181/91

Saaknr. 29/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PATRICK DAKUSE ..... Appellant

AND

THE STATE ..... Respondent

Coram: VAN HEERDEN EKSTEEN, JJA et PREISS AJA

Heard: 25 November 1991

Delivered: 29 November 1991

J U D G M E N T

EKSTEEN, JA :

The appellant and another young man were arraigned before a Circuit Court on a charge of murder. The indictment alleged that they had intentionally killed an 18 year old girl called Fundiswa Vara at Cradock on the night of 25-26 September 1987. They both pleaded not guilty.

The State then led the evidence of David Vara, the father of the deceased. He told the Court that his daughter had gone out on the evening of 25 September in the company of two of her friends. Early the next morning, as the result of a report, he discovered her body lying in the street in an area

.... / 2

known as "the shacks". She appeared to him to have been stabbed below her left armpit and on her right shoulder, and to have been set alight by a burning motor-car tyre placed across the upper part of her body.

The post-mortem report, which was handed in by consent, showed that the cause of her death was burning. It contained no reference at all to any stab-wounds on the body.

The only other witness called by the State was Warrant Officer Vosloo de Beer who had been called out to the scene of the crime at approximately 7.40 a.m. on 26 September. He too described finding the body of the deceased lying in the street. She was naked and appeared to have been burnt to death by a motor-car

.... / 3

tyre having been placed on the upper part of her body. Near her head he found two oblong shaped stones. Some seven metres further on he found another stone which appeared to have bloodstains on it. Beyond that, in the middle of the road, he found what appeared to have been a pool of blood.

At this stage of the proceedings the appellant changed his plea to one of guilty of murder but with extenuating circumstances. The prosecutor thereupon closed his case and appellant's co-accused was discharged.

In tendering his plea of guilty the appellant handed in a written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 in which he

.... / 4

set out the facts which he admitted and on which he pleaded guilty. This statement reads as follows:

"I, Patrick Dakuse, the undersigned, plead guilty to the murder of FUNDISWA VARA (hereinafter referred to as THE DECEASED) but plead that there are extenuating circumstances. The facts leading up to and surrounding the death of the deceased are as follows:

1. On the 25th September I and others attended a party where amongst others the deceased was also present.
2. A large quantity of alcohol was consumed by all those who attended the party, including myself.
3. At a stage the deceased and a person named SINDEPHI got involved in a very heated argument.
4. They were asked to leave the party, which they did with a large group in attendance. I was part of the group in attendance.
5. On arriving outside SINDERHI picked up a stone and threw it at the deceased which caused her to fall to the ground.
6. The rest of the group allowed themselves to be incited and also started throwing stones at the deceased, some of which

struck her on the head. I joined in with this action of throwing stones realizing that death was a possibility for the deceased as a result of this attack by the group.

7. After the deceased became motionless on the ground I stopped throwing stones at the deceased.

8. Hereafter a member of the group went and fetched a tyre, put it over the deceased and set it alight.

9. I was in no way a leader in this group and was in fact a boy amongst men. I was 17 at the time.

10. Although I foresaw the possibility of the death of the deceased and nevertheless associated myself with the group by throwing stones at the deceased, it was never my specific intention to kill the deceased. There was no premeditation on my behalf whatsoever. As a result of the liquor I consumed, group pressure and the influence of older people I participated in the stone throwing. I personally took no initiative or played no actual part in the burning of the deceased. I am deeply remorseful for what I did."

.... / 6

After putting certain questions to the appellant in order to clarify aspects of his statement, the learned trial Judge convicted him on the strength of his statement.

The appellant's mother was called to give evidence in mitigation of sentence, and the trial Judge thereupon proceeded to sentence the appellant to 11 years imprisonment. Leave to appeal against the sentence was refused by the trial Judge but was granted by this Court on a petition to the Chief Justice.

