

SOUTH AFRICA / JUDGMENT

S v Lewis (28/86) [1986] ZASCA 29 (25 February 1986) [1986] ZASCA 29

COURT

Supreme Court of Appeal

BEFORE

Jansen, Hefer, Nicholas

CASE / FILE NUMBER

28/86

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KATHLEEN LEWIS APPELLANT

and THE STATE RESPONDENT

HEFER, JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE [DIVISION]

IN THE MATTER BETWEEN

KATHLEEN LEWIS APPELLANT

and

THE STATE RESPONDENT

CORAM : JANSEN, HEFER, JJA, et NICHOLAS, AJA

HEARD : 28 FEBRUARY 1986.

DELIVERED : 25 MARCH 1986.

JUDGMENT

HEFER, JA :

On 16 November 1982 the appellant accompanied her husband and three young children in a motorcar to Wemmerpan in Johannesburg. There, she attempted to kill the whole family, including herself,

by introducing exhaust fumes into the car by means of a rubber pipe. Her attempts were thwarted by a passerby. All the members of the family were removed to hospital where they were treated and eventually recovered.

As a result of this incident the appellant was charged in a regional Court with an attempt to murder the children. She pleaded guilty and was convicted. After conviction she testified under oath in mitigation of sentence. She also called her husband, a psychiatrist (Dr Slutzkin), and a probation officer (Mr Thuynsma) as witnesses. The regional magistrate sentenced 3

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sentenced her to imprisonment for 6 years, of which 2 years were conditionally suspended. An appeal against the sentence to the Transvaal Provincial Division was dismissed , but leave was subsequently granted to appeal to this Court.

In what follows I shall be quoting extensively from the record of the evidence presented to the trial Court. Such quotations are the ipsissima verba unaltered of the record

It emerged from the evidence of the appel-

lant and her husband that the latter was sentenced during April 1981 to a long term of imprisonment for murder

He noted an appeal (apparently against the conviction and after spending a year in prison, he was granted bail pending the outcome of the appeal. The appeal

was heard in Bloemfontein on 4 November 1982. Appellant and her husband were in Court when it was heard,

and....⁴⁴and it became clear to them that the appeal would not succeed and that Mr Lewis would have to return to prison . However, on 7 November 1982 a certain Botha, who had been a State witness at Lewis' s trial. , told the latter that he had lied at the trial and that "he wanted to put matters right". In the event Lewis and Botha went to see a member of the Attorney General's staff. There, according to Lewis, Botha "got hell from the prosecutor and we were all sent away".

On 15 November 1982 Lewis spoke to Botha again who then indicated that he was no longer prepared to confess his perjury. What happened thereafter was described by Lewis as follows :

"That 5

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"That evening after work I told my wife. The effect on my wife your worship was disastrous. She just seemed to collapse into tears. No matter how I tried to console her, it did not help. She never even came to bed that night. The morning of the 16/11/82 started disastrously by my wife having a fit of some sort, I had to give her two tranquillizers and put her to bed. Later that day when the hysteria had evaded I took her and the children to Wemmerpan for the rest of the afternoon. The Court knows the rest what happened at Wemmerpan."

The relevant part of appellant's own evidence reads as follows :

" I had been having treatments ever since my husband was first arrested for murder on 5/12/1981, I was having treatment from the doctor for my nerves and on the day he was sentenced to nine years imprisonment I evidently collapsed and everything

from 6

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from then just went haywire, X couldn't, I couldn't work, I started to drink, I lost my job and I couldn't pay my rent and I lost my flat and I couldn't feed my children and the more I battled to get out of it the more i couldn't and the more I seemed to drink and take pills and then when my husband came out on the 8/4/1982 he got me right again, he got me to stop drinking but I still had

to take the pills because I was still in a terrible state of nerves. I couldn't seem to do without the pills but things got very much better and right up to his appeal I seemed to be coming right and then we went to Bloemfontein I then saw that his appeal wasn't going to work and I started to drink again and I started to get confused and I don't know sometimes a day or two used to go by that I didn't know what I was doing, I used to have black periods and then when he told me that about Hennie Botha on the Monday the 15th the Monday, I just seemed to go to pieces again."

