

SOUTH AFRICA / JUDGMENT

S v Lesetla and Another (8/88)

[1989] ZASCA 50 (31 March 1989)

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COURT

Supreme Court of Appeal

BEFORE

Hoexter, Steyn, F.H. Grosskopf

CASE / FILE NUMBER

8/88

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Case no:8/88 E du PIN THE SUPREME COURT OF SOUTH AFRICA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LIPITSA RALEBATHE LESETLA First AppellantMOTLALAPULA MABETAS
Second AppellantandTHE STATERespondent.

LIPITSA RALEBATHE LESETL

MOTLALAPULA MABETA

THE STATE

Coram:HOEXTER, STEYN JJA et F.H. GROSSKOPF AJA
Heard:Delivered:

Coram:

Heard:

Delivered:

22 March 1988 31 March 1989

JUDGMENT F.H. GROSSKOPF AJA:On 31 March 1987 two young hikers, Phillip van Rensburg and Laurence Lombard, pitched camp on top of the Drakensberg mountains at a spot which has been referred to in the evidence as the Valley of the Baboons. After darkness had fallen the two hikers entered their small tent and lit a candle. While they were busy preparing a meal they suddenly found themselves being pelted with stones from outside. They left the tent, but found that their assailants continued to attack them with stones. Both young men were felled by the stones when

they tried to escape. Lombard regained consciousness during the night, but fell asleep again. When he woke up the next morning there was no sign of his friend van Rensburg or of their tent and other belongings. Lombard was fairly badly injured, but managed to find his way back to safety.

JUDGMENT F.H. GROSSKOPF AJA:

The mutilated body of van Rensburg was recovered

by helicopter a few days later at a point towards the bottom of the escarpment and some 800 feet below the point where he and Lombard had pitched camp. The court found that van Rensburg was thrown over the edge of the escarpment by his assailants, but it could not be established whether van Rensburg had already been dead when this was done. Lombard was unable to identify any of their assailants. It was subsequently established that the attack on van Rensburg and Lombard had taken place near the border of Lesotho. The police investigations took them into Lesotho and this led to the arrest of four persons, two adult males (the appellants in this case) and two young boys who were respectively about 16 and 13 years of age. The youngest member of this group, one Lebusetsa Khaloli, was used as a state witness. The other three were charged with and convicted of murder. They were also convicted of attempted murder relating to the attack on Lombard, and of robbery with aggravating circumstances in

respect of the taking of the tent and other belongings of van Rensburg and Lombard. The court found that there were no extenuating circumstances present in the case of the two appellants and imposed the death sentence on each of them in respect of the murder count. The court granted the two appellants leave to appeal to this court against the finding that there were no extenuating circumstances present in their case. The appellants were accordingly also granted leave to appeal against their sentences on the murder count. The first appellant denied that he was present when these crimes were committed, or that he had anything to do with the commission of these crimes. The second appellant admitted at the outset of the trial that he was present when these crimes were committed. When he came to give evidence, however, he changed the whole basis of his defence and relied on an alibi. The court for good reasons rejected the

evidence of both appellants as false. In convicting the two appellants the trial court relied on confessions which had been made by both appellants before police officers, and on statements by the appellants at the section 119 proceedings in the magistrate's court. These confessions and statements were admitted by the court after having heard evidence on the question of their admissibility. In deciding on the participation of the appellants in the commission of the crimes the trial court also had regard to the evidence of the witness Khaloli in so far as it was corroborated by other reliable evidence and by the inherent probabilities of the case. Khaloli was the 13 year old youth who had been an accomplice in these crimes and whose evidence the trial court found to be "entirely unreliable". After weighing all the evidence the court came to the following conclusion:

"Now there are some differences in detail between the confessions and subsequent statements of each of the Accused. We do not find these differences very surprising. They accord, in broad outline, more or less with what Khaloli has said, and the story given by each of the Accused is much the same as the story given by the other Accused. In broad outline, it corresponds also with the evidence of Lombard as to what occurred on the night in question. There can be no doubt from this evidence that all three Accused participated in the attack on the deceased and on Lombard. They all threw stones, heavy stones apparently, at Lombard and van Rensburg in circumstances when they must have realised the likelihood or, at least, the possibility of causing them serious bodily harm, if not, death. In our view there is no doubt that all the Accused acted in common purpose."

