

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPEAL

DIVISION)
AFDELING)

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

DAVID MASHELE

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Pro Deo
Prokureur van Appellant

Respondent's Attorney Dep. A.G. (Jhb.)
Prokureur van Respondent

Appellant's Advocate C. P. VAN VUUREN
Advokaat van Appellant

Respondent's Advocate G. A. BORCHERS (MEI)
Advokaat van Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op

17 - 8 - 72

1 - 9 - 10 -

(W.L.D.)

corpm ogilve Thompson H.R.
Thollip AR
Rabie AR

C. P. VAN VUUREN 9.45 - 11.00 11.15 - 11.30
G. A. BORCHERS 11.30 - 11.45

Thollip S.A.:- ^{C. P. V.} The appeal succeeds to the extent that the verdict of murder and sentence of 10 years imprisonment are set aside and a verdict of culpable homicide and sentence of 5 years imprisonment are substituted.

REGISTRAR.
31.8.1972

Pro Deo Adv. C. P. van Vuuren

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

DAVID MASHELE APPELLANT

AND

THE STATE RESPONDENT

Coram: Ogilvie Thompson, C.J., Trollip et Rabie, JJ.A.

Heard: 17 August 1972

Delivered: 31 August 1972

J U D G M E N T .

Trollip, J.A.,

It was common cause on appeal that on 12 July 1971 the appellant, a Bantu aged 50 years, assaulted his wife, aged 31 years, at his home in Meadowlands, Johannesburg, by pouring boiling water on her and hitting her several times with a small axe. She was admitted to the Baragwanath Hospital on the same day. There she was attended by Dr. Fontana. She progressed well, skin-grafts were done, and she was able to get up and walk about in hospital.

But /2

But suddenly her condition deteriorated, and she died on 13 August, more than a month after her admission. The cause of death was a deep vein thrombosis of each leg resulting in a pulmonary embolism.

The appellant was charged with murder.

He pleaded guilty to culpable homicide, saying that he did not intend to kill her. That plea was not accepted. He was found guilty of murder with extenuating circumstances and sentenced to 10 years imprisonment. He has appealed with the leave of the Court a quo against his conviction and sentence.

The first contention by Mr. van Vuuren for the appellant was that the State had failed to prove beyond reasonable doubt that the deceased had died as a result of the appellant's assault on her.

That contention was founded on certain evidence given by a Dr. Lazarus, the district-surgeon, under cross-examination. He conducted the post-mortem

examination /3

examination on the deceased and testified for the State about what he had found. In his evidence-in-chief he expressed categorically the view that the deep vein thrombosis and ensuing pulmonary embolism were "a direct result of the burns". That was also the firm opinion of Dr. Fontana.

It is true that both of them conceded that the precise medical reason for such thromboses developing is still unknown. That did not detract, however, from their testimony that, in the present case, they considered that the condition had resulted from the deceased's severe burns and (according to Dr. Lazarus) from the necessary concomitant of her being confined to bed for a while. Indeed, Dr. Lazarus said that her being confined to bed was the main factor contributing to the occurrence of the thromboses.

Those parts of the evidence given by Dr. Lazarus under cross-examination that the defence relied on were as follows. Firstly, despite her injuries she

could /4

could and (particularly because of her obesity) should have been made to get up and move about approximately a week after being hospitalised; that (according to him) would have discouraged, though not necessarily prevented, the development of the thromboses. But it subsequently became common cause at the trial that, sometime during that month of hospitalisation, she did get up and walk about, and it is, I think, a fair inference that she was duly made to do that when her condition and medical treatment permitted it. Hence, that evidence does not serve to break or weaken the causal connection between the assault and her death.

Secondly, Dr. Lazarus said that, but for the thromboses, she would have survived. That was also the effect of Dr. Fontana's evidence. However, that too does not assist the appellant's case, since both of them testified that the thromboses had resulted from her injuries. Incidentally, Dr. Lazarus went further and said that she

would /5

would probably have survived even without medical attention.

That conflicted with Dr. Fontana's testimony that without immediate medical attention she would have died "instantly", i.e., possibly within a day. That dispute is not relevant here but to another aspect of the case, which will be dealt with presently.

