

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MZAZILE WILLIAM NTOMBELA

Appellant

and

THE STATE

Respondent

CORAM: BOTHA, GROSSKOPF, STEYN, JJA

HEARD: 24 November 1988

DELIVERED: 29 November 1988

J U D G M E N T

GROSSKOPF, JA

The appellant was charged with three other men on two counts of murder, two counts of attempted murder, a count of unlawful possession of a firearm and a count of unlawful possession of ammunition. After a trial in the Witwatersrand Local Division (GORDON AJ and assessors) the appellant was found

guilty on all counts but his co-accused were found not guilty and were discharged. In respect of one of the murder charges (count 2) the Court found extenuating circumstances, but in respect of the other (count 4) no extenuating circumstances were found, and the appellant was sentenced to death. On the counts other than count 4 periods of imprisonment were imposed. With the leave of the trial judge the appellant now appeals against the finding that there were no extenuating circumstances in respect of count 4, and against the resultant death sentence.

Although there is no appeal against the conviction on any of the counts, and only an appeal against sentence on count 4, it is necessary to set out briefly the background to the events and the manner in which these offences were committed.

At the time of the trial in 1987 the appellant was 33 years old. He came to Johannesburg from Natal in 1976 and worked for Nel's Dairies in Victory Park until his dismissal, in circumstances to be dealt with later, on 10 June 1986. He lived in a hostel in Alexandra. The appellant was active in labour

affairs, and in 1985 joined the Commercial Catering and Allied Workers Union of South Africa (hereinafter referred to as CCAWUSA). At Nel's Dairies he served at first on the Workers' Committee and later became a shop steward and chairman of the seven shop stewards.

As from the end of 1985 there were labour troubles at Nel's Dairies. In December there was an illegal strike after the management had announced that no service bonus would be paid to employees. After negotiations, management agreed to pay the bonus. In January 1986 disciplinary action was instituted against a worker for recruiting trade union members during working hours. The worker resigned. Then, in April, a worker was dismissed for incompetence. A strike ensued, and after consultation with the workers, a trial was held at which CCAWUSA was represented. The upshot was that the worker was reinstated.

Bliss Dairies in Bezuidenhout Valley is a separate company which is under the same control as Nel's Dairies. In June 1986 there were labour disputes at Bliss Dairies. The

nature of the disputes does not appear clearly from the evidence, but nothing much turns on it. On 5 June 1986 there was a strike at Bliss Dairies. This was, it seems, sparked off by the dismissal of a worker. Many of the workers of Nel's Dairies went to the premises of Bliss Dairies, apparently to show their solidarity. They travelled in two vehicles belonging to Nel's Dairies. This was done without the approval of the management of Nel's Dairies. One of the vehicles was a bus which Nel's Dairies had acquired to convey workers between the hostel and their work. The other was a milk lorry, which, it was said in evidence, was unsafe for the conveyance of passengers. According to the evidence of Mr. Hugo, the distribution manager of Nel's Dairies, the appellant and one Patrick Diani (who was accused no. 2 in the court a quo) ordered the driver of the milk lorry to leave Nel's Dairies with a full load of passengers despite Mr Hugo's instructions to the contrary. The appellant denied in evidence that he had been responsible for the unauthorized use of the milk lorry. Nevertheless the appellant

and Diani were suspended, and, after a hearing, dismissed on 10 June. The appellant testified that CCAWUSA made representations to have him reinstated. If so, its efforts were apparently not very strenuous. Mr. J Masuku, an official of CCAWUSA, gave evidence for the appellant in extenuation. In cross-examination he testified as follows:

"Do you know the circumstances of accused No. 1's dismissal from Nel's, do you know why he was dismissed? --- Well, I don't know exactly the details that have surrounded that but I just know that there was an incident involving company trucks and that thereafter he was dismissed.

And your union obviously decided not to take any court action to have him reinstated? --- Well, the circumstances under which they were dismissed, the union would have failed to convince the court that they must be reinstated.

You are satisfied with that, you are satisfied no court would have reinstated them? --- Yes."

Whatever may be the rights and wrongs of the action taken against the appellant, it is a fair inference that it left him with a sense of grievance against the management of Nel's Dairies.

On 16 June 1986 the employees of Nel's Dairies did not

work, and received no wages. There is no suggestion that this unpaid holiday was related in any way to the appellant's dismissal. At that time a state of emergency was declared. On 17 June 1986 work proceeded normally, but on 18 June the workers refused to work or to leave the premises. There is evidence that this action was in support of the appellant and Diani. The position became tense and the police were called in. All the workers, amounting to about 350, were arrested under the emergency regulations and detained. After about ten days they were released, and some of them were re-employed. Others refused to return to work.

On 14 July 1986, at about 6 a.m., an employee of Nel's Dairies, one Patrick Moilola, was on his way to work. A short distance from the entrance to the premises of Nel's Dairies the appellant shot him from behind with a handgun. Moilola recovered, and the appellant was convicted of attempted murder for this shooting (count 1). No reason for this shooting appears from the appellant's evidence at the trial, which was a

complete denial of complicity. However, in an extra-curial statement dated 12 August 1986 he said that he and some others went to Nel's Dairies to shoot one Buzekozeko "because he did not want to strike after we agreed that no one was to return to work." Buzekozeko was not there "so I decided that someone else must be shot and Patrick was the first person I saw."

