127/93

Case nr 32/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

MOHAMMED YUSUF ABRAHAMS — Appellant

and

THE STATE — Respondent

CORAM : HEFER JA

KANNEMEYER, HOWIE AJJA

HEARD : 1993-09-07

DELIVERED : 1993-09-20

J U D G M E N T

KANNEMEYER, AJA

The appellant was charged before the court a quo with the murder of his wife and with theft. He was acquitted on the theft charge and no more need be said thereanent. He was convicted on the count of murder and sentenced to five years' imprisonment of which half was conditionally suspended. The period of suspension was not fixed. The appellant now appeals with leave of the trial court against both his conviction and the sentence imposed.

The appellant was married to the deceased, Helena Elizabeth Potgieter, in accordance with Muslim rites, on 3 March 1980. The marriage was initially happy and two sons were born of it. However, in 1986, relations between the appellant and his wife started to deteriorate. The appellant had cause to suspect her of infidelity and she left the common home from time to time for short periods. The appellant was devoted to her and did all in his power to

retain her affection. He provided generously for her and bought her a house in Bezuidenhout Valley and a motor car.

In November 1989 the deceased left the appellant with the two children and moved to Parys where she lived with a certain Anthony Buytendag with whom she had formed an association. The appellant stayed alone in the Bezuidenhout Valley house over Christmas but the deceased visited him on 26 December 1989 and asked for R200 which she needed because their younger son was ill. This he gave her and she left again.

She returned to the appellant on 2 January 1990 together with their younger son. They were sitting in the lounge and the deceased complained of being hungry. The appellant sent the domestic worker, Harriet Mokutu, to a neighbouring café to buy bread. She had her baby on her back and, as the appellant's son wanted to go to the café with her, her friend Thomas, who was working on the premises, accompanied them. The appellant and the deceased were then alone together in

the house. There is no reason to believe that this situation was engineered by the appellant, but the result is that his evidence stands alone as to what followed thereafter.

He says that the deceased opened her handbag to take out a cigarette and he saw an envelope in the bag. In it he found a Christmas card from Tony Buytendag to the deceased. The appellant tore the card in half and threw it on the floor. This portion of evidence is corroborated by that of detective warrant officer Baard, the investigating officer, who found the card on the floor. It can be seen next to the open door in the photograph, exhibit C4. The message printed on the card is couched in affectionate terms as appears from exhibit E. The appellant says that when he read the card he became angry and said to the deceased :

> "I am sick and tired of this nonsense. I am going to sort Tony out once and for all now". (His evidence continues). "I went to the back, I locked the kitchen door. My sliding door was open. Then I said to her : 'come, let us go, I am going to show once and for all, I am going to sort him out, because he is using you people too much' And as I was coming towards her, she said to me in Afrikaans : 'Jou vark, ek wens hy maak jou vrek'.

> All I remembered, I pulled the gun, and I just started shooting. Then she got up. She stood up and said to me 'Jingles [his nickname] I love you, take me to hospital, you shot me in the hip'. I ran, I grabbed her. I grabbed her and I was going towards the door, realised what I have just done. As I came through the door where the passage is, while holding her, I stumbled with her and the gun just went off in my hand and I started shaking. I saw her eyes going back and kept saying 'Nunny Nunny' [deceased's nickname] and shaking and shaking and I thought she was deceased. I put her down, I went to the sliding door and I locked it and I went out. I took the car and went to go and find my child..."

It is necessary to refer to the "gun" in greater detail. He had bought a .38 revolver and four rounds of ammunition a few weeks before the incident on the black market because he had been told that Tony Buytendag, whom he considered to be a ruffian, had threatened to assault him. He kept the revolver on his person at all times. He had no experience of firearms and did not know what make the revolver was nor could he depose to its condition. After leaving the house he threw the revolver away and the police have been unable to find it. The appellant says that before he left the house he opened

the revolver to see how many bullets were left, "because I was going to shoot Tony, I was a very angry man ..."

