

CASE NO.: FA 2/97

IMMANUEL KATJIVARI

versus

THE STATE

HANNAH. A.J.P. ej GIBSON, J. et COETZEE, A.J.

1998/05/18

CRIMINAL PROCEDURE SENTENCING

Circumstances in which a sentence of life imprisonment should or should not be imposed considered.

The brief facts of the case were as follows. On 23rd November, 1994 at approximately 5pm the deceased and some friends were drinking liquor at a post called Otjatjinjinge in the district of Okakarara. The appellant joined the group and when he finished off the last of the liquor without permission an argument erupted between him and the deceased. They started to fight but were separated. The appellant then returned to his employer's house and returned with his employer's .303 rifle. At that stage the deceased was on his way to his own house and at a range of some 30 metres the appellant aimed the rifle at him and shot him in the back, killing him.

The Court-a-^wo found that the appellant had a direct intention to kill the deceased and Ms Dammert, who appears before us on behalf of the appellant, does not seek to challenge that finding. The main thrust of her argument is that the circumstances in which the murder was committed were not such as to warrant the imposition of a sentence of life imprisonment, particularly when regard is had to the fact that the appellant, at the age of forty years, was a first offender.

What is abundantly clear is that the offence was committed in a fit of anger. There had been an altercation between the appellant and the deceased in which the appellant came off the worst and in anger at having been humiliated, at least in his eyes, the appellant went off and fetched the rifle with the intention of shooting the deceased and, still in a rage, carried out that intention. The case has to be distinguished from one in which a murder is committed in cold-blood or where the circumstances are particularly vicious. As was said by Mahomed CJ in *S v Tcoelib*, 1996 (1) SACR, 390

(NmS) at 397 with reference to a sentence of life imprisonment:

"Even when it is permitted in civilized countries it is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence."

In the present case there were no indications that there was any real risk of the appellant repeating his conduct.

He had no previous convictions for violent crime or for that matter, any crime at all. And there was nothing to suggest mental instability. And the murder was not of a cold-blooded or premeditated kind. It was, as I have said, committed in a fit of anger. In my view, a sentence of life imprisonment was not warranted and the learned judge in the Court-a-^wo misdirected himself when he said:

"It seems to me that society would expect that a murderer is sentenced, unless there are important mitigating circumstances, to the maximum sentence available."

That statement, so it seems to me, is in conflict with the passage cited from the *Tcoeib* case *supra* which stresses the need to question whether the nature of the murder was so dreadful or monstrous that society would legitimately expect the imposition of the ultimate sentence. The learned judge has effectively reversed the emphasis laid down by the Supreme Court though in all fairness it must be said that his judgment was delivered before the *Tcoeib* case was decided.

In the light of that misdirection and for the other reasons which I have given it is open to this Court to interfere with the sentence. I would allow this appeal and set aside the sentence on count 1 and substitute therefor a sentence of 15 years imprisonment backdated to 12 September 1996. The sentences imposed on the second and third counts are ordered to be served concurrently with the sentence on count 1.

ON BEHALF OF THE APPLICANT

MS M A DAMMERT

Instructed by:

Directorate of Legal Aid

ON BEHALF OF THE RESPONDENT

ADVOCATE H F JACOBS