

SOUTH AFRICA / JUDGMENT

S v Cloete (489/90) [1991] ZASCA 91 (30 August 1991)

[1991] ZASCA 91

COURT

Supreme Court of Appeal

BEFORE

Smalberger, Grosskopf FH, Van den Heever

CASE / FILE NUMBER

489/90

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

489/90

N v H

DAVID CLOETE v THE STATE SMALBERGER, JA :-

489/90N v H

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between: DAVID CLOETE Appellant and THE STATE Respondent
CORAM: SMALBERGER, GROSSKOPF F H, JJA,

et VAN DEN HEEVER, AJA

HEARD: 16 AUGUST 1991

DELIVERED: 30 AUGUST 1991

JUDGMENT SMALBERGER, JA: The appellant was convicted on 2 March 1990 in the Witwatersrand Local Division by SUTHEJ, J and two assessors on counts of murder (count 1) and robbery with aggravating circumstances (count 2). No

2/

2 extenuating circumstances were found on count 1 and he was sentenced to death; on count 2 he was sentenced to 12 years' imprisonment. The charges against the appellant arose from events which occurred on the night of 28 September 1988 at the home of one Zagarias Johannes Grobler (the deceased) in Maraisburg. The deceased was a widower who resided on his own. On the night in question his home was entered by persons bent on robbery. During the course of the robbery the deceased was killed. He was manually strangled by his assailants. When the robbers eventually left, they took with them various items belonging to the deceased including a Toyota

Cressida motor vehicle (the Cressida). In the early hours of the morning of 9 October 1988 the appellant was seen driving the Cressida by a policeman on patrol duty. When the

3/

3 Cressida came under police scrutiny the appellant accelerated in an attempt to make good his escape. A chase ensued. It ended when the appellant collided with a pole. The appellant was taken into custody. A short while later he managed to escape. He was pursued on foot. Shots were fired at him after he failed to heed warnings to stop. He was wounded in the foot and shoulder, and eventually caught. On examination of the Cressida the housing around the ignition lock was found to be broken. It was later discovered that the Cressida had false number plates. When asked to explain his possession of the Cressida the appellant claimed that it had been brought to him by a woman for repairs; he was, however, unable to say who she was or where she stayed. No other explanation by the appellant for his possession of the Cressida was forthcoming during the trial as he failed

4/

4

to testify on the merits at the conclusion of the State case. The above facts are not in dispute for the purposes of the present appeal.

The only other evidence linking the appellant

with the crimes in question is a confession made by him to a magistrate on 21 October 1988. The admissibility of the confession was contested at the trial, but after hearing evidence the Court a quo ruled it to be admissible. The appellant's confession was to the following effect:-

"Op die 28ste September 1988 is 'n moord by 'n Blanke huis in Maraisburg gepleeg. Dit is 'n Blanke man wat vermoor is. Hy is verwurg aan sy keel. Op die dag van die moord was ek, Bennie, Frank en Ronnie wie se regte naam Gerald is, in die huis waar die witman dood is. Ronnie het twee sleutels gehad om die voordeur oop te maak. Ons het ingegaan en die oubaas gevind in die huis. Die oubaas het gevra 'wat soek julle in die huis'. Ronnie, Frank en Bennie het hom oorrompel en verwurg. Ek het net die oubaas se hande vasgehou. Hy het bewusteloos geraak. Ons het hom gelos op die bank. Ons het toe goete

5/

5

gevat in die huis. Ons het uitgegaan met die goed. Ronnie het teruggegaan in die huis en sleutels teruggebring. Hy sê dit is karsleutels en toe gaan hy na die garage en het toe die oubaas se kar gevat. Ons het toe na die lokasie gery. Ons het die goete wat ons gevat het by Ronnie se plek gebêre. Ons het die oubaas se kar by my werksplek gaan parkeer. Ronnie sê ons moet die kar verander sodat die pplisie dit nie kan opspoor nie. Gister het ek die kaptein gevat na die oubaas se huis toe. Dit was in die aand wat ons op 28/9/88 by die oubaas se huis was. Gister het ek gewys

waar die deur is waar ons ingekom het (die voordeur). Ek het ook gewys waar die kooi (bed) gestaan het. Ek het ook gewys waar Ronnie die sleutels op die tafel gevat het. Hulle het kiekies gevat by elke plek wat ek gewys het. Toe loop ons terug polisiestasie toe." Argument on appeal with regard to the merits

centred on the admissibility of the confession. It appears ex facie the document in which the confession is contained that it was made by a person whose name corresponds with that of the appellant, and that the confession was made freely and voluntarily by such

