S v HARTMANN 1975 (3) SA 532 (C)

Citation	1975 (3) SA 532 (C)
Court	Cape Provincial Division
Judge	van Winsen J
Heard	March 19, 1975; March 20, 1975
Judgment	March 21, 1975
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Criminal law - Murder - What constitutes - "Mercy-killing." - Medical practitioner convicted of - Sentence - Duty of Court to impose sentence and not suspend B it pending action by Medical Council - Act 13 of 1928, sec. 41 - Accused sentenced to one year's imprisonment, accused to be detained until rising of Court and balance to be suspended for one year - Medicine - Disciplinary proceedings - Act 13 of 1928, sec. 41 - Effect. C

Headnote : Kopnota

Even if all the accused has done is to wilfully hasten the death of a human being who was due to die in any event, it nonetheless constitutes the crime of murder.

The accused, a medical practitioner, was charged with the murder of his father, aged 87, who for many years had been suffering form a carcinoma of the prostate. Thereafter secondary cancer had manifested itself in his bones, more particularly his ribs. Until 21 August 1974 the deceased had been living with the accused's brother in Pretoria where he had D received X-ray treatment for the cancer growths in hospital there. The accused had visited him there and on one occasion found him to be bedridden and suffering great pain. The accused was very close to his father and had thereafter induced his father to come to Cape Town by air, whence he was transferred to the Ceres Hospital as a private patient of the accused. There was no longer any question of a cure. The deceased was very emaciated, incontinent and on pain-killing drugs. By 11 September he was in a critical state of ill-health and expert E medical evidence described him as being moribund and close to death. The accused had instructed a nursing sister to give the deceased an injection of 1/2 gr. of morphine, which she had reluctantly done. An hour later the accused had himself got a further ampule of 1/2 gr. of morphine from the sister and placed it in the deceased's drip. The accused had remained with the deceased and about 11/2 hr. later, at 11 p.m., obtained 250 mgr. of pentothal from the sister and injected it into the drip. F Within seconds of his doing so the deceased died, pentothal not being an analgaesic but of use in anaesthesia and, unless properly controlled, having fatal effects. The Court found that the accused had not desired to end his

father's life: his motive had been compassionate, to relieve his father of the further endurance of pain and the continuation of a pitiable condition. He was, however, aware that his act would inevitably terminate his father's life.
Held, that the accused clearly entertained that intention which was an essential ingredient of murder.
G *Held*, further, as to evidence that the deceased had consented to the administration of such a drug, that that would not constitute a defence to the charge.
Held, accordingly, that the accused's act of "mercy-killing" made him guilty of murder as charged.
Held, further, in regard to a suggestion by the State that sentence be postponed until after disciplinary action had been H taken by the Medical Council, that, regard being had to section 41 of Act 13 of 1928, the ball was in the Court, and that in any event it would be inappropriate to postpone the sentence.
Held, further, regard being had to the mitigating factors, that this was a case if ever there was one for giving full measure to the element of mercy and that the accused should be sentenced to one year's imprisonment, the accused to be detained until the rising of the Court and the balance of the sentence to be suspended for one year.

Case Information

Criminal trial on a charge of murder. The facts appear from the reasons for judgment.

VAN WINSEN J

F. W. Kahn, for the State.

G. D. van Schalkwyk, for the accused.

Judgment

VAN WINSEN, J.: The circumstances of this tragic case are within a narrow compass. There is no dispute between the State A and the defence as to its factual features, and, save in one minor respect, there is no contest between the parties in regard to the fact that the essential elements that go to constitute the crime charged have been established by the State. The accused tendered no evidence to controvert the evidence adduced by the State and accused's counsel did not, nor could he on this evidence, argue that the State had failed B to discharge the *onus* resting upon it.

Very briefly the main facts of this matter are the following.