Thirdly, Dr. Lazarus conceded that a perfectly well person can contract such a thrombosis and resultant pulmonary embolism and the chance of its occurring is enhanced if the victim, like the deceased, is obese. But it is clear that he regarded the possibility of the deceased having died from the condition independently of her injuries and hospitalisation as being very remote. For he could not recall any fatal case of that kind from his own experience, and, in any event, it is most unlikely that he intended by that concession to depart from his categorical opinion, previously expressed, that the deceased's death had resulted from her injuries and hospitalisation,

a view, moreover, that was also held by Dr. Fontana.

Consequently, the above points, taken individually or cumulatively, do not support the above-mentioned contention. In my view the Court a quo correctly held that the deceased's death had resulted from the appellant's assault upon her.

Mr. van Vuuren's second contention was that the State had failed to prove beyond reasonable doubt that the appellant, in assaulting the deceased, had the actual or legal intention to kill her, so the verdict of murder could not stand.

The appellant denied that he had any such intention. His version of the assault was that the deceased and another woman, Martha Selapanyane, arrived at his home and started attacking him. He defended himself. In the course of the ensuing fight the deceased sustained the injuries which necessitated her removal to hospital. The appellant's version need not be

considered /7

considered in detail. The Court a quo found that he was a most unsatisfactory witness and rejected his version, where it conflicted with that of the State witnesses, as being false. That finding was fully justified and was not challenged on appeal. Consequently, his denial of having the necessary intention to kill is suspect. In any event, the subjective state of his mind at the relevant time can best be determined by inference from all the established circumstances leading up to and surrounding the infliction of the deceased's injuries. I therefore turn to those circumstances.

The appellant is a mature and responsible Bantu. He had worked for the same employer for the past 10 years. According to Sergeant Meya of the South African Police, stationed at Meadowlands, who had known him for a long time, the appellant was "a law abiding and peaceful decent man". He was married by native custom to the deceased, having paid lobola for her. About 4 years ago

she /8

she left him, saying (according to the appellant) that she was returning to her home since the appellant had no more money. Before leaving she had removed her belongings piecemeal from his home. He had not seen her since she left until the day in question, i.e., for about 4 years. He had in vain searched for her to try and get her back, since he still loved her, and hence he had not reclaimed his lobola. On the day in question his neighbour, Sithole, reported to him that she had arrived and wanted the remainder of her belongings. After Sithole had left, the deceased and Martha Selapanyane, a relative of hers, entered his house. The appellant was sitting near the stove on which a kettle of boiling water stood. According to Martha the deceased said that she had come to fetch her goods; the appellant replied, "you take them where you see them"; the deceased replied, "No, we are not fighting". The description given by Martha about what then happened is as follows: the appellant stood up,

grabbed /9

grabbed the deceased at the back of the neck, took the kettle of boiling water from the stove, and poured the water all over her; she fell to the ground; the deceased then took an axe from near the stove, with which he hit her with the blunt end and chopped her with the sharp edge; at this stage Martha ran away to fetch the police.

Martha was the only eye-witness to the start of the trouble between the appellant and deceased. The Court a quo regarded her as truthful. But her evidence must be approached with some caution. The reasons are as follows. As the Court a quo itself observed, her testimony confuses what she actually saw with what she inferred had happened from the information she subsequently gained from the police and from seeing the deceased's injuries. Moreover, she obviously exaggerated or embellished her testimony in certain respects. She said that she had seen him chopping out about four of the deceased's teeth with the axe, and, when she afterwards returned to the scene, she found the teeth and disposed

of them down the drain. She also said that he chopped the deceased on the left forearm with the axe causing a wound which, she later saw, had been stitched. But Dr. Fontana refuted that evidence. He said that the deceased's teeth were intact and her forearms bore no such wounds. Furthermore, her testimony that the appellant poured the boiling water on top of her head is improbable. It differed from what she said at the preparatory examination - "die water het eers begin hier agter by haar rug, amper by die nek" - and it is contrary to the medical evidence. According to that evidence the deceased was extensively burnt on the back, the back of the neck, the left and right side of the head, the left shoulder and part of the left forearm, but no mention was made of the top of the head. Martha was also most evasive when asked under cross-examination whether the appellant was angry when he poured the water over the deceased.

