

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Case No 314/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MARTHINUS HERMANUS BYLEVELD

Appellant

and

THE STATE

Respondent

CORAM: NESTADT, VIVIER, JJA et NICHOLAS, AJA

HEARD: 9 September 1993

DELIVERED: 23 September 1993

JUDGMENT

NICHOLAS, AJA

At about 6 o'clock on the morning of Saturday 22 April 1989 a station wagon left Sasolburg en route for Hendrina. The occupants were Henning Smit ("Henning"); Manning's brother Solomina Smit ("Solomina"); and Gregory Muldoon, who was married to Manning's cousin. From Hendrina they drove on to Pullenshope, a township situated about 20 kms from the town, in order to visit their uncle, Marthinus Smit ("Marthinus"). They arrived at his house at about 9 a.m. and found him there with his nephew, Marthinus Byleveld ("Byleveld"). They were sitting drinking whisky and the visitors joined them. They continued to drink throughout the day.

At about 6 p.m. the whole party set off for Hendrina in order put in petrol for the return journey to Sasolburg. Marthinus's 7 year son went with them. From the filling station they drove to the Hendrina hotel. Henning remained outside in the car with Marthinus's son. The others

went into the hotel, where they stayed for 60-90 minutes, playing a game of snooker or pool. Each of them drank 3 or 4 double tots of whisky or brandy.

They left to go back to Pullenshope. Just out of Hendrina they stopped next to two black hitch-hikers and gave them a lift. After travelling some distance they stopped to let off the black men. Byleveld, Marthinus and Solomina got out of the vehicle and demanded money from the hitch-hikers, who tried to run away. One of them made good his escape, but the other got away only after Byleveld had caught hold of him by the back of his jacket and ripped it off him. About R50 was found in a pocket, and with this they returned to the hotel. They spent the money on drinks over the next hour.

Leaving the hotel once more, they took the Bethal road, in order to go to a farm where Marthinus, who was driving, said that a sheep could be bought. En route they stopped at the roadside and picked up a black woman who was hitch-hiking. Byleveld, who had been sitting next to Henning

on the rear seat, moved over to the back compartment of the vehicle, and the woman took his place. From behind her Byleveld started to handle the woman's breasts and to touch her in the area of her private parts. She protested , "Stop-stop, die baas pla my." Marthinus did nothing at that stage, but later, when his young son expressed a need to urinate, the vehicle was brought to a stop. The woman opened the door and got out and tried to run away. She was unsuccessful. Byleveld and Solomina each caught hold of her by an arm and slapped her. Byleveld gave her a blow and she fell to the ground. He removed her knickers and took off his trousers and had intercourse with her. He then thrust his fist up her vagina. Marthinus gave him an empty "dumpy" beer bottle which he pressed up her vagina. He followed this with another beer bottle. He slapped her and jumped on her and kicked her. She was beside herself, shouting and screaming. Eventually she was left lying by the roadside, groaning with pain.

The party returned to Hendrina once more and drew up at the petrol pumps of "Hendrina Implements". Byleveld washed his arm and hand, which were covered with blood. He got into an altercation with the petrol attendant, one Lazarus Mahlangu, from whom he tried to snatch his money-bag, and he hit him on the mouth.

They set out again on the Bethal road and arrived at the farm of Ruben Hirschowitz near the town. Byleveld and Solomon went to the sheep kraal, where Byleveld caught a sheep and brought it back to the vehicle. They returned to Pullenshope where the animal was slaughtered.

At about 9 'clock on the following morning (Sunday 23 April 1989), Sgt Daniel Mahlangu of the South African Police found the dead body of a woman lying in the grass beside the tarred road between Hendrina and Bethal. It was later identified as that of S.M..

Arising out of these incidents, Byleveld was on 14 May 1991 arraigned as accused No. 1 on 5 counts in the

Eastern and South Eastern Circuit Court. They were:

1. The murder of B.M..
2. The rape of B.M..
3. Indecent assault on B.M. by touching her breasts and private parts and pressing a beer bottle up her vagina.
4. Theft of a sheep from Ruben Hirschowitz.
5. Assault on Lazarus Mahlangu at Hendrina Implemente.

As accused Nos 2 and 3 respectively, Marthinus Smit and Solomina Smit were charged on counts 1, 2 and 4. Before a court composed of Curlewis J and two assessors each of the three accused pleaded not guilty on all counts, but during the course of the trial Byleveld amended his plea on counts 4 and 5 to one of guilty.

