272/78/TMS

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIPONOMO MKIZE Appellant

and

THE STATE Respondent

Coram: Wessels, Hofmeyr JJ.A. et Hoexter A.J.A.

Heard: 26 September 1978

Delivered: 29 September 1978

J U D G M E N T

WESSELS, J.A.:

Appellant (a 27 year old male) and Jabuliswe Ndlovu (a 45 year old woman) appeared before BROOME, J., and assessors in the Zululand and North Coast Circuit Local Division on a charge of murder. It was alleged in the indictment that they had wrongfully and intentionally killed Ndlovu's husband, Ezra Ndlovu.

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They were both found guilty; in the case of appellant of murder without extenuating circumstances, and in the case of the deceased' wife of murder with extenuating circumstances. In her case, the learned Judge a quo imposed a sentence of eight years' imprisonment. In the case of appellant the mandatory death sentence was imposed. Appellant's application for leave to appeal against his conviction and the finding that no extenuating circumstances were shown to have existed, was dismissed by the presiding Judge. The appellant's appeal, which is limited to the issue of extenuating circumstances, is before this Court pursuant to leave granted by the Chief Justice.

In evidence given at the trial, apellant denied that he had been a party to the killing of the deceased. His alibi defence was rightly rejected by the trial Court. His co-accused did not give evidence. In her case the trial Court took into account, as an extenuating circumstance, the admitted fact that the deceased

had...../3

had on occasion assaulted her in a brutal manner. On one occasion he had broken her arm. Shortly before the murder, the deceased so seriously injured her one eye that it had to be removed. This assault also resulted in partial deafness. It was also urged on her behalf that she had consumed liquor during the early evening before the murder took place. This submission was rejected by the trial Court.

In so far as appellant is concerned, the trial Court held that it had not been proved by him that he had in any way been affected by intoxicating liquor at the time the murder took place. It was also contended on appellant's behalf that he knew of the brutal treatment meted out by the deceased to his wife, and that his feeling of sympathy with her caused appellant to act as he did. As to this, the judgment of the Court a quo reads as follows:

> "It was also argued that the evidence given by the witness Zephaniah Ndlovu regarding the previous history of trouble between

> accused No. 2 and the deceased was a matter which should be taken into account but the Court considers that as there is no relationship between accused No. 1 and accused No. 2 - it is not as if he were her son intervening to protect her - any trouble there might have been between these two was not a matter of his concern and is not a matter which can be considered to be extenuating. Even although accused No. 1 did say to his brother Sigwili that he had done this because of the deceased's wife this, even if it were the motive, is not a matter which can be regarded as extenuating."

In so far as extenuating circumstances are concerned, an accused is required to establish a factual basis by a preponderance of probabilities. In this case, the nature of the appellant's defence precluded him from establishing a factual basis by means of his own evidence. But that is not the end of the matter. The court is entitled and bound to have regard to the evidence as a whole in order to determine whether or not an accused has discharged the onus resting upon him on the issue of extenuating circumstances.

In his evidence-in-chief, appellant stated that during the morning of the day in question he was at deceased' kraal and assisted in the stacking of

fertilizer. After the work had been completed, "cartons" of beer were obtained from a neighbouring kraal. It was then about 10 a.m. Apparently the liquor was consumed at deceased's kraal. Appellant also testified as follows:

> "How long did you carry on drinking there? -- We just continued drinking on that day and when our supply was running out we then sent a child to go and get us more liquor from Qwabe's kraal.
>
> Was the deceased in this matter present with you? Was the deceased present at that time while you were drinking? -- Yes, he was present there and there was a time when deceased and others left the kraal and went to the field where a tractor was busy plowing.
>
> Did you then later return to the deceased's kraal? -- Yes, we returned to the deceased's kraal in the company of the young man who was plowing there with the tractor.
>
> Now while you were drinking at the kraal of the deceased, can you tell the Court who was present there? -- Mhlongo, and Mahaye, he is a neighbour of the deceased's kraal, and Sigwili, accused No. 2 and I.
>
> Were any other of the deceased's family present? -- Yes, deceased's children, those are the girls, were present there.
>
> At what time did you leave the deceased's kraal? -- I think it was 7.30 p.m."

Nothing ...../6

Nothing of importance emerged from appellant's cross-examination, except that he mentioned that he was aware of "trouble" between the deceased and his wife. He also mentioned that deceased's wife had that morning returned from hospital, where she had received treatment for her injured eye.

