IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SIZUKULWANA ERNEST ZULU ..... appellant

and

THE STATE ..... respondent

Coram: CORBETT, HOEXTER et HEFER, JJA

Date of hearing: 23 September 1985

Date of judgment: 25 September 1985.

J U D G M E N T

CORBETT, JA:

The appellant, a Zulu man, whose age was found to be approximately 25 years, appeared before BROOME J and two assessors in the Circuit Local Division for the Southern District of Natal on the charge of having murdered

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Mantombi Florence Zulu, a Zulu woman. Upon arraignment the appellant, who was represented by counsel, pleaded not guilty to the charge of murder, but tendered a plea of guilty of culpable homicide. The State did not accept the tendered plea and the trial proceeded on the murder charge. The appellant was found guilty of murder by the unanimous verdict of the Court. The trial Judge then addressed the following remarks in open court to appellant's counsel:

> "You will no doubt explain to him that the onus is on the Accused to establish extenuating circumstances on a balance of probabilities; that that onus is discharged on an examination of all the evidence, but of course, in the peculiar circumstances of this case, he is in a better position than anybody to explain why he did it and why it is morally less reprehensible than it might otherwise appear to be and as I say, he may well wish to place more information before the Court on this extremely important aspect."

The trial was then adjourned to enable counsel to take instructions. Upon the resumption appellant's counsel informed the Court that the appellant had elected not to

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give any further evidence on the issue of extenuation. Having heard counsel's submissions on the issue, the Court (by a majority formed by the trial Judge and one assessor) held that there were no extenuating circumstances. The appellant was accordingly sentenced to death. With the leave of the trial Judge, appellant appeals to this Court against the finding of no extenuating circumstances and the resulting death sentence.

There is little dispute about the facts, which are also within a narrow compass. Both the appellant and the deceased lived at the Ingwangwane Location in the district of Ixopo. On the evening of 25 August 1983 at about 8 p.m. the deceased was lying on a mat inside the hut which she occupied together with her children. The hut, circular in shape, had a door and two small windows. The deceased was lying in the left-hand half of the hut as seen from the doorway (described as "the women's side of the hut"), with

her head nearest to the door and about 4 paces from it. A rug covered the deceased's body and part of her head, but not her face. Her head faced towards the door. The interior of the hut was dimly lit by a candle and a small fire. The door was of the stable-door variety and the upper half was open. There were six others in the hut at the time, all of them children. They were listening to the radio. Suddenly and without warning a shot was fired from the open doorway. The bullet struck the deceased in the upper chest and she was killed instantly.

Appellant admits that he fired the fatal shot from a ,303 Enfield rifle. Appellant, a half-brother of the Chief of the area, had been handed this rifle by the Chief's wife some two months before with instructions to hand it over to the police. The appellant did not do so immediately and still had the rifle in his possession on the night of the shooting. Thereafter he hid the rifle by burying it.

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The police took possession of the rifle more than a year later, after the appellant's arrest on 18 September 1984.

The appellant's explanation in evidence for his conduct was that he had had trouble with the deceased prior to the shooting. He had been paying court to a woman, Girlie Gumede, who stayed at the deceased's kraal. The deceased objected to this relationship and, according to appellant, attacked him on three occasions. On the first occasion, while appellant was riding his bicycle past the deceased's kraal, she challenged his presence there, produced a "gun" (presumably a pistol or a revolver) "from her breast" and fired at him. The bullet struck his bicycle. He fled, leaving the bicycle behind. On the second occasion appellant was in the deceased's hut when she pulled an assegai from the thatched roof. As she was about to stab him, appellant fled. On the third occasion appellant and the deceased met on a road. She again took out her "gun" and fired at appellant,

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but missed. He ran away. These incidents occurred during a period of about a month immediately prior to the death of the deceased.

The appellant stated further that on the night in question he went to the deceased's kraal, armed with the rifle. He walked past the hut and, glancing through the window, saw that there were people inside. He looked in at the doorway and saw what appeared to him to be a pile of clothing on the floor in the left-hand half of the hut. He fired the rifle at this pile and then ran away. Later that night he heard that the deceased had been killed. He did not intend to kill the deceased. He simply wanted to "scare her off".

The trial Court found the appellant to be "an extremely poor witness" and rejected his evidence in a number of respects. Firstly, it found that appellant's version of the trouble with the deceased, and in particular

his story of the three episodes recounted above, was "too far-fetched and grossly improbable" to be acceptable.

