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CASE NO. 351/86
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

KOOS ALBERTUS SAMPSON APPELLANT

and

THE STATE RESPONDENT

CORAM: HOEXTER, NESTADT JJA et STEYN AJA

HEARD: 2 MARCH 1986

DELIVERED: 13 MARCH 1987

J U D G M E N T

NESTADT JA:/.....

NESTADT, JA:

Appellant, a coloured youth, was convicted in the Cape Provincial Division on two counts of murder. Despite a finding, in each case, of extenuating circumstances, he was sentenced to death on both of them. With the leave of the trial judge he appeals now against such sentences.

The crimes were committed within about 15 - 30 minutes of each other on the night of Friday, 25 October 1985 in Lambert's Bay in the district of Clanwilliam. A summary of the circumstances in which they took place is the following. At about 9 pm appellant's first victim, Cathleen Kamfer, a 19 year old cousin of appellant,

arrived at his house from where she lived next door. She wished to speak, not to appellant (with whom she was on bad terms) but to someone else there. On becoming aware of her presence, appellant told her to leave. She refused to do so. An argument developed between them. Appellant took hold of her so as to lead or push her off the premises. They grappled with each other. At one stage appellant attempted to force Cathleen's head into a drum of burning coals which stood in the yard. He then got hold of part of a bed-post, consisting of an iron bar or pipe, with which he struck her in the region of the head and shoulders. She attempted to escape but fell just inside the kitchen. Appellant continued his attack on her with his weapon.

Standing/ .....

Standing over her he rained down blows on the unfortunate woman. Altogether he hit her about 15 times. It was in this manner that she was killed. According to the post-mortem report, the cause of death was brain damage. Her skull was fractured; indeed it was shattered.

Leaving her where she lay appellant then ran off. Before doing so, however, having by this time either lost or discarded the iron bar, he armed himself with an axe which he picked up in the yard of the premises. Why he did this was never explained. He proceeded down a road in the area. A short distance away, in the open veld, he met a man whom he knew, called Hendrik van Wyk. This person (described in the evidence as an "ou man" but whose age is given in the post-mortem report as about 25) was

obviously/ .....

obviously and heavily under the influence of liquor. The alcohol content of his blood was 0,31 grams per 100 ml. He turned out to be the second person that appellant killed that fateful evening. It is not altogether clear what happened between them but, according to the findings of the trial court (consisting of Lategan J, and assessors), appellant asked him for a cigarette. This, for some reason, led to him insulting appellant who then attacked him with the axe. As he repeatedly struck van Wyk he was heard to say "Times, kom kyk hoe kap ek hom vrek". Appellant's evidence that he had initially acted in self-defence, seeing that van Wyk had made as if he was going to stab appellant with some "seer-maak ding" which he thought van Wyk had, was rejected.

Correctly,/.....

Correctly, in my view, this finding was not challenged. The multiple injuries that appellant inflicted on van Wyk were fearsome. His head and face were mutilated by an estimated 18 blows. The cause of death was shock and loss of blood.

This was not the end of appellant's rampage that night. He was involved in two other incidents. These were the subject of two further counts on which he was found guilty. A certain Pieter Kamfer had witnessed part of the attack on van Wyk. Being afraid, he began to move off. Appellant, on noticing him, called him. The words he used were "Pieter my bla" meaning "Pieter my friend (or brother)". However, appellant's feelings towards him were, in truth, inexplicably hostile because

immediately thereafter he chased after Pieter and attempted to strike him with the axe. As he did so, he screamed "Ek kap julle almal vrek". Pieter managed to run away and escape unhurt. In respect of this conduct appellant was convicted of attempted murder and sentenced to two years imprisonment. The remaining conviction was one of malicious damage to property (on which he was sentenced to six months imprisonment). After his clash with Pieter, appellant went to the nearby house of Martha van Wyk in order to speak to her son. When informed he was not there (and according to appellant, because he was told to "voertsek") he smashed a number of her windows with the axe. This was about 10 pm. He was arrested about half a hour later.