The pathologist who conducted the post-mortem examination on the body of the deceased conceded that when the third gunshot wound was inflicted which, as will be shown presently , pierced the deceased's lung she could have reacted as described by the appellant, leading a layman to conclude that she was dead. However she was not. When the domestic worker returned with her friend, the deceased was still alive and was lying in the passage just inside the front door, the glass panel on the side of which she broke with an occasional table. She was calling for help. The door was opened and her half-brother who happened to arrive at that stage, rushed her to hospital where she died later that day.

The appellant admits firing the two shots as a result of which the deceased died. His defence is that when he fired the first two shots he lacked criminal responsibility for his

acts resulting from non-pathological causes while the third shot, he says, was fired accidentally.

It is convenient at this stage to consider the pathologist's evidence concerning the injuries suffered by the deceased. He agrees that two of the bullet wounds, those which the appellant claims to have been caused by the first two shots fired by him, were probably fired while the deceased was sitting down as is the appellant's case. They are both situated in the area of the deceased's right groin. One, referred to as wound number 2 in evidence, is of little consequence but the wound referred to as number 3 passed through the abdominal aorta, the inferior vena-cava and the right renal artery and the bullet exited over the right buttock, through the right side of the pelvis. The third shot, referred to as wound number 1 in the pathologist's report, is the one which the appellant claims to have fired accidentally. It struck the deceased in the left chest, passed through the left pleural cavity, through

the left lung and the bullet came to rest in the left lobe of the liver. There was tattooing round the entrance wound indicating that the shot was fired at close range. This, to some extent, supports the appellant's version that the shot causing this injury was fired as he was carrying the deceased towards the front door. It does not, however, necessarily support the appellant's claim that the shot was fired accidentally.

Mention must also be made of the blood stains found after the incident. The deceased was sitting in the couch which can be seen on the left side of the photograph, exhibit C1. Blood-stains can be seen in the deceased's shoes which are on the floor in front of the couch. They can also be seen on the white floor rug in front of the couch; see also exhibit C2. The deceased was found by Harriet, as already mentioned, near the front door. The blood that was found there is ringed in photograph exhibit C4. There was no blood between these two areas and it seems unlikely that the

deceased walked or crawled from the couch to the front door. The pathologist was asked which shot, in his opinion, had probably caused the death of the deceased. He replied :

> "In my opinion, the one which involved the abdominal aorta, the inferior vena cava and the right renal artery, in view of the fact that these have directly involved major blood vessels, certainly the wound through the chest which involved the right lung and then, after that, the liver, would also have caused a considerable amount of shock and blood loss".

He had earlier said of the chest wound:

> " I think eventually this had been a fatal wound, in view of the fact that is traversed the left lung which is a highly vascular structure, as well as terminally involving the liver."

At this stage it is necessary to consider the two defences separately. I start with that of non-pathological criminal incapacity when the first two shots were fired.

In S v Kalogoropoulus 1993(1) SACR 12(A) at 21i, Botha JA said :

> "The criminal incapacity which is relied on in this case is of the kind which is described in judgments of this Court as non-pathological

> incapacity [see, for example S v Laubscher 1988(1) SA 163(A), S v Calitz 1990(1) SACR 119(A) and S v Wiid 1990(1) SACR 561(A)]. It has been said that in a case of this kind psychiatric evidence is not as indispensable as it is when criminal incapacity is sought to be attributed to pathological causes. On the other hand, an accused person who relies on non-pathological causes in support of a defence of criminal incapacity is required in evidence to lay a factual foundation for it, sufficient at least to create a reasonable doubt on the point, and ultimately, always, it is for the Court to decide the issue of the accused's criminal responsibility for his actions, having regard to the expert evidence and to all the facts of the case, including the nature of the accused's actions during the relevant period."

Once the foundation has been laid the onus is on the State to rebut it. If the claim of non-pathological incapacity may reasonably possibly be true an accused person will be entitled to an acquittal; see S v Mahlinza 1967(1) SA 408(A) at 419 A-C; S v Wiid 1990(1) SACR 561(A) at 564 a-d. But the caveat entered by Ogilvie Thompson JA (as he then was) in R v H 1962(1)(SA) 197(A) at 208 B must be borne in mind, namely :

> "As remarked earlier, defences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence,

> although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question."

