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

APPELLATE

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE. APPEL IN STRAFSAAK.

IVAN JUSTIN DU PREEZ

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Pro Deo
Prokureur van AppellantRespondent's Attorney A.G. (Pmburg)
Prokureur van RespondentAppellant's Advocate J VAN KENSBURG
Advokaat van AppellantRespondent's Advocate G J TRUIER
Advokaat van RespondentSet down for hearing on
Op die rol geplaas vir verhoor op28-8-72
1.6.9.

(N.P.D.)

Learn: Ogilvie Thompson H.R.
Weissberg H.R.
Truier H.R.Van Kenburg 9.45-10.20
Truier 10.20-11.00

C.A.N.

1. The conviction for murder with extenuating circumstances is set aside, and there is substituted therefor a verdict of guilty of culpable homicide.
2. The sentence of 7 years' imprisonment imposed by the trial Court is altered to a sentence of imprisonment for 4 years

REGISTERED

7.9.1972

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION)

In the appeal of:

IVAN JUSTIN DU PREEZ Appellant

versus

THE STATE Respondent.

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

Heard: 28th August 1972. Judgment delivered: 7-9-1972.

J U D G M E N T.

OGILVIE THOMPSON, C.J.:

Appellant was convicted in the Natal Provincial Division of murder and, extenuating circumstances being found to have been present, he was sentenced to 7 years' imprisonment. Upon leave granted by the trial Judge (Shearer, J.), he now appeals against both the conviction and the sentence.

It is common cause that on the afternoon of 25th

December...../

December 1971 Agrippa Zondi, a Zulu male hereinafter referred to as the deceased, died almost instantaneously on District Road 76, in the Umvoti district, as a result of a head wound caused by a bullet from a pistol fired by appellant. It is also common cause that at all times material to this case the deceased was in the company of his cousin Welcome Zondi, also a Zulu male and to whom I shall hereinafter refer by his first name.

At the locus in quo District Road 76 runs, with a slight up-gradient, in an approximately north-easterly direction as one proceeds along it towards Greytown from Rietvlei. Sometime prior to December 1971, appellant had, apparently pursuant to a contract to purchase by instalments, paid a deposit on a piece of land abutting the aforementioned road on its northern side and separated therefrom by a wire fence in which there is a gate. During the forenoon of 25th December 1971 appellant, accompanied by his wife and young son aged approximately 5 years, commenced to picnic at a shady spot on the aforementioned land and relatively close to the road.

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The exact distance between the picnic spot and the nearest (i.e. northern) edge of the road is not given in the record, but it would appear to have been no more than some 10 to 12 yards. Appellant's truck was parked at the picnic spot, and in the truck he had both a shotgun and a loaded pistol. The latter had ten bullets in its magazine and one in the barrel. Before commencing their picnic luncheon at about noon, appellant and his wife together partook of brandy and soda, and again after finishing their meal. At the trial appellant said he thought he had had four drinks altogether; his wife's evidence was that he "most probably had about five drinks". According to their evidence, only half a bottle of brandy had been brought to the picnic spot; and neither the defence nor the State suggests that appellant had, in all, consumed more than approximately a quarter of a bottle of brandy on the day in question prior to the fatal shooting.

After the meal was over and all the brandy had been consumed, appellant - according to the defence evidence - fell asleep; his wife apparently merely dozed off for a short while

only. It is common cause that during the afternoon, somewhere around 4 p.m. (the exact time was not fixed with any precision at the trial) the deceased and Welcome walked up the road (ie., towards Greytown), proceeded a short distance past the picnic spot and then started to come back down the road again. It is further common cause that, after appellant had commenced firing in their direction as hereinafter detailed, the deceased received the fatal head wound before he and Welcome had yet passed the picnic spot on their return journey.

Welcome was the main State witness at the trial. His evidence was largely supported by that of Trephina Gwala, a young Zulu female who was admittedly in the near vicinity when the shooting occurred. The version to which they deposed regarding the events which culminated in the fatal shot differed in certain material respects from that testified to by appellant and his wife, who were the only defence witnesses as to the occurrences in situ. The trial Court, although remarking that appellant "could certainly not be described as a completely satisfactory witness", and that it felt unable to conclude that appellant's wife had

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in her evidence given "a completely accurate and uncoloured account of what took place", nevertheless took the view that, "in so far as the physical actions of the parties are concerned and what was said", the defence version might reasonably be true, and adjudicated upon that basis. In this Court, counsel for the State was content to approach the case and support the conviction and sentence on the same basis. Accordingly, what follows is - save where otherwise stated - a summary of the defence version.

