LL Case No 196/1990

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ANDREW JOHN OLIVER Appellant

and

THE STATE Respondent

CORAM: BOTHA, VIVIER et F H GROSSKOPF JJA

HEARD: 14 NOVEMBER 1991

DELIVERED: 29 NOVEMBER 1991

JUDGMENT

BOTHA JA:-

The appellant was convicted of murder by a Judge and assessors in the Witwatersrand Local Division, and, extenuating circumstances having been found, sentenced by the trial Judge to 8 years' imprisonment. With the leave of the trial Judge, the appellant appeals against his conviction and sentence.

It is common cause that the appellant caused the death of the deceased, Justin Smith, by firing two shots from a pistol at him. The shooting took place during the early evening of 9 December 1987, at a house in Kew, Johannesburg. The deceased was 24 years of age when he died. At the time of the shooting the appellant was just two weeks short of his 24th birthday.

The events leading up to the shooting are summarized in the judgment of the trial Judge as follows:

> "The accused, the deceased and witness Gino Allasio and other witnesses attended the Highlands North High School together. The

house at 116 8th Road, Kew, is owned by Mrs Machetto, who occupied a separate portion of the house. The larger portion of the house was occupied by the deceased, the accused and the said Gino Allasio, each of whom had a separate bedroom and was liable for a third share of the rent, payable at the beginning of each month to Mrs Machetto.

During December 1987 it is common cause that the accused was in arrears with his share of the rent. This apparently worried Mrs Machetto who asked the deceased and Gino to get in touch with the accused whom she had not seen for a few days, and get him to attend to the matter. They agreed to do so. The accused was an habitué at a restaurant known as Hammersley's Bar and they looked for him there. They were accompanied by Gino's girlfriend.

According to Mr McFarland, the owner of the restaurant, the accused was out on an errand for Mr MacFarland's brother, and on his return to the restaurant there was a confrontation over the question of rent between the deceased, Gino and the accused, in the course of which the accused's drinking problem and the question of his treatment for it at an institution were discussed. The tenor of this discussion was obviously a humiliation for the accused, particularly as it occurred in a public place and in the presence of Gino's girlfriend, and was accompanied by threats that the accused would be beaten up and his television and hi-fi set should be sold or pawned.

Matters appeared, however, to have been settled on the accused's undertaking to

> arrange for payment of the rent. An arrangement was also made that they would all meet later that evening at the house of a mutual friend, one David Fine. The deceased drove Gino and his girlfriend to the house of Gino's parents and then proceeded to the house in Kew. The accused, who had obtained the money for the rent, arrived before the deceased at the house in Kew."

The only eye-witness as to the events that occurred when the deceased arrived at the house was Mrs Machetto. The following summary of her evidence, which was not challenged on behalf of the appellant, appears in the judgment of the trial Judge:

> "She states that at about 19.15 on the day in question she was at home, when she heard a shot. She went outside to investigate and saw the deceased opening the gate. She heard the deceased say: 'Olly (referring to the accused), do you want to come and move your car?' She called out to the deceased: 'Heavens, I heard a shot. Something has happened in the house.' The deceased replied: 'Don't worry. It's only Olly.' The deceased then walked down the driveway towards the front door when she saw him put out his hand in front of him and heard him say: 'Olly, can we talk about this?' She heard at that stage a second shot and saw the deceased fall to the ground at the entrance to the house, that is to say, the accused

fell in a half-seated position, one hand behind him; the other clutching his stomach. The deceased then called to her and said: 'Get an ambulance.' She went in to her side of the house and telephoned the Bramley Police Station. She returned to the scene and saw the accused's motor car, a blue Passat, being driven away."

The evidence given by the appellant was summarized by the trial Judge as follows:

"He referred to a history of humiliation and occasional physical assault that he had suffered at the hands of the deceased, which had continued since their schooldays. The deceased was clearly the dominant personality in the management of what was referred to as 'the commune', and the court is prepared to accept the accused's version, corroborated as it is by the evidence of Gino, as to the insult and humiliation, suffered by him over a long period.

