

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

AJAY SOOKAY Appellant

and

THE STATE Respondent

CORAM: KOTZÉ, TRENGOVE, BOSHOFF, JJA

HEARD: 12 SEPTEMBER 1985

DELIVERED: 27 SEPTEMBER 1985

J U D G M E N T

BOSHOFF, JA

The appellant, a 25 year old Asian

found guilty in the Cape of Good Hope Provincial Division by

Baker J/.....

Baker J sitting with 2 assessors, of housebreaking with intent to steal with aggravating circumstances, murder without extenuating circumstances and robbery with aggravating circumstances. After the appellant admitted a long list of previous convictions of which 14 were in respect of housebreaking, the learned Judge sentenced him to 4 years imprisonment on the count of housebreaking with intent to steal, and to death on both the counts of murder and robbery.

The trial Court refused him leave to appeal but on an application to the Chief Justice, he was granted leave to appeal against the convictions and sentences.

The trial Court in convicting the appellant

rejected/.....

rejected his evidence as a tissue of lies and found that he on Friday the 10th June 1983 at Kei Apple Court, Sea Point, had broken into the flat of one Bartolomo Crosti, hereinafter referred to as the deceased, murdered the deceased in the flat and robbed him of his pistol and about R395,00 in cash.

Mr Borman, who is now appearing for the appellant, in effect conceded that the trial Court correctly rejected the evidence of the appellant and argued that this Court should now deal with the appeal on the facts which are now common cause or not disputed. On that basis he argued, the State only established that the appellant broke into the flat with the intention of stealing and

stole/.....

stole the pistol; the State did not prove that he committed either the crime of murder or the crime of robbery.

It is really not possible to deal properly with his arguments without first of all referring fully to the facts and circumstances of the State's case.

The deceased who was 47 years of age, had been living by himself for the past number of years in a bachelor's flat in Kei Apple Court in Kei Apple Road in Sea Point. Kei Apple Court is a double storeyed block of flats with 8 individual flats on each level. On the ground level are two rows of 4 flats on either side of a cement courtyard. Entrance to the/.....

to the individual flats is gained through a door from the courtyard. Each flat consists of a small square bedroom, approximately 5 by 5 paces, a kitchen and a bathroom. From the front door a short passage leads to the bedroom; the bathroom and the kitchen are on opposite sides of the passage. The deceased occupied flat no 5, the front door of which is fitted with a mortise and a yale lock, and also a safety chain. The latch of the yale lock is rigid and can be released from the outside with a key and from the inside by turning the knob on the yale lock. The bathroom window consists of 4 individual wooden-framed panes of glass. The two bottom frames are fixed but the two top frames are

hinged/.....

hinged on the top. The opening of each of these two window-frames can be regulated from the inside with an iron stay with holes in and fixed to the bottom part of the window-frame. A pin screwed to the main frame fits into the holes to secure the stay at whatever opening of the window is required. The window nearest to the front door was always kept slightly open with the pin in the first hole of the stay. During the wet wintry conditions the adjustable window-frame fitted tightly into the main frame due to the swelling of the wood and it was very difficult to close or even open the window wider. Of all the windows in the cement courtyard this was the only window without burglar-

proofing./.....

proofing. When fully opened a person can gain access to the flat, through this window. The other hinged window-frame in the bathroom was never opened.

During the early hours of the morning of Friday 10 June 1983, the deceased was at the La Perla restaurant in the company of one Gorrini and two other persons. Gorrini gave him a lift home and dropped him at Kei Apple Court at 03h15. Janice Haines who was employed by the deceased as a char arrived at the flat at 10h00 on Saturday the 11th and found the front door standing ajar. She entered and found the deceased dead on the floor in front of his bed. She ran out and summoned the police./.....

police.

Detective w/o Benzien arrived at the flat at 11h30. The deceased was dressed in a vest and white underpants. The front of the vest and underpants was covered with blood. The deceased was lying on his back on top of an asbestos heater. There was visible evidence that a struggle had taken place in front of the double bed. Ashtrays, an electrical clock, a radio and three empty "Mills" cigarette packets were lying on the floor. Blood was found on the bedspread, the carpet, the floor, against the cupboard and on a shirt which was lying on an easy-chair. A bloodtrail led from the bedroom out of the front door across the courtyard and down

Kei Apple/.....

