HARSAAK 235/77

235/77

G.P.-S. J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPÈL DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

G. LEKOLWANE
Appellant.

versus/teen

SIGHT
Respondent.

Appellant's Attorney Pro Deo *Respondent's Attorney* PG (JHB)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate T. Klopper *Respondent's Advocate* C. J. T. Raadt
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 11 [illegible]
Op die rol geplaas vir verhoor op

15 1 1 E

(WLD)
Coram: Rumpff HR, Rabie et Diemont AR, C. J. V

10.45 vm ——— 11.00 vm

The Court allows the Crown appeal. The decision of the trial Court that there were no extenuating circumstances is accordingly set aside and a verdict of murder with

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GEORGINA LEKOLWANA Appellant

and

THE STATE Respondent

Coram: RUMPFF C.J., et RABIE J.A., DIEMONT J.A.

Heard: 7 November 1977

Delivered: 28 November 1977

J U D G M E N T

DIEMONT, J.A.

The appellant in this case, Georgina Lekolwana, was charged with and convicted of murder on 17 August 1977 in the Witwatersrand Local Division

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of the Supreme Court. The court found that there were no extenuating circumstances and she was accordingly sentenced to death on the following day. An application was made for leave to appeal against the sentence and granted by the judge a quo.

The story which led to appellant's trial and conviction is a common-place story of domestic tragedy which has been told in the courts many times. The deceased, Stephen Lekolwana, lived with his wife, the appellant, in a house in Soweto. They had been lawfully married in 1966 and one child, a boy, was born of the marriage in August 1967. Stephen started drinking and when he did so he fought with his wife. She went to the Native Commissioner's Office for advice but was told that for the sake of the child she should not seek a divorce. The end of the marriage came soon afterwards

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and is best told in her own words:

> "Now in your married life did you live at 2136 Mapethla? --- Yes.
> Was there any stage when you moved out of that house permanently? --- October 1974.
> Why did you do that? --- I was chased away by my husband.
> Why did he chase you away? --- He had a girlfriend. Before then she visited me but then she fell in love with my husband, the deceased.
> Her name? --- Marthina.
> Did your husband tell you why you had to move out? --- He said that he has got another woman who was better than myself".

Shortly after the appellant left the deceased arranged for a friend and his wife, Ephraim and Sarah Debetso, to come and live with him so as to assist him with his washing and ironing and to contribute to the food which they ate.

On the evening of 1 March 1975 as it was growing dark Sarah Debetso was busy lighting a candle in the kitchen when she looked up and saw a woman looking through the window; there were also

two men outside. She asked her husband who the person was and at the same moment the door opened and the woman entered the kitchen. This woman was very cross and drew a knife from her bosom. Sarah Debetso did not know the woman but she recognized her in court as the appellant. Her husband however, knew the woman and called her by her name, Ousie Georgina; he asked her why she had come into the house and why she was so annoyed. He claimed that he had met the appellant on previous occasions when he had visited the house and been introduced to her by the deceased who said that she was his wife. He said further that as she came into the kitchen she asked "who does Stephen's washing and who does his ironing?". His wife, Sarah, replied that she did it, whereupon the appellant asked "where is Stephen?". She was told that he was ill and that he was in bed. The appellant then picked up a candle and entered the

room in which the deceased was lying saying that she wanted to set the wardrobe alight. The witness stopped her from doing so because he said that his clothing and his wife's clothing was also in the wardrobe. The appellant went out of the bedroom and Ephraim then woke the deceased who had been asleep; he was told that his wife, Georgina, was there and that she had a knife.

Events then moved swiftly. The appellant went into the bedroom occupied by Ephraim and his wife and started throwing their clothing out of the wardrobe and throwing blankets on the floor. In the meantime the deceased hurriedly put on his shirt and trousers and then asked his wife to sit down and talk matters out with him, adding that he was ill. The appellant seemed to be calming down

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but Ephraim decided that the time had come to go and call the policeman who lived next door. Sarah stayed behind and witnessed what followed:

> "My husband was out when the accused suddenly attacked the deceased and stabbed him (indicates front of chest). She stabbed the deceased with the knife she had drawn from her dress in front. Where did she stab him? --- I can't exactly point out the spot but it is in front of the chest.
> How many times did she stab him? --- To me it appeared two stabs, then I started screaming. The deceased did not fall but the accused then went round the back of the deceased and stabbed him on the back".

The deceased fell; the appellant jumped over him and then went out. After that Ephraim returned and was told what had happened.

The district surgeon was not called as a witness but his report was handed in by consent and

the correctness of the facts contained therein and findings made by him was admitted. The cause of death is recorded as a "stab wound of the pulmonary artery: haemorrhage". There is no mention of a second wound on the back, but on one of the two photographs handed in by consent a mark appears on the back of the body which may be a stab wound.

The appellant was the only witness called for the defence. She described to the court the unhappy history of her marriage and said that after she had been forced to leave the common home in October 1974 she had tried to communicate with her husband by telephone; that was in January 1975. She asked after her child who had been taken away to deceased's parents in Pietersburg, but was told by deceased to leave the child alone and leave him alone. He then put the telephone down and she did not try to communicate with him again. She denied

that she had visited the house on 1 March 1975 or that she had stabbed her husband. She learned of her husband's death some months after he had died; this information was given to her by a man who came from the same kraal as she did in Pietersburg. Under cross examination she was questioned as to her attitude to the deceased:

> "Were you cross at your husband for throwing you out of the house? --- My heart was sore.
> Did you go willingly? --- He assaulted me and I left.
> He assaulted you? --- He did.
> And did you leave him? --- He told me to leave.
> Did you do so willingly? --- I left because he said I must leave".

