

SOUTH AFRICA / JUDGMENT

s v Mloyi and Another (631/87)

[1988] ZASCA 77 (1 June 1988)

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COURT

Supreme Court of Appeal

BEFORE

Van Heerden, Kumleben, Viljoen

CASE / FILE NUMBER

631/87

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631/87

/mbIN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ELIZABETH MLOYI FIRST APPELLANT

RICHARD FANO SHEZI SECOND APPELLANT

and

THE STATE RESPONDENT

CORAM : VAN HEERDEN, KUMLEBEN, JJA et VILJOEN,

AJA

DATE OF APPEAL : 23 MAY 1988 DATE OF JUDGMENT : 1 JUNE 1988

J U D G M E N T

KUMLEBEN, JA/

1.

KUMLEBEN, JA The two appellants, with a third accused, Muzubele Dladla ("accused no 1"), stood trial on a charge of murder before Thirion J and two assessors in the Natal Provincial Division of the Supreme Court. It was alleged that they had unlawfully and intentionally killed a woman, Thembane Dlomo. All three accused were found guilty as charged. In regard to extenuating circumstances, in the case of first appellant, Thirion J found such to be present but the majority of the court came to the opposite conclusion. The court was, however, unanimous

that in the case of second appellant and accused no 1 there were no extenuating circumstances. In the result the appellants were sentenced to death.

(Having/

2.

(Having regard to the youthfulness of accused no 1 -he was probably 17 years old at the time of the murder - the learned Judge in the exercise of his discretion sentenced him to 15 years' imprisonment.) The application of the two appellants for leave to appeal against their convictions and sentences was granted. Before us counsel for both appellants conceded that the correctness of the convictions could not be challenged and restricted their

submissions

to the question of extenuating circumstances. The first appellant, a woman of about fifty years of age, was the lover of a certain Mtumeni Dladla ("Mtumeni"), who was referred to in evidence as her husband. They lived together in the Durban area though

his/ 3. his kraal was in the Kranskop district. Mtumeni died

whilst living in Durban. Subsequently first appellant went from Durban to his kraal for a cleansing ceremony which was one of the customary rites arising from his death. The deceased also lived in the Kranskop

area and was one of the guests who arrived to attend the ceremony. It took place towards sunset on Sunday

7 September 1986. At a stage when the deceased was in the main hut with the two appellants, accused no 1 and others, second appellant instructed her to drink the

beer that she had been given and he told accused no 1

to guard the door of the hut. Both accused no 1 and

second appellant struck her with an iron pipe to pre-

vent her escaping. When the deceased pleaded to be

released/ released, second appellant said "We won't leave you. Why did you kill my father?" The deceased denied this allegation. Second appellant continued to assault her with the iron pipe. At a certain stage when she was lying on the ground, he inserted the iron pipe into her private parts and made the women present smell the pipe. After accused no 1 and second appellant had taken turns at assaulting the deceased with this pipe, first appellant, at the request of second appellant, produced a rope. With it he hoisted the deceased on a roof rafter, then let go of the rope causing her to fall to the floor. He remarked that she was still breathing and repeated this procedure a second time. As she lay on the floor her two assailants instructed

first/

5. first appellant to fetch meat and beer which they consumed whilst smoking dagga. After this interlude second appellant instructed everyone to leave the hut. He remained inside with the deceased and at one stage was replaced by accused no 1. When others were allowed to re-enter the hut the deceased was seen to be lying naked on her back with her clothes folded under her. Second appellant asked first appellant to hand him a knife. This he in turn handed to accused no 1. The latter proceeded to stab the deceased twice on her left breast, thus finally killing her. First appellant provided more rope with which to tie up the body of the deceased. It was dragged to a dry watercourse where it was abandoned.

First appellant carried the clothes of the deceased to this/ this spot where they were left. On returning to her hut, first appellant set about removing traces of blood from its floor and destroyed certain other evidence of deceased's presence there that night. At first light second appellant and accused no 1 departed. Later that morning first appellant sent someone to see whether the body of the deceased had been adequately concealed. These are in brief the grisly details of what can only be described as an atrocious murder.

