G.P.A. A. 448.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Q. NTANZI

Appellant.

versus/teen

TE THE STATE

Respondent.

Appellant's Attorney Pro Deo *Respondent's Attorney* Dpp/A.G (Pbh)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate M. Bhaitowitz *Respondent's Advocate* P Loetsee
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on [illegible] 1974
Op die rol geplaas vir verhoor op

16

(W.L.D) Coram: Rumpff (HR) Rabie et Corbett (ARR)

Bhaitowitz 9.48 - 9.54; 10.40 - 10.42.

Loetsee 9.55 - 10.40;

C.A.U.

The Court allows the appeal and alters the verdict to one of murder with extenuating circumstances. The appellant is sentenced to 12 years'

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

QAMBOKKWAKE NTANZI ..... Appellant

versus

THE STATE ..... Respondent.

Coram: Rumpff, C.J., Rabie et Corbett, JJ.A.

Date of hearing: 12th November 1974

Date of Judgment 21 November 1974

J U D G M E N T

CORBETT, J.A.:

The appellant was convicted in the Witwatersrand Local Division of the crime of murder and the Court held that there were no extenuating circumstances. He was accordingly sentenced to death. The trial Judge (Coetzee, J.) granted leave to appeal against the finding of the non-existence of extenuating circumstances and, consequentially, also against the sentence imposed. The appellant was

also...../

also convicted (i) of being in possession of a firearm, viz., a ,22 gas pistol, without the necessary licence, in contravention of section 2 of Act 75 of 1969; and (ii) of being in possession of certain ammunition, viz., a ,22 cartridge, without being in lawful possession of a firearm capable of firing such ammunition, in contravention of section 36 of the aforementioned Act. In view of the imposition of the death sentence in respect of the murder charge no sentence was passed in respect of these two additional charges, (to which I shall refer as the second and third charges respectively). There is no appeal against these convictions but in the event of the appeal against the death sentence succeeding the question of sentence in respect of these two charges will have to be considered.

The basic facts of the matter are hardly in dispute and may be stated quite briefly. The deceased, a Bantu woman, aged thirty-three, worked in a small shop situated in Plein Street, Johannesburg. The proprietor thereof was a Mr Sam Penn. At about 8 a.m. on the morning of 6 November

1973 Penn opened his shop to the public. Shortly thereafter the deceased arrived and walked through the shop to a small back-room where she used to keep and change into her dust coat. While she was still inside this room the appellant entered the shop, went to this room and fired three shots at her from a pistol of 6,35 m.m. calibre. One of the bullets struck the deceased in the right parietal region of her head. The post-mortem examination revealed that the bullet followed a downward and medial path ~~in~~ to enter the right cerebral hemisphere and lodge in its substance. She died a short while later, this bullet wound being the cause of death.

The appellant was arrested the same day and on the following day he made a statement before a magistrate in which he confessed to having shot the deceased. It is clearly to be inferred from this statement that he shot the deceased deliberately. This, too, was the tenor of the evidence which he gave at the trial. In the circumstances the trial Court had no difficulty in coming to the conclusion - quite correctly - that he intended to kill and was, therefore,

guilty...../

guilty of murder. In order, however, to assess the correctness of the Court's further conclusion that no extenuating circumstances were present it is necessary to refer in more detail to certain of the evidence and to the Court's factual findings in regard thereto.

In the course of his evidence the appellant stated that during November 1973 he worked as a cleaner at a block of flats and lived in a room at his place of employment. He first met the deceased in 1972. They became lovers. They used to sleep together on occasions in the appellant's room. The deceased lived in a location. The appellant had never visited her there. He found her to be a "reliable" person and loved her very much. This relationship continued until about three months before the murder. Then a sudden change occurred. She told him that they could no longer sleep together and have intercourse because she was "sick". He nevertheless continued to meet her outside the shop where she worked. On one occasion, during this period of three months, when he went to visit her at the shop, he observed her sitting,

together with her sister and a strange Bantu man, in a Valiant motor-car which was parked outside the shop. This was at the commencement of her lunch hour. The car drove off and appellant walked away. The appellant returned to the shop later and saw the deceased being brought back in the car. He approached her and asked her who the strange man was. She told him that he was her brother-in-law.