"Do.....7

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"Do you remember going hysterical?

I remember my husband telling me and I remember starting to scream and that is the last I can remember.

On the 16/11/1982 before you went to Wemmerpan or at Wemmerpan had you been drinking at all? Yes.

Did you drink accessively or not? Yes I had a lot to drink.

When did you start drinking?

I think when I got up, the next morning about 11.00.

And you started to drink straight

away? Yes and I was taking pills.

What tablets were you taking?

Tranquillisers, Activan . "Elsewhere she testified that when her husband suggested on the day in question to take the children swimming, she asked him to take them to Wemmerpan. At that stage she had decided to commit suicide. She thought that at the dam "I could wander off there and

nobody 8

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nobody could find me". Once there, after taking some brandy and tranquillising tablets, she decided to kill her husband and children too. She crushed some tranquillisers in her husband's drink and gave each child two tablets. The result was that he and the children all went to sleep in the car, whereupon she connected

a length of washing-machine piping which happened to be in the car, to the exhaust and passed it through one of the windows. She started the engine and sat in the car awaiting death until she lost consciousness.

(What happened thereafter, I have already described.)

Asked about her reason for wanting to kill her children, she said :

"I....9

effect

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"I wanted to commit suicide, I felt I didn't want to leave my children behind as I didn't want them to be a burden to other people and I always dreaded that my children would be put in a home."

Dr Slutzkin's evidence is to the following

" Can you tell the Court your findings regarding the state of the accused .? When I

examined the accused I found that there was no evidence of mental disorder at the time of the examination. She denied feeling depressed at that time and she said she felt in control of herself and there was no signs of any disordered thinking at the time of the examination.

And regarding the actual offence

itself? Regarding the offence there

had been a two year history during which time her husband had been in gaol and

during 10

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during this time she had been very depressed and there had been some history of overdosing and that during that time and she also has a previous history of post-partum depression, that is depression following the birth of a child and her husband told me that at one time she had become almost impossible to live with because of this state of depression she was in. Also during the two years that her husband was in gaol she had taken to drinking and taking tranquillizers. Just before the actual crime it appears that her husband was at home on appeal bail and there seemed to be some hope for him for his appeal or true some evidence that someone had promised him, new evidence . Then this person apparently backed down and this had a tremendous traumatic effect on the accused. It was described to me by her husband that it had a catastrophic affect on her and she went crazy, she was drinking, taking pills. He said the following morning she went berzerked and then she collapsed

and 11

11.

and then when she came round she asked to go for a drive to the Vaal river. He took her to Wemmerpan for some reason of his own, I think it was too far or something. There she said she had intended to commit suicide by taking an overdose and getting lost. While she was wandering around contemplating this she decided that it would be, the best thing to do the whole family in, herself and her husband and the children. It had something to do with an idea that this would be the perfect Utopia, a solution to all her problems perhaps an over idealization of this idea and - the idea that she would then save the children from all the trauma and her husband, all this trauma that they have been going through and also that if she just killed herself they wouldn't be subjected to further traumas in their life. At the time of this event she had been drinking a lot, she had had been taking a lot of pills as well. She had gone berzerk that morning and it seems to me that the whole behaviour had switched over into possibly a psychotic

state 12

12.

