

SOUTH AFRICA / JUDGMENT

S v Overmeyer (297/88) [1989] ZASCA 27 (29 March 1989)

[1989] ZASCA 27**COURT**

Supreme Court of Appeal

BEFORE

Joubert, Nestadt, Eksteen

CASE / FILE NUMBER

297/88

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BENJAMIN OVERMEYER APPELLANT

and

THE STATE RESPONDENT

Judgment by: NESTADT, JA

CASE NO. 297/88/ccc

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between BENJAMIN OVERMEYER APPELLANT and THE STATE

RESPONDENT
CORAM: JOUBERT, NESTADT et EKSTEEN JJA
DATE HEARD: 21 March 1989
DATE DELIVERED: 29 March 1989**JUDGMENT**

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NESTADT, JA:

During the afternoon of Thursday 11 June 1987, appellant entered the premises of a gentlemen's hairdresser in Muizenberg. It was owned and conducted by 77 year-old Rhoy Taylor. To appellant's knowledge he was alone in the salon at the time. He was sitting in the chair used by him to cut customers' hair. He was reading a newspaper. Appellant's intention was nefarious. It was to steal money. He proceeded stealthily into the shop. He made for and reached the till. It was more or less in the middle of the room. The chair in which Taylor was sitting was just beyond it. Appellant opened the till and extracted cash in an amount of R65 from it. He pocketed the money. By this time, however, Taylor had become aware of appellant's presence. He jumped up from his seat and hastened towards the front door. There he grabbed an assegai and then moved towards appellant whom he tried to stab. Appellant, whose

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escape route out of the shop was thus obstructed, took out a clasp-knife which he had in his pocket. The blade was 7,5cm long and 1,5 cm at its broadest. He stabbed Taylor five times with it; twice in the chest, once in his left side and

(superficially) twice in the neck. He then went past his victim and fled out of the shop. Taylor remained behind. He was mortally wounded. The injuries to the chest caused both lungs to collapse whilst that to his side pierced the left kidney. He collapsed and died soon afterwards in his salon. The doctor who performed a post-mortem examination on the body of the deceased gave the cause of death as multiple stab wounds.

These events led, consequent upon

appellant's arrest on 9 July 1987, to him being charged and convicted by VAN SCHALKWYK AJ and assessors, sitting in the Cape Provincial Division, of murder and robbery (with aggravating circumstances). No extenuating circumstances

were found so that on the conviction for murder the death

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sentence was imposed. In respect of the robbery conviction he was sentenced to six years' imprisonment. This appeal

(which is before us with the leave of the trial judge) concerns only the death sentence. In particular, it is against the finding that there were no extenuating circumstances.

Before us, counsel for appellant

contended that there were a number of factors which, if taken cumulatively, justified and indeed necessitated a finding of extenuating circumstances. The first was the

intention with which the crime was committed. It was argued

that this should have been held to have been *dolus eventualis* rather than, as the court *quo* found, *dolus directus*.

It is necessary, in order to decide this issue,

to examine appellant's testimony (on which, in the absence of any eye-witness to the actual stabbing, the trial court's factual findings were largely based) in a little detail. I

take it up at the point when the deceased confronted appellant.

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Appellant describes his then state of mind as follows:

"HOF: Het jy daaraan gedink om net stil te staan

en te sê: 'All right', ek is gevang? Nee, meneer, ek het 'n 'way' gemaak om uit te kom daar, maar ek kan nie uitgekom het nie, meneer. As jy stilgestaan het en vir mnr Rhoy gesê het: 'All right', ek is gevang, wat dink jy sou gebeur het? Wel, dat miskien sal mnr Rhoy die polisie gebel het. Ja, en jy is toe bang vir dit? Ja, meneer.

En toe besluit jy maar om jou weg uit te baklei? --

- Reg, meneer.

MEV ATKINSON: En jy sal seker enigiets gedoen het om dan uit te kom toe jy sien jy is gevang daar? --

- Reg, mevrou. En jy wil net uit? Ek wil net uitgekom het, mevrou."

