

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

RAMAKRISHNA NAIDOO.....appellant

and

THE STATErespondent

Coram: Jansen et Hefer JJA, et Galgut AJA

Date heard: 8 November 1985

Date of judgment: 21-11-1985

J U D G M E N T

GALGUT AJA:

The appellant, to whom I shall refer as the
accused, was found guilty in the Natal Provincial Division

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by a Judge and two assessors, on two counts of murder.

That Court found that there were extenuating circumstances. The learned Judge then sentenced the accused to eighteen years imprisonment on each count and ordered that the sentences should run concurrently. Leave to appeal to this Court, against the sentences imposed, was granted pursuant to an application made in terms of s 316 (6) of Act 51 of 1977.

The two counts arose out of an incident which occurred in Durban on the night of 14 March 1983 outside the building in which the Pride of India restaurant ("the restaurant") is situated. The accused, on that night, shot and killed two Asian men.

The accused worked as a welder and panel beater during the day. At night he worked at the restaurant as (so it was described in the evidence) a

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"bouncer". It would seem that this term describes a man whose task it is to take adequate steps against unruly or troublesome visitors to the restaurant.

The facts which are not in dispute are the following: On the night in question eight or ten people, including the two men killed by the accused and to whom I shall refer as the deceased, were playing pool in the billiard room of the restaurant. At about eleven p.m. all these men were asked to leave the premises. One or more of the group caused a disturbance and splashed water, apparently from a fire-hose, on the stairs and in the passage of the restaurant. The deceased and three others proceeded to a parking area near the restaurant and entered a red Alpha Sud motor-car parked there. The one deceased sat in the driver's seat and the other deceased sat in the passenger's seat .

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in front. The three others sat on the back seat. The car was then driven from the parking area and along a driveway which ran along the front of the building in which the restaurant was situated. As the car was approaching and near the building, accused fired several shots at the car thereby killing the two deceased. Each died as the result of a bullet wound in the chest.

A witness, Suria Gobind, testified that he had been playing pool; that after he left the restaurant at about 11 o'clock he saw the accused and one Suchu (his correct name is Sathu and, as will be seen later, he was the under-manager of the restaurant) standing near the restaurant building; that the Alpha was approaching the building; that the accused moved towards it and started shooting; that a number of shots were fired; that the car carried on slowly and passed / him.....

him and after the car had passed him the accused fired a further shot at the rear of the vehicle; that the car then stopped nearby; that shortly thereafter Captain du Toit of the police arrived. In cross-examination Gobind was unable to deny that the first shot was fired into the air. He said he saw the accused with the fire-arm in his hand, but could not say from where he had taken it.

Captain du Toit happened to be in the vicinity and having received a radio call proceeded to the scene. There he found the car with the deceased in it. In reply to a question put by Captain du Toit, to the group of people gathered there, the accused answered and said that the man who had done the shooting had run away. Gobind, however, intervened and said that the accused had fired the shots. Captain du Toit then searched the accused and, tucked in the waistband of his trousers,

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found a 9 mm Parabellum pistol. He found a slug in the car. It later transpired that it had been fired from the said pistol and that the pistol was the property of the above-mentioned Sathu. Although the magazine of the pistol holds fifteen bullets, only six were found in the pistol. There were bullet holes in the car, three in the front windscreen, one in the bonnet, one in the side and one in the back window.

The manager of the restaurant, one Katha Reuben Pillay ("Reuben"), testified that there was a disturbance at the restaurant; that he opened his office door; that a fire-hose was being used; that the night watchman had hold of one Nolan, apparently one of the persons who had been playing pool; that he, Reuben, allowed Nolan to leave; that the accused arrived a few minutes later; that he told the accused the above facts; that he told

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the watchman to show the accused the car - the Alpha - to which some of the persons who had been playing pool had gone. The evidence is to the effect that Reuben, Sathu, the accused and the watchman went downstairs and that Reuben then locked a gate behind the others and he, Reuben, then went back upstairs.

Ronald Mariah who had been in the pool room and was one of the three passengers in the Alpha, testified that after the car had left the parking area and was proceeding towards the building he saw the accused in front of the car; that the accused was "firing with a gun" at the car; that some of the bullets hit the car; that the "security guard"- the "African chap" - was next to him while he was firing; that the driver of the car collapsed; that he, Ronald, then leant forward over the front seat and controlled the car till it stopped; that the security guard did at a certain stage "hit the glass of the back window".

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The accused had reported for duty at the restaurant but had to go off with the under-manager, the said Sathu, to arrange curtaining for the restaurant. They returned at about 11 p.m. When they went upstairs there was water on the stairs and in the corridor. We have seen from Reuben's evidence what the accused was told and how the accused, the night watchman and Sathu came to be outside the building.

The accused was arrested at the scene after 11 p.m. on 14 March. On 15 March, ie the next day, he made a statement to the police in which he explained why he had gone off with Sathu and what happened on their return and how he, Sathu and the night watchman came to be together outside the building. In this statement he said inter alia that the persons in the Alpha were swearing at them; that the night watchman had gone to the car to tell them to leave; that the car drove towards him

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and Sathu; that he became scared. The statement contains the following:

"Manager 'Sathu' handed me his firearm and told me to fire at them. As I walked towards the car, the car drove towards me when I 'cocked' the firearm and fired a shot into the air. About three a/males were opening the car doors, and I became scared. I then fired a few shots directly into the car at point-blank range. The car began to move on, followed by the watchman. The car stopped on the left side of North Coast Road. The police arrived shortly and questioned us, as to who fired the shots. At that moment I was scared, and told the police that some other people fired the shots, because 'Sathu' told me that he will report the matter at the police station.

