

SOUTH AFRICA / JUDGMENT

S v Mkhize (294/85) [1986] ZASCA 62 (28 May 1986)

[1986] ZASCA 62

COURT

Supreme Court of Appeal

BEFORE

Viljoen, Botha, Boshoff

CASE / FILE NUMBER

294/85

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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between: SIFISO DOUGLAS MKHIZE APPELLANT
 AND
 THE STATE RESPONDENT
CORAM : VILJOEN, BOTHA, JJA et BOSHOFF, AJA
HEARD : 23 MAY 1986
DELIVERED : 29 MAY 1986

JUDGMENT

VILJOEN, JA

In the/....

2.

In the Court a quo the appellant faced
seven serious charges involving a number of counts
of housebreaking with intent to steal and/or rob
and robbery with aggravating circumstances, one
of attempted murder and two counts of murder,
all of them alleged to have been committed during

the period 7 April 1984 to 28 May 1984. He was convicted on all seven counts. No extenuating circumstances having been found he was sentenced to death on each of the murder charges (counts 5 and 6). On the other charges he was sentenced to various terms of imprisonment which, in view of the cumulative effect, were ordered to run concurrently and in respect of which he received an/

3.

an effective sentence of ten years imprisonment.

The learned trial Judge granted the appellant leave to appeal against his various convictions as well as against the sentences of death imposed in respect of counts 5 and 6 on the issue whether or not the trial Court erred in finding that there were no extenuating circumstances. The appellant has, however, abandoned his appeal against his convictions and the only appeal before this Court is against the finding by the trial Court that there were no extenuating circumstances. Counts 5 and 6 allege that on 28 May 1984 the accused murdered Mr Johannes Hendrik de Bruyn and his wife Fanny Elizabeth Maud de Bruyn at their/.....

4their residence 95 Mayors Walk, Pietermaritzburg. The reports of the post mortem examinations reveal that Mr de Bruyn died of penetrating stab wounds of the lungs and Mrs de Bruyn of a penetrating wound of the chest. Apart from superficial lacerations and abrasions, Mr de Bruyn sustained the following clean cut wounds:

- (1) 6 cm long, left outer upper arm-penetration 7 cm deep into muscle only.
- (2) 6 cm long, left-upper chest over 2/3rd costal cartilages - close to midline.
- (3) 8 cm long-right upper chest over 2/3rd costal cartilages - close to midline.
- (4) 6 cm long, back of left shoulder-penetration 7 cm deep into muscle only.

Wound 2 passed "downwards/backwards/ medially/

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medially through 2/3 costal cartilages into the

left lung." The total penetration was - 12 cm.

Wound 3 passed "downwards/backwards/ medially

through 2/3 costal cartilages into the right

lung." The total penetration was - 12 cm. Mrs

Fanny de Bruyn sustained, apart from the bruising of both eyes and certain small lacerations of the forehead, the following clear-cut wounds:

- (1)(2) 1,5 cm long each on top of left shoulder (superficial).
- (3) 3 cm long left upper arm (superficial) .
- (A) 4 cm long left wrist (superficial).
- (5) 5 cm long in supra sternal notch.
- (6) 12 cm long right upper arm-penetration 9 cm into muscle only.

Wound/

6.

Wound 5 passed "downwards/backwards

through the upper part of the sternum", pene-

trading ± 12 cm into the aorta and the right

lung. Mr de Bruyn was 66 and Mrs de Bruyn 71 years of age at the time of their deaths. What happened at the house of the de Bruyns that afternoon was described by the appellant himself before a magistrate in the course of proceedings under s 119 of the Crimi-

> '<> nal Procedure Act 51 of 1977, as follows:

"I arrived at this place, 95 Mayor's Walk, between 2,00 and 3,00 in the afternoon. At the front steps I found the White male standing there; at the steps of the front, Your Worship. The white woman was inside the house. The White male asked me what I was wanting or looking for there. I

did/

7.

did not waste time nor did I say anything else except that I told him that I wanted some money. Then he ordered me to leave his premises. He said that repeatedly. As he said so he was retreating up the steps, back into the house. I followed him close by.

Were you armed at that stage? ... No, not yet then.

Yes? Carry on. When he tried to close

the door, to close me out, I kicked the door open. When he was inside, he tried to close the door. I kicked the door open. It was the lower portion of the door. The door is in half, Your Worship. The top and the bottom. I kicked the lower portion and gained entrance into the house. That White man then grabbed hold of a chair which was just to the side, next to the wall, aimed to hit me therewith. I got hold of the chair. I took hold of the chair with my one hand.