Kei Apple Road for a distance of 10 metres. Traces of blood were also found on the door-handles on the inside of the front door, on the yale lock knob and the safety chain. The deceased had a gold Omega Constellation wrist-watch on his left wrist, a gold chain round his right wrist and a gold chain with charms round his neck. He had a gold ring with a black stone on his right ring finger. There was a broken gold chain under his neck and a large gold crucifix between the door of the bedroom and the table. Green corduroy trousers with blood on the inside of the waistband hung over the back of a chair next to the table. In the right front pocket were three R20 notes, one R5 note, one R2 note, a fifty

cent/.....

cent coin and 2 20c coins, totalling R67,90. The keys of the front door were on the table. There were signs that someone had been sleeping in the bed; the blankets were thrown back. Under the one pillow a firearm holster was found. A complete human fingernail was found on the floor. Under the bed a large screwdriver was found. A Medico-legal postmortem examination disclosed that the deceased died of a bullet wound in the abdomen 9 centimetres below the chest and 9 centimetres to the right of the midline. The track of the bullet could be followed backward and downwards at 45° to the horizontal passing through loops of the small bowel, through the iliac artery to become lodged in the

5th lumbar/.....

5th lumbar vertebra. The artery is fairly large and bleeding from it would be rapid and cause unconsciousness within a couple of minutes, five minutes at the most. The deceased also had two parallel scratches one centimetre apart and 3 centimetres long on the chestwall 9 centimetres below the collarbone, a 0,5 centimetre rounded abrasion on the back of the right thumb and 3 minor superficial 0,5 centimetre rounded abrasions on the left knee.

No powder burns or powder marks were found at the place of entry of the bullet. No powder burns or marks were expected because the deceased had a vest on when the bullet wound was inflicted. The

vest/.....

vest also had no powder burns or powder marks which according to the ballistics expert signified that the shot was fired with the muzzle not less than 55 centimetres away from the deceased.

Det w/o Brits, who prepared the plan, took the photographs and looked for fingerprints, found the fingerprints of the left hand of the appellant on the rainwater downpipe next to the open window and the palmprint of the appellant on the windowsill of that window in the bathroom. The palmprint was facing into the bathroom. There were marks on the left side of the open window which indicated that the window-frame had been forced open. The screwdriver which was a particularly large one could have been used to force the window-frame open. There were marks on the cistern overflow outside below the window, which could have been/.....

been caused by a person stepping onto the overflow in order to raise himself to reach the window.

According to Det w/o Brits a person, climbing through the bathroom window from the outside would normally step on the overflow, pull himself up by holding onto the downpipe where the fingerprints of the appellant were found, and leave the palm-print on the inside of the window in order to pull himself through the window. The screws of the pin, which fits into the window-frame stay, appeared to have been loosened recently and that part of the wooden-frame was broken as would have happened if the pin had been forced outwards to further open the window.

Judging/.....

Judging from the number of empty cartridges found in the bedroom, the bullet marks against the wall, ceiling and door and the places where the bullets were found, three shots were fired in the bedroom. The one killed the deceased, one was fired from near the bed in an upward direction striking the wall and then the ceiling in the passage causing the bullet to end up in the bathroom. Another was fired slightly downwards through the trousers of the deceased which hung over the back of a chair, through a cupboard door causing the bullet to end up inside the cupboard. The appellant had brought the screwdriver into the flat and he was the person who had been engaged in a struggle with the

deceased/.....

deceased in the flat. A bullet struck the lower part of his ringfinger ripping off his nail completely, penetrated his palm, passed through the soft flesh of his palm and left his hand below the wrist. There were gunpowder marks on the tip of the injured finger with very little scatter signifying that the firearm was fired at close range. His fingernail was found on the floor on the far side of the bed. Almost all the blood found in the room came from his injured hand, more particularly the spattered blood on the corner of the bed near the door and on the side of the bedroom doorframe, on the floor and the carpet in front of the double bed and away from where the deceased was found on

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the floor, also the blood found on the inside of the waistband of the trousers, on the door-handle, on the inside of the front door, on the yale lock knob, on the safety chain and in the blood trail leading out of the flat. Some of the blood found on the underpants of the deceased also came from the appellant.

The appellant removed from the flat the 7,65 Walther pistol which belonged to the deceased and which discharged the bullets in the flat.

He was unemployed and had come to Cape Town from Pietermaritzburg to make arrange-

ments/.....

ments for his wife who was from Cape Town originally, to move back to Cape Town. He had a Permanent Building Society book and had no more than R1,02 in his savings account since April 1983. On the Friday morning after the incident in the flat he returned to the Petersens where he had been staying and said that he had injured his hand when he fell from a roof. He was taken to hospital and there he said that he was injured when he was being robbed. On the Saturday morning he bought himself an airticket to Durban, for which he paid R155, and deposited R240 in his savings account with the S A Permanent Building Society.