In another statement, given on 11 September 1986, he expanded somewhat on his reasons. He said:

"At work I was fired on 10th June this year. The workers did not go home. They waited for me to know if I was fired or not. So when I came out of my employer's office, they wanted to know if I was fired. I said I was fired and they said that they were going to strike and I informed them not to strike because I was going to take steps against my employer because he fired me for no good reason. After 5 days they came to me at the hostel and told me that I was bluffing them and told me they were taking steps to strike. Then on the 17th June they came to me and told me they were going to strike on the 18th June. On the 18th I went to work to see if they were striking or not, so I found them striking. All the people who striked were arrested and detained. I will say there were about 900. After that I went to the Union to find out why they were arrested. The Union asked the factory why they were arrested and the factory said they did not want them detained but it was during the state of

emergency. After they were released I met them at the hostel and took them to the Union. Actually I met them in town and those who had no busfare I gave money to go to the hostel. They then went to the Union and the Union advised them not to go back to work until they were advised why they were arrested. They did not go to work but after a long time they went one by one. Those who went to work informed the employer that I was the one who told them not to work. I asked them whether I caused them to strike. I became very cross and decided to kill those who went back to work. It was me and the people who did not go back to work who decided this."

The next shooting was on 16 July 1986. Early that morning the appellant and some others went to the premises of Bliss Dairies in Bezuidenhout Valley. The deceased was a security guard doing duty at the premises. He was shot twice from the side, either by the appellant himself, or by an accomplice at the instigation of the appellant. One shot caused minor injuries to the head but the other, which entered the deceased's chest, caused his death two days later. The accused was convicted of murder in respect of this count (count 2). Extenuating circumstances were found as follows:

"Dealing with the events at the Bezuidenhout Valley,

this is a case which has caused us some difficulty. We cannot be certain as to who fired the shot. It would be no mitigation if the accused did hire an assassin. While it is clear that the accused was a party to the deed, at the very least he was an accomplice, directly implicated. Nevertheless, because of the difficulty mentioned, and perhaps charitably in this regard we find that there are extenuating circumstances."

On 25 July 1986, at about 8 a.m., a Bliss Dairies van was delivering dairy products at Checkers Stores at Halfway House. The appellant and one or two others arrived there by car. The appellant went to where the delivery was taking place, and shot one of the workers in the neck. The worker survived. The appellant left again in the car. The appellant was convicted of attempted murder on this count (count 3).

This then brings me to count 4, which is of direct importance for the present appeal. This incident was also on 25 July 1986, but in the afternoon. Eyewitness evidence was given by accused no. 3, whose evidence was, on the whole, accepted by the Court. At about 2 p.m. accused no. 3 was in his car at the hostel in Alexandra, when the appellant approached

him, entered the car and told him to drive off. Accused no. 3 complied. They first put in petrol with money which the appellant provided, and then bought fried chicken. The appellant took out a firearm and put it in the chicken container which he placed on the back seat of the car. They drove to Parkhurst, where the appellant told no. 3 to park. The appellant took the firearm from the container and stuck it into his trousers in front. They got out and walked some distance until they saw a delivery van of Nel's Dairies. The appellant told no. 3 to return to the car and to move it to a certain corner. No. 3 did so, and waited for a while. While he was waiting the appellant went to the van, and shot the driver. As appears from the medical evidence he shot him twice in the side of the body below the right armpit. He then ran back to where no. 3 was parked. They drove away. The deceased died the same day. In extra-curial statements the appellant admitted the killing, although he gave no details about how it happened. There can be no doubt that the appellant was correctly convicted

of murder and, indeed, there is no appeal against his conviction. In its judgment on extenuating circumstances the trial court fully and correctly set out and considered all the factors relied upon by the defence, but came to the following conclusion:

"The accused set out deliberately to shoot and kill a completely innocent worker, any worker, who might be found going about his lawful business of going to work. The hapless person was in fact so engaged and was simply assassinated. There is no evidence that accused even knew this man; knew his circumstances; considered the suffering that he would cause. We have taken into account all the arguments advanced. We find that the act is one of a simple brutal murder. There is absolutely nothing that can lessen the moral guilt. The man, a completely innocent man going about his lawful duties was gunned down in an act of assassination. In the circumstances, insofar as count 4 is concerned, we are unable to find the existence of extenuating circumstances."

The principles by which this Court is guided when asked on appeal, in a case of murder, to reverse a finding by the trial Court that there were no extenuating circumstances are well-known, and have recently been re-stated as follows in S v Mc Bride 1988 (4) SA 10 (A) at p. 19 A-C:

"... the decision as to the existence or otherwise of

extenuating circumstances is, in the first instance, essentially one for the trial Court; and in the absence of any misdirection or irregularity this Court will not interfere on appeal with the trial Court's finding as to the non-existence of extenuating circumstances unless that finding is one to which no reasonable Court could have come. This Court cannot substitute its view on the question of extenuating circumstances merely because it disagrees with the view of the trial Court. Nor, in the absence of good grounds for interference with the finding of the trial Court, does this Court express any view as to whether the trial Court could or should have found extenuating circumstances."