On another, subsequent, occasion the appellant went to the shop at lunch time to meet the deceased by appointment. On his way there he saw her driving away in the same Valiant motor-car, together with the same strange man. He returned later and saw the deceased alighting from the same motor-car in front of the shop. He endeavoured to question her about this stranger but she "just ran into the shop".

Thereafter, on a third occasion there was a similar occurrence. This time appellant was able to speak to the deceased. He asked her why she had not admitted that she and the stranger were in love, instead of pretending that he was her brother-in-law. She then told him that she was three

months pregnant and alleged that he was responsible for the pregnancy. He denied responsibility on the ground that they had ceased to co-habit three months before. She then told him that she had taken certain bullets belonging to him and that unless he admitted responsibility she would give them to the other man so that the latter could kill him (the appellant). She admitted that this man was her lover and not her brother-in-law and told the appellant that he was a "foolish man". He then asked her to return the money which she had borrowed from him. She refused, saying that she had taken it because he was a foolish man. She again threatened him, saying that she would bring other people the following day to come to kill him.

The appellant stated with reference to this discussion -

> "My Lord, that annoyed me very much because I loved her very much and, My Lord, I could not think well in my mind".

He returned to his place of employment and carried on with his work. That night he brooded over this conversation.

He described his state of mind thus:

> "I was very angry. I could not think of anything in my mind".

The following morning he went again to the shop. He took with him the gas pistol, which was the subject-matter of the second charge. He was standing next to the door of the shop when the deceased arrived. He tried to speak to her but she laughed at him and ran into the shop. He became more annoyed. He went into the shop and shot her. He fired the pistol five times but did not know how many of the shots hit her. The deceased was facing him when he shot her. When asked to explain how she sustained the head wound, with a downward and medial track, the appellant stated that she bent forward ("vooroor gebuk"). After this the appellant walked out of the shop and went away. One bullet remained in his pistol. This was the bullet, according to him, which was later found in his possession and which formed the basis of the third charge.

Most of the appellant's story stands uncontradicted. Certain portions of it, however, are in conflict with the

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State evidence. In the first place, it is abundantly clear from the evidence that the bullet which caused the death of the deceased was of 6,35 mm. calibre and could not have been fired from the ,22 inch gas pistol. Nor could the ,22 bullet found in the gas pistol have been fired from that fire-arm. Appellant's testimony that this was the weapon used to shoot the deceased is thus in direct conflict with this evidence and is manifestly untrue. Although he denied having done so, the appellant must have used another pistol, of 6,35 mm. calibre, to commit the crime. There is no evidence as to what happened to this weapon.

Secondly, appellant's evidence that he walked normally in and out of the shop at the time of the commission of the crime is contradicted by Penn's account of what happened. According to the latter, he was standing behind the counter on the morning in question. After the deceased had gone to the back-room he noticed somebody on the other side of the counter, crawling towards the back of the shop. The intruder had his left hand and knees on the floor and was holding

something...../

something, which looked like a pistol, in his right hand. Although Penn was unable to make an identification, the person he saw was obviously the appellant because he went on to describe how this person crawled to the little back-room; how he then heard three shots; and how the person then crawled out of the shop.

Thirdly, appellant's averment that he fired five shots is in conflict with both the evidence of Penn (that he heard three shots) and other State evidence. Two bullet marks were found on the wall of the back-room and, of course, one bullet was discovered lodged in the deceased's brain. In addition two empty cartridge cases were found in the shop. All this evidence tends to suggest that no more than three shots were fired.

In the Court a quo two judgments were given: one in relation to the general verdict that the appellant was guilty of the crime of murder (I shall call this the "first judgment"); and one on the issue of extenuating circumstances

(which..../

(which I shall call the "second judgment"). To ascertain the relevant factual findings and findings on credibility made by the Court, it is necessary to refer to both judgments.