The judgment of BROOME J advances what, in my opinion, are good reasons for rejecting this version and on appeal this finding of the Court was not challenged by the appellant's counsel. The trial Court nevertheless accepted that there must have been some reason for appellant to do what he did. Secondly, the Court rejected the appellant's evidence that he fired at what appeared to be a pile of clothing and found that he was well aware that the object on the floor was the body of a human being. Here again I do not think that the reasoning of the trial Court can be faulted. Although the hut was dimly lit, the State evidence indicates that one could see that the deceased was a reclining human and not a pile of clothing. Her face was uncovered and only about 4 paces away from the doorway. Thirdly, the trial Court rejected appellant's assertion that he merely wished to scare the deceased, not kill her. Here the appellant found

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himself in a logical cul-de-sac. He did not reveal himself at the time of the shooting and ran away immediately thereafter. Had the deceased survived she would not have known who had shot at her. Appellant was consequently unable to explain how she would thus have been "scared off" her aggression towards him. Fourthly, during the course of his evidence the appellant alleged that he did not know that the rifle was loaded and thought that "it explodes even if it is empty and it has no ammunition in it". This is contrary to other parts of his evidence and to a statement made by the appellant to a magistrate shortly after his arrest when he confessed to having "fired a shot at her". It is implicit in the reasons of the Court a quo that it rejected also this very far-fetched profession of ignorance of the workings of a fire-arm.

The trial Court accordingly concluded that the appellant intentionally fired the rifle at point-blank range at what he realised was a human being and that it was

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"a very clear case of dolus eventualis". The judgment on extenuating circumstances reveals that one member of the Court was of the view that the appellant's state of mind had exhibited dolus directus. If it were necessary to do so - which it is not - I would be inclined to hold that the evidence established a case of dolus directus. The trial Court also made no specific finding as to whether the appellant realised at the time of the shooting that the recumbent human form was the deceased. The inference that he did seems inescapable. And indeed the postulate that he did not think that it was the deceased could only blacken the case against the appellant as far as extenuation is concerned.

In regard to the question of extenuation, the Court emphasized the lack of any credible evidence explaining appellant's conduct. BROOME J stated:

> "Now the Court accepts that there must have been something to have caused the Accused to do what he did. It is not known what that something is. In the
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> complete absence of evidence as to what motivated the Accused to do this, the Court cannot speculate that it was probably something which would operate to reduce his moral blameworthiness."

The Court also considered the argument that the shooting was not premeditated and in this regard BROOME J said:

> "The Accused did take the firearm, he did make his way after dusk to the deceased's hut, he did look through the window of that hut and saw that there were persons inside. He did then proceed to the door, the top half of which was open, and he did fire a shot at what he much have known was a person lying on the floor. It seems clear that the Accused left his home with the fire-arm intending to fire a shot. The use of the firearm was premeditated. Even if it was only at the stage that he looked through the door and saw what he did, that he decided to shoot the person lying there, he still had sufficient time to reflect. It was a con-scious decision to aim and fire at that person. This was not an impulsive, spur of the moment or reflex act, but the limited time is obviously a factor to be weighed in the scales with all the other evidence."

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The views of the assessor who considered that there were extenuating circumstances were summed up by the trial Judge as follows:

> "In the view of the other member of the Court, extenuating circumstances do exist because the Accused being an unsophisticated rural man with little education, it is reasonable to infer that he probably had some grudge other than that mentioned by him in his evidence. It is felt that the Accused's evidence that he went there to frighten the deceased cannot be rejected and that only on reaching the open door of the hut, did he make a spur of the moment decision to fire at the person, and that all these factors combine to reduce his moral blameworthiness to the necessary extent."

On appeal counsel for the appellant has advanced the same arguments in favour of extenuation as were put to the Court a quo. There is no suggestion that the majority of the trial Court misdirected themselves on any point of substance or that their decision was one which no reasonable Court could reach. Moreover, I am not persuaded that the

majority of the trial Court erred in concluding for the reasons stated by BROOME J that there were no extenuating circumstances. It is true that appellant probably had some grudge against the deceased, but without knowing what it was and how exactly it arose, it is not possible to evaluate it as a circumstance reducing the appellant's moral blameworthiness. There is very little basis for concluding that appellant's decision to fire the rifle at the deceased was taken on the spur of the moment, but even if it was, I agree with BROOME J that he still had sufficient time to reflect. Appellant was, on his own admission, sober at the time, and was no longer an immature youth. Unsophisticated, rural and poorly educated he may have been, but this on its own cannot extenuate what the trial Judge rightly described as a "stealthy and cowardly" murder.

The appeal is dismissed.

M M CORBETT.

HOEXTER, J)
HEFER, J) CONCUR.