Then Suria among the crowd pointed me, as the person who fired the shots. I was immediately arrested by the police, and police took a firearm from me.

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I feel that I was not responsible for this and I was influenced by the manager, Mr 'Sathu'."

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The accused in his evidence repeated that Sathu had given him the pistol. He further testified that as the car was approaching him it was driven directly at him and the door on the left side of the car was opened; that he became afraid; that he fired a shot into the air; that he then fired shots at the car because it was coming towards him; that the night watchman struck the rear of the car. In cross-examination he conceded that he foresaw the possibility of killing persons when he fired the shots into the car.

The learned Judge gave the Court a quo's reasons for not accepting the accused's version that the car was being driven at him, or that he was in any danger, or that the door of the car was opened, or that the accused had reason to believe that the inmates were planning to get out. The Court a quo accepted that the accused, on his return to the restaurant, was told by Reuben of the

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disturbance. There is nothing in the Court's reasons to suggest that the accused was not shown the Alpha; that he was not taken downstairs together with the night watchman and Sathu; that he was not with them when the Alpha was approaching; that the pistol was not the property of Sathu and that the pistol was not handed to the accused by Sathu.

After the Judge had given the Court's reasons for finding the accused guilty of murder the defence asked for an adjournment "to investigate factors relating to the accused's moral blameworthiness on the question of extenuating circumstances". When the case was resumed some two months later members of the accused's family gave evidence. It appears further that the accused had in the interim been examined by two psychiatrists and two other doctors. Their reports had been placed before the State prosecutor who advised the Court a quo "the overwhelming
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thing is that the accused was placid, and he still perhaps is a placid type of person who that night acted quite out of character".

In setting out the Court's reasons for finding extenuating circumstances, the Judge said:

" There is evidence before us that the accused was normally a placid, calm-natured type of person and that on this particular evening he behaved completely out of character. The cause of this, we have heard, is that for years the accused was subjected to emotional pressure at home by virtue of his mother's demanding conduct and aggressive attitude towards him and other members of the family. There is evidence which suggests that earlier, on the evening of the day in question, the accused had been subjected to verbal abuse by his mother, as a result of which he had thrown a plate of food against the wall. This, according to the evidence, was the first time he had exhibited any violent qualities".

/Counsel.....

Counsel for the accused then addressed the Judge in mitigation of sentence and said, inter alia:

" M'lord, there are certain facts pertaining to the crime, as I read your Lordship's judgment, which remain somewhat unexplained, and a clue, in our submission, is to be found in the fact that it was not the accused's own gun that was used on the night in question, but a gun that belonged to somebody else. The probabilities, we suggest, seem overwhelming that the under-manager, with whom he had returned from his visit to Phoenix that night and came there, coinciding with some disturbance at the restaurant, must have given him the gun. It has been suggested - it has never been denied - in cross-examination of the accused that in fact the gun was given to him by this man Sathu, and it is a fact that the gun used was not the accused's own weapon".

In his reasons for sentence the Judge said that the accused had been an asset to his family; that he had been the supporter of his parents; that he had never dis-

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played any tendency towards violence; that he had acted completely out of character; that although there were two counts there was "in fact only one incident which gave rise to both counts". The learned Judge stressed that the crimes were "two very grave crimes indeed" and that "two families have lost their sons without any justification".

I have set out the sequence of events and the personal characteristics of the accused in some detail. I have done so because in my view the evidence indicates that the accused did not know who was in the car; that he had no personal reasons for wishing to kill them; that he was shown a car on the instructions of the manager; that he was taken downstairs; that the pistol was given to him by the under-manager. In all these circumstances and if one bears in mind the accused's character and that the accused made his statement to the police

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on the day after the shooting, one should not overlook what the accused said in that statement, viz, "I feel that I was not responsible for this and I was influenced by the manager, Mr Sathu". This is not evidence but it accords with the overwhelming probabilities.

The learned Judge a quo did not in the reasons for convicting the accused or in the reasons for the finding that there were extenuating circumstances or in the reasons for sentence make mention of the overwhelming probability that the pistol was handed to the accused by the under-manager and that he, the accused, was influenced by him and possibly also by the manager Reuben. This aspect of the case is so important that the learned Judge's failure to advert thereto at any stage of the proceedings caused me to conclude that he did not have regard thereto or did not have sufficient regard thereto. He erred in failing to do so.

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It has been said repeatedly in this Court that sentence is pre-eminently a matter for the decision of the trial Court. The grounds on which the Court hearing an appeal can interfere with a sentence imposed in the exercise of that discretion have also been repeatedly stated, see the cases referred to by Hiemstra in Suid-Afrikaanse Strafproses, 3rd ed. No good purpose can be served by repeating what is there said. It follows from what has been said above that this Court is free to interfere with the sentences imposed.

The accused is a man of 30. His character and past conduct cannot be faulted. He had no personal reason for killing the deceased. He probably did not know who they were. He was influenced as indicated above. There was no premeditation. In all these circumstances I am of the view that a sentence of 18 years imprisonment on each count, albeit they were ordered to run concurrently,

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is far too severe. I am further of the view that the gravity of the offences warrants a sentence of 10 years on each count and that the sentences should run concurrently.

In the result the appeal succeeds. The sentences of 18 years imposed by the Court a quo are set aside and a sentence of 10 years imprisonment is substituted on each count. The two sentences are to run concurrently.

O. GALGUT.

Jansen, JA)
Hefer, JA) concur.