The first appellant admitted in his confession that

he was the person who made the suggestion to the second appellant that they should go and rob the two hikers of their money. The first appellant further admitted that he took part in the attack on the two hikers and that he threw the stone which struck the deceased on the back of his head, causing him to fall down. He further alleged in his confession that the second appellant was the person who

killed the deceased by dropping a rock on his head. (I may mention that the second appellant in his confession in turn blamed the first appellant for dropping a rock on the head of the deceased). The first appellant also admitted that he cut off some hair of the deceased and that he removed R160 in cash from the deceased's pocket. He and the second appellant then tied the hands of the deceased together before throwing him over the cliff. The first appellant pleaded guilty to the murder charge when he appeared before the magistrate at the section 119 proceedings. The magistrate asked the first appellant why he had killed the deceased, and he replied "I wanted money".

The second appellant admitted in his confession

that he took part in the attack on the deceased and the deceased's friend. That attack occurred after the first appellant had suggested that the four of them should go and kill the white men whom he had seen in the Valley of the

Baboons. On the second appellant's own version (which is admissible against him only) it was therefore their stated

intention to go and kill the two hikers. The second appellant said that they threw stones at the white men and one of them fell down when he was struck by a stone. He alleged that the first appellant then dropped a big stone on

the head of that white man. The second appellant's

confession proceeded as follows:

"The white man was lying down and he was not moving and Lephitsa (the first appellant) said that the white man is dead. We saw that we made a mistake by killing him. Then we decided to hide him. We then took him to a high cliff We turned him on his back and rolled him down the cliff."It is the evidence of the witness Khaloli that all

four of them returned to the white man who had fallen down and that they further assaulted him by throwing stones at him and hitting him with sticks. Khaloli further testified as

follows:

"Well why were you hitting him with sticks and stones? We were killing him.

Did you intend to kill him at that stage? --- Yes. Was it part of the plan to kill him or did you just - was it your own idea to kill him? Originally we intended just going to rob them and get the money. We saw that he had fallen and we decided that we should finish him up. Now are you able to say whether the deceased was still alive at the stage that you took him to the edge of the cliff? He was already dead."

Khaloli confirmed the version of the first appellant that the deceased's hands were tied together with a piece of rope before he was thrown over the edge of the cliff.

In the light of all the evidence the court a quo

found that it did not matter which of his assailants in fact caused the death of the deceased, or whether the deceased was killed before or after he was thrown over the edge of the cliff. The court a quo concluded that all the attackers intended to bring about the death of the deceased and that they all participated in the acts which brought about this result. I respectfully agree with this conclusion of the

trial court.

The court a quo considered the question of

extenuating circumstances against the background of these findings, but found that there were no factors present which reduced the moral blameworthiness of the two appellants in relation to the crime of murder. Mrs. Collett, who appeared for the first appellant, conceded that it was no part of her case that the trial court misdirected itself or committed any irregularity in regard to its finding on extenuating circumstances. The only remaining issue, therefore, is whether the finding that there were no extenuating circumstances was one to which no court could reasonably have come. (See *S. v. Ndlovu* 1970(1) SA 430(A), at 435 A-B; *S. v. Bowers* 1971(4) SA 646(A), at 649 A-E; *S. v. Mongesi en Andere* 1981(3) S.A. 204(A), at 207 H-208 A).

