

SOUTH AFRICA / JUDGMENT

S v Netshiavha (366/87) [1990] ZASCA 101 (25 September 1990)

[1990] ZASCA 101

COURT

Supreme Court of Appeal

BEFORE

Van Heerden, F H Grosskopf, Goldstone

CASE / FILE NUMBER

366/87

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

CASE NO: 366/87

In the appeal of: NALEDZANI PETRUS NETSHIAVHA APPELLANT and THE STATE RESPONDENT

Coram: VAN HEERDEN et F H GROSSKOPF JJA; GOLDSTONE AJA

Date heard: Friday 14 September 1990 Date delivered: 25 Sept. 1990

2

JUDGMENT GOLDSTONE AJA:

The appellant was convicted of culpable homicide by Kloppe ACJ in the Supreme Court of Venda. He was sentenced to imprisonment for ten years* With leave of the Court a quo the appellant now appeals to this Court against the sentence.

The trial was the sequel to events which occurred on 20 September 1985 in consequence of which the appellant killed the deceased, one Nephalama, by striking him with an axe on the head and neck. The appellant pleaded guilty to culpable homicide and in support thereof his counsel handed in a written³ statement. It reads as follows:

"I, the undersigned accused NALEDZANI PETRUS NETSHIAVHA plead not guilty to the charge of murder. I deny that I unlawfully and intentionally caused the death of the said JOHN NEPHALAMA GUMANI. In terms of s.258(a) of the Criminal Procedure Act 51 of 1977, I plead guilty to culpable homicide. In that I unlawfully and negligently caused the death of the said deceased. I had mistaken the deceased to be a bat and it was only later that I realised that what I have struck was a human being. The reasonable man would have foreseen that it was a human being and a reasonable man would have not killed the deceased. I did not comply with the standard of the reasonable man, thus I accept negligently. (sic)."

4 Counsel for the State accepted the plea and Klopper ACJ duly convicted him.

The appellant was called to testify in mitigation of sentence. He informed the Court that he was 25 years old and married. Both he and his wife were unemployed and they had one child of the marriage. He said that he regretted what he had done. No evidence was led as to his standard of education. He added that:

"My Lord, I did not have the intention to kill the deceased, I was only frightened about what was happening."

He said also that he and the deceased had no problems between them prior to the accident.⁵ In sentencing the appellant, Klopper ACJ in effect held that the appellant did intend to kill the deceased and on that basis he imposed what is clearly a heavy sentence.

Almost two and a half years after the trial, an application was made to Le Roux CJ in terms of section 316 of the Criminal Procedure Act, 51 of 1977, for leave to appeal against the sentence. In terms of the provisions of section 316(3) of the Act, leave was also sought to lead further evidence relevant to sentence.

Four witnesses were called to the witness stand. California Netshiavha, the wife of the appellant, said that on the night in question she heard a scratching sound. She saw something like a bat hanging from the rafters. The appellant went for his axe. She heard his footsteps outside after which, in a state of fright, she followed the appellant to his brother's⁶ kraal. She knew of no ill feelings between the appellant and the deceased.

The brother of the appellant, Mashonelo Netshiavha, testified that the appellant arrived at his kraal on the night in question and told him that he had chopped a creature which resembled a bat. He returned with the appellant to his kraal. The creature was not there. However, he saw something like a small donkey crossing a fence in the vicinity. The appellant followed the creature and chopped it with his axe. A short while later, their eldest brother, Gideon Netshiavha, drove up in his motor car and in the reflection of the vehicle's lights they saw what looked like the body of a small child with the head of an adult. The face was that of the deceased. The body was dressed only in a vest and underpants. This witness also said that he knew of no ill feelings between the appellant and the deceased.

7

Gideon Netshiavha described his journey home. Strange animals were seen by him in the road. He drove into and killed two of them and put them into his motor car. One looked like a hyena and the other a pole-cat. He came across his brothers standing next to a small body with the head of the deceased. He called the headman to the scene. When he arrived the body had transformed itself into that of the deceased. This shocked him. On the following day the appellant and the police found the clothes of the deceased neatly wrapped and covered by a stone. A knife and money were found with the clothes. There was no enmity between the appellant and the deceased according to this witness.

Then there was the evidence of the investigating officer. He found the body of the deceased. Next to it were the bodies of two wild animals. Gideon Netshiavha explained to him what had happened that night. He also confirmed the discovery on the next day of the appellant's clothing.

In a report to this Court, Le Roux CJ refers to the difficulty which one has in weighing up the evidence concerning what appears to be a genuine belief in witchcraft. He referred to the apparent absence of a motive for the killing of the deceased. As I understand his report, Le Roux CJ would not have rejected the statement by the appellant that he did not intend to kill the deceased. I agree. This approach differs from that of Klopper ACJ.

In any event, in terms of section 316(4) of Act 51 of 1977, the further evidence received by Le Roux CJ is deemed, for the purposes of this appeal, to be evidence taken or admitted at the trial. The result is that this Court is now obliged to consider afresh the question of sentence in the light of the further evidence.

I agree with Le Roux CJ that there is no reason to reject the appellant's stated deep belief in witchcraft or his disavowal of an intention to kill the deceased. Indeed, that was conceded by counsel for the State. That belief was clearly and directly related to the attack on the deceased. Objectively speaking, the reasonable man so often postulated in our law does not believe in witchcraft. However, a subjective belief in witchcraft may be a factor which may, depending on the circumstances, have a material bearing upon the accused's blameworthiness: *S v Nxele* 1973 (3) SA 753 (A) at 757 A. As such it may be a relevant mitigating factor to be taken into account in the determination of an appropriate sentence. In my opinion, it is a relevant factor in the present case and indeed it offers the only explanation for the appellant having killed the deceased. As already mentioned, the evidence disclosed that the appellant and the deceased were neighbours who were on good terms with each other. There was thus no objective motive for the crime. On the other hand, if one applies an objective test, the appellant acted grossly negligently in striking out with an axe at a person who in no way acted as a threat to his life or property. Indeed, his negligence was admitted by him in his statement to which reference is made earlier in this judgment. That negligence resulted in the most unfortunate death of an innocent person. Such conduct merits a sentence of imprisonment for a substantial period of time. Counsel for the State submitted that an effective sentence of four years' imprisonment would be appropriate. He suggested also that in addition there should be a further period of imprisonment to be suspended on appropriate conditions. I agree with the suggested effective sentence. However, I do not regard this as an appropriate case for imposing an additional suspended sentence.

11

The order of the Court is as follows:

The sentence of ten years' imprisonment imposed upon the appellant for his conviction of culpable homicide is set aside and in place thereof he is sentenced to four years' imprisonment.

R.J GOLDSTONE VAN HEERDEN JA) GROSSKOPF JA) Concur

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