The main witnesses for the State were Henning Smit and Gregory Muldoon. The above chronicle of the events of 22 April 1989 is largely a conflation of their evidence. The

defence admitted the contents of the report of the post mortem examination conducted on the body of B. M. by Dr Kruger. The important findings and observations appear from the following extracts.

"dat die vernaamste lykskouingsbevindings in verband met hierdie liggaam die volgende was -Veelvuldige kneusings gesig, mond, nek en (L) temporale area - wydverspreide intraserebrale bloeding. 340 ml. Lion Lager bierbottel deur vagina in die buik gedruk met intra-abdominale bloeding. Erge kneusings van vulva-fourchette en vaginawand. Bloed bevattende vloeistof in bierbottel... dat die oorsaak/oorsake van die dood die volgende was - Intraserebrale bloeding. Erge beserings van onderbuik en skok."

LYS WAARNEMINGS

4. Uitwendige voorkoms van liggaam en toestand van ledemate: Veelvuldige kneusings van gesig, lippe, tandvleise, nek. Boonste en onderste ledemate en vulva wydverspreide intensiewe kneusings van (L) temporale area.
- KOP EN NEK
5. Skedel: Geen frakture.
 6. Skedelinhoud: Wydverspreide intraserebrale bloeding ...
 7. Oog-, neus- en oorholtes: Normaal
 8. Mond, tong en farinks: Kneusings van lippe en tandvleise.
 9. Nekstrukture: Kneusings.
- BORS

10 Borskas en diafragma: Normaal.

BUIK

16. Buikholte: Bloeding onderbuik. 340 ml Lion Lager bierbottel met bloederige vloeistof in onderbuik gekry.

26. Geslagsorgane: Erg kneusing van vulva fourchette en vagina met bloeding. Daar is 'n gat deur die vagina gedruk tot in die buikholte deur 'n bierbottel - met bloeding in die laer buikholte. Daar is baie bloed aan die bloes, 'skirt' en onderklere en kouse. Laasgenoemde is erg geskeur. Geen broek aan nie."

Byleveld gave evidence in his own defence, but neither Marthinus Smit nor Salomina Smit testified.

In his evidence Byleveld said that he arrived at the house of his uncle Marthinus at Pullenshope on Friday 21 April 1989. They rose early on the Saturday and started drinking. The Sasolburg party arrived at about 9 o'clock and they drank brandy and beer together throughout the day. In the evening they went to Hendrina, took in petrol and had drinks (5 or 6 doubles) at the hotel, where they played "pool". He told of the picking up of the two hitch-hikers

and robbing one of them of R50, with which they returned to the hotel; of a proposal by him that they should go and buy a sheep; and of their departure for a farm which Marthinus said he knew. He told how they picked up the woman. He said that while she was sitting in the rear seat and he was behind her in the back compartment, he put his hand in her bosom in a search for money. He described how the woman was assaulted and he admitted that he drove his fist into her vagina and then pushed a beerbottle up her. Asked what the woman did while this was going on, he replied, "In daardie stadium was ek heel bedwelmd, hulle se sy net bale geskreeu." The others told him how he had assaulted her. He said that there were some parts he could remember, but he did not recollect how he had assaulted her. Because he had revived to some extent as a result of the cold air and the rain, he could remember going back to Hendrina and having an argument with the pump attendant. He remembered driving to the farm and passing the place where the woman was lying. He said, "op

daardie stadium [net ek] niks daaraan gedink nie."

The trial court convicted Byleveld on counts 1 and 2, on count 3 (in respect of the indecent assault committed inside the vehicle) and on counts 4 and 5. The learned judge said that the trial court rejected the defence submission that as a result of his consumption of liquor the accused was incapable of forming an intention to kill. While it accepted that he had consumed a large quantity of liquor, the evidence was that all the accused were hard drinkers. The court rejected Byleveld's evidence that he could not remember how he had tortured and raped the victim. They were unanimous that he well knew precisely what he was doing, and they had - no doubt that his intention was to kill her.

Mrs Karin Havenga, a consulting psychologist, gave evidence in mitigation. To this I shall return.

The trial court made findings in regard to mitigating and aggravating factors. Curlewis J said that, taking into account everything that could be said in favour

of the accused, the only sentence that could be imposed was the death sentence. He said that he could not remember that he had ever encountered "'n meer veragtelike en walglike handeling".