In regard to the three conflicts of testimony referred to above, the trial Court held that the appellant's evidence as to the murder weapon was untrue and that the appellant had lied when he stated that he used the ,22 gas pistol and no other. This conclusion is obviously unassailable. In his first judgment the trial Judge remarked that this untruth lay at the centre of the appellant's version and was intimately tied up with his story that ammunition for this firearm had been taken by the deceased and that she had threatened him therewith. In the second judgment it was made clear that the story about the bullets was rejected. While this story does sound somewhat implausible, it is not clear to me why the accused's untruthfulness about the murder weapon should be regarded as ruling out, as a reasonable possibility, his allegation that the deceased had stolen certain bullets from him. It is clear that he did have another pistol (the murder

weapon..../

weapon itself), together with appropriate ammunition, and he may well have had other ,22 ammunition.

As to the conflict between Penn and the appellant regarding the manner in which appellant entered and left the shop, the trial Court accepted Penn's version. No specific reasons for this preference are given. There are three aspects of Penn's evidence which prompt comment. Firstly, it is clear that his eyesight is very poor. He stated that he had undergone an operation on his eyes nine years previously and that he had been medically advised that another operation had become necessary to avert the possibility of blindness. Secondly, he stated under cross-examination that it was only when he first heard the shots that he turned to look towards the back-room. If, as Penn says, he saw an intruder crawling into his shop, with something in his hand which looked like a pistol, it is strange that he should not have watched the intruder continuously until the time of the shooting. Thirdly, Penn states that the intruder fired his weapon from a crawling position. Having regard to the position and path of the

fatal wound, this appears somewhat improbable, even if one accepts the appellant's evidence that the deceased bent forward, or ducked. On the other hand, Penn's account of how the appellant crawled in and out of the shop is a very graphic one and it seems unlikely that a person in his position would have invented it. Although invited by appellant's counsel to do so, we are not able to hold that in preferring Penn's evidence the trial Court came to a wrong conclusion.

As to the number of shots fired, it seems reasonably clear that the appellant's evidence is incorrect. Little, if anything, appears to turn on this, however, since it is quite possible that in the circumstances he could be genuinely mistaken in this regard.

In the judgments of the trial Court emphasis was placed upon another aspect of the appellant's version, namely that the deceased was facing him when he shot her. It was held that in the light of the medical evidence and a photograph of the wound, this was quite impossible and that the appellant was being untruthful. The Court interpreted this evi-

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dence as indicating that the deceased was shot in the "back of the head" and that, therefore, the appellant must have "stealthily" crawled up from behind and thus shot the deceased. This finding appears to have played a significant role in the Court's assessment of the appellant's credibility. I do not think that this finding is justified by the evidence. The parietal region, where the wound was situated, indicates the top, rather than the back, of the head; and, in any event, the downward and medial track of the wound is more consistent with appellant's version than with a shooting from behind.

In his second judgment the trial Judge stressed that the Court did not regard the appellant "generally as a credible person". In regard to credibility and the question of extenuating circumstances the judgment states:

1. "Certainly insofar as the events which immediately preceded the killing are concerned, we did not accept that what he said actually happened or that it was, for instance, his intention merely to see or to meet or to confront the persons who were supposed to have his own bullets with which to kill him. For instance, he clearly did not face the deceased when he shot her. Consequently insofar as the facts or circumstances immediately preceding the act are concerned,

there.../

there is no credible material which has been provided by the accused on which we can base any particular finding in his favour.

2. We have accepted as a probability that the previous day and particularly during the afternoon, he was angered by an accusation about his paternity which he probably did not accept in his own mind having regard to the fact that he had not slept with the deceased for three months. It is also possible that he felt at that moment that some of the money he had spent on the deceased during the period of their association, must for some other reason be returned to him and that he may have made such demands which she ignored. We accept that she may have dealt with them in an insulting fashion.