Mr Hunt, who appeared in this court and in the court a quo on behalf of first appellant, submitted in both courts that the cumulative effect of the following considerations warranted a finding that extenuating circumstances were present:

(a) The/

7.

- (a) The fact that first appellant honestly believed, whether reasonably or not, that the deceased was responsible for the death of her husband;
- (b) The cleansing ceremony, at which the deceased put in an appearance, must have been a time of heightened emotion for first appellant when she would have been particularly conscious of the loss of her husband and, as she saw it, the cause of his death.
- (c) She did not physically take part in the killing of the deceased;

- (d) There was nothing to indicate that any of the unnecessary acts of brutality were done on her instructions or carried her approval.

I turn to consider each of these alleged grounds for extenuation.

The judgment dealing with the extenuating circumstances does not explicitly state whether the court found/

8. found as a fact that first appellant held the belief

referred to in (a) above. That she did appears to

have been the view of the learned Judge. In the judgment on the merits he observed that "(t)he killing

seems to have had something to do with the death of Mtumeni" and in the judgment on extenuation he obser-

ved that first appellant "felt more keenly" than the other two the death of her lover. In the latter judgment it is noted generally that the assessors were of the view that the factors put forward by counsel did

not amount to extenuation. It is, however, not clear whether they did not accept that she held such belief or whether, having found that she did, they did not regard it as an extenuating circumstance.

One/

- 9.

One must turn to the evidence in this regard.

First appellant when testifying on the merits denied knowledge of any allegation that the deceased had been responsible for Mtumeni's death. This is understandable since, when falsely denying any complicity in the murder, she could be expected to dissociate herself with the motive as well. It is significant though that during the assault upon the deceased, second appellant asked

"Why did you kill my father?" This question, it can be accepted, was prompted by what first appellant told him that evening. Another state witness Nokwetembe Ngubane said that during the assault the first appellant was heard to say "Kill the dog. She killed Mtumeni."

In/ 10. In the judgment it was said that the evidence of this witness was not without blemish and was therefore to be viewed with caution. But there appears to be no reason why this evidence or what was said by first appellant ought to be rejected. Moreover, it is to be noted that no other motive for the killing emerges

from the evidence. This Mr Meiring, who appeared for the State, conceded. in the circumstances it can be

accepted as a probability that first appellant did believe that the deceased had been responsible for the death of her husband and that this made her decide that the deceased was to be killed. This of course in no way excuses her/

11.

her conduct but, particularly in the case of a person of primitive mentality, it can operate to reduce in a measure her degree of moral blameworthiness. The other three factors relied upon by counsel for first appellant need be but briefly discussed. Their cogency, if any, is not significant. The fact that the deceased arrived at the cleansing ceremony may possibly have been the event which precipitated what followed. This consideration is however, in my view, little more than a makeweight. The consideration discussed in the previous paragraph is the important one. It is true that first appellant was not directly involved in the assault and killing but this fact is largely offset by the probability that she instigated it and at no stage

disassociated/

12. dissociated herself with the actions of the other

two assailants. The fact that she did not take part in any of the brutal and depraved acts, or on the face of it condone them, does to an extent redound to her credit. In the result, as regards first appellant, I am of the view that the learned Judge's evaluation of the circumstances bearing upon extenuation was correct and that the court ought to have found that in her case extenuating circumstances did exist.

The grounds on which it was contended that

in the case of second appellant a similar finding is warranted are the following: the amount of liquor he

had consumed; that he had acted on the instructions of

first appellant; and that she had told him that the

deceased/ 13. deceased had caused the death of Mtumeni, whom he

looked upon as a father, and had thus influenced him to commit the murder.

