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Case no 4/84
/MC

MAPUTSE HEADMAN DYALVANE

- and -

THE STATE

VIVIER AJA.

Case no. 4/84.
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal between:

MAPUTSE HEADMAN DYALVANE Appellant

- and -

THE STATE Respondent

CORAM: RABIE CJ, et MILLER, VAN HEERDEN JJA et GALGUT, VIVIER AJJA.

HEARD: 16 August 1984.

DELIVERED: 31 August 1984.

J U D G M E N T

VIVIER AJA.

The appellant was convicted by PICKARD J and two assessors in the Supreme Court of Ciskei of the murder of Joyce Komiki which took place on the evening of 26 June 1982 at Mdantsane. The court found extenuating circumstances but, this notwithstanding, the trial Judge in the exercise of his discretion under sec 277(2) of Act 51 of 1977, decided to impose the death sentence. Arising out of the events of the same evening, the appellant was also found guilty of assaulting Tabo Dyalivani with intent to do grievous bodily harm, for which the appellant was sentenced to be detained until the rising of the court. With the leave of the trial Judge the appellant appeals to this Court against the sentence of death.

According to the facts found by the trial court, the deceased was killed under the following circumstances. The deceased was the 32 year old widow of the appellant's late brother. The two-bedroomed house, in which she lived with her nephew Tabo Dyalivani, belonged to her late husband, who had taken the appellant with his wife and child into his house after the appellant had been evicted from his own house. The deceased resented the appellant's presence in the house and had already unsuccessfully attempted to have him evicted by the authorities.

On the evening in question, the appellant arrived home with his wife to find that his clothes had been thrown out of the wardrobe in his bedroom and

scattered on the floor. The door of the wardrobe was broken. Armed with a large weapon, described as a bayonet, which his wife had taken from the top of the wardrobe and handed to him, the appellant went into the diningroom where the deceased and Tabo were sitting. He stabbed at Tabo with the bayonet but the latter managed to evade the blow and run out of the house. The appellant thereupon attacked the deceased, stabbing her six times in the chest, abdomen, back and left hand. One of the wounds penetrated the heart, another the right kidney. The deceased managed to run to a neighbour's house where she collapsed. The cause of death was given as multiple stab wounds of the chest and abdomen.

The appellant admitted that he had stabbed the deceased. His version was that when he came out of the bedroom, the deceased took a knife from her pocket and stabbed at him. He then saw her two brothers coming out of the other bedroom, both armed with knives. He took the knife from the deceased and stabbed her with her own knife. The trial court rejected the appellant's version. It instead accepted Tabo's evidence that the only people present in the diningroom were the deceased, the appellant and himself, that the deceased was not armed and that the appellant started attacking them the moment he entered the diningroom.

The finding that there were extenuating

circumstances, was that of the majority of the trial court. The majority found on the evidence of Tabo and the deceased's neighbour that the appellant was, despite his own denial of having had anything to drink, to some extent under the influence of liquor. Tabo's evidence was that when the appellant arrived at the house that evening he smelled of liquor and also walked like a drunken man. The neighbour's evidence was to the effect that when the appellant came out of the house after he had stabbed the deceased he gave the impression that he was not sober. The majority of the trial court also found that the appellant was provoked by the fact that his clothes had been thrown out of the wardrobe, as an indication to him that he was

not wanted in the house. The minority of the trial court found that the appellant had not proved that he was under the influence of liquor, nor that his clothes had been thrown out of the wardrobe.

After the trial court had found that there were extenuating circumstances, the State proceeded to prove the following previous convictions :-

(1) On 10 February 1970 the appellant was convicted of assault with intent to do grievous bodily harm for which he was sentenced to 3 months imprisonment. The SAP 69 form states that the victim was a 20 year old man and that the appellant used a knife.

(2) On 29 June 1970 the appellant was found guilty of the theft of 2 tape-recorders and 15 rolls of wall paper from the shop where he was employed, for which he was sentenced to 3 months imprison= ment.

(3) On 12 June 1978 the appellant was convicted on two counts of assault with intent to do grievous bodily harm. In respect of both counts the victim was a 27 year old man and the appellant used a knife. On each count the appellant was sentenced to 5 months imprisonment, which was totally suspended for 5 years on certain conditions.

(4) On 17 July 1978 the appellant was convicted on two counts of assault with intent to do grievous bodily harm. The respective victims were a 23 year old woman and an 18 year old boy. In respect of both counts the appellant used a knife. The sentences were identical to those imposed on 12 June 1978, namely 5 months imprisonment on each count, wholly suspended for 5 years on the same conditions.

(5) On 2 August 1979 the appellant was found guilty of a contravention of sec 14(1) of Act 17 of 1956, for which he was sentenced to 9 months imprisonment, wholly suspended for 4 years on certain conditions.

Although the judgment on sentence refers also

to the nature of the assault on the deceased, it is clear from the rest of the judgment and from the record, that the real or decisive consideration in the trial Judge's decision to impose the death sentence, despite the existence of extenuating circumstances, was the appellant's previous convictions.