Byleveld was sentenced to death in respect of count 1. He was sentenced on count 2 to imprisonment for 7 years, and on each of counts 3, 4 and 5 to imprisonment for 1 year.

Byleveld noted an appeal to this court against his conviction and sentence on the murder count. In arguing the appeal against the conviction, however, his counsel limited himself to an argument that Byleveld's form of intention was not dolus directus as found by the trial court, but dolus eventualis.

There is on the record some uncertainty about the details of the final phase of the assault. Henning Smit said in his evidence in chief: "Hy het op haar maag gespring. Hy het haar op die regterkant in die ribbes geslaan ... geskop ... Dit is al plek waar hy vir haar geskop het." He said

nothing about blows or kicks on the victim's face or head.

Muldoon said that he did not see Byleveld abusing the woman: at the time he was vomiting out of the window and he heard the woman screaming and the next thing that he knew they were on their way again. On post mortem examination Dr Kruger found the rib cage and diaphragm to be normal: he did not mention bruising or abrasions in the area of the chest or the abdomen. But he did find multiple bruising of the face, lips, gums and neck, and wide-spread intracerebral haemorrhage. The explanation for the discrepancy must be that Henning erred in regard to the places on the woman's body at which the attack was directed. In the circumstances that would not be surprising. Henning was sitting in the car; and the events took place at night; and apparently there was some rain.

It is plain that the injuries listed in items 5-9 of the report were the result of a violent attack on the head and face region. These were inflicted after the assault on

the woman's genitalia. The facts justify the inference that they were inflicted for no other purpose than to terminate the life of this ill-used woman.

In regard to the appeal against sentence, it is now for this court to consider afresh, and untrammelled by the findings of the trial court, the question whether the sentence of death was the only proper sentence.

The starting point is the accused as a person -
What manner of man is he? Rumpff CJ said in S v Du Toit
1979(3) SA 846 (A) at 857-8:

"...wanneer [die beskuldigde] as strafwaardige mens vir oorweging aan die beurt kom, moet die voile soeklig op sy persoon as geheel, met al sy fasette, gewerp word. Sy ouderdom, sy geslag, sy agtergrond, sy geestestoestand toe hy die misdaad gepleeg het, sy motief, sy vatbaarheid vir beïnvloeding en alle relevante faktore moet ondersoek en geweeg word. En hy word nie met primitiewe wraaksug beskou nie, maar met menslikheid en dit is hierdie menslikheid wat in elke geval, hoe erg ook al, vereis dat versagter omstandighede ondersoek moet word."

Mrs Karin Havenga furnished two psychological reports, being exhibits B and M, which bear the dates of 11 and 14 May 1991

respectively, and she also gave oral evidence (The date on Exhibit M appears to be incorrect because she refers in the report to " in depth consultations with the accused on 22 and 24 May 1991 at Pretoria Central Prison".)

In Exhibit B Mrs Havenga was able to give only her first impressions, gained from a brief interview with Byleveld, who did not keep an appointment for a second consultation. The following are extracts from this report:

"Die beskuldigde was ± ½ uur laat vir sy konsultasie. Hy het my met 'n aggressiewe houding ontvang. ... Die beskuldigde het verder aggressief geraak toe die erns van sy saak aan hom uitgewys is a.g.v. sy 'nonchalante', traakmy-nie-agtige houding.

Die indruk wat hy skep, is een van 'n geweldige aggressiewe persoonlikheid. Hy toon geen emosies of berou t.o.v. sy misdade nie. He tree onverantwoordelik op en beseft blykbaar nie die erns van sy saak nie. ...

Die beskuldigde is volgens my mening, wat beperk is tot 'n kort interaksie, 'n baie aggressiewe persoon wat moeilik beheer het oor sy aggressie, indien hy enige beheer het, en wat nie verantwoordelikheid wil of kan dra vir sy optredes nie. Hy is manipulerend in sy gedrag en laat besluitname en verantwoordelikheid aan ander oor. Sy houding lok dan ook verdere aggressie uit by ander wat hom dan

rede gee om uiting te gee aan sy aggressie. As gevolg van sy alkohol misbruik, wat aanwesig blyk te wees, vererger dit dan verder sy lewensfunksionering."