On the other hand the appellant himself admitted (although in the context of his own version)

that /11

that Martha did accompany the deceased and was present when she was burnt by the boiling water, and that Martha only fled thereafter. It was also common cause that the boiling water was in a kettle and not ^{in a} receptacle like a saucepan. That suggests that its contents were more likely to have been poured through its spout over the deceased, as Martha testified, than thrown or spilt over her. Moreover, the medical evidence and photographs of the burns indicate that the boiling water must have been poured on to her back in the region of her neck and then ran down her shoulders, substantially as deposed to by Martha. And incidentally, if, as she testified, the appellant did grab and hold the deceased by the back of the neck while pouring the water over that part of her body, he would also have scalded his hand; and, indeed, he admitted (again, of course, in the context of his version) that his right hand did get burnt.

Consequently, Martha's evidence about how

the /12

the appellant assaulted the deceased with the boiling water can safely be accepted in substance - as the Court a quo did - but not her evidence about his assaulting her with the axe, since she probably fled as soon as he took it up.

Shortly after Martha had fled Sergeant John Meya, who happened to be passing in the street, went to the appellant's house as a result of a report he had received. He heard blows being struck. Looking through the window, he saw the appellant chopping her with an axe. She was lying on the ground. In response to his kicking at the door he saw the appellant peeping through the window to see who it was. The latter then let Sergeant Meya in, handed the axe over to him, and was arrested. Despite the fact that the appellant had outwardly reacted normally to the demand for entry and for handing over the axe, Sergeant Meya testified in effect that he had never before seen him in such a state - he was so upset and angry that

he /13

he appeared to have lost his senses. The only explanation the appellant gave to him for his conduct was that the deceased had been away from his home for a long time and that she had now come back "to worry and trouble him at his home". He (the appellant) also said: "This woman is fortunate that you arrived immediately, because I wanted to kill her and then thereafter kill myself", and "you take me now and hang me now if you may". That the appellant made those statements was elicited from Sergeant Meya by cross-examination. They were thus admissible even if they amounted to confessions (cf. R. v. Bosch 1949(1) S.A. 548 (A.D.)) Sergeant Meya's testimony was accepted by the Court a quo, correctly in my view.

Now the appellant's state of mind at the time of his assaulting the deceased is of crucial importance in this case. Martha was most evasive about whether he became enraged at the deceased's request to remove her belongings, but ultimately she did not deny it.

That /14

That the deceased said to the appellant, "No, we are not fighting," as Martha testified, is some indication that he had then become angry. In any event, it can be safely inferred from Sergeant Meya's evidence that the appellant must have been beside himself with rage, not only when he was seen by Sergeant Meya, but also when he poured the boiling water on to the deceased. Why else would this stable, peaceful, and law abiding person otherwise suddenly resort to such violence? And the reason for his anger is not far to seek. It was probably the realisation that the deceased had returned after those four years of absence, not to stay at home, but to gather her remaining belongings and depart for good. As the Court a quo said in finding extenuating circumstances:

" The Court is nonetheless prepared to hold that he was emotionally involved with the deceased and that when she came to fetch her things he was aggrieved and, rightly or wrongly, lost his temper with her."

The axe was handed in to Court as an exhibit.

It was not produced before us. Sergeant Meya described it as "a small, but very sharp axe". It was common cause between counsel on appeal that it was something like a tomahawk with a blunt side and very sharp cutting edge and a wooden handle about 15 inches long - the kind of axe that would ordinarily be kept next to a stove for chopping firewood and breaking down coal. When used as a weapon, it could obviously inflict severe and dangerous injuries.

Sergeant Meya also saw a kettle in the kitchen - that presumably was the kettle that was used. Unfortunately, the kettle was not made an exhibit, and there was no evidence about its size, except a passing remark by Martha that it was "a big kettle", which is somewhat vague.

Nor was there any evidence about how full it was when it was on the stove or how much water the appellant poured or, judging by her burns, must have poured on to the deceased.