The accused went on to say that at the meeting at Hamersley's Bar the deceased played a more prominent and aggressive role than that depicted by Mr Allasio; that he was again insulted there by the deceased outside the restaurant, on leaving it. He had also been told that his television set had already been pawned to cover his portion of the rent. He said that he obtained the rent money from an Autobank and from Gino and returned to the house. His explanation of the shooting is as follows: He says that he feared that in spite of the fact that he had

obtained the rent money he would be beaten up by the deceased when the latter arrived at the house. He armed himself with the deceased's fire-arm in order to scare the deceased away, and he says that he did not expect to use it and did not know how to do so. While he was fiddling with the weapon in the passage, he says a shot went off accidentally, striking the ceiling.

The accused went on to say that he heard the sounds of the deceased and Mrs Machetto talking outside. He went to the entrance of his bedroom; the front door was open; and he said to the deceased: 'Don't come any closer.' The deceased stood still for a second and then said: 'Olly, let's talk about it.' The deceased moved forward, the accused stepped back, and then, to quote his own words, 'a shot went off. I did not intend shooting and can't remember pulling the trigger. The first shot was accidental.' The deceased fell to the ground and shouted to the landlady: 'Hurry up and get an ambulance.' 'I turned and before I could move I was tackled from behind by the deceased. We wrestled arm-in-arm. Another shot went off in the course of the wrestling down the passage and we bumped into a cupboard at the end. The deceased went limp; he tore off my shirt; and I ran away."

A post mortem examination of the body of the deceased revealed the presence of two gunshot wounds. Both of them were entrance wounds. One was situated

about five centimetres above the left nipple of the deceased, and the other in the deceased's back. It is clear that the appellant fired three shots: the first bullet went into the ceiling, the second struck the deceased in front of his chest at the time when the appellant and the deceased were facing each other at the front door of the house, and the third hit the deceased in the back whilst the appellant and the deceased were inside the house (struggling, according to the appellant's evidence).

The trial Court was not favourably impressed with the appellant as a witness. It found that his memory failed him, or purported to fail him, in respect of many crucial points. He was unable, or declined, to explain how the two shots which struck the deceased were actually fired. The trial Court did not consider that the appellant was frank with it when dealing with this part of the case. It rejected as "not credible" his evidence that he took the weapon out of fear,

expecting to be beaten up by the deceased, and that he wanted to scare off the deceased. It concluded that he took possession of the weapon while waiting for the deceased to arrive at the house, with the intention of shooting the deceased, and that he carried this intention into effect. That was the basis upon which he was convicted.

In argument before this Court counsel for the appellant advanced four alleged irregularities in the conduct of the trial as the main basis of his attack on the appellant's conviction. I proceed to deal with them in turn.

Counsel's first point related to the calling of witnesses by the trial Judge. After the appellant had concluded his evidence, but before his counsel at the trial had closed his case, counsel for the State applied for leave to re-open the State case by calling further evidence. The application was refused. The evidence was then led of a number of witnesses on

behalf of the appellant, who testified, in the main, to the effect that the appellant was of a meek and mild disposition and not given to violence or aggression. When the appellant's case was closed, prosecuting counsel applied to the trial Judge to exercise his powers in terms of section 186 of the Criminal Procedure Act 51 of 1977 by calling four witnesses, whose names were supplied and of whom counsel said that he believed that they could assist the Court on the question of the character of the appellant with regard to violence. The trial Judge granted the application. In the event, only three of the witnesses were called, and it turned out (as a perusal of the record shows) that their evidence was of practically no consequence in the trial. However, counsel for the appellant who appeared in this Court (he did not appear at the trial) contended that the assessors might have been influenced by the evidence in question. He argued that the trial Judge ought not to have acceded to the State's

application under section 186, since there was no basis on which the trial Judge could have considered that the evidence in question was "essential to the just decision of the case", in accordance with the concluding part of the section. The argument is misplaced. The second part of section 186 deals with the situation where the trial Judge is imperatively enjoined ("shall") to call a witness whose evidence appears to be essential to the just decision of the case. It is obvious that the State's application had not been founded on that part of the section, and that the trial Judge did not purport to advert to it at all. The application was plainly based on the first part of the section, which confers on the trial Judge a discretion ("may") at any time of the proceedings to call any person as a witness. In that context counsel sought nevertheless to argue that the manner of the exercise of the Judge's discretion in this case constituted an irregularity, on the ground that the