In my opinion, there was no reason to suspect appellant's evidence regarding the consumption of liquor during the day in question; it was in no way relevant to his defence, nor was it given on the issue of extenuating circumstances. In any event, a State witness (Thandizile Ndlovu), a daughter of deceased's wife, stated that drinking commenced at about 3.30 p.m. and continued till "the liquor was finished at dusk". In my opinion, it is probable that a fair volume of liquor was consumed during this relatively protracted drinking session, and that both appellant and deceased's wife had their share of it. It is so, of course, that there is no evidence which suggests that either of them was intoxicated. It is to

be doubted whether a finding that extenuating circumstances existed could properly have been based on the sole fact that appellant had consumed intoxicating liquor.

It was submitted on appellant's behalf that the trial Court erred in disregarding the effect the deceased's brutal treatment of his wife probably had on him. The Court a quo, as appears from the above-quoted passage in the judgment, considered that since there was no family or blood relationship between appellant and the deceased's wife, "any trouble there might have been between" deceased and his wife "was not a matter of his concern and is not a matter which can be considered to be extenuating." In my opinion, and with respect to the opinion of the Court a quo, this finding constitutes a misdirection. The evidence shows that appellant was on a friendly footing with both deceased and his wife. Unless it were to be assumed that appellant was a person with a callous nature, it is probable that he was affected by the suffering inflicted by the deceased on his wife. It seems reasonably clear on

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the evidence that appellant's motive in taking part in the murder was bound up with deceased's brutal treatment of his wife. Zephaniah Ndlovu, a cousin of the deceased, stated in his evidence on behalf of the State, that he had on occasion acted as a "peacemaker" between deceased and his wife. He testified as follows:

> "Can you tell the Court what transpired between you and accused No. 2? -- On a certain day I went to accused No. 2's kraal. Accused No. 2 was injured. She had been injured by the deceased and when I got there we had a discussion about that and I was the peace-maker there and we settled the matter. There accused No. 2 uttered a threat saying that she was not prepared to settle the matter. She said, "one of us is going to die."
>
> To whom was she referring when she said, "one of us is going to die."? -- She was referring to the deceased, Ezra, and accused No. 2 went further and said, "I am going to stab him with an assegai whilst he is asleep. I will push the assegai through his body and through the matress. If I fail this I will throw boiling water at him." I remonstrated with her pointing out to her that she will be arrested if she embarks on that and I further pointed it out to her that it was her fault that caused the deceased to injure her.
>
> Was anything else said? -- There was another incident before the one which I have described.

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You told the Court that you acted as peacemaker, did you suggest anything so as to make the peace between them? -- Yes, inasmuch that I talked to the deceased and the deceased was then agreeable to the fact that he, the deceased, was going to get a goat and slaughter the goat in making peace between the two and that the bile of that goat will be poured onto the injury accused No. 2 had received indicating that he was making peace.

Was accused No. 2 agreeable to this? -- No she was not.

What did she say? -- She said she was going to revenge.

How long before the death of the deceased did this incident occur? -- This is my rough estimation of the period, I would say about three weeks."

On a conspectus of the evidence as a whole, I am of the opinion that it is highly probable that the scheme to kill the deceased originated with his wife and not with the appellant. I say so for the following reasons:

1. Deceased's wife had a keenly felt desire for revenge and a motive for killing her husband. On the other hand, appellant appears to have had no motive personal to himself only. It appears that deceased's wife arrived at the kraal during the morning of the day in question after having been treated in a hospital, presumably for her injured eye, which had been removed. Her thirst for revenge in the

circumstances is understandable.

2. Deceased's wife was some 18 years older than appellant. It appears from the above-quoted passage in the evidence of Zephaniah Ndlovu that deceased's wife was a strong-willed person. Despite Zephaniah's efforts to bring about a reconciliation, deceased's wife obstinately refused to agree thereto. She appears to be the type of woman who could have influenced appellant to assist her in killing the deceased.

3. The active participation by deceased's wife in the murder, is, in my opinion, more consistent with her having procured appellant to assist her in killing the deceased, than with appellant having influenced her in the first place to join him in killing the deceased.

In this context, the fact that both appellant and deceased's wife had been consuming intoxicating liquor for some hours during the late afternoon of the day in question, assumes a far greater importance than it would

otherwise...../11

otherwise have had. Although there is no evidence that either of them was intoxicated in any marked degree, it is a wellknown and sad fact that even a moderate degree of intoxication tends to make persons less inhibited, and therefore more prone to give expression to their innermost feelings - in the case of deceased's wife, to her abiding feeling of strong resentment for what deceased had done to her, i.e., causing the loss of an eye and partial deafness.

