently been abolished in that country, in favour of a subjective approach, by section 8 of the Criminal Justice Act 1967 (15 and 17 Eliz. II, C.80); see Burchell and Hunt, ibid, at 146. Moreover, according to Swanepoel, Die Leer van versari in re illicita in die Strafreg (1944), at 57 et seq.,

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the English maxim just mentioned was associated with the old doctrine of versari in re illicita. The latter doctrine is now obsolete in South Africa; see S. v. Bernardus, 1965 (3) S.A. 287 (A.D.), and S. v. Mtshiza, 1970 (3) S.A. 747 (A.D.) at 751 H to 752 B.

Furthermore, with particular reference to intention where there has been provocation, in R. v. Thibani, 1949 (4) S.A. 720 (A.D.) at 731, this Court preferred to regard provocation as "a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent, as well as the act, beyond reasonable doubt". In S. v. Mangondo, 1963 (4) S.A. 160 (A.D.) this Court indicated that, since the test of criminal intention is now subjective, and since the earlier cases of provocation applied a degree of objectivity, it may be necessary to consider afresh the whole question of provocation. In S. v. Dlodlo, 1966 (2) S.A. 401 (A.D.) this Court held that, on the facts, the appellant,

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in view of his provocation, could not be said to have intended to kill in the subjective sense; and the verdict was accordingly altered to one of culpable homicide. And in S. v. Delport, 1968 (1) P.H., H. 172 (A.D.), this Court held that where, as on a charge of murder, the presence of the requisite legal intent is in issue, "it is self-evident that the trier of a fact is required to have regard to all the evidential material which, in the light of our available knowledge of how the human faculty of volition functions, is relevant to the determination of the state of mind of the accused concerned"; and that intoxication and provocation, either singly or together, may so affect a person's mind that the requisite intention to kill is absent; and that in any event provocation may, "depending on considerations which need not be mentioned here", be relevant to extenuation.

On the other hand, the facts of a particular case might show that the provocation, far from negativing an intention to kill, actually caused it. The crime would be murder, not culpable homicide; see S. v. Krull, 1959 (3) S.A. 392 (A.D.). However, depending on the circumstances, such provocation could be relevant to extenuation.

In R. v. Krull, supra, at 396, in fin., to 397A, this

Court expressed the view that, in considering the question of intention to kill when provocation is accompanied by idiosyncrasies such as hotheadedness, conformity to objective standards must, for practical reasons, be insisted on. It would seem that the dictum must yield to the tenor of the other decisions in this Court, cited above, and to the settled trend in favour of the subjective approach in the matter of intention. The test for intention being subjective, it seems to follow that provocation, which bears upon intention, must also be judged subjectively, whether or not it is accompanied by idiosyncracy; see Burchell and Hunt, ibid at 247. Where provocation is relevant to extenuation there seems all the more reason for the exclusion of objectivism, since one is then considering the moral blameworthiness of the accused, and not his legal culpability under a system of law.

To sum up, in my view the position may be formulated as follows -

1. Section 141 of the Transkeian Penal Code should be confined to the territory for which it was passed.
2. In crimes of which a specific intention is an element, the question of the existence of such intention is a subjective one, namely, what was going on in the mind of the accused.

22/... 3. Provocation

3. Provocation, inter alia, is relevant to the question of the existence of such intention.

4. Provocation, subjectively considered, is also relevant to extenuation or mitigation.

In the present case, the evidence as to the appellant's provocation and anger was as follows: Asked by the prosecutor whether he was angry at the time of the killing, he said, "M'Lord, I was more than cross or angry, because she had told me right in my face that I won't see the setting of the sun". In his previous answer he said, "M'Lord, there was a darkness before my eyes, and I thought she might rise again and 'thakatha' (bewitch) me". These statements must be considered in the light of the circumstances as a whole. The appellant THOUGHT that the deceased had, by evil witchcraft, caused the death of his two brothers; and that his own life was in danger, for she had pronounced, about a month earlier, "You will all die". When he set out to

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confront the deceased on the fatal occasion in this case, he took with him a cane-knife. Why? And from his evidence it is clear that, after she had again threatened him, he deliberately and intentionally cut off her head so that she could not rise up again and bewitch him. Hence, if provocation played any part in his conduct, far from negativing intention to kill, it contributed to such intention, which was clearly established. Hence there is no room for a verdict of culpable homicide, and counsel's final contention cannot be upheld. On that footing there is no appeal against the sentence of imprisonment for five years.

In the result, there are no grounds for disturbing the verdict arrived at by Harcourt, J., and his assessors, or the sentence imposed by the learned Judge.

The appeal is accordingly dismissed.

G.N. HOLMES

JUDGE OF APPEAL.

Diemont, A.J.A.
Miller, A.J.A. } CONCUR.