As I have said, in respect of both convictions of murder, (i e of Cathleen Kamfer and Hendrik van Wyk), extenuating circumstances were found. Three factors were in this regard held to have been established by appellant. One was that he suffered from a psychopathic personality. A psychiatrist, Dr M B Magner, had testified on behalf of appellant to this effect. He had examined appellant at Valkenburg Hospital after appellant's referral there for observation by a magistrate in terms of sec 79 of the Criminal Procedure Act 51 of 1977. In support of the application of this section there was evidence by appellant's parents that though of normal intelligence (he had reached Std 9) appellant had always been a tense, restless person who behaved aggressively if he did not

get his way; when he became angry he would do "enige iets; nie soos 'n normale mens nie". According to Dr Magner the psychopathic traits which appellant exhibited were: (i) a lack of emotional rapport; he was an aloof, indifferent sort of person whose relationships with other people were superficial; (ii) a tendency to respond aggressively in situations of provocation or frustration "without due concern for the well being of other people"; (iii) a lesser capacity to control his behaviour than the average person; he was impulsive. Appellant's psychopathic condition was of "quite a high degree... quite close to certification"; it was a "serious psychopathic personality". It explained his attack on Cathleen; he would have felt provoked and threatened by her.

A second/ .....

A second factor held to be extenuating was the liquor that appellant had drunk on the evening in question. This, so it would seem, consisted of some beer and brandy (though appellant confines it to the former). A sample of his blood drawn at 10:45 pm contained 0,12 grams of alcohol per 100 ml. Lategan J, with justification, categorised this as "n baie matige hoeveelheid alkohol". What evidence there was on the point, was that appellant was not drunk or (on his arrest) even under the influence of liquor. Appellant himself admitted that, in acting as he did, he knew what he was doing. However, on the strength of Dr Magner's evidence, it was, correctly in my view, taken into account. In the opinion of the psychiatrist it was

a "significant/.....

a "significant feature" particularly in relation to the assault on van Wyk. Whilst this was "a somewhat purposeless, meaningless (one) with minimal provocation", which was prima facie "difficult to explain", the influence of the alcohol rendered appellant more likely to have acted aggressively and less able to control himself; "the second killing probably wouldn't have occurred if he had been sober. I think he probably would have stopped after the first assault".

Thirdly, account was taken of appellant's youth. He was born on 24 October 1966. This made him aged 19 years the day before the murders. In the words of the learned trial judge:

> "Dit bly egter 'n feit dat 'n mens van 19 jaar oud soos jy toe was heelwaarskynlik nie dieselfde rype oordeelsvermoë het as die wat 'n man het wat aansienlik ouer is nie."

The result was a finding of extenuating circumstances in the following terms:

> "Ons is van oordeel dat jou karaktergebreke tot die mate waartoe jy 'n vasgelegde onvermoë in jou aard het om frustrasie te kan weerstaan en verantwoordelik optree, 'n faktor is wat as strafversagting behoort te dien. Ons is ook tevrede dat vanweë jou jeugdigheid en die bewese invloed wat die matige inname van drank op jou gehad het ten tye van die pleging van die misdryf, saam met hierdie eersgenoemde faktor, as strafversagting kan dien. Ons bevind dan dat daar by jou versagtende omstandighede is."

The one consideration which impelled Lategan J in, nevertheless, exercising his discretion (in terms of sec 277 (2) of Act 51 of 1977) to impose the death sentence was the extreme danger that appellant posed to society. The learned judge expressed himself in this regard as follows:

> "In my oordeel is jy dus aan die einde van die dag so 'n gevaarlike mens dat ek dink ek my plig sal versaak as ek jou weer op die gemeenskap gaan loslaat."