She concluded Exhibit B by saying -

"Ek sou aanbeveel dat die beskuldigde volledig deur 'n psigiater en/of 'n geneesheer geevalueer word, omdat ek self nie 'n betroubare evaluering kon uitvoer nie."

In Exhibit M, however, Mrs Havenga said that, although she had in Exhibit B recommended a psychiatric examination, she felt that with the additional information she had obtained a fairly clear clinical picture of the accused could be formulated. Apart from her interviews with the accused she had communicated by telephone with Mr Dreyer, the vice-headmaster of the special school at Witbank where the accused had been a pupil; had had telephone conversations with his mother and his ex-wife; and had made a psychometric evaluation.

The accused was born on 12 October 1963 and thus was 27 years old at the date of his conviction. He attended

two primary schools, which were normal academic stream. He was placed in a special school in high school because of his low intellectual abilities. Mr Dreyer followed up all the accused's school records, and gave her the following information. The accused was a quiet pupil with good manners, who attended school regularly. He was a school prefect and leader of the cadets. He also sang in the school's operas. His actual level of functioning was low, which is why he was placed in a special school, where more individual attention is given and the environment is fairly structured. He left school in 1980 with a standard 8 certificate (Special School).

He married in about 1983. His wife left him in 1986 because of his alcohol abuse, and his physical abuse of her and the children when he had been drinking. His occupational history is very erratic; he had been employed in about 14 positions in the preceding 10 years, most of the changes being made in consequence of alcohol abuse and

misconduct.

In the light of psychometric tests Mrs Havenga formed the opinion that his intellectual level of functioning was below average - on the border of mental retardation.

The following information was obtained from the South African Wechsler-Bellevue Intelligence Test for Adults, which, as well as testing intelligence, is also valuable for clinical assessment:

"- The accused lacks greatly in long-term memory which may explain some incoherence in his testimony.
The accused has a low self-esteem, both physically and emotionally.
The accused has fairly good social skills in spite of his impaired intellectual functioning. He can anticipate and manipulate social situations quite well... The accused has an extremely poor pattern of logical thought process and his abilities concerning common sense are practically nonexistent.
The accused is very impulsive in his thought processes and also in his actions. He acts without thinking about the consequences."

Mrs Havenga concluded Exhibit M with the following -

"CONCLUSIONS AND RECOMMENDATIONS

1 The accused does not appear to be psychotic or emotionally extremely disturbed.

2 The accused has an intellectual ability which borders on mental retardation. Due to his problems surrounding adaptability, which can be seen in his bad work record and poor interpersonal relationships, the accused can be regarded as functioning on a mentally retarded level of a mild nature.

3 The accused appears to have a alcohol abuse disorder (alcoholism), which further influences his functioning in all facets of life.

4 The accused has a low impulse-control and poor logical thought patterns, which become basically non-existent with the intake of alcohol. He then becomes totally disinhibited in his behaviour.

5 The accused appears to have sexually abnormal preferences (sexual disorder: moderate paraphilia) which are not necessary to note in detail, but which are similar in nature to the incidents which took place on the evening of the murder. This was told by his ex-wife and confirmed by the accused.

6 It is difficult to comment on the prognosis and rehabilitation of the accused. The possibility exists but is hindered by his low intellectual functioning.

7 The accused needs to be placed in a structured environment because he does not have the ability to structure his own life constructively and positively.

8 The accused is easily influenced and has been in trouble before because of this. It is

doubtful whether the accused would have carried out the incidents in this case on his own initiative.

9 It is improbable that the accused was aware of the consequences, implications and nature of his actions at the time of commitment, due to his low intellectual functioning which was further impaired by alcohol abuse.

10 In general the accused functions on a very low level and has limited insight into situations of any nature."

Counsel for Byleveld submitted that there were a number of mitigating factors. I deal with each of them in turn.

Intoxication. It is beyond question that Byleveld had a massive intake of liquor during the day and evening of 22 April. In the judgment on sentence Curlewis J accepted that this was so, but said that the court had already found that this did not have the result that the accused did not know what he was doing, and what he had done and what would happen if he treated the woman in the way he did. Counsel for the State argued that the evidence showed that despite the amount of liquor consumed by the accused he retained a

high measure of motor co-ordination. That may be so, but it is beside the point. The question relates not to the effect of intoxication on his physical ability to act, but to its effect on his mind. It is clear in my view that his appreciation of the consequences and implications of his conduct was severely blunted. This bizarre conduct itself provides an indication of how severely his mind had been affected by alcohol, and the fact that he so grossly misconducted himself in the presence of his relatives, including a small boy, suggests a total lack of shame and an absence of any appreciation of the enormity of his acts.