state or an irrational thinking of a sudden nature and at the time of this - when she actually decided on this crime on this course of action rather because the intend to me wasn't criminal, it just seemed to be a course of action that she was going to solve the life's problems like this. It seemed to me that she must have been irrational, irrational state of mind. It seemed to me that she couldn't be really held fully responsible for her actions at the time of the crime, the time of the... The position with the accused now regarding her actual mental state? Her actual mental state as I mentioned at the time of my examination in the prison, I think it is some five months after this event, she has taken a new view of things, she got a new perspective of life. She has taken a new view of things. She managed to come back to reality and see things in a completely different light, according to my discussion with her and furthermore I don't pick up any evidence of mental disorder. It seems that the mental state that she went into was one

of 13

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of these reactive states to a situation event and then it has cleared up. In the future are you of the opinion that one day in the future the accused would be able to resume her role as mother of the children? I would think that this is possible. I would imagine that she would have to be monitored, to have either a probation officer or something like that where .. would guide her and so on and monitored how she is coping with her life and to just check on her when she - because now having this history of depression she could be prone to coming depressed again under stressful situations or even for no reason at all and she needs to be monitored and treated appropriate at the right times. In your opinion what effect would a term of imprisonment have on the accu"

sed? Well, I think this would be very traumatic to her. The period in prison that she has spent now has sort of enabled her to set her mind right to take a positive

approach 14

14.

approach and I think a long period in prison would seem a purposeless thing for her and her being a person as I said prone to depression would certainly, could fall under the state of depression again.

Does the accused show desire to resume her role as mother of her children? She does, I think she

is realistic about the situation, she doesn't expect it to just fall into her lap. I think she realises that she has like to prove herself . "

Mr Thuynsma, the probation officer, confirmed in his evidence the contents of a written report which he had prepared earlier. The only relevant parts of the report are the following :

"It was evident during the investigation that the accused is now in contact with reality and can perceive reality in a

normal 15

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normal way. However, she is in definite need of intensive therapy to assist her in realizing her situation and coping with life. She is still very insecure, will have to cope with the results of her actions and will have to cope with a life without her husband and children."

(The reference to the absence of the children relates to the fact that they had been committed to a children's home where they were still detained at the time of the trial.)

"This is the accused's first offence and she is not observed as criminally orientated.

The precipitating factors for her offence are :

14.1 An unhappy and unstable marriage.

14.2 16

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14.2 Severe depressions. 14.3 Dependence of drugs (to alleviate depression) and alcohol. 14.4 Her husband's imprisonment on a charge of murder and the subsequent failure of his appeal on this offence. 14.5 Her own sense of insecurity , loss of contact with reality, failure and poor self image."

"It is deemed very important that the accused is assisted in adjusting within the community, obtaining work and establishing a suitable home as well as maintain close contact with her children as her children are now her only base of security and purpose in life.

It is felt that the accused would not gain from imprisonment presently as she would be submitted to rehabilitative treatment removed from the community and

this 17

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this in effect only retard her eventual adjustment in society.

15. RECOMMENDATION

It is recommended that the accused be dealt with in terms of Section 297(1) (a) and (i) (dd) and (ee) of Act. 51/1977 on the following conditions : "

The regional magistrate disposed of Dr Slutzkin and Mr Thuynsma's evidence in two brief sentences as follows :

"The findings of Dr Slutzkin and Mr Thuynsma are to a great extent based on the accused and her husband's version. This Court can not agree with the recommendations of the probation officer. "

I have two observations on these remarks.

The first relates to the fact that the findings of the

professional 18

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professional witnesses were largely based on the appel-

lant and her husband's version. The correct way in

which this type of evidence falls to be dealt with was

explained by RUMPFF JA (as he then was) in *S v Mngomezulu* 1972(1) S A 797 (A D) at p 798 and, provided that

the facts on which the findings were based were proved to the Court, no reason existed why Dr Slutzkin and Mr

Thuynsma's views should not have received proper consideration. The second observation relates to Mr Thuyns-

ma's recommendations. A probation officer's report is something to which considerable importance is at -

tached (cf S v Adams 1971(4) S A 125 (C) at p 127

and S v Jansen and Another 1975(1) S A 425" (A D)

at 19

19.