Collett

S. v. Ndlovu

S. v. Bowers

S.v. Mongesi en Andere

Mr.Maharaj, for the second appellant, submitted

Maharaj

that the learned trial judge misdirected himself when he observed in the concluding portion of his judgment on

extenuating circumstances that the appellants' lack of intelligence, their background and their lack of education were circumstances which did not "in law" amount to extenuating circumstances. The words "in law" may not have been a happy phrase in the context, but it seems to me to be clear in the light of the judgment as a whole that the learned trial judge never intended to lay down that circumstances such as lack of intelligence, a primitive background and lack of education are not relevant to extenuation. The remarks of the learned trial judge in his judgment on the application for leave to appeal show that he accepted that such circumstances may indeed serve to constitute extenuation. It was found, however, that the probable influence of these circumstances in the present case did not reduce the moral blameworthiness of the appellants. The relevant passage in the judgment on the application for leave to appeal reads as follows:

"Of all the various factors referred to by counsel,

the one which is undoubtedly true, and which occasions one a great deal of thought, is the fact that the Accused were clearly not only unintelligent persons, but extremely primitive persons. We did not regard this factor as being sufficient, either in itself, or having to the other factors, as being sufficient to reduce their moral guilt."

Mr.Maharaj did not contend that there were any other alleged misdirections or irregularities on the part of the trial court. It was submitted by counsel for both appellants that the initial intention of the appellants and their two co-perpetrators had been to steal money and not to kill anybody, and that the murder was therefore not premeditated. This argument was also raised in the court a quo, but it was held that ultimately the intention was formed by all four of the assailants to kill the deceased. It appears from the confessions of the two appellants and the evidence of Khaloli that all four of them returned to the deceased, who was then lying either dead or

in a state of unconsciousness, and proceeded to assault him in a most brutal manner. I agree with the learned trial judge that it does not matter whether one of them dropped a large stone on the head of the deceased (as was admitted, at least in principle, by both appellants in their respective confessions), or whether all four of them further attacked and assaulted the deceased with stones and sticks (as was said by Khaloli). At that stage, at latest, all four of them had clearly formed the direct intention to kill the deceased. This was manifested by their conduct. Yet there was no reason to kill the deceased; they could have taken his belongings without any fear of resistance. It should also be borne in mind that the second appellant conceded in his confession that right from the outset it had been their stated intention to go and kill the white men in the Valley of the

Baboons. It would, therefore, be futile for the second appellant to argue that the murder was not premeditated as far as he was concerned. To make quite certain that the deceased would die they went even further and bound his hands together and threw him down the cliff. It was submitted by counsel for the appellants that the fact that the appellants did not even bother to remove the deceased's watch from his arm, indicated that they were really in a state of panic at that stage, and they only wanted to dispose of the body. The observation may be made that they could not have been in too great a hurry if they still found time to cut off a piece of the deceased's hair and remove money from his pocket. When this same argument was raised in the court the learned judge pointed out that they would hardly have decided to tie the deceased's hands together if they were simply trying to get rid of what they believed was a corpse. There is, in any event, no evidence to support a finding that the appellants were in a state of panic when the deceased was thrown down the cliff.

The main argument which was advanced on behalf of both appellants in regard to extenuation was that it was unreasonable for the court to find that the admitted facts relating to the appellants' primitive background and their lack of intelligence and education did not constitute extenuating circumstances. Reference was made to the case of *S. v. Tsankobeb* 1981(4) SA 614(A), but the facts of that case are clearly distinguishable. The court accepted that the appellants were unintelligent, illiterate and uneducated persons "who have probably led the greatest portion of their lives acting as herdsmen in remote areas and somewhat far removed from what we like to call civilisation." After dealing with these and other factors the learned trial judge concluded in his judgment on extenuating circumstances that the members of the court were "far from satisfied that there are present in this case any factors which reduce the moral

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v. *Tsankobeb*

blameworthiness" of the appellants in relation to the crime of murder. I have already referred to the other remarks of the learned trial judge with regard to the lack of intelligence and education and the general background of the appellants. The court considered all these factors, but found that they did not reduce the moral blameworthiness of the appellants in relation to the murder. In my judgment it cannot be said that such a finding is unreasonable at all in the circumstances of this case. There is, therefore, no justification for this court to interfere with the finding of the court a quo. The appeals of both appellants are accordingly dismissed.

a quo.

HOEXTER JA F.H. GROSSKOPF

STEYN JA Concur Acting Judge of Appeal.

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