Murder not planned. It can be accepted that Byleveld did not, when the deceased took her seat in the station wagon, then conceive a plan to murder her. It may well be true that when he put his hand in her bosom he was searching for money. The probability is that his thoughts then took another direction and he went on to handle her private parts. She managed to get out of the car, but when

she tried to run away he threw her to the ground and raped her and he then proceeded, possibly because of his paraphilia, to maltreat her genitalia in the way in which he did. But if that was the scenario, I do not think that the fact that the fatal assault was not pre-planned was a mitigating factor: rather, if there had been pre-planning that would have been a strongly aggravating factor.

No previous convictions. The fact that Byleveld had a clean record is a factor to be taken into account.

Influence by others. In her viva voce evidence Mrs Havenga said that she believed that the accused could be very easily influenced, and that she thought that he was influenced by his uncle (accused no. 2) and by the group situation. In Exhibit M she said that it was doubtful whether the accused could have carried out the incidents in this case on his own initiative. The evidence, however, is all the other way. Byleveld was throughout the evening in the forefront of events and taking the initiative, without

prompting from any of his companions.

Remorse. He expressed no remorse at the trial. It is questionable whether he has the capacity to feel remorse. In her evidence Mrs Havenga said that Byleveld told her that he was remorseful about what had happened. However, because he is emotionally very labile, he does not really show many feelings and she could not really say whether he was remorseful or not.

Co-operation with police. This may be so, but it is not of great moment.

In regard to circumstances of aggravation, the outstanding factor is the enormity of the crime itself. A black woman, said to be 40 years old, alone on a country road, is picked up at night and given a lift in a vehicle containing 5 white men. She is subjected to an indecent assault, and when she tries to escape, is thrown to the ground and raped, and then subjected to humiliating treatment, obscenely tortured and brutally assaulted, and

finally left helpless and groaning with pain on the roadside.

The question then is whether taking into account the mitigating and aggravating factors, the death sentence is the only proper sentence for this accused for this crime.

Although given in the context of the provisions of the previous s. 277 of the Criminal Procedure Act, the judgment of Holmes JA in S v Matthee 1971(3) SA 769 (A) at 771 A-E is still apposite -

"Once extenuating circumstances have been found and a trial Judge has a statutory discretion to impose 'any sentence other than the death sentence', factors ordinarily relevant for consideration would include the following -

- a) whether the very circumstances found to be extenuating, e.g. intoxication or provocation, did not in themselves contribute to the brutality of the deed, so that the element of heinousness should not be emphasised out of perspective;
- b) whether, in the particular circumstances of the case, the alternative of imprisonment, if necessary for life, would not be regarded by society as an adequate deterrent to others;
- c) whether the discipline and training of a lengthy period of imprisonment might have reformatory effects, so that the accused's continued existence would not be a real danger

to society; and (d) whether the evil of his deed is so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing.

These considerations are not to be applied as rigid rules of thumb, but as aids in the exercise of a judicial discretion in all the circumstances of a particular case."

It is, I think, clear that in this case the accused's state of intoxication did contribute to the brutality of the deed, which was probably the result of liquor operating on the sorry creature which the accused is: deficient in intellect to a level near mentally retarded, with a seriously flawed psyche, apparently emotionless, and highly aggressive when under the influence of alcohol. But although this does make this monstrous crime explicable I do not think that its heinousness is reduced.

It seems to me that there is little prospect that imprisonment would result in any change for the better in the accused. He functions on a mentally retarded level, and his learning capacity is limited. He is and is likely to remain

a danger to society. Apparently he is without emotion and suffers no remorse. He has low impulse control and acts impulsively without thinking about the consequences. He is completely disinhibited after taking alcohol.

In my view this is pre-eminently a case of the kind which Holmes JA described in para (d) of his judgment. The evil of the accused's deed is shocking in the extreme. The mere telling of it produces revulsion and abhorrence. I have little doubt that the view of society would be that the death sentence is imperatively called for.

The appeal is dismissed.

H C NICHOLAS, AJA

VIVIER, JA concurs