Judge was thereby, as counsel put it, affording the State "a second bite at the cherry", having regard to the fact that the meek and non-violent character of the appellant had been canvassed in cross-examination of the State witnesses, and to the fact that the State's prior application to re-open its case had been refused. (It does not appear from the record that the prior application was directed at the same object as the application now under consideration, but I shall simply assume that it was.) There is no substance in this line of argument. The calling on the appellant's behalf of a number of witnesses as to the appellant's character added a new dimension to that line of enquiry, and it could quite understandably have prompted the trial Judge to consider that a balancing of the scales of justice rendered it advisable to hear a possible other side of the story, as was foreshadowed in the State's application. But, however that may be, it is not the function of a court of appeal to consider

how it would itself have exercised the discretion. The discretion vested in the trial Judge and the manner of its exercise, it is clear, is assailable on limited grounds only. No such grounds as would warrant interference by this Court have been shown to exist in this case. Counsel's first point accordingly fails.

It was argued in the second place that the trial Judge should, under section 186, have called for medical evidence on the effects of the joint intake by a person of alcohol and a medical substance called Epanutin, and that the trial Judge's failure to do so constituted an irregularity. The argument was based, in the first place, on the evidence of the appellant that at the relevant time he was taking Epanutin tablets every morning and that he had partaken of liquor during the day in question, and, in the second place, on the evidence of Mrs Labuschagne, a qualified criminologist who was called to testify on the appellant's behalf. In the course of

her evidence she said that it was well known that Epanutin had a sedative effect, and she suggested the possibility that the appellant's state of anxiety at the time of the shooting could have been worsened "by mixing Epanutin with alcohol", and that his "capacity to act as a free moral agent was somehow, due to medical factors, compromised". Counsel argued that the combined intake of the medication and alcohol may well have been the cause of what he called the appellant's "somewhat erratic behaviour" on the day in question, and that the trial Judge was accordingly obliged mero motu to cause this aspect of the case to be investigated further. There is no merit in the argument, for a number of reasons. One is that Mrs Labuschagne is no expert on the effect of alcohol and drugs on the mental state of a person; the views and possibilities put forward by her in this regard are no more than mere theories, unsubstantiated by expertise or evidence. Another reason - which is in itself fatal to the argument - is

that the appellant himself at no stage in his evidence suggested that he had been affected by the medicine and the alcohol that he had taken on the day in question. Any such suggestion would in any event have run directly counter to the observations of his condition deposed to by the witnesses who saw him shortly before the shooting. Counsel's argument accordingly rests on nothing but pure speculation. There is simply no room for criticising the trial Judge for not having given attention to an enquiry of that nature. So counsel's second point fails, too.

The third point was that the trial Judge had committed an irregularity by allowing one of his assessors to "descend into the arena", by questioning the appellant and the witness Mrs Labuschagne at inordinate length and in an improper manner. I do not agree with counsel's description of either the length or the nature of the assessor's questioning. The questions put by the assessor were probing and somehwat

extensive, to be sure, but on a perusal of the record I am quite satisfied that the questioning did not exceed the bounds of propriety. There was consequently no irregularity. The third point also fails.

