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Case: 570/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DHEVARAJ NAIDOO ..... Appellant

AND

THE STATE ..... Respondent

Coram: HOEXTER, EKSTEEN et HARMS, JJ A

Heard: 16 May 1994

Delivered: 30 May 1994

J U D G M E N T

EKSTEEN, JA :

The appellant was convicted in the Durban and Coast Local Division of the murder of his wife and of his seven-year-old daugther Prashansa. On the first count - i e the murder of his wife - he was sentenced to 15 years imprisonment, and on the second count - i e the murder of his young daughter - he was sentenced to death. The present appeal is brought in pursuance of the provisions of section 316 A of Act 51 of 1977 and is directed against both the conviction and sentence on the second count. There is no appeal before us in respect of either the conviction or the sentence on the first count.

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The appellant and his wife, Amrita, got married on 6 October 1983, and their daughter, Prashansa, was born on 4 December 1984. The couple were divorced on 24 January 1986 and remarried on 8 December 1986. They were divorced for the second time on 18 June 1988 but again remarried on 3 September 1990. The trial court found that all these marriages were unhappy and at times "tempestuous". The appellant's wife was found not to have been free from blame for this state of affairs. She is described as being "a shrew" and "given to uncontrolled fits of temper" leading to outbursts of violence against the appellant. It was this behaviour of hers, the court found, which eventually contributed to the appellant's resolve

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to shoot and kill her on 29 April 1992. The fatal shooting occurred at about 6.15 that evening. It appears from the evidence that Amrita had gone to their children's bedroom and was sitting on the floor next to a bed engaged in her daily meditation when the appellant approached her and shot her through the forehead with a 9 m m semi-automatic pistol. The wound was stellate, indicating that the pistol had been pushed up against her forehead when the shot was fired. At more or less the same time and in the same room the appellant shot Prashansa through the left temple. Again the wound was stellate in appearance indicating that the pistol had been in contact with her temple

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when it had been discharged.

A neighbour, Mrs Maharaj, deposed to having walked past appellant's flat that evening on her way to a café downstairs. She had not heard any shots but as she went past appellant's flat she smelt gunpowder. Some five minutes later the appellant came down the stairs calling to her for help. He had a towel round his waist and the upper part of his body was wet. He appeared to be distraught and told her that Prashansa had shot his wife and then shot herself. Mrs Maharaj ran to his flat. In the bedroom she found Amrita sitting on the floor with her head against the bed apparently dead. Prashansa was lying on the floor

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and was still breathing. Mrs Maharaj then ran to her flat and summoned an ambulance and a doctor. Other neighbours came in and tried to resuscitate Prashansa but she died while they were with her. The 9 mm pistol with which the two had been shot lay on the floor close to Prashansa's hands creating the impression that she had been handling it when she fell. The pistol was covered in blood.

The police arrived on the scene shortly afterwards and when Detective-Sergeant Ogle asked the appellant what had happened, he explained in some detail how Prashansa had shot her mother and then turned the gun on herself. This same story was repeated by the appellant to Detective-Constable

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Singh in a sworn statement made on 1 May. Shortly after his arrest on 7 May, however, appellant made a confession to a magistrate in which he admitted having shot his wife and his daughter. His earlier explanation was therefore a complete fabrication.

At his trial the appellant pleaded guilty to the murder of his wife and tendered a lengthy explanation of that plea in terms of section 112 of the Criminal Procedure Act (51 of 1977) in which he set out details about his unhappy marriages to Amrita, and finally about the provocation she had offered him which led him to shoot her. He professed not to remember actually pointing the gun at her,

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but remembered only the shot. He said that he then noticed Prashansa standing next to him, and while he was fumbling to put the safety catch on, another shot went off which struck Prashansa. This was in effect what the appellant advanced in evidence at the trial. The court, however, found him to have been "an unmitigated liar .... in practically every respect on which issue was joined" on the facts, evasive, and disingenuous in the adaptation of his answers to meet the conflicts which emerged in cross-examination. This conclusion to which the court came is amply borne out on a mere reading of the record and there is no reason for us to differ from it, nor was it suggested in

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argument that it was wrong. The fact that the stellate appearance of the wound on Prashansa's temple is indicative of the pistol having been held up against her skin when it was discharged, tends to lend cogent support to the trial court's finding that the appellant's allegation that he was fumbling with the safety catch when the shot went off, was a fabrication. It tends rather to point to a deliberate intention to kill Prashansa. This conclusion is reinforced by the concocted story the appellant told to all and sundry immediately after the fatal shooting - a story which he himself later conceded was devoid of all truth. The appeal against the conviction for the

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murder of Prashansa therefore cannot succeed.