6/

6 person in his sound and sober senses without having been unduly influenced thereto. The fact that a full answer was inadvertently not obtained to one of the introductory questions does not detract from that conclusion. Accordingly, in terms of section 217 (1)(b),(ii) of the Criminal Procedure Act 51 of 1977 (the Act), voluntariness of the confession is presumed unless there is proof to the contrary by the appellant on a balance of probabilities. That much is common cause. To the extent that the appellant attempted by his own evidence to discharge such onus he failed lamentably. He was found by the Court a quo to be a "scandalously bad witness". This finding is borne out by a perusal of his evidence. He contradicted himself in numerous respects on material issues, and was totally discredited as a witness. His evidence that he was assaulted in order to make a confession was

7/

7 rightly rejected. His counsel could not, and quite properly did not, seek to rely on his evidence. By contrast, the evidence of the State witnesses, who disavowed any suggestion that the appellant was assaulted or unduly influenced into making a confession, is not open to any material criticism. This much too was, rightly, conceded by the appellant's counsel. Faced with the total rejection of the appellant's evidence, his counsel was forced to rely on factors dehors his evidence in order to try and persuade us that it had been established on the requisite balance of probabilities that the appellant's confession was not freely and voluntarily made. Before making his confession the appellant was duly warned by the magistrate. The preliminary questions contained in a pre-prepared form such as is

8/

8 customarily used when taking a confession were put to him, and his answers thereto recorded. The purpose of these questions is to assist in recording matter from which a trial Court can later infer whether or not the statement was freely and voluntarily made by the person concerned in his sound and sober senses - the questions themselves constitute no imperative formula. From the appellant's answers to certain of these questions it transpired that he had been arrested twelve days previously and had subsequent to his arrest made a statement to a police officer, Capt Thoms. The magistrate also recorded the presence of handcuff marks and small scabs on the appellant's wrists. It is furthermore common cause that the appellant was taken by the investigating officer to the magistrate who recorded his confession. It was contended on the

appellant's behalf that these factors were indicative

9/

9 of unlawful pressure having been brought to bear upon the appellant to induce him to make a confession, and that accordingly the magistrate should have enquired further than he did into matters having a bearing on the voluntariness of the appellant's statement. There is no substance in this contention. There is no acceptable evidence to support a finding that any unlawful pressure was brought to bear on the appellant. The fact that the appellant confessed twelve days after his arrest and subsequent to making a statement to Capt Thoms cannot per se reasonably support the inference that pressure was brought to bear upon him, let alone constitute proof of involuntariness on a balance of probabilities. The handcuff marks on the appellant's wrist were satisfactorily explained in evidence. The answers given by the appellant to the questions put to him raised no

10/

10

suspicion of lack of voluntariness on his part and did not call for further questioning or investigation by the magistrate in this regard. The only legitimate criticism of the events surrounding the making of the confession stems from the fact that the appellant was taken to the magistrate by the investigating officer. As has been stated before, this is an undesirable practice which must be avoided wherever possible. But it does not per se amount to an irregularity which would render an otherwise admissible confession inadmissible. Taken in conjunction with other considerations it could, in an appropriate case, lead to an inference of lack of voluntariness. On the facts of the present matter, however, no such conclusion is justified. Indeed, on a conspectus of the evidence relating to the admissibility of the appellant's confession as a whole, I am satisfied that

11/

11

even if the onus had rested on the State it would have succeeded in establishing the requisite elements for admissibility beyond all reasonable doubt. In the circumstances the appellant's confession was correctly admitted in evidence. Section 209 of the Act provides that an accused may be convicted of any offence on the single evidence of a confession if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by aliunde evidence to have been actually committed. In the present instance there is aliunde evidence of the commission of the offences to which the appellant confessed as well as material confirmation of the confession. Such confirmation lies inter alia in the fact that access was gained to the deceased's house without any physical breaking, which accords with

