G.P.S. J. 445.

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

(Appèl DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

ABEDNEGO SEFUBA
Appellant.

versus/teen

DIE STAAT
Respondent.

Appellant's Attorney [illegible] *Respondent's Attorney* P.G. (Bmftn.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate S. Berman *Respondent's Advocate* B. YUTAR S.C.
Advokaat van Appellant *Advokaat van Respondent* A.J. de Klerk

Set down for hearing on 7-4-1971
Op die rol geplaas vir verhoor op 1.6.7.

Ogilvie Thompson, H.R., Jansen, A.R. Trollip, A.R.

(O.P.A.)

9.45 - 10.45
11.00 -
11.15 - 11.35
11.35 - 11.37

C.A.V.

Postponed: 22.9.71 Appeal dismissed (1.6.71)

[illegible]
[illegible], APPEAL COURT,
REGISTER, APPEALS
[illegible]

See order,
dated 22/9/71

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

ABEDNEGO SEFUBA ..... APPELLANT

AND

THE STATE ..... RESPONDENT

Coram : Ogilvie Thompson, C.J., Jansen, et Trollip, JJ.A.

Heard : 7 September 1971. Delivered : 22 September 1971.

J U D G M E N T .

Trollip, J.A. :

The appellant, a Bantu male about 28 years old, was sentenced to death for murder without extenuating circumstances by the Orange Free State Provincial Division (Erasmus, J., sitting with assessors). He appealed to this Court, with the leave of the Court a quo, against the sentence only. Leave to appeal against the conviction was refused, and that aspect was not further pursued. In essence, therefore, the appeal concerns the finding by the Court a quo that there were no extenuating circumstances.

Before .... /2

Before canvassing the merits, I want to place on record, with the consent of the parties, that the appellant, prior to the commission of this offence, had virtually a clean record. According to his S.A.P. form 69, his only previous conviction, in 1961, was for a minor liquor offence. It can therefore be ignored. That form should have been made part of the record of the proceedings in the Court a quo in accordance with section 303 bis of the Criminal Procedure Act, No. 56 of 1955. Through no fault of counsel that was not done. Hence the present recording of the facts.

The deceased, also a Bantu male of an age, size, and build similar to the appellant's, died as a result of being stabbed in the chest with a sharp instrument by the appellant about 6.30 p.m. on Tuesday, 22 December 1970, outside the Bantu living quarters at No. 1 Parachute Battalion, Tempe. The instrument used looked like a bayonet, the blade of which was about 10 inches long with a very ~~short~~ sharp point. It penetrated the deceased's chest to a depth of about 6 inches, incising the left lung, and causing massive

haemorrhage .... /3

haemorrhage. According to the medical evidence, the blade was so sharp that not much force was required for it to have caused such a wound.

The following facts were common cause or not disputed or satisfactorily proved. The Bantu living quarters were occupied by the appellant, the deceased, David Ntuli, Dawid Leheto (known as Klein Dawid), Klaas Mfene, and Sidwell Gasie. On 1 December 1970 the deceased, accompanied by appellant and Klein Dawid, had visited the deceased's girl friend for the purpose of drinking there. No difficulty between them had arisen on that occasion. But subsequently some trouble between the deceased and appellant did arise. The appellant, a clerk in charge of the work attendance register, had marked the deceased as absent from work on 19 December 1970. The deceased denied his absence, apparently resented that entry in the register, and remonstrated with Ntuli and the appellant about it. Now at 6.30 p.m. on the Tuesday, 22 December, the abovementioned Bantu, their work for the day having ended, were all present together in their living quarters (a dormitory with 8 beds and a table in it) with the exception of Klein Dawid. Ntuli, older

than .... /4

than the others, apparently held some position of responsibility and authority over them, since he described himself as a foreman. He had worked at the camp for a number of years. The deceased, employed as a waiter at the camp, had had something to drink (.10% alcohol was subsequently found in his blood). Klaas was on his bed reading his Bible. The others were sitting about on the beds, just talking. Arising out of certain remarks made by the deceased to Ntuli, a quarrel arose and developed between the deceased and appellant in the dormitory. There was a conflict in the evidence of Ntuli, Klaas, and the appellant as to precisely how it arose and the course it took. Of those witnesses Ntuli made the best impression on the Court a quo. No doubt because of his age and the responsible position he held, he had tried to quell the trouble and make peace between the quarrellers. The Court a quo regarded him as an honest and impartial witness and obviously preferred his evidence to that of the others. That approach was justified and in any event is unassailable on appeal.