at p 428 (both dealing with juveniles; S v Maxaku

1973(4) S A 248(C) at p 254), for it usually provides

the Court with all available information which will as-

sist in understanding the problems of the accused (S v

H and Another 1978(4) S A 385 (E C D) at p 386) and in

determining the most appropriate form of punishment. Such

a report always requires careful consideration and often

critical analysis in order to ensure that the views of

a probation officer are not simply substituted for the

Court's own views (S v H and Another loc cit). But if

the recommendations contained therein are not followed,

the accused and a Court of appeal is entitled to know

why. In the instant case neither the appellant nor

this : 20

20.

this Court knows why Mr Thuynsma's recommendations were not followed. Although it is not stated in the magistrate's reasons, a possible reason for the trial Court's summary dismissal from consideration of Dr Slutzkin and Mr Thuynsma's views (based, as they were, on what the appellant and her husband had told them) may be that the Court was not impressed by the appellant's evidence nor by that of her husband. Of the appellant the magistrate said :

" she was a pathetic and untrustworthy witness. She made a very bad impression in the witness box."

Of her husband he said :

"The 21

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"The accused's husband also made a very bad impression. He blatantly lied in order to save his face. The Court has no hesitation in rejecting the evidence as false."

It is not clear what the evidence was which was thus rejected. Obviously, everything that the appellant said in evidence was not regarded as false, for the Court relied for some of its findings entirely on her evidence which was supported in many respects by that of her husband. In dealing with the appellant's evidence the magistrate made a remark which may offer a clue to what he had in mind viz that "it is obvious from all the evidence that she did not alone or on the spur of the moment decide to commit this crime. She

took 22

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took all the blame in order to protect her husband"

(My emphasis.) This remark relates to the denial by the appellant and her husband that the latter had had any hand in the attempt on the children's lives. Although it is by no means an obvious conclusion to me, I am prepared to accept that their denial in all probability was false. For reasons which will presently appear, however, their untruthfulness in that regard is of minor consequence.

The primary importance of their evidence lay in its relevance to the circumstances which had prompted the appellant to commit the offence. And, as respondent's counsel rightly conceded in this Court, there 23

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there is no justification for doubting the correctness of their evidence in that regard. Thus, if my earlier surmise is correct that the trial Court's assessment of Dr Slutzkin and Mr Thuynsma's evidence was influenced by an assumption that it was based on incor-

rect information given to them by the appellant and her husband, the assessment itself is plainly incorrect.

Reverting then to the magistrate's reasons, the following emerges :

(1) No mention whatsoever is made of the all important circumstances in which the attempt on the children's lives was made.

(2) Dr Slutzkin and Mr Thuynsma's professional evaluation 2424 2 4.

evaluation of the effect of those circumstances of the appellant's state of mind was ignored.

The irresistible conclusion is that the regional magistrate, in determining what an appropriate sentence would be, not only excluded highly pertinent information from consideration but also failed to take advantage of valuable professional guidance. By doing so, he precluded himself from properly considering the matter at hand.

As appears from some of the decisions to which he referred and from some of the remarks in his reasons for sentence (which I need not quote), he regarded the appellant's offence as simply another instance of wilful child 25

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child abuse , against which the community is entitled to be protected. This was obviously not such a case.

I would describe the appellant's offence as a tragic culmination of a series of traumatic events which so af-

fected her personality that she had no further will to live, and eventually reduced her to a state of irrationality in which even the heinous crime of killing her" own children became quite acceptable.

It follows from what I have said that the magistrate misdirected himself and that this Court is now free to consider afresh the question of an appropriate sentence.

