139/71

G.P.-S. J.-445.

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

(APPEL DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

ANDRIES MOSIA

Appellant.

versus/teen

DIE STAAT

Respondent.

Appellant's Attorney Pro Deo *Respondent's Attorney* Adj. Prok.gen.
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate L N Liebowitz *Respondent's Advocate* P. Yutar, SC CB. Cillié (Nie aangehoor)
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on Vrydag 24 September 1971
Op die rol geplaas vir verhoor op

3, 5, 8

W.P.A. Botha, A.R., Potgieter, A.R., Rabie, A.R.

9.45 - 11.04 Appeal dismissed. Reasons to be handed in later.

REGISTRAR, APPEAL COURT,
GRIFFIER, APPÈLHOF,
BLOEMFONTEIN.
24 - 9 - 1971

Protea 29.9.71. Reasons handed in per Rabie J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ANDRIES MOSIA ..... Appellant

AND

THE STATE ..... Respondent

Coram: Botha, Potgieter et Rabie, JJ.A.

Heard: 24 September 1971.

Reasons handed in on 29 September 1971.

J U D G M E N T

RABIE, J.A.:

At the hearing of this matter the Court dismissed the appeal without calling on counsel for the State, and intimated that its reasons would be filed later. These are the reasons.

In the Witwatersrand Local Division, Myburgh, J., sitting with two assessors, found the appellant, a twenty-year old Bantu male, guilty of having on 25 December 1970 in Naledi, Johannesburg, murdered Wellington Didi

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and Jacob Letebele. No extenuating circumstances were found, and appellant was sentenced to death. The learned trial Judge granted leave to appeal against the sentence.

The facts of the case, as found by the trial Court, were briefly as follows. At about 8 p.m. on the day in question appellant entered the house of Jacob Letebele, a 52-year old Bantu male, in Naledi, in search of a 16-year old girl, Theresa Moape, who was staying with the Letebele family. Wellington Didi and John Msimango, both elderly men, were also in the house at the time. The appellant was a complete stranger to the men in the house, but he claimed that he knew Theresa, although she denied it. Theresa refused to go out with appellant, whereupon he proceeded to drag her out of the house. When they got outside, she managed to free herself from his grasp, and then ran back into the house. Appellant followed her and tried to drag her out of the house once again. Letebele, Didi and Msimango then took sticks because, said Msimango, "he came there and dragged the girl out, and then we wanted to know

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what he was doing". According to Msimango the three of them were prepared to use their sticks, but they never did so, for, as Didi raised his stick, he was stabbed by appellant. Appellant, using a knife with a blade six inches long, stabbed Didi a second time, whereupon Didi fell to the floor and died. Appellant then twice stabbed Letebele and he, too, died almost immediately. Thereafter Msimango was stabbed twice, but his wounds were not of a serious nature, and he managed to escape. Appellant then searched Didi's pockets, and thereafter left the house with Theresa. Outside, at the gate, they met one David Mokomo. Appellant reminded Mokomo of a quarrel which they had had the previous day, and then stabbed him twice. Mokomo's wounds were not of a serious nature.

Didi and Letebele were both stabbed in the heart and lungs, and according to the medical evidence substantial force must have been used when the wounds were inflicted.

Appellant's evidence as to what happened in

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the house was to the following effect. Letebele invited him into the house, and, whilst he was waiting for Theresa, five men, including Letebele, Didi and Msimango, entered the room and proceeded to assault him, using knobkieries and sticks. He stabbed Didi and Letebele in self-defence, and, using a small table to ward off blows which were aimed at him, he managed to escape injury. The trial Court rejected all this evidence. Appellant also testified that he had before 1 p.m. on the day in question smoked a dagga cigarette and shared half a bottle of brandy and six bottles of beer with Theresa. The Court took this evidence into account when considering the question of extenuating circumstances, as well as appellant's further evidence that he had slept from about 1 p.m. that afternoon until nearly 8 p.m.

On the question of intent, and the question why appellant used a knife, the following is said inter alia in the judgment of the trial Court.

> ".... John, Jacob and Wellington were not set on assaulting the accused. They had

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the sticks with them trying to prevent him from unlawfully and forcibly dragging the girl from her house. It is beyond doubt that the accused, if he so wished, could have departed without injuring anybody, but he was not there for that purpose of being peaceful about anything. He was there with the set purpose of dragging the girl, if necessary, by force from the house. These three people stood in his way in achieving that result, and it was for that reason that he stabbed them ..... He at no stage apprehended injury to himself. .....

