CASE NO. SA 2/96 IN THE SUPREME COURT OF NAMIBIA

In the matter between

HALUNANYE MOSES APPELLANT

versus

THE STATE RESPONDENT

CORAM: MAHOMED, C.J. et DUMBUTSHENA, A.J.A. et MTAMBANENGWE, J.

Heard on: 1996.10.04

Delivered on: 1996.10.11

APPEAL JUDGMENT

MTAMBANENGWE, J. : The appellant was convicted by the High Court on his own plea of guilty to a charge of murder and sentenced to life imprisonment. The appeal against sentence only comes before us by leave of this Court.

Substantial heads of argument were submitted both on behalf of appellant and by State counsel, Mr January, who initially argued that the appeal should be dismissed.

On pleading guilty to the charge of murder a statement in terms of section 112(2) of the Criminal Procedure Act no. 51 of 1977 was handed in by his legal adviser in which, inter alia, the appellant admitted that he killed the deceased, his own daughter, by assaulting her with a stick and:

"7.....that he knew that the deceased could have died as a result of the aforesaid assault but nevertheless proceeded to assault her.

8. ... finally, admits that although he was under influence of liquor, he could still realise what he was doing."

Evidence in mitigation revealed that the deceased, about 4 years of age, was very ill and unable to walk when on the night in question the appellant fetched her from the house of a certain neighbour, she pleaded with him to carry her but, instead, he dragged her by her foot, he subsequently beat her with a green stick because, as he said under cross-examination,

"The liquor, I was drunk as I mentioned before and when my daughter, when I went to collect my daughter to come back home I thought she's not walking very fast as I wanted, as I wished, so I just started beating her because I was drunk."

The appellant also admitted that a few days prior to the death of the deceased he had been ordered by the headman to take the child to hospital but had gone drinking instead. The prosecutor then asked him:

"Do you agree with me that you are indeed a person with no feelings?"

and he reolied

"Correct, Your Honour, maybe I'm becoming mad, but I really don't know what I did that night."

The appellant was ordered to be examined by a psychiatrist

who found nothing mentally wrong with him but said that alcohol might have had some influence on his conduct on the night in question.

The appellant is a first offender and was of 41 years old. He supported his family of eight children, a wife and a mother by cultivating and selling mahango. His conduct on the night in question clearly shows a man who was very drunk. He expressed his remorse as follows, in answer to his legal advisor's question:

> ".... I really feel very bad about it because I didn't know what I was doing, I was, it's difficult to recall what I did to my own child, to my own daughter."

The learned Judge-a-quo convicted the appellant on the basis of the section 112(2) statement which clearly means that he found him guilty of murder with dolus eventualis. Although in passing sentence he considered all the personal circumstances of the appellant, and must have been alive to the fact that appellant pleaded guilty, however, he does not seem to have taken into account the fact that the appellant was found guilty of murder with dolus eventualis. See Du Toit: Straf in Suid-Afrika, p. 76 and S v Siqwala, 1967(4) SA 566 (AD) at 571 H.

The learned Judge-a-quo remarked in regard to the crime and the interests of society:

> "When one looks at the crime that you have perpetrated it -. overshadows these personal circumstances by far. You killed your own small

> daughter. This was the daughter that even the headman, on your own version, told you to take for medical treatment but you preferred to go drinking. When you fetched her that evening you saw that she was ill and you knew that she was ill. Despite this, when she asked you to carry her, you dragged her along by her foot and after dragging her a while, you took a stick and hit her with the stick until she died. Although you were intoxicated you knew what you were doing was wrong, but you, nevertheless, persisted in your deed.
>
> It is difficult for me to comprehend how any person can act in such an indescribably cruel manner towards his own young child. It is an horrendous offence that you had committed. When one takes the interest of society into account, I must consider that a child is normally entitled at least to love and affection from his own parents and not to the type of conduct that you had perpetrated upon her. Society cannot tolerate that those most vulnerable members of society, i.e. the children, be abused by those persons who are supposed to care for them with love and affection and I intend sending out a message to society at large that those people who abuse and maltreat these poor innocent vulnerable members of society, even if they are drunk, will be dealt with severely."

There is a striking disparity between the sentence passed by the trial Judge and the sentence which this Court would have passed (S v Berliner, 1967(2) SA (A) at 200.) While it may be understandable from the above passages in his judgment on sentence, that the heinousness of the crime evoked a sense of outrage in the Judge-a-quo's mind, but, as Strydom, J.P. said in S v Mehemia Tiiho, 1992(2) SACR 639 (NmHC),

> "It is true that the heinousness of a crime should not evoke emotions which outweigh all other consideration."

The appellant obviously behaved like a mad man; hence the Judge-a-ouo's order that .he be examined by a psychiatrist before he passed sentence. All this was because of

5 intoxication, a factor which should have been given more weight than seems to have been the case. In this regard the remarks of Holmes, J.A. in S v Siawala. supra, at 571 D - E are apposite:

> "In considering the relevance of intoxicating liquor to extenuating circumstances, the approach of a trial Court should be one of perceptive understanding of the accused's human frailties, balancing them against the evil of the deed."

Mr January for the State, who was asked to address the Court first at the hearing of this appeal, did concede in the end that the sentence could not be allowed to stand, and that we were entitled to interfere with that sentence or, appeal.

In the result the sentence of the Court-a-quo is set aside and substituted with one of -

> Seventeen (17) years imprisonment of which seven (7) years are suspended for five (5) years on condition that the accused is not convicted of murder committed within the period of suspension.

MTAMBANENGWE, JUDGE

I concur

I. MAHOMED, CHIEF JUSTICE

I concur

E. DUMBUTSHENA

ACTING JUDGE OF THE SUPREME COURT

ON BEHALF OF THE APPELLANT: ADV J R WALTERS

Instructed by: Legal Aid

ON BEHALF OF THE STATE: ADV H C JANUARY