Appellant was awakened from his sleep by his wife, who made a report to him to the effect that two Bantu men (subsequently identified as deceased and Welcome) who were walking up the road had, when passing by, behaved in an insulting manner towards her; that she had exhibited the shotgun "to scare them off", but that they had merely laughed at her; and that they had now turned round, apparently believing her to be alone. According to appellant's wife's testimony at the trial, these two men had, when walking by along the road, leered at her, rubbed themselves in the area of their genitalia, and one of them had loosened

his..../

his fly buttons. She fetched the gun from the front of the truck "just to show them that she was not frightened of them". She stood, she said, holding the shotgun by the barrel with the butt on the ground; but this merely caused the two men to laugh at her. When the men turned round and started to walk back along the road, she wakened her husband and made the report to him.

Upon waking from his sleep, appellant saw the two men, who were apparently now walking down the road (i.e., in the direction of Rietvlei), and said to them "Can't you see this is a white woman?" Moving a little nearer towards the two men, appellant asked his wife to hand him the pistol, which she did. As the men proceeded down the road, appellant fired four shots - to cite his own words - "diagonally in front of them", the bullets striking the ground "about 7 feet in front of them". According to appellant, he then noticed that "there were rocks in the road" and realised that a bullet might perhaps ricochet and injure one of the men. For that reason, he thereafter fired over the men, aiming, he said, "between two and three feet above their..../"

their heads". The fourth shot so fired caused the deceased to fall. Appellant testified that he had often practised with this pistol and that he regarded himself as a "fairly good shot". He said that each of the shots he fired on the day in question was carefully aimed, and throughout his evidence he consistently maintained that, save in relation to the aforementioned possible ricochet off the ground, it at no time occurred to him that a bullet might hit either of the two men. Indeed, appellant deposed that he was "so confident that I could not have hit the deceased" that he first thought that the deceased's aforementioned fall was a subterfuge. However that may be, upon discovering that he had in fact killed the deceased, appellant put the body at the side of the road and then, with all expedition, drove away. He took no steps to report the occurrence but - it is suggested, because he was in a state of panic: the trial Court accepted that after the fatality the accused was "appalled" - merely "drove on and on" until near Dundee, where he spent the night at a farm. He returned to his home the following morning, and only after his arrest there later that day, did he make any statement to

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the police.

At this juncture it is apposite to refer to two further features in relation to the actual shooting which, although mentioned in the trial Court's judgment, were not the subject of any specific finding by it. The first concerns the relative positions of deceased and appellant, and the distance between them, when the fatal shot was fired. Appellant's own testimony in this regard was that deceased was "about 18 or 20 feet ahead of me" when the fatal shot was fired. Appellant, however, insisted that, when struck by the bullet, the deceased had not yet passed him; that is to say, appellant's contention is that when the bullet hit the deceased, the latter was still on the Greytown side of appellant. This testimony is not readily reconcilable with the position of the wound and the evidence of the District Surgeon. The bullet entered the skull of the deceased in the right posterior parietal region; as the District Surgeon described it, "towards the back of a line drawn from ear to ear over the skull". The direction taken by the bullet from the point of entry was slightly forward and downward.

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The District Surgeon was of the view that the person who fired the fatal bullet stood "slightly higher than the deceased, to the right and behind the deceased". This evidence points strongly towards the deceased having already proceeded down the road in the direction of Rietvlei to a point slightly past the spot from which the appellant fired the fatal shot. The second of the above-mentioned features relates to the behaviour of the deceased and Welcome after the firing commenced. Welcome testified that he and the deceased ran, holding hands and crouching or dodging in an endeavour to avoid the bullets, for a distance which he estimated as about 33 yards before the deceased was struck. Appellant deposed in chief that, in response to his initial expostulation of "Can't you see this is a white woman?", the two Bantu merely sneered at him and that, after he started shooting, they continued to walk slowly down the road "just doing the same thing, looking at me, looking at each other and sneering and laughing as it were". In cross-examination appellant adhered to this, specifically denied that

either...../

either Welcome or the deceased had ever run or dodged, and added that, in spite of his pistol shots, the two men were "just turning their heads and laughing at me and then talking to each other..... this is the only dodging that they did". Appellant's wife's testimony was substantially to the same effect. It is difficult to credit that, despite the several shots passing so close to them, these two Bantu would have continued so unperturbedly and disdainfully to walk down the road.