According to Ntuli, the deceased mentioned to him that he would be going away for the week-end, and he

stated .... /5

stated that he did not want to hear on his return that Klein Dawid had been with his girl friend, saying abusively of him, "Dawid se gat"; he also added that "hy wil ook nie hê die honde wat daar by die kamp werk moet daar by sy meisie gaan drink nie". The appellant heard these remarks and took umbrage; he apparently regarded the remarks as also reflecting upon himself, despite the deceased's denial that they were so intended, since he accused the deceased of "generalising". Despite Ntuli's admonishing both of them and trying to stop the quarrel, it continued. I interpolate here to say that during the quarrel, according to the appellant's testimony, the deceased accused Klein Dawid of having made advances to his girl friend when he, the appellant, and the deceased had visited her on 1 December 1970, he swore at the appellant when the latter denied that, and he intimated that on the previous day he and his brother, John Sehloho, had lay in wait for him to kill him for having marked the deceased absent in the register on 19 December 1970. Klaas testified that he did not hear that part of the quarrel, but he admitted he was not paying much attention then, being too engrossed in reading his Bible. But Ntuli firmly denied

that .... /6

that version of the appellant. The Court a quo accepted his denial and rejected that testimony of the appellant. Despite some attack on that finding by Mr. Berman, for the appellant, and even if it were open to us on an appeal only on extenuating circumstances to decide otherwise, I am not persuaded that that finding was wrong.

According to Ntuli's further testimony, the quarrellers became angry with each other, and the appellant got hold of a hammer out of a cardboard box above Klein Dawid's bed. After a struggle Ntuli managed to disarm the appellant of the hammer. During this struggle the deceased drew a "kierie" (about 3 foot long, ½ inch in diameter, and of moderate weight) from underneath his mattress. As Ntuli was then afraid that the deceased would hit the appellant with the kierie, he ushered him with his kierie out of the dormitory and left him outside.

Pausing here, I should mention that there was an acute conflict in the testimony about the hammer. The appellant denied that he possessed himself of any hammer.

Klaas .... /7

Klaas said that the deceased drew his kierie from underneath his mattress, that the appellant then armed himself, not with a hammer, but with a knife from Klein Dawid's box, that, although it might have occurred, he did not see the appellant arm himself with a hammer or Ntuli struggle with him for its possession. Ntuli said that he left the hammer on the table in the dormitory, but he could not say what happened to it, that he did not mention it to the police initially but only on the next day, and that they did not search for it. The Court a quo accepted Ntuli's testimony on the hammer aspect, and despite Mr. Berman's argument to the contrary, I am not satisfied that that finding was wrong.

Proceeding with the course of the quarrel, I think that it is clear that, by the time Ntuli had put the deceased out of the dormitory, the appellant had armed himself with the bayonet. It is true that he said that he picked it up from the table when the deceased, still in the dormitory, threatened to hit him first with a bucket and then with the kierie, that he then frightened the deceased with the bayonet, and as the latter retreated backwards out of the dormitory,

he .... /8

he (the appellant) followed him outside. But that is contradicted by the evidence of both Ntuli and Klaas, and was rightly rejected.

When Ntuli was returning from having left the deceased outside, he said, he met the appellant, armed with the bayonet, on his way outside. It must have appeared to him that the appellant was on trouble bent, but, Ntuli said, as the latter was armed with a dangerous weapon, he was afraid to restrain him physically, so he merely exhorted him not to do anything. The appellant paid no heed to this exhortation and proceeded on outside. Ntuli did not see what happened outside.

As to what actually happened outside the appellant said that he was afraid that the deceased would fetch his brother and that both of them would then assault him, that when he went outside he was on his way to report this incident to the authorities, that when he got outside the deceased advanced on him and attacked him with the kierie, and that he warded the blow off and at the same time stabbed the deceased. That version was rejected by the Court a quo as being most improbable and unsatisfactory. In particular the appellant did not really give a firm, single reason for

stabbing .... /9

stabbing the deceased; his evidence vacillated between his being so frightened that he did not know how he had stabbed him, his trying to frighten the deceased off, and his stabbing in self-defence. Moreover, his version conflicts with that of John Sehloho, the deceased's brother. When he arrived on the scene, Sehloho said, he saw the deceased emerging from the outside entrance of the dormitory, walking backwards, being followed by the appellant, who then held the kierie by its point in his left hand, and, while the deceased was so retiring, the appellant stabbed him. Despite his possible bias against the appellant, and certain criticisms of his evidence, the Court a quo accepted his evidence. Again, even if it were open to us to consider the correctness of the Court a quo's acceptance of Sehloho's evidence and the rejection of the appellant's, I am not persuaded by Mr. Berman's argument that those findings were wrong.