MR INTERPRETER: He indicated left hand,

Your Worship. And then with my right

hand I drew out a knife from my trouser pocket and opened the knife with the help

of/

8 of my left hand which was holding to the chair. After opening the knife I threatened with a stab blow and as a result of the feint blow stab blow he left hold of the chair. In the meantime his wife was there - a White lady - and got hold of a tray; a wooden tray Your Worship. Tea tray, Your Worship, and she struck me with it and it was whilst she was striking me with the tray that I also began stabbing her husband, or the male person. As the White lady insisted on inflicting several blows with the tray, X turned around and stabbed her. Your Worship, I then started stabbing both of them left and right, stabbing the lady and the man, at the same time. Left and right, swinging my arm. The White lady then cried out while rushing to the front door which she opened. At that time I was running to the other bedrooms to one side to search there. When I came back I saw the lady closing the door and come back. After that I approached her and asked her for some money. There was some money in a plastic bank bag, Your Worship. Small bag, Your Worship. I don't remember how much there was inside there,

but/

9.

but I think it was R100,00 and there were a few cents just next to that bag. It was lying on the table and she gave it to me.

Did she give you both the bag and the

small change? No, not the change,

Your Worship. I picked it up myself.

COURT: Did she give you the bag only? Yes.

Yes? I went to a side bedroom or spare bedroom and there looked for something to wear since my 'T' shirt was covered in blood here in front. I wanted to change.

Where did the blood come from? It was blood from both of them. The White people, which spilled on me. I got a jacket in that spare bedroom and put it on

Over your 'T' shirt? No, no, Your

Worship.

MR INTERPRETER: The fault of the Interpreter, Your Worship, I am sorry.

I did not wear the jacket, but I had it in my hand.

COURT: Yes? I went into another room

which/...10

which is next to the kitchen. When I did so the man - the White man - got up. I did not see him when he entered another bedroom, but saw him when he came from there. He came out from that bedroom. I then went out and ran away because I feared that he had armed himself with something. I went round the corner and hid myself there. As I stood there round the corner I heard a noise as that of a door being locked and when I went back to that door I found that it had been locked on the inside."

"Are you able to say how many times you

stabbed the White lady? I did not count, Your Worship.

Where on her body did the blows land? All over her chest, Your Worship.

Were she and the White male still alive when you left the scene or had any of

them died already? Your Worship, when I looked through the window, or through the burglar guards, I noticed the two of them sitting at a table, one on the one side and the other on the other side; opposite each other. That is all

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11.

I wish to say, Your Worship."

The two deceased were indeed found in the positions described by the appellant. A photograph handed in shows them sitting on chairs on either side of the kitchen table as if reclining on the table with the top parts of their bodies - both dead.

The trial Court held: "If one has regard to the nature of the injuries suffered by the two deceased as revealed by the post-mortem reports, there can again be little doubt, especially in the light of the accused's s 119 statement and the Okapi knife found on the scene of the murder, that the accused struck at the two deceased with murderous intent. As a result thereof the two deceased died. On counts 5 and 6 the accused is found guilty as charged."

Mrs/

12.

Mrs Miriam Khumalo gave evidence in mitigation on the appellant's behalf. She testified that she first met the appellant when¹ he, at the age of approximately five years, stole a bread from her mother who was a hawker. Enquiries resulted in their learning that the appellant was a vagrant child who had been abandoned by his mother and "slept in the long grass". She and her mother pitied him. Her mother took him into her home and after her mother's death, she took him and brought him up with her own children. He was bright and progressed well at school until, when he was about 15 years of age, a man who claimed to be the appellant's uncle,/...

13. uncle, "stole" the child. After two years the appellant returned to them and reported that he had had a very hard time under the "uncle". According to her testimony he was never aggressive. When asked whether it was necessary for him to commit these offences, to break in and steal, her answer was:

"Well at the time when we found him when he was small we realised that it was natural for him to have taken the bread because he was very hungry then."

Questioned by the learned trial Judge whether he ever acted strangely, she replied that she sometimes suspected that he was not normal. When he was still small he would sometimes not answer at all when they talked to him and afterwards/

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wards he would start crying. When other children who were playing with him wanted to take his things, he would simply give them the things. Medical evidence was led by the State with a view to establishing the age of the accused. The evidence indicated that he was at least 19 years of age. In the course of argument by counsel for the State on the issue of extenuating circumstances the learned trial Judge remarked:

"it is clear that the Appellate Division requires a fairly complete and comprehensive enquiry as to the personality, the mental make up, the psychological background, the psychological profile if you wish, of a person placed in the situation in which the accused was when he was 19 years old."

After/

15.

After further exchanges between counsel and the learned Judge, the latter decided to refer the appellant for mental observation by two psychiatrists in terms of s 79 of the Criminal Procedure Act, 51 of 1977. The psychiatrists appointed duly examined and observed the appellant, submitted reports and testified in Court. Both these expert witnesses expressed the view that the accused did not suffer from any mental illness or mental disorder. Presumably in view of Miriam Khumalo's evidence, the Court was concerned about the question as to whether the appellant did not suffer from any personality disorder and the psychiatrists were questioned/.....