The accused, a medical practitioner presently practising at Ceres, is the son of the deceased. The latter, an old gentleman of 87 years of age when he died, had for a number of years been suffering from a carcinoma of the prostate. This condition had C spread to other parts of his body, and secondary cancer manifested itself in his bones and more particularly in the ribs. Until 21 August 1974 the deceased had been living in Pretoria with the accused's brother and he had received X-ray treatment for the cancer growths in hospital there. The accused visited him on occasion, and during the earlier part of 1974 D found him to be bedridden and suffering great pain. He was induced to come to Cape Town by air, and form there he was transported to Ceres where he entered the Ceres Hospital as the private patient of the accused on 22 August 1974. At that stage the deceased was on symptomatic treatment, and there was no longer any question of a cure. He was on admission completely E bedridden, very emaciated, incontinent and on painkilling drugs. After being in the hospital for some days he suffered a pulmonary embolus and a laryngeal stridor. He appeared to be dying, but on receiving treatment revived for a short time. After a day or two he was put on to intravenous foods because he was unable to swallow without choking. Because of the pain involved in giving him injections these were done by means of an intravenous drip. Without elaborating thereon it is

apparent F that by 11 September 1974 he was in a critical state of ill-health and suffering pain. A State witness, Dr. Harrison, Associate Professor of Anaesthetics at the University of Cape Town, stated that, having regard to the description contained in the accused's statement to the police of the deceased's condition on that day, he was moribund and that he must have G been close to death. The accused instructed Nursing Sister MacHill on duty in the hospital at Ceres on the evening of 11 September to give deceased an injection of 1/2 gr. of morphine, which she did with some reluctance, thinking that the dose was too large. This was administered at about 7.30 p.m. At approximately 8.30 p.m. the accused obtained from Sister MacHill a further ampule of 1/2 gr. of morphine, and the accused H himself placed this in the drip. The accused remained with the deceased, and at about 11 p.m. obtained 250 mgr. of pentothal from Sister MacHill. Pentothal is not an analgaesic but is used in anaesthesia and unless properly controlled will have fatal effects. He injected the pentothal into the drip and within seconds of his doing so the deceased died.

A post-mortem on the body of the deceased disclosed *inter alia* that the ribs were affected by an extensive metastatic tumor infiltrate. Both lungs showed hypostatic pneumonia and consolidation. Dr. Bunge, who conducted

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the examination, stated that, if regard were to be had to his clinical findings alone, he would have concluded that the deceased had died because of the spread of cancer combined with general debility and pneumonia. However, blood samples which A were taken from the deceased showed that penthobarbitone was found to be present in the liver and the blood. This substance derives from pentothal. This witness testified that, in the light of this finding, taken in conjunction with the contents of the accused's statement to the police - briefly summarised in what is set out above - he was of the opinion that the immediate cause of the deceased's death was the B administration by the accused to deceased of the 250 mgr. of pentothal. This opinion is confirmed by Dr. Harrison, who stated that the dose administered was more than sufficient to have resulted in the death of the deceased, more especially when this occurred after two heavy doses of morphine (1 gr. in all) had been given to the patient within the last three hours.

As has already been stated, none of the above evidence is C controverted and it can only lead to one conclusion, viz. that the accused performed an act, that is, the injection of the pentothal into the drip connected to the deceased's body, that this act was unlawful, and that it led directly to the death of the deceased within a matter of seconds. It is beyond doubt that, in acting as he did, the accused did not desire to end D his father's life. The motive for his action was a compassionate one, viz., to relieve his father of the further endurance of pain and the continuation of the pitiable condition in which he then was. Nevertheless to achieve such relief he was prepared to do an act which he was aware would inevitably terminate his father's life. He therefore clearly E entertained that intention which is an essential ingredient of the crime with which he is charged.

It is true that the deceased was in a dying condition when this dose of pentothal was administered and that there is evidence that he may very well have died as little as a few hours later. But the law is clear that it nonetheless constitutes the crime of murder even if all that an accused has done is to hasten the F death of a human being who was due to die in any event. See *R. v Makali*, 1950 (1) SA 340 (N). Here the State has proved that but for the accused's action the deceased would not have died when he did. That such action, if wilfully undertaken, constitutes murder is also the law of England, as appears from a number of decisions in the English Court, cited by Hart and Honoré in their work *Causation in the Law* at pp. 307 - 8.