In the present case the appellant called a psychologist, Mr Redelinghuys, to support his contention that he was not criminally responsible for firing the first two shots. Mr Redelinghuys relied, to a large extent, on information obtained from the appellant and, in so far as the incidents surrounding the shooting are concerned, entirely on this information. The account that the appellant gave to Mr Redelinghuys agrees with his evidence-in-chief. It is necessary to determine whether this account may reasonably possibly be true, for if it is not, the findings of Mr Redelinghuys are based on unacceptable premises.

But first it is necessary to consider the conclusions to which Mr Redelinghuys came. He considers that the appellant is able to handle emotional pressure and exhibits no signs of any explosive tendency. He gave no indication that he was

naturally violent or aggressive.

He says :

> "Ek vind by die beskuldigde dan 'n enkele geïsoleerde episode van onvermoë om 'n impuls te weerstaan, welke onvermoë aanleiding gegee het tot 'n enkele aggressiewe gedragshandeling, wat tot die dood van sy vrou aanleiding gegee het. Voor hierdie episode was daar geen tekens van algemene impulsiwiteit of aggressiwiteit in sy persoonlikheid of in sy gedrag nie. Beskuldigde se optrede en gedrag ten tye van die voorval herinner sterk aan die sogenaamde 'Geïsoleerde eksplosiewe versteuring'... Ek moet egter sterk beklemtoon dat beskuldigde na my mening wel blootgestel was aan erg voorafgaande psigo-sosiale stressors, en dat dit na (sic) my mening is dat sy spesifieke gedrag, 'n uiting was van frustrasie en woede, opgebou oor jare heen as gevolg van spesifieke druk binne sy huwelik."

However, though there was a close resemblance between the appellant's behaviour and that found in an isolated explosive disorder his conduct on the day in question cannot be so described because in a true case of isolated explosive disorder the degree of aggression expressed during the episode is grossly out of proportion to any precipitating psycho-social stressor whereas in the present case the

appellant's actions were not disproportionate to the preceding psycho-social pressure. The only explanation that Mr Redelinghuys can give of the appellant's behaviour at the relevant time is that over the years he had tried to keep his wife but that her final conduct with Buytendag made him realise that he meant nothing to her. This exposure to humiliation and the final rejection of him as a person could have caused him to snap both psychologically and emotionally and that he momentarily lost control of himself and fired two shots in fury and frustration, which hit her.

Under cross-examination Mr Redelinghuys said that the emotional pressure at that stage was so great that the appellant did not act rationally ("rasioneel opgetree het"). Asked what he meant by this he answered :

> "Dat hy nie volgens die besef van sy insig opgetree het nie; dat hy nie wat hy rasioneel sou weet dat dit gevaarlik of verkeerd is, dat hy nie volgens daardie besef opgetree het nie of volgens sy gevoel".

The trial court, in a somewhat brief judgment, rejected

the appellant's version of the events in question. The conclusion was reached that :

> "the accused was not 'deurmekaar' as the defence alleged but was angry and fired at the deceased with intent to kill. His anger was not such as to render him unable to control his actions."

On a reading of the appellant's evidence one does not gain a satisfactory impression. Having earlier said that he remembered "pulling" the revolver from his back and starting to shoot and that he remembered pulling the trigger, he later said that he heard the "gun going bang, bang" and that two shots went off. He would not give a straightforward reply to the question whether he remembered firing two shots. He answered that two shots went off and that he must have fired these shots but did not know that he was shooting.