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questioned in this regard. In the course of the judgment of the Court the learned trial Judge said :

"In elaboration of his report Dr Dunn stated, as did Dr Soni, that while it was clear that the Accused suffered from no mental illness or mental disorder, a character profile was almost impossible to establish since the Accused refused to co-operate with the psychiatrists. The

Accused did have certain personality traits in common with a psychopath, such as aloofness, indifference, disdain for others, suspicion; he was an individual who did not trust others, with innate aggression towards others. He was, Dr Dunn pointed out, rather a loner. It could not, however, be said, Dr Dunn concluded, that he was a psychopath. His crimes may well have been committed simply for material gain. He manifested the characteristics of

someone with a distinct criminal dis-

position. Even so, Dr Dunn appeared to agree with the suggestion put to him that there/...

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there was an element of abnormality in the personality of the Accused, and that this could have resulted from his somewhat unconventional childhood. The question is whether this personality abnormality, stemming from the Accused's childhood, combined with the Accused's youthfulness, qualifies as an extenuating circumstance. Perhaps I should first say something about the Accused's age. On the medical evidence of Dr Kauffman, he was estimated to be at least 19 or 20 years of age. The Court accepts that estimate and approached the question of extenuating circumstances on the basis that the Accused is not a mature adult.

Now, I have said that the issue was whether the personality abnormality which Dr Dunn mentioned, read with the relative youthfulness of the Accused, could be regarded as an extenuating circumstance. Let me say immediately that on this issue this court is divided."

"The view of one of the members of the Court is that the personality abnormality of the Accused, assuming it to have been

established/....

18.

established, created a pattern of behavioural abnormality or deviation which, if measured against normality, and taken with the Accused's youth, would reduce the Accused's moral blameworthiness. The view of the majority of the Court, however, is that neither the observations of Dr Dunn nor the evidence of Miriam Khumalo reveal a personality abnormality of the sort that could conceivably constitute extenuating circumstances. That is all the more so when one bears in mind that the Accused bears the onus. Dr Dunn does not say that the Accused is actually a psychopath. Psychopathy, even if it finds its origins in a warped childhood, does not in any event per se constitute an extenuating circumstance."

"In the view of the majority of this Court the personality deviation to which Dr Dunn referred simply reflects a tendency to criminality and, as Mr. Schaup has contended, criminality as such is not tantamount to an extenuating circumstance. The motive for the crime in the case of Counts 5 and 6, as in the case of the other counts, was financial gain. Whenever the

Accused /.....19

Accused encountered resistance, however feeble, he invariably resorted to violence. This is true for the other counts as well as for Counts 5 and 6. In the case of Counts 5 and 6 it led to the death of the two deceased. The attack on them was brutal, vicious and sustained. That he might encounter some resistance in the course of his robbery was not unexpected. In the case of these counts, as in the case of the other counts, he armed himself in advance. He did not hesitate to use violence. The nature of the crimes he committed, more particularly the crimes referred to in Counts 5 and 6, manifests a considerable degree of inner vice on the part of the Accused. These crimes were not committed on the spur of the moment. They were carefully planned and audaciously executed. There was no indication of irrational or spontaneous behaviour on the part of the Accused. In each case the spur or the stimulus was the resistance from his victims. The majority of this court is accordingly not persuaded that the Accused has succeeded in discharging the onus of establishing extenuating circumstances along the lines suggested by the minority earlier in this judgment."

On/.....

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On appeal before us it was submitted, on behalf of the appellant, that the learned Judge a quo erred in finding that the appellant's motivation for the acts he committed was solely material gain. While material gain was the principal driving emotion, another factor which contributed to his deviate behaviour, was the personality disorder which Dr Dunn conceded, it was contended. I do not agree. The majority of the Court did, as appears from the extract from the judgment quoted above, take this factor into account. The learned Judge referred to the evidence of Dr Dunn who "appeared to agree with the suggestion put to him that there was an element/.....

21 . element of abnormality in the personality of the

accused which could have resulted from his somewhat unconventional childhood" and dealt with this factor fully. It was further submitted that the majority of the Court did not have sufficient regard to the cumulative effect of the age of the accused, the personality disorder, the absence of dolus directus and the possibility of rehabilitation. As far as the absence of dolus directus is concerned, the Court was well

aware of the fact that the accused's direct aim was not to kill, but to overcome resistance and took into account, quite justifiably and correctly/

22. ly in my view, the brutal, vicious and sustained

attack on the deceased. On the possibility of imposing a sentence alternative to the incomparably utter extreme of the death sentence we were referred to the judgment in the matter of *The State v Letsolo* 1970 (3) SA 476(A). In that case extenuating circumstances were found to exist but the death sentence was imposed. What the Appellate Division dealt with there was the exercise of its discretion by a court which found extenuating circumstances. In the present case the enquiry was whether extenuating circumstances existed .

It is quite clear from the judgment that the majority of the court a quo properly took into account/

23.

account, both singly and cumulatively, the youthful age of the appellant, his personality and psychological make-up and his intention when he assaulted the deceased.

The appeal is dismissed.

JUDGE OF APPEAL

BOTHA JA)

) - agree BOSHOF AJA)

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