12/

12

the manner described by the appellant; that a robbery took place; that the deceased was manually strangled; and that, most importantly, the appellant was subsequently found in possession of the Cressida. In the circumstances there is no danger of the confession being false or unreliable in a material respect. The Court a quo was therefore entitled to convict the appellant on the strength of his confession, more particularly in the absence of any evidence by the appellant on the merits. It follows that the appeal against the convictions cannot succeed. This brings me to the question of sentence. No argument was advanced against the sentence of 12 years' imprisonment on count 2. That leaves only the sentence of death on count 1 to be considered. Since the appellant's trial the Criminal Procedure

13/

13 Amendment Act, 107 of 1990, has come into operation. With regard to its provisions, this Court now has a discretion to determine, with due regard to the presence or absence of any mitigating or aggravating factors, whether the death sentence on count 1 was "the proper sentence". The phrase "the proper sentence" has been interpreted by this Court to mean "the only proper sentence", from which it follows "that the imposition of the death sentence will be confined to exceptionally serious cases; where (in the words of NICHOLAS AJA in *S v J* 1989(1) SA 669 (A) at 682 D, albeit in a different context) 'it is imperatively called for' (per NESTADT, JA, in *S v Nkwanyana and Others* 1990(4) SA 735 (A) at 745 F). Is this such a case?

The appellant's date of birth does not appear from the record. His age, according to the

14/

14 indictment, was 53 years at the time of the trial; there is a suggestion on the record that he may be some years older. If regard is had to his list of previous convictions, it seems likely that his age at present is in the region of 54 years. His criminal record dates back to 1955. He has numerous previous convictions for theft and housebreaking with intent to steal. His last conviction for a crime of violence was in 1958 when he was sentenced to 10 years' imprisonment for attempted murder. In 1976 he was declared an habitual criminal. Although 5 1/2 years elapsed from the time he was released on parole in 1983 until the commission of the present offences, the appellant is obviously a recidivist, is set in his criminal ways and is incapable of rehabilitation. While his prime propensity is for dishonest crimes he is clearly not averse to the use of violence when the

15/

15 need arises. The community requires effective protection against the likes of the appellant. There can be no gainsaying the seriousness of the appellant's conduct involving as it did an attack by a group on an elderly, defenceless person in his own home. Conduct of this kind is becoming increasingly prevalent and calls for severe punishment. However, in determining whether or not the death sentence is the only proper sentence regard must be had, inter alia, to the circumstances of the offence, the extent of actual participation therein and the form of intent

present. In the present instance the robbery was carefully pre-planned. But there is no evidence to suggest that the appellant went to the deceased's home with the preconceived intention of killing him. The absence of proof to that effect is reflected in the Court a quo's finding that the form of the appellant's intent

16/

16 was *dolus eventualis*. Sentence of death will rarely be imperatively called for in the absence of *dolus directus*. The appellant has not been proved to have been the prime mover behind the robbery and the events which followed thereon. He did not himself strangle the deceased, although he held the deceased's hands while he was being throttled. The killing of the deceased was not accompanied by any unnecessary or gratuitous cruelty or brutality. Although this is very much a borderline case, I am satisfied that the death sentence on count 1 is not, in the circumstances, the only proper sentence. A sentence of imprisonment, and more particularly life imprisonment (bearing in mind the need effectively and permanently to protect society from the appellant) would also be a proper and appropriate sentence, and would satisfy the main purposes of punishment (*S v Mdau* 1991(1) SA 169

17/

17 (A) at 176 G - 177 C). That being so, a sentence of life imprisonment should be substituted on count 1.

In the result the following order is made:- "The appeal against the convictions and the sentence on count 2 is dismissed. The appeal against the sentence on count 1 succeeds. The sentence of death is set aside and there is substituted in its stead a sentence of life imprisonment. The sentence on count 2 is to run concurrently with that on count 1."

J W SMALBERGER JUDGE OF APPEAL

GROSSKOPF, FH, JA)) concur VAN DEN HEEVER, AJA)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZASCA/1991/91.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-cloete-unknown-topic-asca-1991>

Prepared on 10 October 2026 · Esheria