Counsel's fourth point (which did not really relate to an irregularity) was that the trial Court's reasoning, as reflected in the judgment of the trial Judge, was flawed because of a failure to address itself to the vital question as to whether the appellant's version of how the shooting occurred could reasonably possibly be true. The point is without substance. It is founded upon mere form: that the trial Judge failed to state in so many words that that was the criterion applied by the trial Court in assessing the evidence of the appellant. The omission to do so is of no consequence, when regard is had to the reasoning of the trial Court, as set out by the trial Judge. As was mentioned earlier, the trial Court rejected the vital part of the appellant's explanation

of how the shooting occurred as being "not credible". The trial Judge's judgment sets out the reasons why the appellant's evidence was so rejected. It is not necessary to go into the details. It is plainly implicit in the judgment that the trial Court considered that it was not a reasonable possibility that the evidence was true. This point is also rejected.

I turn next to the merits of the conviction. This aspect of the appeal I propose to dispose of very briefly. Despite the earnest efforts of counsel for the appellant, I remain unpersuaded that there is any warrant for this Court to take a different view of the facts from that of the trial Court. A perusal of the record reveals that the trial Court had every reason to reject as false beyond reasonable doubt the evidence of the appellant that he did not intend to shoot at the deceased when the first shot that struck the deceased was fired. That being so, the only reasonable

inference to be drawn from the facts is that the appellant had the intention to kill which was requisite for the conviction of murder.

The appeal against the conviction must be dismissed.

Finally, I turn to the sentence imposed on the appellant. In arguing this part of the appeal counsel for the appellant did not contend (wisely, in my opinion) that the trial Judge had misdirected himself in any way when passing sentence, but he urged us nevertheless to reconsider and to interfere with the sentence on the ground that it was unduly severe.

There are undoubtedly a number of weighty considerations of a mitigating nature present in this case. The appellant had long suffered bullying and humiliating treatment meted out to him by the deceased. On a number of occasions the deceased, incensed at the sound of the music the appellant was accustomed to play in his room, assaulted the appellant by striking and

kicking him. On such occasions the appellant just ran away. He never retaliated, never objected. The evidence is clear that he is indeed a person of a meek disposition, and of a wholly non-aggressive nature. The picture of the appellant emerging from the evidence is a rather pathetic one. One witness likened him to "a bird with a broken wing". Then, shortly before the murder, the appellant was subjected to particularly humiliating treatment at the hands of the deceased. He was told that his TV set had been pawned, and that his hi-fi set would be pawned or sold. He was ordered to go to a centre for treatment of his drinking problem, and the deceased insisted, threateningly, that he should stay there until he had been cured. The deceased threatened to beat him up. It must be accepted that the appellant was in an emotional turmoil when he was awaiting the deceased's arrival at the house. He had the intention to shoot the deceased, but his act in doing so was wholly out of character. The

past history of the relationship between the appellant and the deceased and the immediately preceding provocation suffered by the appellant serve to lessen his moral culpability considerably. Mr Segal, a clinical psychologist, examined the appellant and gave evidence on his behalf, confirming the impact that all the confluencing factors had on the appellant. Mr Segal testified further that, since the commission of the crime, the appellant had succeeded remarkably well in rehabilitating himself; inter alia, he had found fixed employment, in which he was performing well, and he had overcome his drinking problem. He showed genuine remorse for what he had done. He had become a much more mature person.

The crime was a serious one, of course, and the interests of society cannot be disregarded. In all the circumstances, however, this Court is of the view that there is good cause for reducing the period of imprisonment which the appellant must undergo to make

amends for his crime. If this Court had been entrusted with the task of sentencing the appellant in the first instance, it would have imposed an effective sentence of imprisonment of 4 years. The disparity between such a sentence and the sentence imposed by the trial Judge is sufficiently pronounced to warrant interference by this Court. The sentence will therefore be amended accordingly.

The order of the Court is as follows:

1 The appeal against the conviction is dismissed.

2. The appeal against the sentence is allowed. The sentence imposed by the trial Judge is set aside and there is substituted for it the following sentence:

> "8 years' imprisonment, of which 4 years is suspended for 5 years on condition that the accused is not convicted of a crime involving violence to the person of another,

committed during the period of suspension, and in respect of which he is sentenced to imprisonment without the option of a fine."

A.S. BOTHA JA

VIVIER AR

CONCUR

F H GROSSKOPF JA