The 26

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The offence is, of course, a serious one, the more so since so-called family murders in which whole families are wiped out and the murderer finally takes his own life, appear to have become the order of the day. The alarming incidence of this phenomenon has caused it to become a major social problem the solution of which unfortunately seems to keep evading sociologists and criminologists alike. And that is the crime which the appellant would have committed, had it not been for the fortuitous intervention of someone who happened to be in the vicinity. A very considerable degree of mitigation is, however, to be found in the circumstances in which the offence came to be committed and in the appellant's 27

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appellant's state of mind at the relevant time. I have already stated my views in that regard and nothing further need be said. A few remarks about the interests

of society - the third consideration usually mentioned in a discussion of the question of sentence - will, however, not be out of place.

Related to the circumstances of the instant case, the question simply is ; would the interests of society best be served by sending the appellant to prison? For the following reasons, the answer, in my view, is negative. First, the appellant would gain nothing from such a sentence. As appears from the probation officer's report, she is not "criminally orientated" and 2828

and requires no rehabilitation because of criminal propensities . On the contrary, it is reasonable to assume , in accordance with Dr Slutzkin's evidence, that it would only affect her detrimentally. Second, Mr Thuynsma's views of the importance of assisting the appellant to adjust within the community in the way described in his report, appear to me to be correct. Third, every conceivable effort should be made to repair the harm which must inevitably have been done to the children, not only by the attempt on their lives, but also by what preceded it. Their father was convicted of murder and sentenced to a long term of imprisonment. As a result, their mother who was already prone to bouts of depression, became 29
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became even more depressed and addicted to liquor and to tranquillising drugs; she lost her employment;

there were days when the children had no food; and then came the tragic attempt on their lives, as a result of which they were removed from their mother's custody and detained in a home {apparently after being declared to be in need of care}. A more dismal picture of any child's life is hardly imaginable and I can conceive of no benefit to these children by now sending their mother to gaol too. Fourth, a sentence of imprisonment would in the circumstances have little deterrent effect either on the appellant or on others. I wish to emphasize, as I did before, that this is not simply a case of brutality 30

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brutality towards a child, but that it concerns the last desperate act of a person who was intent on destroying herself. Such a person will not be deterred by the prospect of a heavy sentence, should the attempt at suicide be unsuccessful. Fifth, and in view of what I have just said, a sentence of imprisonment can serve no other purpose than that of retribution. In the circumstances of this case no further retribution is, in my view, called for, nor would society demand it.

Mr Thuynsma recommended that the appellant be dealt with in terms of the provisions of section 297

(1) (a) of the Criminal Procedure Act 51 of 1977, i.e. that sentence be conditionally postponed. I prefer to deal with 31

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with her in terms of section 297(1)(b) by imposing sentence and suspending its operation, for no other reason than to bring the matter to finality. The question of suitable conditions then arises. The first condition should obviously be aimed at the prevention of a repetition of the offence. Any others should relate to psychological or psychiatric treatment for the appellant and to her custody of the children, the main aim being her psychological rehabilitation and the welfare of the children. But the children are already protected and the appellant realises that they will not be restored to her custody until she proves herself. The Welfare Department is, moreover, aware of the case and one may rest assured that the children 3232. children will not be restored to the appellant's custody prematurely. Save to the extent that the appellant will have to submit to the supervision of a probation officer, I have accordingly decided not to impose any further conditions.

The order which I make is the following: 1 . The appeal succeeds to the extent that the sentence of & years imprisonment which the regional magistrate imposed on 15 May 1983, is wholly suspended for 5 years with effect from that date on condition that the appellant -

(a) is not convicted of murder or attempted murder committed during the period of suspension, and

(b) 3333

(b) submits, in terms of section 297(1) (b

read with section 297("l)(a)(i)(ee) of

Act 51 of 1977, to the supervision and

control of a probation officer as defined

in the Children's Act 33 of 1960.

2. The Registrar of this Court is instructed to convey this judgment to the Regional Director in Johannesburg of the Department of Health and Wel-

fare under reference number W 77601.

J J F HEFER, JA.

JANSEN,JA.)CONCUR. NICHOLAS,AJA.)

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Prepared on 11 October 2026 · Esheria