On the case made out by the State against

the/.....

the appellant before the trial Court, there were really four questions of fundamental importance to the guilt or innocence of the appellant which called for an answer, namely, how the screwdriver came to be in the flat, how the appellant came to be in the flat, how the deceased came to be mortally wounded and where the appellant got the money which enabled him the day after the deceased had died to buy the airticket and to deposit R240 in his savings account.

The appellant was the only person alive who could provide the answers and the Trial Court had to consider whether he had an innocent explanation which in all the circumstances of the case could reasonably be true; R v Difford 1937 AD 370.

The/.....

The explanation put forward by the appellant was rejected by the trial Court and Mr Borman was in this Court not prepared to support the appellant's version of the occurrence of the events on that fatal morning.

In the absence of an acceptable explanation the inference is irresistible that the appellant broke into the flat by gaining entry into it through the bathroom window and using the screwdriver to force the window open with the intention of stealing something inside the flat. This much was conceded by Mr Borman. He had the screwdriver with him when he reached the bedroom where the deceased was still in his bed. The deceased had his pistol in

a holster/.....

a holster under his pillow. The pistol was removed from the holster and three shots were fired.

The one that struck the finger of the appellant was fired at close range, less than 55 centimetres away and the shot that killed the deceased was fired when the deceased was more than 55 centimetres away from the muzzle of the pistol. The appellant and the deceased were involved in a struggle before the deceased received his wound and after the appellant had received his injury because the blood of the appellant was found at different places in the room and also on the underpants of the deceased. The deceased evidently did not move away from where he sustained his wound because his blood was not

found/.....

found in other parts of the room. The pistol was at an angle of 45° to the body of the deceased and slightly to the right front of the deceased when the shot was fired and struck the deceased in his abdomen. The appellant was physically smaller than deceased and described by the trial judge who had seen him as a "physical weed."

Mr Borman contended that there was no evidence as to who pulled the trigger to fire the shots in the flat and the proved facts were consistent with a struggle having taken place for possession of the pistol during which the shots could have been accidentally fired in which event the appellant was not guilty of any offence.

At the/.....

At the worst for the appellant he was guilty of culpable homicide. If he pulled the trigger during the course of the struggle there was no dolus directus but only dolus eventualis and that could be relevant as far as extenuating circumstances were concerned. The deceased removed the pistol from the flat after the appellant was mortally wounded and was according to Mr Borman for that reason not guilty of robbery, but theft. The correct verdict in count one therefore should simply have been housebreaking with intent to steal and theft.

This approach of Mr Borman was an oversimplification of the case and overlooked material

facts/.....

facts which were established by the evidence and probabilities. The appellant was an intruder in the flat and went there to steal. He was armed with a screwdriver and found the deceased in his bed in the bedroom. The deceased had the pistol under his pillow and would certainly have used it to ward off the appellant should the appellant have attempted to attack him with the screwdriver. The appellant must have been in front of the deceased and very close to him when the deceased shot him in the finger and through the palm. In fact on the evidence of the ballistics expert the appellant could have sustained the injury while holding the screwdriver in a striking position in his/.....

his hand. The shot that was fired at the appellant from the bed of the deceased would have been aimed upwards in the direction of the passage door whence the appellant had come and that probably accounted for the bullet marks against the wall and the ceiling in the passage. The fingernail that was ripped off by the shot was found on the floor on the side of the bed near the wall and not in front of the bed. A struggle must then have ensued for possession of the pistol because blood from the injured hand was found in front of the bed and at different places in the room. During that struggle a shot was fired in a downward direction from the front of the bed through the trousers on the back of the chair and

into/.....

into the door of the cupboard. It could not have been aimed at anybody. During the struggle blood from the hand of the appellant came onto the front of the underpants of the deceased. At some stage the appellant must have been in possession of the pistol because the fatal shot was fired at the deceased when the pistol was at an angle of 45° to the body of the deceased and 55 centimetres or more away from the abdomen of the deceased. What is more the appellant was the last person to be in possession of the pistol because he left the flat with it. In any event, it is impossible to imagine how the pistol could have been at such an angle and so far away from the deceased if the deceased still

had/.....

had possession of it and the appellant was struggling to get possession of it or to get it to point away from him. The appellant demonstrated to the trial Court what on his version happened and the trial Court rejected his version outright as physically impossible. Judging from the nature of the injury to the finger and palm it is equally difficult to accept that it was caused when a shot went off while he was holding onto the pistol and struggling to get possession of it.