In the present case Mr. Steyn, who appeared for the appellant, did not submit - and, in my view, rightly so - that the trial Court had committed any misdirection or irregularity. His contention was that no reasonable Court could have come to the conclusion that there were no extenuating circumstances in relation to the murder charged in count 4.

An extenuating circumstance, in the oft-quoted words of LANSDOWN JP in R v Biyana 1938 EDL 310, is "a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the

prisoner's guilt". It is trite law that the appellant bore the onus of establishing extenuating circumstances on a balance of probabilities.

What were the possible extenuating circumstances in the present case? The actual killing does not point to any such circumstances. It was cold-blooded and premeditated. Mr. Steyn contended however, that the appellant's motives for killing the deceased served to mitigate the moral blameworthiness of his conduct.

It goes without saying that, in an appropriate case, the motive with which a deed is committed may have a bearing on the perpetrator's moral culpability. The first difficulty in the appellant's way in the present case, however, is to determine exactly what his motive was. In evidence he denied that he had committed any of the offences charged, and he persisted in this denial even when giving evidence in extenuation. His own evidence is consequently of no direct assistance in establishing any motive for the killing. The extra-curial statements quoted

above are not very clear and in any event suggest a cold-bloodedness which is not helpful to the appellant's case.

Mr. Steyn was consequently constrained to argue on the basis of probabilities arising from the objective facts of the case coupled with snippets derived from other evidence or evidential material.

Now at the outset it seems clear that the appellant engaged in the shooting of these four persons because they were employed by, or, in the case of the deceased in the second count, working for the benefit of, Nel's Dairies or Bliss Dairies. One can possibly infer from this, coupled with certain other evidence such as his extra-curial statements, that his purpose in doing so was to encourage workers to strike, or to punish them for failing to do so. Such a purpose, it seems to me, is by itself not mitigating - indeed, depending on other circumstances, it may aggravate the moral obloquy attaching to the deed. And when one tries to determine the reasons prompting the appellant to terrorise workers into striking, or to punish them for not doing

so, one enters into the field of pure speculation. Nothing in the evidence provides a safe basis for inference. Thus Mr. Steyn suggested that the appellant had lost his position of relative authority when he was dismissed; that, according to some evidence, the workers had in any event turned from him because his leadership was not decisive enough; that his loss of standing was exemplified by the failure of the workers to strike when he told them to do so (this, incidentally, in the face of the appellant's own evidence that he was opposed to the strike); and that his purpose with the killings may well have been to reassert his authority over the workers. A mere desire to gain power would of course not be an extenuating circumstance by itself, but the theory proceeded along the lines that the appellant's purpose was beneficial - having gained power he would have used it for the benefit of the workers. The purpose which is thus suggested is not supported by any evidence. If one is to speculate, one might as well imagine that the appellant acted from hunger for power, or pique at being disobeyed by the workers

(assuming, again, that he was the instigator of the strike), or in the hope of obtaining his own reinstatement as an employee of Nel's Dairies, no matter what suffering he imposed on others, or even from a desire to vent his spite on Nel's Dairies and Bliss Dairies by depriving them of their workforce. Thus, even assuming that the murder was committed by the appellant in an attempt to reassert his authority over the workers, such an attitude on his part would as a matter of probability, not by itself amount to an extenuating circumstance.

Then it was argued that the appellant may have been induced by fellow workers, or even by CCAWUSA, to commit these offences. There are hints in the extra-curial statements quoted above that the appellant planned the offences in concert with others who did not go back to work. These hints were, however, not elaborated on at the trial, and the evidence shows that in the actual commission of the offences the appellant was the prime mover. Indeed, in the count with which we are concerned the appellant was, according to the facts found by the trial Court,

the sole actor. And participation by CCAWUSA is negatived by the evidence. Mr. Masuku testified that CCAWUSA was opposed to violence against strike-breakers, and that the appellant would have received no support from the union in respect of the offences committed by him. There was nothing to contradict this evidence. There is accordingly nothing on record to show that the appellant was coerced, encouraged or even influenced by others to commit the offences of which he was convicted, and, in particular, the murder which forms the subject of this appeal.

Finally it was suggested that the general state of labour unrest, which resulted inter alia in the appellant's own dismissal, must have had an influence on his mind. This seems highly probable, but does not go far enough. It is not enough for the appellant to show that he was probably influenced in one way or another. He had to show that he was influenced in a way which reduced the moral blameworthiness of his conduct in murdering the driver of the delivery van in the present count. This again raises the question, discussed above, of what his real

motive was in killing the deceased. The trial Court came to the conclusion that the influence exerted on the appellant by the conditions at the time did not serve as extenuation, and I do not think that, applying the principles set out above, we can interfere with this finding.

In the result I remain unpersuaded that no reasonable court could have found that there were no extenuating circumstances in the present case.

The appeal is dismissed.

E M GROSSKOPF, JA

BOTHA, JA }
STEYN, JA } Concur