In giving the trial Court's reasons for its verdict of murder, Shearer, J., after referring to appellant's claim, as advanced by him in evidence, to be a proficient shot with his pistol, and after expressing the Court's view that appellant had apparently become "increasingly incensed with the deceased and Welcome as they came down the road towards him", stated that the only inference which the Court could draw was that appellant's aim was "directed substantially less than two to three feet above the heads of the advancing Bantu males". The learned Judge went on to say that the Court could only

conclude...../

conclude that at the stage at which he fired the fatal shot, appellant "was in a state where he was reckless as to whether or not the deceased or Welcome was struck by the bullet or not". An important finding of fact was then expressed in the judgment as follows, viz:

"We do not, and I emphasise this, find that the accused fired that last shot with the deliberate intention of injuring or killing the deceased. But we do find that he fired that shot leaving a margin of safety so small as to endanger the deceased and that he did not care at that stage whether the deceased was in fact injured or not".

The learned Judge thereupon proceeded, with mention of this Court's decision in S. v. Sigwahla, 1967 (4) S.A. 566, to discuss dolus eventualis and to express the view that appellant's own evidence of changing from aiming in front of the men to aiming over their heads indicated that appellant "subjectively foresaw the possibility of harm as a result of firing".

The Court's reasons concluded with the following passage:--

"We come to the conclusion therefore that the accused killed the deceased unlawfully; that he subjectively foresaw the possibility, after a large number of shots had been fired, that the deceased might receive an injury from it, that he could die, and that he was reckless

as...../

as to whether such consequence followed or not. The proper verdict, therefore, we consider, and this is the unanimous verdict of this court, is that the accused is guilty of murder".

The trial Court's finding that, in firing the last shot, appellant had no "deliberate intention of injuring or killing the deceased" is not challenged. Nor was it disputed by counsel for appellant that the latter was guilty of culpable homicide. In this Court counsel for appellant - correctly in my view - centred his submissions around the basic contention that the State did not beyond all reasonable doubt prove the intention to kill necessary to sustain a verdict of murder.

In the context of such intention to kill, dolus eventualis has during recent years been discussed in several decisions of this Court. Most of those decisions were again referred to in S. v. P., 1972 S.A. (3) 412 (A.D.) at p. 416 et seq. For the purposes of the present appeal, it suffices to emphasise that the inquiry is not what the appellant ought to have foreseen, but what he did foresee; that the subjective

foresight...../

foresight of resultant death which constitutes dolus eventualis must be established by the State beyond reasonable doubt; and that although, like any other factual issue, such subjective foresight may be proved by inference, the inference must be the only one reasonably to be drawn from the facts of the particular case (S. v. Dlodlo, 1966 (2) S.A. 401 (A.D.) at 405 and R. v. Du Plessis, 1944 A.D. 314 at 318).

Appellant deposed that his resort to shooting was, as he put it, "just a method of scaring them off". However deplorable one may regard such an attitude, it clearly appears from the summary of appellant's evidence given earlier in this judgment that, as soon as he appreciated the possible danger of injury from a bullet ricocheting off the ground, appellant commenced to shoot over the heads of the two men. It is true that appellant allowed a lamentably small margin of safety. As already mentioned, he himself said that he aimed only

~~"between two and three feet"~~ over the heads of the men; and under cross-examination he conceded that his object was for the men to hear that he was firing "real live bullets", and that the final shot might even have been aimed as little as

two feet above their heads. While such conduct can only be regarded as in the highest degree reprehensible, the fact remains that ex hypothesi appellant was at all times aiming to miss; and, as indicated earlier, he throughout his evidence maintained that he was at the time entirely confident that his skill as a marksman was such as to preclude the possibility of any bullet striking either of the two men. That this confidence proved to be so tragically misplaced is a measure of grievous error of judgment and, indeed, of gross negligence on appellant's part. To shoot with a pistol in the direction of a moving human being leaving so small a margin of safety may indeed fairly be described as reckless conduct; but reckless conduct per se is not necessarily to be equated with dolus eventualis. Deploable though appellant's conduct was, it does not, in the light of all the evidence, in my view, establish that appellant subjectively foresaw the possibility of injury or death. That appellant ought to have foreseen such a possibility is, in my opinion, beyond all question; but, on a conspectus of all the facts of the

case as found by the trial Court, the State failed, in my view, to prove that, notwithstanding his denials, the appellant must have foreseen - and, therefore, did foresee - the possibility of injury or death ensuing from his actions.

It follows that, in my judgment, the trial Court erred in holding that dolus eventualis had been proved. Consequentially, the appellant should have been convicted, not of murder, but of culpable homicide.