He then pushed deceased's hand that was holding the assegaito one side and stabbed him, for the first time, in the chest. He had aimed the blow there. Deceased then just stood where he had thus been wounded. Appellant stabbed him a second time (in the chest). Still, deceased just stood there. The further injuries (to his neck and side) were then inflicted. Under cross-examination, appellant was asked why he had stabbed deceased as often as he did;

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why he had not fled earlier. The evidence in this regard reads:

"Hoekom het jy nie net verbygehardloop nadat jy hom die eerste keer gesteek het nie? - — Wel , mevrou, toe het mnr Rhoy nog steeds gebly staan, mevrou, met die assegaai in sy hand, mevrou. Ja, maar hy is nou een keer gesteek, hoekom het jy nie het verbygehardloop nie? Ja, reg, mevrou. Hoekom het jy nie verbygehardloop nie? Ek weet nie, mevrou.

Hoekom het jy nie maar net die ou man gestoot nie?

Wel, die eerste keer wat ek hom gesteek het, mevrou, het hy my net so vreeslik aangekyk, mevrou, sien mevrou.

HOF: Ja, maar kyk, jy het nou die assegaai na eenkant toe gedruk, het jy vir my gewys met jou hand. Ja, meneer. Toe steek jy hom. Ja, meneer.

Hy is 'n ou man - nou hoekom het jy hom nie net uit

die pad uit gestamp en uitgehardloop nie? Ek weet nie, meneer. Hm? Ek sal nie kan sê nie...

Nee, maar hy staan nou daar, jy het die man al twee
keer gesteek. Ja.

Hoekom stamp jy hom nie - daar is baie plek daar -
en hardloop uit? . Ek weet nie, meneer. Ek kan nie sê nie."

Appellant admitted that he knew that to stab a person in the chest might result in his death; he
had not attempted to

stab deceased in a less vulnerable part of his body. He

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gives this significant evidence:

"Hoekom het jy hom in die bors gesteek? Wel, ek
het nie gekies nie, mevrou, ek het net gesteek dat
ek kan uitkom, mevrou.

Ja, maar jy sê baie duidelik dat jy na die bors
gesteek het. Ja, mevrou.

Nou hoekom was dit nou nodig om na die bors te
steek? Wel, ek het net sy hand so uit die pad uit gehaal, toe steek ek net, mevrou...

Jy kom na hom met h mes toe en jy steek hom in die bors - wat het jy gedink gaan gebeur as jy
hom in

die bors steek? Wel, dit is jou plek daar waar die hart sit, mevrou."

Now, it may be accepted that appellant

did not enter the premises with an intention to kill

(although already at that stage he foresaw the possibility of resistance by deceased, and therefore
a confrontation with him); his aim was to rob him. This is shown by the fact that, having entered
the shop, he did not immediately go up to deceased and stab him. What gave rise to his attack
on deceased was the latter grabbing an assegai and challenging

appellant. Only then did he take out his knife. I should

interpose to mention that the trial court, understandably,

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had considerable doubt as to the veracity of this part of appellant's version but, on the basis that it was reasonably possible, decided the matter accordingly. Of course, it did not follow that appellant's conduct was in any way

justified. As VAN SCHALKWYK AJ, in his careful judgment observed, there could be no question (and it was not so contended) that appellant acted in self-defence. He could and should have submitted to being arrested. His stabbing of deceased was therefore clearly unlawful.

But to return to the issue of *dolus*.

It was submitted on behalf of appellant that he had simply continued stabbing without thinking; there had been merely an insensitive recklessness on his part; his only thought was to get away from deceased. I am unable to agree. The decision to stab deceased was formed at a late stage. But this *per se*, on the facts of the present matter, was not extenuating. Nor, in my opinion, is it inconsistent with

appellant having, at the relevant time, an actual intention^{9/}

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to kill deceased. Regard being had to (i) the type of weapon used; (ii) the number of times deceased was stabbed; (iii) the vulnerable parts of his body which were injured; (iv) the penetrating nature of three of the wounds and (v) the inability of appellant to explain why (taking into account that deceased was a somewhat puny old man, who it would seem posed no real threat to appellant), he did not successfully flee, the trial court was fully justified in holding that the only reasonable inference was that appellant acted with *dolus directus*. This conclusion makes it unnecessary to consider whether, in any event, *dolus eventualis*, in the circumstances of this case, did not constitute an extenuating circumstance. A second set of circumstances relied on was appellant's youthfulness, immaturity and low intelligence. The submission was that these traits, when he was suddenly and unexpectedly faced with the deceased wielding an assegai, influenced his subsequent conduct; he was not able

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to cope with the situation; he panicked and stabbed without good reason, save that he thought it would provide a way out; and his moral blameworthiness was, in the result, abated.