In his judgment on sentence the trial Judge stressed the seriousness of the offence and the gruesome circumstances in which the deceased had been killed. He then came to the conclusion that a proper

.... / 7

sentence for the appellant would be 12 or 13 years imprisonment, but in view of the fact that he had been in custody for about two years awaiting trial, the sentence ought to be reduced to 11 years imprisonment.

Mr. Gess, who appeared before us on behalf of the appellant, submitted that the Judge a quo had misdirected himself in several respects. In the view I take of the matter, however, it is not necessary to deal with any of these submissions.

In the light of the evidence led by the State the appellant had to be sentenced on the facts as set out by him in his statement. It was the only explanation before the Court of what had occurred that night. There was nothing in the State evidence to

.... / 8

contradict it or to cast any doubt upon the unqualified acceptance of his explanation.

The appellant says in his statement that he was 17 years old at the time. At the commencement of the trial the State accepted that he was born on 7 May 1970 which would have made him 17 years and 4 months old at the time of the commission of the offence.

Warrant Officer de Beer also conceded under cross-examination that the information he had gleaned led him to conclude that there had been a party at a house some 100 metres from the place where the body of the deceased had been discovered, and that both the appellant and the deceased had attended that

party. De Beer also conceded that shortly after the arrest of appellant's co-accused, he had mentioned the name of Sindephi in connection with the murder, and that the police had been looking for Sindephi ever since but were unable to find him. He did not suggest that there was no such person as Sindephi.

That stones had been thrown at the deceased is also borne out by the bloodstained stones found by de Beer when he went to the scene the morning after the murder.

When questioned by the Judge a quo in clarification of his plea, appellant alleged that he had bought some R30 worth of liquor at the party and that he and his co-accused had consumed it before

.... / 10

the attack on the deceased.

In the light of these allegations the following features must be seen as mitigating factors, viz.

(1) The youthful age of the appellant. In fact he was a mere boy.

(2) The amount of liquor which he consumed at the party that evening and which must have had the effect of reducing his normal inhibitions.

(3) The fact that he had acted as one of a mob and that he had been incited by people older than he was - as he says, he was "a boy amongst men".

.... / 11

(4) On his statement it is clear that he had not anticipated such an attack on the deceased but had participated in it on the spur of the moment.

(5) He had not taken the initiative in any of these actions.

(6) He had not participated in setting the deceased alight.

(7) He has no previous convictions for crimes of violence. He has only one previous conviction viz. for theft committed in 1985 when he was a boy of 15. On that

.... / 12

occasion he was treated as a juvenile and received corporal punishment.

Aggravating circumstances are to be found in the manner of the killing. As the learned trial Judge correctly points out the burning of a person to death in the way the deceased was killed in this case is a particularly gruesome and cruel action. For a mob of young men to chase a defenceless 18 year old girl down a street throwing stones at her prior to setting her alight serves but to aggravate the horror of the deed. Such an offence cannot be seen other than in a serious light.

In weighing up the aggravating and miti-

..... / 13

must weigh heavily in mitigation of sentence. Taken together with the other mitigating factors I have mentioned a sentence of 13 years imprisonment - the period which the trial Judge initially had in mind - seems to me to be unduly severe. A sentence of 7 years imprisonment would, in my view, be more appropriate. The difference between such a sentence and the one the trial Judge had in mind is so great as to give rise to the inference that the trial Judge acted unreasonably and therefore improperly, and that this Court is therefore entitled to interfere with the exercise of his discretion. (S. v. Anderson 1964 (3) SA 494 (A) at p 495 G - H.)

The trial Judge reduced the sentence of

.... / 14

13 years imprisonment which he had in mind by 2 years by reason of the fact that the appellant had spent almost two years in custody awaiting trial. It would therefore only be fair if we too were to extend that consideration to the appellant by reducing the sentence of 7 years that I had in mind by the same period of time.

In the result therefore the appeal is allowed and the sentence of 11 years imprisonment imposed by the trial Court is altered to one of 5 years imprisonment.

J.P.G. EKSTEEN, JA

VAN HEERDEN, JA)
PREISS, AJA) concur