139/85

364/84

STEPHEN BLAKE

AND

THE STATE

364/84/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STEPHEN BLAKE Appellant

AND

THE STATE Respondent

CORAM: MILLER, GROSSKOPF, JJA et GALGUT, AJA

HEARD: 21 November 1985

DELIVERED: 27 November 1985

J U D G M E N T

GROSSKOPF, JA

The appellant was convicted in the Cape Provincial Division by ROSE-INNES J and assessors of murder

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with extenuating circumstances. He was sentenced to fifteen years imprisonment. He now appeals against his conviction and sentence, leave having been granted following a petition to the Chief Justice.

The facts may be summarized as follows.

On 15 September 1982 the appellant, who was then 18 years old, went to the Constantia Berg Hotel near Wynberg in the Cape. This was some time after 6 p.m. He first played a number of games of pool and drank some beer. At eight o'clock the discotheque in the hotel opened and the appellant wanted to visit it. Because of some previous trouble the person in charge would not allow the appellant to do so, but the assistant

manager .....

manager of the hotel told the appellant that he would be allowed in the men's bar or ladies' bar. The appellant preferred the ladies' bar where he ordered a beer. A woman was sitting at the counter next to where the appellant was standing. She was approximately 45 years old and was a complete stranger to the appellant. After the appellant had ordered his beer the woman asked him to get one for her also. The appellant offered her his beer because he wanted to keep some money for a further attempt to visit the discotheque. The woman would not accept the appellant's beer and he drank it himself.

After this the appellant once more tried his luck .....

luck at the discotheque but was again turned away. He decided to go to bed. Just outside the hotel he saw the woman who had been in the ladies' bar. He asked her where she was going. She said she was going home. He offered to walk her there and she accepted.

Some little while later while they were crossing a field the appellant asked his companion to have sexual intercourse with him. She consented. He took off his trousers and shoes, she suitably adjusted or removed her clothing and they performed the act there on the spot. Afterwards, still in the same state of undress, the two of them sat chatting. The appellant then again suggested sexual intercourse. However .....

ever, this time the woman was unwilling. She made a disparaging comment about the appellant's sexual skills by saying that he was deader than a stick and that she would rather use a stick for sexual gratification. This incensed the appellant: he dressed, fetched a stick which he saw lying in the near vicinity, and suggested that she copulate with the stick. The woman placed the stick between her legs as if simulating intercourse. The appellant, when giving evidence, could not say whether the point of the stick was actually inside the woman's sexual organ. In a rage he kicked at the stick. By doing so he forced the stick into the woman's genital organs, thereby causing substantial .....

stantial injuries which I shall detail later. The woman started screaming. The appellant hit her with his fist. She fell down, still screaming. The appellant started kicking her and continued until she was quiet. In evidence he denied assaulting her in any other way. He then partially covered her body with articles which he found in the area. I deal with this in more detail later. Having covered her, the appellant went to the home of his brother George. He told George and George's wife Erna about the incident. The three of them returned to the field and found the body of the dead woman. The appellant was taken to another brother where he was later arrested.

At .....

At 11.35 p.m. Mr. and Mrs. George Blake reported the matter to the police and thereafter accompanied Warrant-officer J.J. Roux to the scene of the assault. W.O. Roux found the deceased where the appellant had left her. The greater part of her body was concealed under paper and branches, and her face was covered with chunks of concrete. The accused testified that he placed branches on the deceased, but he could not remember the paper or concrete. It seems clear, however, that it was he who placed all these articles on or over the deceased's body.

The injuries which caused the deceased's death were described in evidence by Dr. C.G. Fosseus, a

government pathologist who conducted a post mortem examination of the deceased. The most important ones were the following. On top of her head was a 6 cm. stellate lacerated wound with no underlying fracture of the skull. A right-sided subdural haemorrhage was present together with bilateral subarachnoid haemorrhages. The anterior chin region showed extensive abrasion, and on the left side of the jaw was a fracture of the jawbone. A large quantity of blood had entered the mouth and airways. She had a black eye with sub-conjunctival haemorrhages. There was a compound fracture of the bridge of the nose together with an open skin wound and much bleeding into the retro-nasal

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space. A 28 by 2 cm rough stick had been inserted into the vagina. This had perforated the vault of the vagina and entered into the right side of the pelvis, causing a large retro-peritoneal haemorrhage in the lower right abdominal area. In addition to these injuries the deceased had a number of bruises and abrasions, some of which had been sustained prior to the fatal assault. Many of these injuries could have been caused by kicks or stamps with the light shoes which the appellant wore on the night in question. Dr. Fosseus thought however, that the stellate injury on the head and the broken nose were not caused in that way although he could not entirely exclude the possibility. These injuries

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were, in his view, probably caused by a heavy object such as a large boulder or a brick or one of the chunks of concrete which covered her face. The cause of death was, in Dr. Fosseus's view, shock caused by multiple injuries. Under cross-examination Dr. Fosseus agreed that the picture presented by the injuries, and particularly those to the head, was one of severe force and a great many blows.