3. This is probably a sine qua non for what ultimately happened. But the mere fact that that triggered a chain of mental states, cannot by itself, in our view, be held to (be) extenuation. One must still look at the quality of that trigger itself in relation to the ultimate act and place it in its proper context. The fact is that the accused and the deceased at this stage, on his own version, were not lovers in the ordinary sense at all and there is no doubt that what might formerly have been a relationship of passion and love, had been allowed to cool off over a period of three months. I can understand very well the immediate reaction of a man who hears that the person whom he had believed to be his faithful and reliable wife and lover, has in fact gone about with other men. Such a person might be overwhelmed by such news

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and commit a crime of passion; possibly the blameworthiness of an intended killing of the woman might therefore be reduced. But I cannot in all honesty accept that that is possible under the circumstances such as the present where that intimate close relationship had not endured over such a long period as three months.

4. We have given this question of extenuation careful thought after the judgment yesterday in order to discover, if discovery were indeed possible, some fact in their relationship which could possibly operate as one which reduced the blameworthiness of this act the next day. But the only reasonably credible fact remaining is the one which I mentioned in the course of my judgment namely, that the mere accusation of paternity by the deceased angered the accused.

5. We did not believe the story about the bullets. That however, is not an accusation of so grave a nature that it should cause a person in the accused's position more than perhaps a deal of annoyance.

6. If it acted as a trigger, he nevertheless thereafter decided quite coolly to kill the deceased. After a whole night had passed he deliberately, the next morning, armed himself and in a stealthy fashion executed his planned murder of the deceased. The mere fact that in a sense it was triggered the previous day and he was then in such an angry state of mind as a result of such an accusation cannot, in our minds, be an act of extenuation for the murder the next morning. It cannot, in our view, be regarded as anything that reduces the moral blameworthiness of his act.

7. If that were so, every person who has some axe to grind with another on one day may be said to be necessarily less blameworthy if, a day later,

> he decides in cold-blooded fashion to go and kill that person. In the instant matter we are satisfied that it furnishes no more than a motive for the murder."

With reference to this extract from the Court's judgment there are a number of observations to be made:-

(a) It is not clear what precisely is comprehended by the words "the events which immediately preceded the killing" in paragraph 1 of the extract. Does this mean that the Court rejected the appellant's evidence as to the meeting with the deceased outside the shop on the morning of the killing? If so, it is difficult to see upon what grounds it could have done so. If not, then the Court appears to have overlooked it as a link in the chain of events which led to the commission of the crime.

(b) In paragraph 2 reference is made to events which occurred on the previous day. There is no reference, however, to the previous meetings between the appellant and the deceased, as described in the appellant's evidence, nor has the Court made any findings of fact in regard thereto.

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This evidence is uncontradicted and on the record there does not seem to be any reason to disbelieve it, particularly as the Court does appear to have accepted most of the appellant's evidence as to what occurred on the previous afternoon (see paragraph 2). As I have already indicated, the trial Court took what was, perhaps, an unduly severe view of the appellant's credibility, a view which was based upon at least one misdirection. I think that in the circumstances this evidence may safely be regarded as correct. Furthermore, this evidence as to what happened at previous meetings is relevant. The motivation for this crime must clearly be sought in the close personal relationship which existed between the appellant and the deceased. And in examining that relationship, and the mounting tensions which developed in the three months prior to the commission of the crime, less than full justice would be done to the appellant if everything prior to 5 November 1973 were ignored. It is the cumulative effect, upon the mind of the appellant of

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a long series of slights, evasions and provocations and of a protracted period of anger and frustration in his relationship with the deceased which must be considered when the question of extenuating circumstances is weighed. There is no positive indication that the trial Court did so. On the contrary the absence of reference to these earlier events and a piecemeal treatment of later factors suggests that it did not.

(c) In paragraph 2 mention is made of certain facts accepted by the Court upon a balance of probabilities, viz., the accusation of paternity, the dispute about money, the insults. Yet when the Court comes to evaluate the question of extenuation in paragraph 4 the paternity factor alone is considered.

(d) The Court's description in paragraph 3 of the relationship between the appellant and the deceased does not, in my view, accurately reflect the factual position. It is true that during the three months prior to the crime the physical relationship between the parties had ceased but

this was because of the deceased's refusal to continue with it on the pretext that she was "sick", a pretext which may well have been designed to conceal the relationship with her new lover. There is no real indication of a cooling-off of the appellant's ardour. On the contrary, he continued to see her at the shop and exhibited all the normal signs of jealousy when he discovered that she had a new "boy-friend". Indeed, in answer to a question by the Court in regard to his motive, he gave the following evidence:

> "Kyk, is die waarheid van die saak nie dalk dat jy was baie kwaad gewees toe jy gesien het jou vrymeisie het nou 'n ander man nie - dit is eintlik die ding?-- Dit is."