Sergeant Meya, it is true, said that there was water all over

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the floor of the kitchen. But that might have come from the kettle after the assault. For the appellant deposed that the kettle afterwards fell on to the floor, and that was not gainsaid by Martha or Sergeant Meya. The former did not say what happened to it after the assault and the latter merely said that he found it in the kitchen.

Owing to the fluidity of water, it is difficult to infer from the total area of the burns (about 20%) what quantity of water had caused them, except to say that it must have been a not insubstantial quantity.

Sergeant Meya also testified that the deceased was dressed, but neither he nor Martha described how she was dressed.

As to the injuries the deceased sustained, the burns have already been described. Those caused by the axe were multiple superficial lacerations on her head and face with bruising of the skull on the top and right and left sides. The skull was, however, intact and there was no

intracranial /17

intracranial haemorrhage. The axe injuries did not cause any complications and many of them had healed by the time she died. That shows that the appellant did not wield the axe with much force. Dr. Fontana said that if she had not received medical treatment immediately after the assault she would have died "instantly" i.e., possibly within a day. That evidence clearly related to the burns and not the axe injuries. If acceptable, it would serve to underline the seriousness of the burns. As mentioned above, Dr. Lazarus disagreed with that evidence. He maintained that even without medical treatment she would probably have recovered, although her recovery would have been delayed. That would tend to minimise the seriousness of the deceased's injuries. However, the Court a quo, impliedly in its judgment on verdict and expressly in its judgment on the application for leave to appeal, preferred Dr. Fontana's testimony on that dispute. As Dr. Lazarus candidly conceded that he

knew /18

nothing about the deceased's clinical condition when she was admitted to hospital, whereas Dr. Fontana had actually attended to her then, that approach by the Court a quo was, I think, justified. In other words, it was duly proved that the burns, but not the axe injuries, constituted from the outset a serious threat to the life of the deceased.

What can be inferred from all those established circumstances as to the appellant's state of mind at the relevant time? The inferences drawn by the Court a quo are epitomised in the concluding passage of its judgment, which reads:

" Now, it all happened virtually on the spur of the moment. There is nothing to suggest premeditation. The accused had the legal intention to kill in the sense that he knew that if he poured boiling water on her and used an axe on her head, there was the risk that she would die, but he did not care whether she died or not. In the result, the Court finds him guilty of murder."

The Court a quo correctly found that the appellant, as he maintained at his trial, had no direct or actual intention of killing the deceased; for if he had had that intention, he could easily have smashed her skull or decapitated her with the axe when she was prostrate upon the floor. The narrow issue, therefore, is whether the only reasonable inference from all the abovementioned circumstances is that, while assaulting the deceased, the appellant foresaw or appreciated, subjectively, that she might possibly die from the injuries he was inflicting upon her. If he did, then he was rightly convicted of murder, for then, in the circumstances of the present case, there can be no reasonable doubt that he inflicted them recklessly, i.e., without caring whether or not she would die (cf. S. v. Dlodlo 1966 (2) S.A. 401 (A.D.) at p. 405 F to H).

In drawing inferences as to the appellant's guilt I do not think that any weight should be given to

his /20

his utterance to Sgt. Meya when he was arrested: "This woman is fortunate that you arrived immediately, because I wanted to kill her and then thereafter kill myself".

Prima facie it is equivocal. It could, inter alia, have meant that hitherto he had not wanted to kill her but was now about to do so. That the injuries he inflicted with the axe were superficial when they could have been immediately fatal lends some colour to that interpretation. But in any event the appellant said that he was then so angry that he really did not know what he was saying. Strong confirmation for the truth of that explanation is to be found in Sergeant Meya's evidence already mentioned. Hence, the remark cannot, in my view, be regarded as any reliable indication of the appellant's true intention or volition at the time. The same applies to the other utterance: "You take me now and hang me if you may".