This conclusion renders it unnecessary to say anything concerning the further submissions advanced by counsel for appellant - namely, that appellant was affected, to a degree relevant to the issue of intent, by the alcohol which he had consumed, coupled with his having awakened from sleep immediately before the shooting - other than that those submissions are, in my opinion, devoid of any substance. The appellant had partaken of a substantial meal and, as regards his faculties at the relevant time, he himself disclaimed any reliance whatsoever upon either alcohol or sleep until a very late stage of his evidence when, somewhat tentatively, he

acceded...../

acceded to a suggestion that these, either alone or in conjunction might conceivably have affected him.

I turn now to the appeal against the sentence. In support of his general submission that 7 years' imprisonment is an excessive sentence having regard to all the circumstances of the case, counsel for appellant argued that Shearer, J., had accorded insufficient consideration to the appellant's personal circumstances and to the fact that he is a first offender. Attempting to derive some support from this Court's decision in R. v. Horn, 1958 (3) S.A. 457, counsel for appellant submitted that a fine plus a suspended sentence would meet the justice of the case.

Appellant is admittedly a first offender. As to his personal circumstances, he is 54 years of age and was at the time of the trial employed on the Railways subject to short notice and at a very modest salary. As mentioned earlier, he has a wife - his second - by whom he has a young son. These features were however in no way overlooked by Shearer, J.,

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In his remarks when passing sentence, the learned Judge, after mentioning that he had given the matter careful and anxious consideration, and that he bore in mind the inevitable effects of the sentence both upon appellant himself and upon his wife and family, pertinently observed that appellant's reckless use of a firearm had occasioned the loss of a human life, and then continued:

"I must, therefore, for the protection of society against such conduct, pass a substantial sentence. That it is not more substantial is because of the provocation implicit in the report which you received from your wife as to grossly insulting behaviour, ^{which} ~~when~~ she described, and because your intention to use the firearm was not premeditated. To some extent, those factors have been taken into account in finding extenuating circumstances, but together with your personal circumstances they have had the effect of reducing the sentence."

The facts in R. v. Horn (supra) were entirely different from

those of the present case. All relevant features of the -----

 latter call for the imposition of a prison sentence. The
 only real problem in this connection lies in the determination
 of an appropriate term. The seven years imposed by the trial

Court was, of course, in relation to a verdict of murder with extenuating circumstances. Although the alteration of that verdict to one of culpable homicide leaves this Court at large to determine what itself considers to be an appropriate sentence, and while such an alteration will usually carry with it a reduction in the sentence imposed by the trial Court, this latter is not necessarily invariably the case (cf. R. v. Karg, 1961 (1) S.A. 231 (A.D.) at 237 H.) This Court must impose such sentence as it considers to be appropriate having regard to all the circumstances of the case.

I have already said that appellant acted in a most reprehensible and grossly negligent manner. That, however, does not entirely conclude the matter. For the loss of deceased's life was the result of appellant's gross negligence accompanied by several aggravating features. I proceed to mention some of these. The deceased and Welcome were unarmed and were neither trespassers nor intruders. They were walking in broad daylight on a public road. Neither had adopted anything approaching a threatening attitude; and in his

evidence appellant himself disavowed any apprehension on that score. Accepting - as, contrary to Welcome's insistent denials, was accepted by the trial Court - that the two Bantu men did make the insulting gestures to the appellant's wife which the latter reported to appellant, that conduct had ceased before appellant precipitately commenced to shoot with the avowed object, as he himself put it, of "scaring them off". When the men - if appellant is to be believed - declined to be "scared" off" and unconcernedly continued to "sneer" at him, appellant maintained his pistol fusilade, aiming perilously close to them. While it is inherent in what I have said earlier that the State failed to show that appellant did not in fact entertain the confidence in his markmanship which he professed, objectively regarded there was - not as a matter of hindsight, but in the light of appellant's own evidence relating to his prior experience with this pistol - but little substantial ground for that confidence. It is impossible to avoid the conclusion that the death of deceased was the culmination of a wholly unwarranted, utterly indiscriminate, and grossly

reckless...../

reckless use of a firearm. As has been repeatedly pointed out by the Courts, a deplorable tendency exists for people to resort too quickly to the use of a firearm. Moreover, as was observed by Schreiner, J.A., in delivering the judgment of this Court in R. v. Karg, supra, at p. 236:

"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment".

The cumulative effect of the various features I have mentioned is such as, in my judgment, to call for a sentence of 4 years' imprisonment.

For the foregoing reasons, the appeal succeeds to the extent set out in the following order, viz:

1) The..../

- 1). The conviction for murder with extenuating circumstances is set aside, and there is substituted therefor a verdict of guilty of culpable homicide.
- 2). The sentence of 7 years' imprisonment imposed by the trial Court is altered to a sentence of imprisonment for 4 years.

WESSELS, J.A.)
TROLLIP, J.A.) *Concur*

W. G. Thorne