We have here to do with a man who is able to control his emotions and who is not given to violence. The woman to whom he is devoted has humiliated him in the past and her fidelity is suspect. She heaps abuse on him when he finds an affectionate Christmas card she has received from her

paramour. He says that he became angry and fired two shots. Although he claims not to know in what direction he fired, they both hit her on the upper thigh close to each other, so he must have been facing her as she sat on the couch. It was suggested that, had he known what he was doing and had he intended to kill her, he would have aimed at a more vulnerable point of her body, but it must be remembered that he was totally inexperienced in the use of firearms, that the deceased was sitting and that he fired from a standing position. One is forced to the conclusion that he deliberately drew the revolver and fired it. All he claimed not to know was whether he shot at the deceased or merely fired random shots. His later attempt to suggest that he was not even aware that he had fired shots is unconvincing. When it was put to him in cross-examination that he must have intended the first two shots to hit the deceased, he answered :

> "If I wanted to kill her, why would I just shoot? I shot anywhere, I did not know I was shooting."

This, coupled with his answers to questions such as :

> "Yes, now you just said you shot twice?...
> Yes, the gun went off twice" and
> "So you remember two shots?... Two shots went off"
> "No, no, the question is do you remember that you
> fired two shots?... Must have been."

satisfies me that he was attempting to water down the effect of his original evidence. It is also too much of a co-incidence to accept that the two shots should strike the deceased in such close proximity had they been random shots.

Had the appellant fired the shots, not appreciating what he was doing, one would have expected different conduct from him thereafter. His conduct as disclosed by the evidence was inexplicable. Without further ado, and merely because, according to him, he thought his wife was dead, he leaves her locked in the house and takes no steps to verify his conclusion or to seek help should it be incorrect. He drives away and picks up his son and thereafter, not having been able to find Buytendag, drives around aimlessly until about half past five that afternoon when he telephones the

deceased's sister-in-law, Mrs Terblanche. According to the appellant he said to her : "Ek dink ek het Nunny doodgeskiet". According to her the appellant told her he had shot the deceased but would not tell her where she was. From this it appears that he was not certain that the deceased was dead when he left the house.

That the appellant was angry, and justifiably so, at the time of the shooting is clear but on an analysis of his evidence I am satisfied that he must have been aware of what he was doing and have consciously shot at the deceased. At that stage he may well not have specifically intended to cause her death but he must have foreseen the possibility of her death resulting and, this notwithstanding, he fired the shots reckless as to the consequences.

The State has, in my view, discharged the onus of proving that the appellant was criminally responsible for the consequences of the first two shots, one of which was fatal, on the basis mentioned above and that he was, accordingly,

correctly found guilty of murder.

The trial judge rejected the appellant's version concerning the circumstances under which the third shot was fired. In view of the above finding it is not necessary to consider whether this conclusion was correct.

There remains the question of sentence. Miss Robinson who appeared for the appellant advanced all the arguments which she could have in this regard. The appellant has no relevant previous convictions. He was in steady employment when he committed the offence and was highly thought of by his employer. He was 46 years old at the time. He is responsible for the welfare of his two young sons. The crime was not premeditated and was the consequence of severe provocation. The appellant has shown remorse and it is unlikely that he will commit a similar crime in future. In the circumstances, it was submitted, imprisonment would serve no purpose and would merely have a negative effect upon the appellant. Accordingly, it was submitted, the sentence

should be totally suspended.

However, the trial court was conscious of the mitigating factors and the leniency of the sentence indicates that the learned Judge took them into account. No misdirection on the trial court's part has been shown and there is no marked disparity between the sentence and what, in my view, would be a proper one. See, in this respect, the alteration on appeal of the sentence in S v Laubscher 1988(1) SA 163(A) at 173 F. Nor does the fact that the learned trial judge found that the appellant fired the third shot with the intention of killing the deceased and that, on appeal, it has been unnecessary to determine whether this finding was correct, alter the position. The appellant is guilty of murder and the number of fatal shots fired by him with the intention of killing his wife is not of material importance in determining an appropriate sentence in this case. Crimes of this nature are prevalent and the sentence should act as a deterrent to others. This will not be achieved if the sentence is wholly

suspended.

The suspension of two and a half years of the sentence will be operative for five years. The appeal is dismissed.

KANNEMEYER, AJA

HEFER, JA

CONCUR

HOWIE, AJA