There is some suggestion in the accused's statement to the G police that he asked his father whether he wanted to sleep and that his father vaguely nodded his head in approval. I do not know whether this portion of the statement is intended to indicate that the deceased desired to have administered to him some drug permanently to end his suffering. It seems highly doubtful that the deceased was at that stage able to appreciate H what he was being asked, or that he was sufficiently rational to signify his assent to the

administration of such a drug, or even whether he in fact did so when he nodded his head. Be that as it may, it would not constitute a defence to the charge that the deceased had consented to the administration of pentothal. It has more than once been held in the Appellate Division that the fact that the deceased wished to be killed does not exclude the criminal responsibility of him who gratifies the deceased's wish. See, for instance, *S.* v *Peverett*, 1940 AD 213, and *S.* v *Robinson and Others*, 1968 (1) SA 666 (AD).

The accused's action in this case falls into the category of what is

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popularly known as "mercy-killing." The attitude of the law towards such actions has long been the subject of public debate - sometimes heated. It is thought by some that the law as stated above is unfeeling and harsh, more particularly with A reference to the medical man who in the course of his profession is sometimes exposed to the lonely dilemma of whether or not actively to assist or refrain from preventing his already doomed and suffering patient's demise. The law as stated above is to the best of our knowledge substantially similar in all western countries. Attempts have been made to have it legislatively altered, more particularly in the United Kingdom and certain of the American States. All these attempts B have foundered. There are undoubtedly strongly held views both religious and sectarian that to allow mercy-killing even when hedged about with innumerable safeguards would pave the way for abuses which would be damaging to the community. Our only reason for referring to these circumstances is to emphasise that the change in the law lies solely within the C competence of the Legislature. The Courts, in appropriate circumstances, can mitigate but they cannot legislate.

For the aforegoing reasons we accordingly find the accused guilty as charged.

It now becomes the duty of the Court to decide whether the accused has on a balance of probability established the D presence in this case of factors mitigating his crime. What the Court is required to do in this regard is well set out by RUMPFF, C.J., in the case of *S.* v *Babada*, 1964 (1) SA 26 (AD) at p. 27. He deals with the Court's duty in the following terms:

> "Die Wetgewer het dus op die Verhoorhof die plig gelê, indien 'n beskuldigde aan moord skuldig bevind word, om vas te stel, eerstens, of daar omstandighede is wat betrekking kon gehad het E op die geestesvermoëns of gemoed van die beskuldigde; tweedens, om te oordeel of sodanige omstandighede die beskuldigde wel beïnvloed het, en, derdens, om te oordeel of die beïnvloeding van so 'n aard was dat die beskuldigde se daad, volgens die mening van die Verhoorhof, daardeur minder laakbaar beskou word sodat die Regter nie verplig hoef te wees om die doodstraf op te lê nie."

I turn then to consider what factors affected the accused's F mind in the perpetration of the crime of which he has been found guilty and to determine whether these factors make this crime less reprehensible than it would have been but for these factors. It is to be noted that it is agreed between the State and the defence that there are certain mitigating factors present in this case and that they do indeed render the crime G considerably less reprehensible.

It is common cause that the accused was very close to his father and that they had many ideas and interests in common. The accused's interest in and concern for his father's health is amply demonstrated by his visits to his father while he was still in Pretoria and his action in having his father removed to the Ceres Hospital where he could be in constant attendance upon and treat him, which he did up until the time of his H death. This relationship was strengthened by his being a witness to his father's suffering. It would appear from the medical evidence that his treatment of his father while the latter was in the Ceres Hospital was close, correct and compassionate.

There can be little doubt that the stress, referred to by Dr. Elliott, experienced by a medical adviser when a patient of his is in the terminal stages of a highly unpleasant and painful illness was greatly heightened in the present case because of the father and son relationship between patient

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and doctor. Sister MacHill's evidence graphically illustrates how the accused was affected by his father's situation on the day on which the accused administered the fatal drug to him. The evidence shows that by the time the deceased was admitted to the Ceres Hospital all hope of a cure had vanished.

A It has been well established that the deceased was then suffering from a fatal condition, the course of which was coming close to its end. This stage of his disease is associated with severe and continuous pain requiring frequent administration of potent pain-killing drugs. An examination of the patient's report sheets for the period of his stay in the B Ceres Hospital disclose an almost daily complaint by the patient in regard to the severe pain he was suffering. The general picture of such a patient is one of extreme misery due to bodily wasting and entire dependence upon his attendants for his essential and even his simplest needs. There comes a time when the patient's quality of life becomes meaningless to C himself through the misery of his pain and physical debility, which results from the effects of the potent drugs used to free him of it.