I think that it can be safely assumed that a mature Bantu like the appellant would ordinarily be fully

aware /21

aware of the hurtful propensity of boiling water, and that, if it is applied in a sufficiently large quantity to certain parts of a person's body, it could cause serious burns which might be fatal. As stated above the evidence established that the appellant poured a not insubstantial quantity of boiling water over her, and that that caused burns which endangered her life from the outset. Clearly, from those facts it is a cogent inference that subjectively he must have appreciated or foreseen, when he was assaulting her, that she might die from the ensuing injuries.

But, in the particular circumstances of this case, is it the only reasonable, possible inference?

(cf. S. v. Dlodlo 1966 (2) S.A. 401 (A.D.) at p. 405 H.)

I do not think so. There was no clear evidence about the size of the kettle or its contents, how much boiling water he poured over her, or how she was dressed. The water

~~he poured over her back may largely have soaked into or~~

through or run beneath her clothing on to her skin, and

the quantity of water and the injuries it was inflicting

might /22

might therefore not have been fully apparent to him. That, and the fact that he acted on the spur of the moment at a time when he was very angry, might have precluded him from realising that he was pouring a not insubstantial quantity over her and causing her extensive and serious burns. Even when she fell down, he might not have realised, for substantially the same reasons, how seriously he had injured her. (Indeed, there is no evidence to prove that she collapsed because of her injuries or merely fell down in the course of the scuffle between them.) It is true that he then took up the axe and inflicted further injuries on her. But these were superficial injuries. They do not support any inference that he foresaw or appreciated that she might succumb from the assault with the boiling water or axe. Consequently, it can be possibly and reasonably inferred that he intended to assault and hurt her for what she had done and was about to do to him, but that, mainly because he was extremely angry, he did not subjectively appreciate or foresee that the injuries he was inflicting upon her might cause her death.

I would add that the dividing line between the issue whether an accused actually foresaw or appreciated the possible fatal consequences of his assault upon the deceased (for murder) or whether he merely ought to have foreseen or appreciated them (for culpable homicide) is sometimes extremely thin and hence difficult to draw (cf. for example, S. v. Mini 1963 (3) S.A. 188 (A.D.)). Of course, the brutality of the assault or the lethality of the instrument used is often decisive in such a case in drawing the line in favour of murder. But that is not invariably or necessarily so. See, for example, Mini's case and Rex v. Thibani 1949 (4) S.A. 720 (A.D.). The fact that at the relevant time the accused's mind might also have been confused or disturbed (in popular parlance - he could not think straight) for some reason, such as intoxication or provocation (S. v. Makonto 1971 (2) S.A. 319 (A.D.) at p. 326 B), pain or some other physical effect caused by the deceased's act (Rex v. Thibani, supra, at pp. 731/2), or anger induced by the deceased's conduct even if such conduct does not strictly amount to provocation

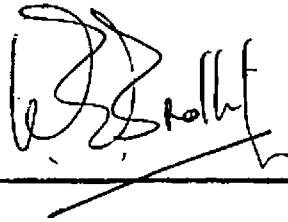
in law (e.g. R. v. Mabole 1968 (4) S.A. 811 (R) at p. 817 - anger through jealousy) may reasonably support an inference that, despite the brutality of the assault or lethality of the instrument used, he might not have subjectively appreciated or foreseen the possible fatal consequences of his assault. Here the appellant's extreme anger at the relevant time might well have precluded his having the requisite appreciation or foresight. The present case is - more particularly because of the potentially dangerous qualities of boiling water - a border-line one; but the cumulative effect of the various factors I have mentioned has lead me to the conclusion that the State did not discharge the onus of establishing the intent necessary to sustain a charge of murder. It follows that he should only have been found guilty of culpable homicide.

As to the sentence, the appellant is 50 years old with no previous convictions. Nevertheless, the crime he committed was a serious one. In all the circumstances I think that a sentence of 5 years would meet the

justice /25

justice of the case.

The appeal succeeds to the extent that the verdict of murder and sentence of 10 years imprisonment are set aside and a verdict of culpable homicide and sentence of 5 years imprisonment are substituted.

A handwritten signature in dark ink, appearing to read 'W.G. Trollip', is written above a horizontal line.

W.G. Trollip, J.A.

Ogilvie Thompson, C.J.)
Rabie, J.A.) concur