I am not losing sight of the fact that appellant had not claimed in evidence that he had been affected by deceased's acts of brutality towards his wife. For the reasons set out above, I am, however, satisfied that it is probable that appellant must indeed have been affected by deceased's conduct towards his wife and that his feeling of sympathy towards her caused him to agree to participate in the killing of the deceased.

In my opinion, in the circumstances set out above, the fact that appellant was not related to

deceased's wife, is an irrelevant consideration, and the Court a quo misdirected itself in holding otherwise. The question is, firstly, whether the abovementioned factors were operative on the mind of the appellant when he committed the murder and, secondly, whether in all the circumstances they served to mitigate his moral guilt. In my opinion, both questions must be answered in favour of the appellant. In fact, I am by no means satisfied that appellant's degree of moral guilt is, in all the circumstances, any greater than that of deceased's wife, who appears to have been the prime mover in this most unfortunate episode.

It follows that the appeal succeeds, and that a verdict of guilty of murder with extenuating circumstances is substituted for that of the Court a quo.

If the Court a quo were to have found (as it should have found) that the existence of extenuating circumstances had been proved, the presiding Judge could,

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het dat die artikel oor die afslaer handel en oor moontlike waarborge of voorstellings wat deur die afslaer self of iemand anders gedoen is, en dat, wat die afslaer betref, hy „op generlei wyse verantwoordelik gehou word nie". Die gewone koper sou, na my mening, na aanhoor of lees van klousule 8 hom nie afvra wat in die reg presies die posisie van die afslaer is nie. Hy hoor en sien dat deur te bie hy verklaar dat geen voorstellings gemaak is wat tot die aangaan van die kontrak aanleiding gegee het nie en dat „gevolglik" die afslaer op generlei wyse verantwoordelik gehou kan word nie. Dit sal natuurlik veral by die koper die indruk skep dat slegs na die afslaer verwys word, indien die afslaer self voor die veiling voorstellings aangaande die plaas gemaak het. En die woord „gevolglik" is in die samehang van die klousule 'n trefwoord wat die afslaer beklemtoon. Na my mening gaan die betoog namens eisers nie op nie en word die algemeenheid van die verklaring in klousule 8 beperk deur die slotsin van die klousule. Na my mening kan, indien nodig, in hierdie saak 'n beroep gedoen word op die reël <u>expressio unius est exclusio alterius</u> wat by die uitleg van 'n wet in gepaste gevalle

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Indien my vertolking verkeerd is, is dit nogtans my oortuiging dat klousule 8 so opgestel is dat dit 'n lokval uitmaak en dat selfs met aanwending van die aanvaarde middels van vertolking, dit nie moontlik is om vas te stel wat die bedoeling van die partye was nie. Die kontrak is voltooi op 'n gedrukte vorm van 'n kontrak wat deur die afslaer as verkopers se agent gebruik is. Die agent verkies om in klousule 8 nie uitdruklik te bepaal dat die verkopers nie aanspreeklik sal wees nie. Hy verwys

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alleen na die afslaer en laat dus in twyfel wat die werklike bedoeling was. Die verkopers het versuim, deur hulle agent, om uitdruklik te stel dat ook hulle nie verantwoordelik gehou wil word nie. Daar is dus m.i., in die alternatief, ten minste twee betekenisse wat redelikerwyse aan die kontrak gegee kan word en dan is die onderhawige geval, na my mening, by uitstek 'n geval waarby die contra proferentemreël toegepas behoort te word. In hierdie verband hoef ek alleen te verwys na die uitspraak van waarnemende appèlregter Davis in Cairns (Pty.) Ltd. v. Playdon Co. Ltd. (supra) op bl. 121 e.v., waar verwys word na ons gemene reg en verskillende skrywers, en waar ook, ten opsigte van 'n koopkontrak, met goedkeuring die volgende passasie op bl. 123 uit 'n Engelse beslissing aangehaal is:

> „I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself."

Ek is bewus daarvan dat hierdie metode van uitleg slegs toegepas behoort te word nadat geprobeer is om die ware betekenis van die kontrak vas te stel, maar soos ek hierbo gesê het, indien my vertolking nie die ware betekenis van die kontrak weergee nie, is, na my mening, dit ten minste net so 'n redelike vertolking as wat die eisers aan die kontrak wil gee.

Na my mening behoort die appèl gehandhaaf te word met koste, insluitend dié van twee advokate.

HOOFREGTER.

JANSEN, AR.
KOTZE, AR.
~~JOUBERT, AR.~~
VILJOEN, Wnd. AR. } Stem saam.