And further;

> "After your husband had chased you away from the house, did you not feel that that was still your place, it was your house, it was your things in there? --- Yes.

And/.....

> And that he had wronged you? --- Yes.
> And that you were entitled to live in that house? --- Yes.
> And use all the things which are in the house? --- Yes."

The trial judge came to the conclusion that both Ephraim and Sarah Debetso were truthful and honest witnesses, that it appeared from appellant's own evidence that she had a motive to harm her husband and that her denial that she came to the house armed with a knife which she used on the deceased was false.

Appellant was accordingly found guilty of murder.

In his judgment on extenuating circumstances the judge a quo stated that he had adjourned the court early on the previous afternoon and requested counsel to discuss the matter seriously with appellant

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> "in the hope that she would be able to give me some facts on which I might base a finding that there was such reduced moral blameworthiness for her act. Counsel informs me that he has fully discussed the matter with the accused. Despite that she is not prepared to give any evidence or to supply any other facts to the Court".

After considering the arguments advanced by counsel the learned judge stated that it was a great pity that she did not take the court into her confidence and that in the result he could not find that the accused had discharged the onus of proving on the balance of probability that there were extenuating circumstances.

The failure of the appellant to return to the witness box and take the court into her confidence undoubtedly placed the court at a disadvantage but, as was pointed out in S.V. NDLOVU 1970(1) S.A. 430(A) although the onus of establishing the existence of extenuating circumstances rests

on the accused, it does not necessarily mean that the accused must give evidence; the trial court may be able to find that the onus has been discharged when regard is had to the evidence as a whole or to as much thereof as has been accepted.

> "But there must always be a foundation of probability before the Court can exercise what is in effect a moral judgment in the matter of extenuating circumstances".

The judge a quo was unable to find such a foundation of probability. He said the reason why she was cross was a matter for surmise:

> "The inference which I drew when I gave judgment was that she was cross with the deceased for some or other reason which one surmises to be the fact that she was no longer living in that home".

I think he erred; the reason why she was cross was as I shall show, only too apparent. The trial judge went on to say in his judgment that

there was no evidence of anything happening immediately before the assault which might have "triggered her actions". That is correct, but it was not correct to state further that:

> "There is therefore nothing in the nature of any provocation or something akin to that that might have caused her to do what she did".

That was a misdirection if regard be had to the evidence which the appellant gave. I am not losing sight of the fact that appellant's evidence was found to be false, but I think it is clear that that finding related only to her denial that she had come to the house on 1 March 1975 and assaulted her husband with a knife. The evidence relating to the events which caused the break up of the marriage and her ejectment from the common home was not found to be false. That evidence had the ring of truth about it/.....

it and indeed was in some measure corroborated by the evidence given by Ephraim Debetso and his wife. They both stated that when the appellant arrived at the house she at once asked "who does Stephen's washing and who does the ironing" and thereafter she threw their clothing out of their wardrobe and blankets into the dining room. This evidence confirms the admission which the appellant made under cross examination - that her husband had wronged her and that she felt that the house was still hers.

If appellant's evidence be accepted the reason for her emotional disturbance when she returned to the house on 1 March is apparent - it was not merely because she was no longer living in the house. She was a woman who had been grievously wronged. Her husband had taken to coming home drunk every day and assaulting her; she had

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been told by an official at the Native Commissioner's Office to continue living with him for the sake of the only child; but when the boy was seven years old he was taken away from her and sent to his grandparents in Pietersburg. She was then chased out of her home because he had found and installed a "girlfriend" in the house who he said "was better than myself". Finally, when she tried to communicate with him about the child he told her to leave the child alone and leave him alone.

This catalogue of misfortune ended in her simple statement:

"My heart was sore".

No woman, whatever her race and whether she came from a kraal in Pietersburg, or a sophisticated home in the northern suburbs of Johannesburg would not in these circumstances have felt deeply affronted

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and humiliated.

The question is not whether there was some form of provocation shortly before the assault was committed and which might serve to negative guilt. In this case mens rea had been established and the question was whether there was provocation short of what was required to negative guilt but which would nevertheless constitute an extenuating circumstance. We are concerned at this stage with the appellaht's moral guilt and it is at least clear, as was said in R v. Fundakubi 1948(3) S.A. 810 (A.D.) at 818 that:

> "the subjective side is of very great importance, and that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration".

There are factors in this case, which

albeit/.....

albeit remote in time in that they occurred months before, are nevertheless relevant and directly related to the commission of this crime. The deceased's callous conduct in assaulting appellant and in taking her child away from her, in driving her out of her home and putting another woman in her place, and his subsequent intransigence when she sought to communicate with him - these are all factors to be taken into consideration. It is a fair inference that the appellant nursed her grievances and brooded over them until after months of stress her emotional state reached a crisis and drove her to an act of desperation on 1 March 1975 when she returned to her house to confront her husband. I am satisfied that the probabilities favour the inference that her uncontrolled conduct when she confronted her husband - the manner in which she entered the house, the attempt to set the clothing

alight, her refusal to speak and her violent attack on him, all this was the result of emotional stress which was provoked by the conduct of the deceased and is a factor which in my view reduces the appellant's moral blameworthiness and consequently serves as an extenuating circumstance.

The decision of the trial court that there were no extenuating circumstances is accordingly set aside and a verdict of murder with extenuating circumstances substituted therefor. It follows that the death sentence is set aside and a sentence of 12 years imprisonment will be imposed in place thereof.

JUDGE OF APPEAL

M.A. DIEMONT

RUMPFF, C.J.
RABIE, J.A.