Consequently, the Court a quo found the appellant guilty of murder. Its motivation was as follows. The appellant started the trouble; Ntuli tried to stop it; when the appellant grabbed the first weapon, the hammer, he

managed .... /10

managed to remove it from the appellant; it is true that the deceased grabbed the kierie, but Ntuli then pushed him outside; he did not return, but the appellant grabbed the bayonet and followed him outside, despite being exhorted by Ntuli not to do so; at that stage the deceased did nothing to the appellant; his possession of the kierie outside was purely fortuitous and played no part in the appellant's ultimate assault on the deceased; and, having followed the deceased outside, the appellant stabbed him with a most lethal weapon while he was retreating backwards from him and was unarmed.

In regard to extenuating circumstances the Court a quo's judgment reads:

"Die Hof het verdaag om mnr. Berman se pleidooi vir versagtende omstandighede te oorweeg. Die Hof het reeds bevind dat die beskuldigde kwaad geword het tydens die gesprek van die oorledene met Ntuli en, hoewel hy nie in die gewone loop van die lewe en alledaagse gebeure geregtig was om so kwaad te word nie, het die Hof nogtans die subjektiewe gemoedstoestand van die beskuldigde ernstig oorweeg en hom daarin probeer indink. Die beinvloeding van die

omstandighede .... /11

omstandighede was nie van so'n aard dat die beskuldigde se daad, na ons mening, daardeur minder laakbaar is nie, sodat die Hof nie die swaarste straf hoef op te lê nie. Ons vind derhalwe eenpariglik dat hier nie versagtende omstandighede bestaan nie."

Now it is well settled by many decisions of this Court that its jurisdiction to interfere with a trial Court's finding of the absence of extenuating circumstances is limited. It can only do so if that finding is vitiated by misdirection or irregularity, or is one to which no reasonable Court could have come.

Mr. Berman contended that the finding of the Court a quo that there was "geen noemenswaardige provokasie" by the deceased was a misdirection. But in so finding it rejected the appellant's version and relied as it was justified in doing, on the evidence of Ntuli and Sehloho. According to their evidence the provocation (if any) which the deceased gave the appellant at the start of or during the quarrel or at the final stage of the stabbing was trivial. Mr. Berman also contended that the Court a quo's findings about the hammer incident and its rejection of the appellant's version

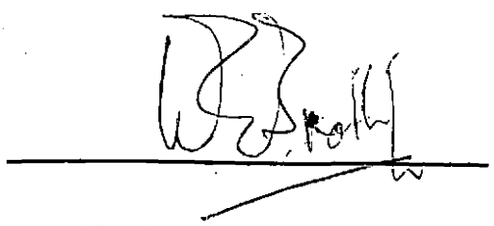
and .... /12

and acceptance of Sehloho's of what happened at the stage of the stabbing were misdirections. For reasons already given, that is untenable. Lastly, the question is whether, on the facts found by the Court a quo, no reasonable Court could have found that extenuating circumstances did not exist. It is true that, as the Court a quo found, the quarrel inside the dormitory inflamed the temper of the appellant and made him angry. Was his mind still so affected by anger when he stabbed the deceased outside the dormitory that his moral blameworthiness was thereby reduced? An affirmative answer to that question could conceivably have been given by the Court a quo. But it is not the function or practice of this Court to go further and say that it ought to have been given (R. v. Muller 1957 (4) S.A. 642 (A.D.) at p. 645 A to C). In that regard, too, it must be borne in mind that it was after the quarrel in the dormitory and after the deceased had been put outside, that the appellant had, despite Ntuli's exhortation to desist, followed him outside and stabbed him when he was on the retreat and defenceless. It was those facts that induced the Court a quo

to .... /13

to hold that the appellant's anger, generated by the quarrel, did not reduce the moral blameworthiness of his final act. Moreover, the appellant, on whom the onus rested to prove extenuating circumstances, did not himself maintain in his evidence that he had stabbed the deceased in anger. In all those circumstances the Court a quo's finding of no extenuating circumstances was not unreasonable in the sense mentioned above and we cannot interfere with it.

The appeal is therefore dismissed.



W, G. Trollip, J.A.

Ogilvie Thompson, C.J.)

Jansen, J.A.)