140/85

241/85

PHASWANA ROBERT MADIHLABA

AND

THE STATE

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PHASWANA ROBERT MADIHLABA Appellant

AND

THE STATE Respondent

CORAM: JOUBERT, VAN HEERDEN, JJA et NICHOLAS, AJA

HEARD: 15 November 1985

DELIVERED: 27 November 1985

J U D G M E N T

NICHOLAS, AJA

At about 6 o'clock on the morning of 14 March 1984, the accused killed the deceased by firing a shot at him. Arising out of the death, the accused

was .....

was charged with murder before the Circuit Court sitting at Lydenburg, and consisting of GORDON J and two assessors. The accused pleaded not guilty, but he was convicted of murder without extenuating circumstances and sentenced to death. With the leave of the trial judge he now appeals to this Court against the finding that there were no extenuating circumstances and against the death sentence.

The scene of the shooting was the Sekhukhune police station, where the accused and the deceased, who were both constables in the Lebowa Police, were stationed.

On the previous evening (13 March 1984) the accused and the deceased were at the police station.

It appears that the deceased relieved the accused in the Charge Office at about 8 p. m.. The accused did not, however, finally leave the police station until later that night. During the evening there was an altercation between the deceased and the accused in the Charge Office. It was so loud that they could be heard by a prisoner who was detained in the cells at the police station and who gave evidence for the State. The occation for the altercation was that the accused had gone to the cells and given tobacco to a prisoner there. The deceased had then gone to the cells and taken the tobacco away from the prisoner, saying that prisoners were not allowed to have tobacco in the cells. Back

in .....

in the Charge Office, the deceased remonstrated with the accused, objecting to prisoners being given tobacco whilst the deceased was on duty. He said to the accused, "Don't you dare do this during my tour of duty. If you want to give these people tobacco, do it during your own tour of duty." He complained that he (the deceased) would get into trouble if the matter were to be reported by a prisoner.

Later that night the accused went back to the cells and gave the tobacco to the prisoner once more.

As to what happened the following morning before the shooting, the State evidence gives an incomplete account.

W/O .....

W/O MASOGA, (whom the trial Court found to be an impressive witness and clearly truthful, and whose evidence was accepted without hesitation) said that he arrived in a vehicle at the police station at about 6 a.m. with tables and chairs to be unloaded. He went to the Charge Office to ask that prisoners be assigned for that purpose. The accused and the deceased were in the Charge Office, seated at a table, on which a service revolver was lying. It appeared from the accused's facial expression that he was angry. The deceased said that he was about to go off duty and the accused said that he was taking over. When MASOGA made his request for prisoners to be detailed to do the unloading,

the accused said, "Ek is moeg, ek wil 'n persoon doodmaak". MASOGA said to the accused, "As jy 'n persoon wil doodmaak jy sal gevang word", and the accused replied, "Nee, ek gee nie om nie, ek sal 'n prokureur kry." The accused and MASOGA went to the cells where three prisoners were detailed to unload the furniture. While the prisoners were at their task, MASOGA stood for a short time on the stoep outside the Charge Office. He could see that the accused and the deceased were quarrelling inside. A little later MASOGA left the stoep and went to where the truck was being unloaded. He heard the sound of a shot. As he ran towards the Charge Office, he encountered the deceased coming from

that .....

that direction, saying that he had been shot and that MASOGA should take him to the hospital. The deceased collapsed on the ground. MASOGA went to the Charge Office. The accused, who was busy writing in the Occurrence Book, said nothing to MASOGA.

Lieut. MALOBA, the station commander, said that he went to the police station after being called by MASOGA, and placed the accused under arrest.

Major JONES of the South African Police, who was seconded to the Lebowa Police, went to the scene at about 8 a.m. on the 14th. The deceased was lying dead on the ground. Major JONES saw an entry in the Occurrence Book to the effect that the deceased had

shot himself. He spoke to the accused who was in his sound and sober senses. The accused said that he had made the entry in the Occurrence Book and that the deceased had shot himself. Later, at about midday, the accused told him that his first account was untrue - that there had been a dispute between himself and the deceased and that he had shot the deceased.

In giving evidence on his own behalf, the accused said that he shot the deceased in self-defence. It is not necessary to set out his account of what took place on the morning of 14 March 1984, because the trial Court rejected his explanation as to the circumstances which led up to the shooting, and it is not suggested that it erred in doing so. The accused did not,

after his conviction, avail himself of the opportunity to give evidence as to extenuating circumstances, and the trial Court was accordingly left with the evidence of the State witnesses and such inferences as could be drawn from the circumstances, so far as they were known, of the shooting.

The accused bore the onus of proving, on a balance of probabilities, the existence of extenuating circumstances. (See S v Theron 1984(2) SA 850(A)).

The approach which should be adopted by a trial Court when considering whether, in the case of a conviction for murder, there are extenuating circumstances, has been described in several judgments of this Court.

So .....