I want to deal specifically with the question of intent: when the accused stabbed Wellington and Jacob I do not think that he had the direct intent necessarily to kill. I think what he had in mind was to stab and in that way to overcome the opposition to his dragging the girl out of the house. Looking at the stab wounds and the circumstances of the case, he certainly had a subjective appreciation that the wounds he inflicted might cause death, and that he was reckless about it.

In our view the intent of the accused was that of dolus eventualis."

For an appeal of the kind here in issue to succeed, an appellant has to show that the trial Court misdirected itself or committed some other irregularity, or that its decision is one to which no reasonable Court could have come (see, e.g., R. v. Balla and Others 1955(3) S.A. 274 (A.) at p. 275 C-D; R. v. Muller 1957(4) S.A. 642 (A.) at p. 645 A). It was contended before us that the trial Court misdirected itself in that it failed to have proper regard to the following factors and/or to their cumulative effect, viz.:

(a) the fact that appellant's mind was "affected by liquor and dagga";

(b) the youthfulness of the appellant;

(c) the lack of a direct intention to kill on the part of the appellant;

(d) the threats posed to the appellant by Letebele, Didi and Msimango; and

(e) the fact that the stabbings were unpremeditated.

Counsel's contention is without substance,

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and it is unnecessary to deal with it at any length. The first three matters raised - i.e., (a), (b) and (c) above - are specifically dealt with in the trial Court's judgment on extenuating circumstances, and it cannot be argued that no proper regard was had to their effect, cumulative or otherwise. Inasmuch as counsel submitted that appellant's conduct should have been judged in the light of the fact that his mind was affected by liquor and dagga, and that this point was really the "substratum" of appellant's case, I will say a few words on this issue. It is unknown how much liquor appellant drank before 1 p.m. on the day in question - his evidence was that he [redacted] shared half a bottle of brandy and six bottles of beer with Theresa - but on his own evidence he slept from about 1 p.m. to about 8 p.m. Furthermore, when he was asked whether he was under the influence of liquor at all on the evening in question, his answer was: "not at all". There was, in brief, no evidence before the Court that appellant's mind had been affected by liquor or dagga.

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As for point (d) above, the position is, as will appear from the portion of the judgment which has been quoted above, that the trial Court found, as a fact, that appellant did not act in the way he did because of any threats posed to him. This being so, it cannot now be contended that the trial Court should nevertheless, when considering the question of extenuating circumstances, have dealt with the matter as if appellant had in fact acted under the influence of threats. Appellant cannot validly raise this point in the absence of proof that the trial Court erred in the finding it made, and we are in no way persuaded that any error was made.

In regard to the last matter raised, i.e., that the assaults were not premeditated, counsel's point was that the trial Court should have taken into account that when appellant went to Letebele's house, he did not do so for the purpose of assaulting anyone. There is no reason to suppose that the Court did not take this into account, but the matter does not end there. The Court proceeded to

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consider appellant's conduct in the house, and there is no sufficient reason for saying that it erred in its view that appellant used his knife "to overcome the opposition to his dragging the girl out of the house". On this finding it is at least questionable whether the fact that appellant had initially not gone to Letebele's house for the purpose of assaulting anyone, can properly be regarded as a factor which called for consideration on the question of extenuating circumstances.

So much for the appeal. It remains to say something about the granting of leave to appeal. It appears from the trial Judge's judgment on the application for leave to appeal that, after hearing counsel for the appellant, he "came to the conclusion that this is a case where there is no reasonable prospect of success", but that he nevertheless decided to grant leave to appeal because counsel for the State intimated that he did not oppose the application for leave to appeal. The attitude of counsel for the State, the

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learned Judge said, "brings about a degree of uncertainty in my mind that there may possibly be such a reasonable prospect. If it were not for that, I would have been inclined to refuse leave to appeal". The considerations which apply when application is made for leave to appeal to this Court have been laid down more than once (see, e.g., Rex v. Baloi 1949(1) S.A. 523 (A.); R. v. Shaffee 1952(2) S.A. 484 (A.); S. v. Shabalala 1966(2) S.A. 297 (A.)). It is clear from these decisions that the primary consideration is whether there is, in the considered judgment of the trial Judge, a reasonable prospect of success on appeal. The learned Judge in the present case, being of the view that there was no reasonable prospect of success on appeal, should, by virtue of the decisions of this Court to which I have referred, have refused leave to appeal, and he erred in allowing himself to be persuaded to grant leave by the attitude of counsel for the State.

P.J. RABIE JUDGE OF APPEAL.

D.H. ~~BOTHA~~ JUDGE OF APPEAL.

H.J. POTGIETER JUDGE OF APPEAL.