It is common cause that all the above injuries (except the minor ones sustained prior to the fatal assault) were inflicted by the appellant. There can accordingly be no doubt that the appellant caused the deceased's death. The only question which was argued on appeal against the appellant's conviction was whether the State

had .....

had proved an intention to kill on his part.

The first aspect relevant to this question is the extent to which the appellant was under the influence of liquor and drugs at the time of the assault. At 1.10 a.m. of the night of the assault the appellant's blood contained 0,07 mg alcohol per 100 ml blood. If, as the evidence indicates, the appellant stopped drinking at 9 p.m. the maximum concentration at 9 p.m. would, according to Dr Fosseus, have been 0,15 mg alcohol per 100 ml blood. Dr.Fosseus agreed with a suggestion by defence counsel that this concentration of alcohol would have rendered the appellant at least moderately intoxicated. As far as drugs are concerned,

the appellant stated that he had taken several diazepam tablets during the afternoon. This was confirmed by his uncle, Mr. C.E.Jooste, who was a State witness. I do not propose analysing the evidence of the appellant and Mr. Jooste about the number of tablets which the appellant consumed because the trial Court found this evidence unreliable, in my view correctly so. Mr. Reebein, on behalf of the State, accepted however that the appellant had consumed some diazepam tablets that afternoon, and this must then be considered common cause. It is also common cause that diazepam has, generally speaking, the same effect as alcohol,with the result that the taking of diazepam would intensify the effect

of alcohol.

I turn now to lay evidence about the appellant's condition on the night in question. Mr. J.G.White, the assistant manager of the Constantia Berg Hotel, spoke to the appellant shortly after 8 p.m. to explain why he was turned away from the discotheque. He gained the impression that the appellant was fairly intoxicated but could not remember any definite symptoms. He thought the appellant's voice was somewhat slurred, but could not be certain because he did not really know the appellant. And, although he saw the appellant walking, he could not remember that the appellant diplayed any difficulty in doing so. He did not consider that the appellant

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was so drunk that he should be refused further liquor and considered that the appellant was sober enough to play pool.

The appellant himself said that, when he left the hotel, he was "a bit drunk ..... fairly drunk .... as far as I could remember now .... "

After the event the appellant went straight to his brother George. Mrs. Erna Blake, the appellant's sister-in-law, could smell liquor on his breath and could see that "he'd been drinking a lot". However, his speech was not slurred, he did not stagger (although he was not 100% steady on his feet) and he gave a coherent account of what had happened. For

the rest "he looked wild, his eyes were big and I could see that there was something wrong. He had been drinking, maybe smoking ..... dagga."

Taking the evidence as a whole I do not think that one could reach a more precise conclusion than that of the Court a quo, viz. "that the accused was affected by liquor and drugs, that he was moderately intoxicated".

I turn now to the question directly in issue, viz. whether the State established beyond reasonable doubt that the appellant acted with the intention to kill. In determining what the appellant's intention was the Court will have regard to his own direct evidence as well as to inferences drawn from the objective .....

tive circumstances.

The appellant's own evidence was that he became angry when the deceased compared him unfavourably with a stick. He then dressed and fetched a stick. The deceased held the stick in the position I have already described. When the appellant was asked why he then kicked the stick, he replied, "Well I just think it was the instinct, just to kick" and later: "I just can't think of the reason now. I just can't remember."

After the stick had been forced into her body the deceased started screaming. The appellant conceded that she was most probably was screaming for help; and said that "I tried to stop her screaming, making a

noise .....

noise .... I hit her with the fist and she fell and she was still screaming .... I started kicking her". His purpose in kicking her was "to let her stop shouting ... trying to let her keep her mouth, that's all .... I kicked her repeatedly until she was quiet .... then I thought she was dead." He said that, while kicking the deceased, he did not think of the possibility that she might die. When asked why he thought that she was dead when she stopped screaming, he said: "I don't know it just came to me that she would be dead". He could not remember feeling her chest to find out whether she might still be alive.

He then covered the body as I have already described .....

scribed and went off to his brother and sister-in-law.