Appellant was born on 15 May 1968. He

was, accordingly, just over 19 years when the crime was committed (and not 18 as the court *a quo* thought). So he was clearly a youth (in his late teens). Moreover, there was ample justification for the observation of the trial court that, whilst not mentally retarded, he seemed to be of low or

less than normal intelligence. A probation officer's report stated:

"Die beskuldigde het die skool gedurende Mei 1983 verlaat. Hy was in standerd 4 in Florida Primêre Skool. Volgens die prinsipaal het die beskuldigde geen gedragsafwykings getoon nie. Hy was beleefd en het baie goed met sy klasmaats oor die weg gekom. Hy was eintlik teleurgesteld toe beskuldigde die skool verlaat."

But appellant's mother testified that he was very "backwards"; "hy kan nie geleer het nie"; he had on occasion spent two to three years in one class.

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There were, therefore, factors which

could have influenced appellant's state of mind and served as extenuation. Indeed, being a youth, he was *prima facie* to be regarded as immature. It would follow from this that extenuating circumstances existed unless, having regard to factors such as his mentality, education and past history as also the nature of the crime and the manner of and motive for its commission, his personality or development was, after all, such that the inference of immaturity was rebutted or neutralised. In this event, he could be regarded as having acted from inner vice thus justifying a finding that no extenuating circumstances existed. This, in summary, is the broad effect, as I understand it, of the leading cases on the problem of sentencing a youth found guilty of murder (see *Svs Lehnberg en h Ander* 1975(4) S A 553(A); *S vs Mapatsi*

1976(4) S A 721(A); *S vs Ceaser* 1977(2) S A 348(A) and *S vs Ngoma* 1984(3) S A 666(A)).

The trial court, in effect, adopted this

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approach. It found, however, that appellant's youth and low

intelligence had not influenced him in doing what he did. Counsel for appellant challenged the correctness of this conclusion, but I am not persuaded that it was wrong. In the

first place, appellant does not appear to have really had an

immature personality. He was almost out of his teens. He had some education. He had been out of school for two or more years. During this time he worked on a number of jobs

(from which he had been dismissed for stealing). He had a permanent relationship with a girl and was the father of her two children.

Secondly, there is the background to and

circumstances of the crime itself. There is no suggestion that appellant was influenced by anyone. He did at one

stage of his evidence say that he had that morning smoked dagga but conceded that when he entered deceased's salon he was unaffected by it. Appellant's predetermined purpose was to steal from deceased. He foresaw that there might be

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resistance which, if it eventuated, would have to be

overcome. This, he thought, could be achieved by hitting deceased. When, however, deceased produced an assegai, appellant decided to attack him with his knife which he had with him all along. He did this in the manner described. It was a vicious attack, involving a number of blows and committed with *dolus directus* or, in the words of VANSCHALKWYK AJ "op 'n berekende wyse". It was rational to the extent that its object was to ensure appellant's escape

(which appellant obviously realised had to be achieved in as short a time as possible). But, of course, it showed a callous disregard for human life. It involved the kind of

conduct about which VAN WINSEN AJA in *S vs Ntini, L and*

Others 1980(2) PH H 101 (AD) said the following:

"In the light of conduct of this nature the youth of each of the appellants - a factor which in other circumstances could serve to extenuate the crime of murder

- loses much, if not all, of its efficacy as an extenuating circumstance. No one can preside in the Courts of the Republic without becoming aware of the distressing fact that a not insignificant

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proportion of the crimes of extreme violence in the performance of which the rights of peaceful citizens are callously ignored are performed by young people. Other than in a case where a statute so provides youth in itself affords no passport conferring in all circumstances immunity from the ultimate penalty upon perpetrators of a crime of violence which results in the death of its victim."

After the crime, appellant rid himself of the knife and changed his clothes. This he did in order to make his detection and identification more difficult. He also gave two friends of his, who knew of what he had done, some money

so that "hulle moet hulle mond hou." All this shows, I think, a degree of shrewdness and a perception of the wrong that he had done. In the result, I do not think that his youth can avail him.

In my opinion, the judgment of the trial

court was a balanced one; it contained no misdirections. Looked at in the light of all the relevant factors and judging them cumulatively, no fault can be found with its conclusion that extenuating circumstances were not proved.

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15. The appeal fails and is dismissed.

NESTADT, JA

JOUBERT, JA)) CONCUR EKSTEEN, JA)

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