The evidence presented suggests strongly that the deceased in this case had reached this stage. Dr. Harrison described him as moribund on 11 September and stated that it could well be that, while there was no certainty about the matter, he had but a few D hours to live.

At this stage the patient presented a problem to his medical attendant which brings about a conflict in ethical principles, namely to save life and to relieve pain and suffering. The magnitude of this conflict varies naturally with the circumstances of each case. In this instance the evidence weighs heavily towards a major conflict owing to the E relationship and close affection between the accused who was the medical attendant and the deceased. Such a conflict can be sufficient temporarily to cloud the judgment of the medical practitioner and allow emotional factors to override orthodox medical behaviour. This appears to have been so in this case.

It is not questioned by the State that the accused was motivated in his actions solely by what he considered to be in F the best interests of his father. When he acted as he did he was well aware of the fact that he was breaking the law. Despite this, as he said to Sister MacHill, he was at peace with his conscience. The criticism of his conduct by the State was that his compassion knew no legal bounds.

These then are the principal mitigating factors present in this case, and it is clear that they all influenced the accused in his conduct.

G What then is the appropriate punishment in such circumstances?

Mr. *Kahn* in an eminently fair address on behalf of the State submitted that, in sentencing the accused, the Court should have regard to the interests of society as well as to the personal mitigating factors present in this case. He rightly H pointed out that mercy-killing was not countenanced in this or other Western countries. He argued that by the nature of its sentence this Court should clearly convey its disapproval of acts performed to achieve that end. The imposition of too light a sentence might, to the detriment of the safety of hospital patients, encourage others to act in the same manner as had the accused. He stressed the danger to society inherent in the practice of euthanasia and the opportunities it would afford to unscrupulous persons to further their own interests. He conceded that it was inevitable that the Medical Council would take disciplinary action against the accused and that this was a factor to which this Court could have regard in determining the

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appropriate punishment. In view of the uncertainty as to what action this body would take against the accused he submitted that it would be preferable for this Court to postpone passing sentence until the accused had been dealt with by that body. It is however of interest to note that in terms of sec. 41 of the Medical, Dental and Pharmacy Act, 13 of 1928, the Legislature A has decreed that when a charge against a doctor forms the subject of criminal procedure an enquiry before the Medical Council may be postponed until the criminal proceedings against the doctor concerned have been concluded in the Courts. It would seem thus that the ball is in this Court. It would in any event, apart from this provision, be inappropriate for this B Court to postpone the passing of sentence as suggested. By virtue of the provisions of the law this Court is seized with the duty to determine the guilt of the accused and thereafter to exact due punishment commensurate with the guilt so determined. It cannot defer the exercise of this function until another body has decided what action to take against the C accused - a decision which might be taken with regard to factors which do not concern this Court. Furthermore an indefinite postponement of sentence would be unfair to the accused.

Punishment serves the public interest in the sense of discouraging a repetition of the offence by the offender and in the prevention of the perpetration of like offences by others. The circumstances of this case are so unique that it can be D accepted that the chances of the accused repeating his offence are negligible. In how far is there a deterrent necessary to prevent other medical men from taking similar action in respect to patients who are their close relatives or to their patients generally? Regard being had to the known commitment of the members of that profession to preserve life I would think that E such a deterrent has not a great role to play. It follows that the consideration relative to the protection of society is of very much less importance in the determination of the appropriate punishment in this case than it would be in regard to most other crimes.

I am reminded in this context of the precept contained in the judgment of HOLMES, J.A., in the case of *S.* v *V.*, 1972 (3) SA 611 (AD) at p. 614, to the effect that:

> "Punishment should fit the criminal as well as the crime, be F fair to the accused and to society and be blended with a measure of mercy."

This is a case, if ever there was one, in which, without having to be unfair to society, full measure can be given to the element of mercy.

This is a case which in my view calls for a total suspension of the sentence. This however cannot be achieved in law and G accordingly the accused is sentenced to a term of imprisonment of one year. The accused will be detained until the rising of the Court and the balance of the sentence is suspended for one year on condition that he does not during that period commit an offence involving the intentional infliction of bodily injury.

H Accused's Attorney: *Syfret, Godlonton & Low*.