It is significant in my view that the appellant's conduct during that whole evening is logically consistent, and that he provided a rational explanation for everything he did save the initial kick at the stick. In my view there is only one possible explanation for this kick, namely that he wanted to hurt the deceased, impelled thereto no doubt by his anger at her insult. It also seems likely that his inhibitions were impaired by liquor and drugs. After this initial kick the appellant wanted to silence the deceased. He did this by causing her serious injuries, particularly to the head. If one assumes that he was speaking the

truth .....

truth that he did no more than strike her once with his fist and thereafter kick her (albeit many times) he must, on the medical evidence, have used great force. It is difficult to imagine that any rational person could think that the repeated application of such force to the head of a person would not place the victim's life in danger. And the evidence does not suggest that the accused's emotional state or his intoxication was such that he would have failed to realize that this danger existed. Indeed, when the deceased became quiet he assumed that she was dead, which is an indication that the onset of death, if not intended, at least did not come as a surprise. In these circumstances I

agree .....

agree with the conclusion of the Court a quo that the appellant, despite his assertion to the contrary, realized that his assault could cause the death of the deceased, but nevertheless continued his assault, reckless and regardless of whether death would result. It follows that the appellant had the intent to kill in the form of dolus eventualis. His appeal against his conviction must accordingly fail.

I turn now to the appeal against the sentence of fifteen years imprisonment. The extenuating circumstances found by the trial Court were the fact that the appellant was under the influence of liquor and drugs; provocation by the deceased; and the appel-

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lant's history of an unhappy and unstable background coupled with his youth.

After the judgment on extenuation the appellant admitted his previous convictions. They stretch back to 1979 and include theft, possession of dagga, housebreaking and assault. He had not been in prison prior to the commission of the present offence, but at the time of his trial he was serving a term for attempted car theft.

Evidence for purposes of sentence was given by Dr. T.Zabow, a psychiatrist. He was in possession of a number of social welfare reports, handed in by consent, which dealt with the appellant's personal back-

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ground. Dr. Zabow had also examined the appellant. Although Dr. Zabow did not consider that the appellant could be clearly labelled as a psychopath he had no doubt that the appellant had psychopathic traits. When asked whether there was a possibility of a recurrence of criminality he expressed the opinion "that unless substantial changes took place in his behaviour, in his attitude, and obviously in his pattern of drug abuse, ... he in fact would be a danger to society." And to effect such "substantial changes" would, Dr. Zabow considered, take an "extended period of time; ... a short period in a prison would in fact not meet those requirements." He acceded to a suggestion that

imprisonment for too long a period might result in a situation in which treatment might be frustrated, but stated (if I understand the evidence correctly) that the best solution to this problem was provided by the "graded system that they have in the prisons". Dr. Zabow accepted that the appellant would be intelligent enough to understand the motivation provided by a suspended sentence, but did not consider himself qualified to express an opinion on the desirability of such a sentence. His view on the most appropriate way of dealing with the appellant was stated as follows:

> "My opinion would be that it would have to be a structured programme with an extremely careful assessment and an independent assessment by a

very .....

> very strict board on release, because I do believe that this man, persisting in his behaviour, would be a danger in society."

He would not be drawn on what period of imprisonment or treatment would be appropriate.

In sentencing the appellant the trial judge referred to the Court's reasons for convicting as well as to the judgment on extenuating circumstances. He took into account the history of the appellant as set out in the various welfare reports. I need not repeat them herein - they demonstrate the psychopathic traits to which Dr. Zabow referred as well as the unhappy and deprived circumstances which may have contributed to the forming of these traits. The learned judge accepted

that the considerations of reformation and assistance to a young person are of paramount importance in considering a sentence, and was obviously well aware of Dr.Zabow's evidence. He finally referred to the brutal and vicious nature of the crime. After passing the sentence of fifteen years imprisonment, the learned judge made a recommendation to the Department of Prisons that the appellant should as soon as possible be assessed with a view to his being treated at the prison hospital for psychopaths at Zonderwater prison.

Mr. Wittenberg, who appeared for the appellant in this Court, did not contend that the trial judge had misdirected himself in any way. I agree that the

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learned judge's reasoning is unimpeachable. Counsel's sole argument was that the sentence of fifteen years imprisonment was startlingly inappropriate.

The main features relevant to sentence were the nature of the offence, the youth and background of the appellant, and, to a lesser extent, his consumption of liquor and drugs. The trial judge took all these factors into account, and appears to have been influenced particularly by the cruelty and viciousness of the appellant's attack on a defenceless woman. I agree that this conduct calls for condign punishment in all the circumstances of the case, and am not persuaded that the trial judge exceeded permissible limits in imposing the

sentence .....

sentence which he did.

In the result the appeal is dismissed.

E M GROSSKOPF, JA

MILLER, JA
GALGUT, AJA } Concur