If it is to be accepted on the proved facts that the fatal wound was inflicted when the appellant was in possession of the pistol, this inference being the only one possible on the proved

facts/.....

facts, then the appellant had to contend with the reasoning of Malan JA in the case of R v Mlambo 1957 (4) SA 727 (AD) at page 737, which reasoning was approved in this Court in S v Rama 1966 (2) SA 395 (AD), and is to the following effect:

"If an assault - using the term in its widest possible acceptation - is committed upon a person which causes death either instantaneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such an aggravated nature that the assailant knew or ought to have known that death might result. The remedy lies in the hands of the accused person and if he chooses not to avail himself thereof he has only himself to blame if an adverse verdict is given."

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The learned judge also stated that if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a Court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so. The learned judge in effect concluded that the logical result of the contrary view would be to place a premium on false

testimony/.....

testimony and to afford protection to the cunning and ingenious criminal who could with impunity commit murders and by withholding or suppressing material evidence that would show the cause of death escape condign punishment.

In the circumstances I am not persuaded that the trial Court was clearly wrong in finding the appellant guilty of murder.

I did not understand Mr Borman to argue that if the trial Court was correct in finding that the appellant fired the fatal shot directly at the deceased, the trial Court was wrong in finding no extenuating circumstances.

Mr Borman also contended that there was

no/.....

no evidence that the appellant removed the R395,00

which he had with him on the following day.

If he wanted to steal or rob, according to Mr Borman,

he would also have removed the articles of jewelry

and the wristwatch which the deceased had on him and

also the R67,90 which was in the front pocket of the

trousers which hung over the back of the chair.

The appellant was injured and bleeding and

the deceased was on the floor seriously wounded and

it was unlikely that he would have remained in the

flat longer than he could help. The blood on the

waistband of the trousers showed that he intended to

run through the pockets but for some reason or other

did not do so. The reason for not doing so is ad-

vanced by the trial Court and it seems to be an

acceptable/.....

acceptable one, namely that he had seen the wad of money on the table and decided to take it and leave. The deceased was a professional gambler and it was not improbable that he would have had such a large sum of money in his room. There is no other conceivable reason why the appellant handled the trousers of the deceased and then just left it. The appellant explained where he got the money from but the trial Court for substantial and cogent reasons rejected his explanation. The inference is irresistible that he removed the money from the flat.

The appellant went to the flat to steal and for no other reason. He was armed with a

screwdriver/.....

screwdriver and prepared to meet such resistance as was to be encountered in order to effect his purpose.

In the process he met and killed the deceased and left with the pistol and at least R395,00 in cash.

In such circumstances he was correctly found guilty by the trial Court of robbery of the pistol and the money.

The trial Court also correctly found that aggravating circumstances within the meaning of section 1(1) of the Criminal Procedure Act no 51 of 1977 were present when each of the crimes of house-breaking with intent to steal and of robbery were committed.

Mr Borman referred the Court to the case

of/.....

of S v Mooi 1985(1) SA 625 - (AD) and raised the question whether the trial judge should have imposed a double death sentence.

The death sentence in the murder count was obligatory because no extenuating circumstances were found. In the robbery count the Court found aggravating circumstances and it was, by reason of section 277 (1) (c) (i) of the lastmentioned Act, within the discretion of the trial judge to impose the death sentence. If the learned judge, after having sentenced the appellant to death in the murder count, also had regard to the fact that the deceased was killed in the robbery in sentencing the appellant in the robbery count the learned judge would have

exercised/.....

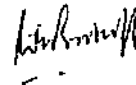
exercised his discretion improperly. The appellant admitted a long list of previous convictions which the trial Court described as absolutely shocking and which caused him to say that the appellant was obviously a professional criminal. There is nothing in the reasons of the learned trial judge to suggest or to warrant the inference that he took into consideration the fact that the deceased was killed in the robbery in exercising his discretion to impose the death sentence. Mr Borman did not and really could not argue that the trial judge did so take the death of the deceased into account.

In the circumstance it was not shown that the trial judge acted improperly in imposing the

death/.....

death sentence as he did.

In the final result no case has been made out on behalf of the appellant that would justify this Court to interfere with the convictions and sentences and the appeal is accordingly dismissed.



JUDGE OF APPEAL

KOTZÉ	JA)	- CONCUR
TRENGOVE	JA)	