So, in S v Mongesi en Andere 1981(3) SA 204(A) at 207

JOUBERT JA said:

> "'n Versagtende omstandigheid is 'n baie wye begrip omdat dit dui op 'n feit of omstandigheid, aanwesig by die pleeg van moord, wat die morele skuld, die verwytbaarheid, van die beskuldigde ten opsigte van die dood van die oorledene verminder of minder laakbaar maak. (S v Petrus 1969(4) SA 85(A) te 94 in fine-95A.) Die benadering wat deur 'n Hof in 'n bepaalde geval gevolg moet word by 'n ondersoek om die bestaan van versagtende omstandighede vas te stel, is deur hierdie Hof soos volg neergelê:
> (1) of daar omstandighede is wat op die geestesvermoëns of die gemoedstoestand van die beskuldigde betrekking kon gehad het, indien wel
> (2) of sodanige omstandighede in die bepaalde geval die geestesvermoëns of gemoedstoestand van die beskuldigde subjektief beïnvloed

het, en

(3) of die subjektiewe beïnvloeding van die beskuldigde se geestesvermoëns of gemoedstoestand van so 'n aard was dat die beskuldigde se optrede ten opsigte van die dood van die oorledene volgens die objektiewe ooordeel van die Hof daardeur minder laakbaar of verwytbaar word. (S v Badaba 1964(1) SA 26(A) te 27H-28A; S v Van der Berg 1968(3) SA 250 (A) te 252F-G.)"

It is of importance in the interests of clarity of thought that these three questions should be considered separately.

The first question is whether there is on the record proof of circumstances which could have a bearing on the mental capacity or the emotional condition of the

accused .....

accused. If there is no such proof, cadit quaestio: if there is such proof then the trier of fact must proceed to a consideration of the further two questions.

In the judgment convicting the accused GORDON J said:

> "I believe that in a moment of madness the accused committed this terrible crime .....

> crime. He appears to be an arrogant young man who would stand no cheek from another policeman. This may be due to the fact that he considered himself a man of importance because his father was a chief. There was such a suggestion made but it is unnecessary to make any finding hereon. He was certainly very angry when he picked up a service revolver which he knew to be loaded. With the intention of killing the deceased he fired into this man's heart from a distance of two or three paces. Having done so, he did not even take the trouble of following behind him, to bring help to the dying man. He did not even try to get him to hospital or to inform the lieutenant of what had happened. What he did was to seat himself at the table, to make a false entry in the book and to keep the true facts from his superior officers."

And in the judgment on extenuating circumstances the

learned .....

learned judge said:

> "We have come to the conclusion that there are no extenuating circumstances in this case. The difficulty that faced us in deciding whether there is a lessening of your moral blameworthiness is that we are not very clear on the reason that you wished to furnish as to why you picked up this revolver and shot the man. You had the man at your mercy with the revolver which you must have known was loaded. There was no question of it not being loaded. You could have done a number of acts, with deceased at point-blank range when you pointed this loaded revolver at him. Almost at point-blank range and as a clearly intended act, you simply fired a bullet into his heart. The argument that preceded it and which caused your wrath was to all intents and purposes a petty argument which could have been settled quite easily by a report to

the station commander. You killed a man of your age; a policeman who had his life before him, and you must suffer the consequences.

I do not wish to say very much, except for one further factor. It has given one of my Assessors and myself some thought and I should mention it in your favour. We feel that something triggered off your violent temper at that particular moment. Perhaps the full extent of your wrath and the causes therefor have not been ventilated or been brought out. Regrettably you have told lies about the whole matter. Nevertheless something occurred which in the heat of the moment caused your passions to be so aroused that you grabbed the pistol and fired a shot into his heart. One of my Assessors and myself gave very serious consideration as to whether or not this fact lessens your moral blameworthiness to such an extent as to constitute extenuating circumstances.

we .....

> We have, however, come to the conclusion that it falls short, it just falls short, but it does fall short of a finding of extenuating circumstances. The other Assessor feels that there is nothing to be said for you in re-. lation to extenuating circumstances. Although there was this one point which I have mentioned in the minds of myself plus one of my Assessors, nevertheless we are all of the view that there are no extenuating circumstances."

From these passages it is apparent that the trial Court found that something happened to put the accused in a violent temper. But the fact that an accused person acted in anger is not in itself extenuating: that depends on the circumstances which influenced his mental capacity or his emotional condition.

Counsel .....

Counsel for the accused could suggest only that there was provocation of the accused. But there was no finding of provocation by the trial Court; there was no evidence of provocation; and it was not part of the accused's case that he had been provoked.

What preceded the shooting was known to nobody but the accused, who chose not to tell the Court the truth, whatever it was, but to put up an unacceptable story of self-defence. There is in consequence no evidence of any circumstances which could have affected the accused's mental capacity or emotional condition.

In my view there was therefore no basis on the known facts of the present case for a finding of extenuat-

ing circumstances, and the appeal must fail.

The appeal is dismissed.

H C NICHOLAS, AJA

JOUBERT, JA
VAN HEERDEN, JA } Concur