That an accused's criminal record may be taken into account by the trial Judge as one of the relevant factors in the exercise of his discretion under sec 277(2) of Act 51 of 1977, is well established. It is equally well established that once the death sentence has been imposed in the exercise of a trial Judge's discretion under the said subsection, the power of this Court to alter the sentence of the trial

Judge is limited. This Court will not lightly substitute its discretion for that of the trial Judge. It will only interfere if the trial Judge exercised his discretion wrongly or improperly i.e. if there is an irregularity or misdirection or when the sentence is "disturbingly inappropriate". See S v Letsolo 1970(3) SA 476(A) at 477 B and S v Lekaota 1978(4) SA 684(A) at 689 A-B.

In the present case the trial Judge accepted that the appellant was 26 years of age at the time of the trial. This means that he was only 13 years old when he was first convicted on 10 February 1970, which seems unlikely in view of the sentence of 3 months imprisonment which was then imposed. Be

that as it may; according to the trial Judge, the appellant on that date:

> "started out on a life of violence and assaults. From that date on for the next nine years the accused embarked on acts of violence to the extent that he was convicted five times for assault with intent to do grievous bodily harm, each time with a knife."

With reference to his previous convictions the trial Judge concluded that the appellant was "obviously a man of violence and a danger to society and to all that come in his path".

The trial Judge considered, as he was required to do, whether a lengthy period of imprisonment would not have the desired reformative effect, but found that the appellant was not a person who could be rehabilitated.

In describing the appellant's career since his first conviction on 10 February 1970 as a "life of violence and assaults", and in saying that for the ensuing nine years the appellant "embarked on acts of violence" the trial Judge, in my view, overlooked the fact that for a continuous period of eight years out of the nine years the appellant managed to stay out of trouble. The first passage in the judgment I have quoted above, conveys the impression that between his first conviction on 10 February 1970 and the last previous conviction on 2 August 1979 the appellant was regularly, or persistently committing acts of violence. That is not so, as the list of previous convictions will show. In fact, after the

appellant was first convicted of assault with intent to do grievous bodily harm on 10 February 1970, more than eight years elapsed before he was again convicted of an offence involving violence. The remaining four convictions for assault with intent to do grievous bodily harm, were all incurred within a space of little more than a month; namely two on 12 June 1978 and the other two on 17 July 1978. With regard to these four convictions, counsel for the appellant informed the trial Judge during his address on sentence that his instructions were that all four convictions arose out of the same incident. My impression from the record is that the trial Judge was at that stage prepared to treat the four convictions as having arisen out of

the same incident. There is however, no mention in the judgment on sentence of this aspect, and it would appear from the passages in the judgment on sentence quoted above that the trial Judge treated the four convictions as if arising out of four separate incidents. Whether the four convictions arose out of the same incident or whether they formed the subject of four separate incidents, was obviously an important matter which could have had a material effect on the weight to be attached to these four convictions. If they all arose out of the same incident it meant that appellant was only on two occasions before his present conviction involved in acts of violence namely once in 1970 and once in 1978.

If, after counsel's address on sentence, the trial Judge was still not prepared to treat these four convictions as having arisen out of the same incident, he should have obtained further information. Compare S v Jack 1982(4) SA 736(A) at 742 F-G.

After that the only other previous conviction incurred by the appellant until the present crime was committed, was the one on 2 August 1979 for contravening sec 14(1) of Act 17 of 1956. This was not an offence involving violence and in regarding it as such the trial Judge misdirected himself.

I am furthermore of the view that in his evaluation of the appellant's previous convictions, the trial Judge gave insufficient consideration to

the very light sentences which had previously been imposed. The totally suspended sentence of 5 months imprisonment imposed in respect of each of the last four convictions for assault with intent to do grievous bodily harm, indicates that none of these assaults could have been of a serious nature. The sentence of 9 months imprisonment for contravening sec 14(1) of Act 17 of 1956 was also suspended. This leaves only the two unsuspended short terms of imprisonment of 3 months each imposed during 1970. In the 13 years since his first conviction until the commission of the present crime, the appellant was therefore in prison for a maximum period of 6 months only. That was in 1970 when he was still very young and immature.

In my view, therefore, the appellant's criminal record does not justify the conclusion reached by the trial Judge, that the appellant in 1970 embarked on a "life of violence and assaults", nor that he was beyond reform. In arriving at these findings the trial Judge misdirected himself in the respects I have set out above.

For the reasons I have given, the sentence of death should be set aside. Under all the circumstances of the case I am of the view that justice would be done if a sentence of 12 years imprisonment is imposed.

In the result the appeal succeeds. The

sentence of death is set aside and it is ordered that appellant be imprisoned for 12 years.

W. VIVIER. AJA.

RABIE CJ.
MILLER JA.
VAN HEERDEN JA.
GALGUT AJA.

Concur.