From the evidence it transpired that the lives of both Amrita and Prashansa had been fairly heavily insured. Prashansa was insured in two policies taken out on 1 December 1986 and 1 July 1990 respectively. Amrita was insured in five policies taken out between 1 January 1990 and 1 November 1991. In four of these policies the appellant was named as the beneficiary, and, in the event of the accidental death of the assured, he stood to receive some R430 000 from these policies alone. The trial court found that the inference that the appellant had deliberately killed his wife and daughter for monetary gain -

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i e to acquire the proceeds of the various policies - was not only consistent with practically every objective fact, but was also the only reasonable inference to be drawn from all the facts. The evidence certainly points strongly to a premeditated and pre-planned murder of both appellant's wife and daughter. His scheme was so elaborate that it could hardly have occurred to him on the spur of the moment; shooting his daughter in the immediate proximity of her slain mother: and then placing the pistol close to her hand to lend credence to the suggestion that she had shot her mother and then committed suicide; and finally dousing himself with water and winding a towel round his waist in

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order to lend credence to his allegation that he had been in the bath or under the shower at the time this tragedy had been enacted. The further consideration that the scheme had been executed in all its detail within some five or ten minutes of the murders, strengthens the inference that it had been carefully pre-planned. It was common cause that appellant's wife was in the habit of meditating at that time of the evening and would therefore be unlikely to offer any immediate resistance to the appellant's approach. The trial court also accepted evidence that the appellant had sought to discourage Amrita's brother from coming to his flat to borrow a coat

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at more or less this time, and had told him to come earlier that afternoon. All this points to careful pre-planning, and a deliberate and swift execution of his plan. The court's inference that the appellant's motive was the base one of greed prompted the trial judge to come to the conclusion that the death sentence was the only proper sentence for the murder of Prashansa in the circumstances.

In respect of the murder of his wife the trial court found that she had "subjected him to continual torment and humiliation over the years" and that that had "played a role in his decision to kill her", but that avarice had taken

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over so that the "primary moving force behind his decision to kill his wife and his child was greed". Nevertheless the long history of acrimony and humiliation that the appellant had had to endure at the hands of his wife, prompted the learned judge to impose a sentence of 15 years imprisonment on that count.

Mr Naidu, in an able and well-presented argument before us submitted that the inference which the trial court had drawn as to the motive of the crime, was not the only reasonable inference to be drawn. He submitted that there were three other reasonably possible motives for the murder of Prashansa viz -

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(1) appellant's fright resulting from the realization that he had actually killed his wife;

(2) his feeling of guilt towards Prashansa resulting from her having witnessed the murder of her mother; and

(3) self preservation.

The first two possibilities may conveniently be considered together. Both seem to involve an emotional upheaval resulting from a realization of the enormity of his deed. In this confused state, it is suggested, he may have acted almost thoughtlessly in killing his daughter whether through fright or to relieve his feeling of guilt.

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The trial court considered the possibility that he may have acted in an "upheaval of emotion" shen he shot his daughter but rejected it as a reasonable possibility in the light of the appellant's clearly conceived and calculated actions immediately thereafter in an attempt to put all the blame on Prashansa. The trial court's reasoning seems compelling and Mr Naidu did not attempt to press the point in argument. Instead he took his stand on the submission that the appellant may conceivably have acted from motives of self-preservation i e either by eliminating Prashansa as a witness to the murder of

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his wife, or else by killing her in an attempt to put the blame for the murder of Amrita on her. This latter suggestion seems to find support in the concocted story the appellant put out immediately after the

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shooting.

In my view, however, it is hardly necessary to decide which of these inferences is the most likely. Whether appellant killed his wife and his daughter in an attempt to obtain payment of the insurance policies, or whether he killed Prashansa in order to eliminate her as a witness to the murder of his wife, or in order to escape liability for his crime by putting all the blame on her, makes very little difference to the despicable and evil nature of his offence. His moral turpitude remains appalling whichever of the three possibilities may have been his true motive. To kill a defenceless little girl of

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seven - and his own daughter to boot - by pressing the barrel of his pistol against her head and deliberately pulling the trigger, whether it be for monetary gain or simply to save his own skin, is so heinous and so horrible as to fill any right-minded person with revulsion. In my view this is one of the extreme cases in which the detruction of the perpetrator is imperatively called for.

At the outset of the appeal Mr Naidu questioned the constitutionality of the death sentence in the light of the provisions of sections 9 and 11(2) of the Constitution of the Republic of South Africa (Act No 200 of 1993). In terms of sections 98(2) and 101(5) of that

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Act may be uncertain that this Court has jurisdiction to adjudicate on this issue. Despite the provisions of section 241(8) it seems to me that it would be undesirable to dispose of this matter before the Constitutional Court has had an opportunity of expressing itself.

In the result -

(1) the appeal against the conviction is dismissed, and

(2) the final determination of the appeal against the sentence is postponed to a date to be arranged by the Registrar in consultation with the Chief Justice,

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pending the decision of the Constitutional Court as to whether or not the confirmation of the death sentence in this case would be in accordance with the provisions of the Constitution of the Republic of South Africa (Act No 200 of 1993).

J.P.G. EKSTEEN, JA

HOEXTER, JA)
HARMS, JA) concur