The court a quo gave close attention to the

question of the extent to which second appellant (and accused no 1) had consumed liquor that Sunday and its effect upon them. In this regard it is stated in the

judgment that "we are unable to find that the Accused's consumption of alcohol, when viewed cumulatively with the other factors, influenced their conduct to any appreciable extent or that it diminished their ability to appreciate the enormity and wickedness of their conduct." The reasons for saying this are thus set out in the judgment:

"When Accused Nos 1 and 3 left Bazana they appeared/

14. appeared to him to be sober, because as he put it, they had not embarrassed him in any way. They then walked some 3 km before reaching Accused No 2's kraal. This exertion would have had a further sobering effect on them. After reaching Accused No 2's kraai they consumed but little in the way of liquor before embarking on the killing."

The manner in which they proceeded to kill the deceased and dispose of her body lends further weight to the conclusion on that their degree of intoxication was not substantial. It is trite that the consumption of liquor tends to erode self-restraint and in certain circumstances this may qualify as an extenuating feature. This,

however, must necessarily depend upon the effect, judged

by the evidence, the liquor had upon the accused person

concerned. (See *S v Saaiman* 1967(4) S.A. 440(A)). Such

evidence in this case fully justifies the finding that

liquor/ 15. liquor had no significant bearing upon their conduct

or state of mind that night.

It can be inferred that first appellant insti-

gated or suggested the killing. The evidence, however, in no way indicates that second appellant was unduly influenced by her, that he was reluctant to comply with her instruction or request, that he played a subordinate role or that he at any stage wished to desist. (Cf. *S v Ramatsheng* 1977(3) S.A. 510(A) at 512 F.) On the contrary, once the decision to assault and kill the deceased was taken, his role was the dominant one. He cannot vicariously benefit from the fact that first appellant believed the deceased had killed her husband, that she was aggrieved at this and thus sought retribution. An assassin plainly cannot rely on the motive

of/ 16. of the person commissioning him to excuse or mitigate

his conduct. Nor can extenuation be based on the contention that second appellant, by virtue of some re-

lationship to Mtumeni, harboured a compelling desire to redress the wrong. The evidence is to the effect that it was only on the evening in question that second appellant learned for the first time that Mtumeni's death was attributed to the deceased.

Finally I must revert to the protracted and

repulsive manner in which second appellant set about killing the deceased. In *s v Robert John McBride* (CaseNo 323/87), a recent judgment of this court, dated

30 March 1988, the extent to which the nature of the crime is relevant to the question of extenuation was

closely/ 17. closely examined. The conclusion reached appears

from the following passage at page 46 of

the judgment (per Corbett JA)

"The nature of the murder (and here I would include the identity of the deceased and the relationship, if any, between the accused and the deceased) and the manner of its commission are factors which, while they cannot be regarded as *per se* excluding extenuation, are nevertheless relevant to the general enquiry as to extenuation. They may be relevant to the factual enquiry as to whether an alleged extenuating circumstance in truth existed or as to whether it actually influenced the accused; or they may be relevant as part of the web of circumstances associated with the crime which must be considered by the court when it passes its moral judgment and decides whether there exist circumstances which in the minds of reasonable men diminish the accused's moral blameworthiness."

These remarks are particularly pertinent to the alleged

grounds of extenuation relied upon. 'The manner in which

the

18. the murder was committed confirms that second appellant's

mind was not to any appreciable degree beclouded by liquor; and that he acted of his own volition in that, had

he been a reluctant or coerced participant, he would

have, one assumes, carried out the killing as expedi-

tiously as possible. The way in which the

murder was executed is in any event "relevant as part

of the web of circumstances associated with the crime"

which the trial Court was entitled to take into account

in deciding that his moral blameworthiness was in no

way reduced by the circumstances submitted by counsel

in argument.

In the result the appeal of first appellant is allowed in part. Her conviction is confirmed but the sentence is set aside and one of 15 years' imprisonment/ ment substituted. The appeal of second appellant is dismissed.

M E KUMLEBEN

JUDGE OF APPEAL

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