(e) In paragraph 5 the Court appears to have adopted an objective approach in regard to the effect upon appellant of the accusation of paternity. This would not be in conformity with the general attitude adopted by this Court in such an inquiry. (See R. v. Fundakubi, 1948 (3) S.A. 810 (A.D.), at 818; R. v. Mkize, 1953 (2) S.A. 324 (A.D.) at 336.) It is true that, having determined the factors which influenced the mind of an accused, the Court is required to pass what is essentially a

moral judgment in deciding whether in the minds of reasonable men such factors serve to reduce the accused's moral blameworthiness (see R. v. Taylor, 1949 (4) S.A. 702 (A.D.) at 717; S. v. Petrus, 1969 (4) S.A. 85 (A.D.) at 94). It is possible that the Court's remarks in paragraph 5 were directed to this second, more objective, inquiry; in which case they would be unobjectionable. It is nevertheless not clear to me that the Court appreciated the separate inquiries which had to be made.

(f) The general tenor of paragraphs 6 and 7 seems to be that because a whole night passed after the accusation and because the appellant deliberately planned to murder the deceased the next day no extenuation can be found. I consider this to be an erroneous view. Bearing in mind the whole history of the relationship between the appellant and the deceased - her rejection of him in favour of another; her deceptions; the accusation of paternity which he considered to be false; her contemptuous treat-

ment of him; and her refusal to repay the money she owed him - I can well imagine that, after the confrontation on 5 November and a night of brooding thereon, his smouldering feelings of anger and resentment could well have burned more fiercely, rather than have died down, by the following morning.

It was emphasized by counsel for the State that a court of appeal is not entitled to interfere with the trial Court's finding on extenuating circumstances merely because it considers that finding to be wrong; it can only do so where the trial Court's finding is vitiated by misdirection or irregularity or is one which no reasonable Court could have made. (See S. v. Malinga and Others, 1963 (1) S.A. 692 (A.D.) at 695.) Having regard to the above-stated observations, and more particularly to those made in paragraphs (b), (c), (d) and (f), I am of the opinion that the trial Court misdirected itself to a degree sufficient to allow this Court to interfere. Moreover, having taken

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the whole picture into account, portraying as it does a crime which was the culmination of a series of incidents in a delicate human relationship and one in which the somewhat callous, provocative conduct of the deceased played a significant role, I consider that the evidence did establish circumstances diminishing the moral blameworthiness of the appellant. The verdict of the trial Court must consequently be altered to one of murder with extenuating circumstances.

This alteration in the verdict necessitates a reconsideration of the sentence, since the death sentence is no longer mandatory. For the reasons mentioned in S. v. Robinson and Others, 1968 (1) S.A. 666 (A.D.) at 679 it is desirable that this Court should now impose what it considers to be an appropriate sentence. There is no doubt that this is a very serious case of murder, despite the fact that extenuating circumstances have been found to have existed. It was a planned crime, even though it may not have been committed "in cold blood". Bearing in

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mind all the circumstances of the case as detailed above, and the fact that the appellant has no previous convictions, I am of the view that a sentence of 12 years' imprisonment should be imposed. At the same time it becomes relevant to consider the sentence to be imposed in respect of the second and third charges. These should be taken together for purposes of sentence and in respect thereof a punishment of six months' imprisonment is appropriate. In view of the lengthy sentence to be imposed in respect of the murder charge it will be ordered that the six months run concurrently therewith.

To sum up, the appeal succeeds. The verdict is altered to one of murder with extenuating circumstances. The appellant is sentenced to 12 years' imprisonment in respect of the murder charge. In respect of the second and third charges a sentence of six months' imprisonment is imposed, such sentence to run concurrently with the sentence of 12 years.

M.M. Corbett

Rumpff, C.J.)
Rabie, J.A.) Concur.