This view was based not only on what was held to be Dr Magner's opinion to this effect (as substantiated by the violent nature of the crimes themselves) but also on appellant's previous convictions. Two were for assault with intent to do grievous bodily harm (involving the use of a knife, and in the one case a brick as well) and one for common assault. They were committed between December 1984 and August 1985. In each case juvenile strokes were imposed. The circumstances of the one conviction for assault with intent were, as the learned judge observed, that appellant had ambushed and then stabbed a former friend in revenge for a previous quarrel they had had. This was the evidence of a Miss Beukes, a social welfare officer who was called by appellant in mitigation of sentence. She said that

appellant had admitted these facts to her.

The other factor, crucial to the sentences imposed, was the finding that:

> "Al is jy jonk is ek veral uit hoofde van die getuienis van dokter Magner oortuig dat selfs langtermyn gevangenisstraf nie die antwoord is vir 'n probleem soos jy nie."

The evidence in question was, according to the learned judge, the following:

> "Dokter Magner getuig dat daar reeds aan jou persoonlikheid gestalte gegee is, dat die gebreke in jou persoonlikheid reeds 'n vaste patroon aangeneem het en dat die waarskynlikhede baie min is dat dit ooit omkeerbaar sal wees."

In the result, appellant's youth was virtually discounted. By reason of his psychopathic characteristics, he had acted, so it was held, from inner vice or wickedness within the meaning of S v Lehnberg en 'n Ander 1975(4) S A 553(A).

Accordingly/ .....

Accordingly, in the words of Lategan J:

> "(I)n my oordeel (het) die feit van jou jeugdigheid op 19 jaar dus nie veel te doen met versagting nie omdat dit wesenlik nie vreeslik verskil maak met jou persoonlikheid of jy 19 jaar of 25 jaar sou wees volgens dokter Magner nie. Jy sou nog altyd dieselfde soort van lewensbenadering gehad het, of benadering teenoor 'n krisissituasie."

Before us, Mr Marlow, for appellant, submitted that in respect of neither murder should the death sentence have been imposed and that there should be substituted (lengthy) terms of imprisonment. In considering the argument of counsel (to whom we are indebted for his pro Deo appearance) it is necessary to bear the following principles in mind (relevant to the discretionary exercise of the death sentence). What had to be decided by the trial court was (as Holmes JA observed in S v Letsolo 1970(3) S A 476(A)

at 476 fin - 477A:

> "whether it would be appropriate to take the drastically extreme step of ordering him to forfeit his life; or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence."

Such alternative would, of course, include a (long) term of imprisonment. However, the possibility of an accused being rehabilitated by the latter form of punishment does not make it the only appropriate sentence or the imposition of the death penalty improper. Such an approach would unduly limit the discretion of the trial court (S v Sithole en Andere 1983(3) S A 610(A) at 615 B - D; S v Tshomi en 'n Ander 1983(3) S A 662(A) at 667 C - D). Nevertheless, the broad principle remains that the death penalty should only be resorted to where, having regard to all the relevant

considerations, it is the only appropriate sentence to be imposed (S v Bapela and Another 1985(1) S A 236(A) at 245 B). On appeal the competence to interfere with the death sentence imposed by the trial judge in the exercise of his discretion is restricted. The issue is not whether the Appellate Division would have imposed it, but whether the trial judge failed to properly exercise his discretion in doing so. Such a conclusion would be justified where, for example, he misdirected himself (S v Pietersen 1973(1) S A 148(A) at 152 C; S v Lekaota 1978(4) S A 684(A) at 689 B) or because the sentence was one which no reasonable court would have imposed (S v M 1976(3) S A 644(A) at 649 fin). But the so called striking disparity test is ordinarily not appropriate (S v Ntuli 1978(1) S A 523(A) at 527 D).

That/.....

That this was a case where serious consideration had to be given to the imposition of the death sentence cannot be gainsaid. It is plain that the crimes committed were of a most serious nature. Appellant murdered two defenceless people in a particularly brutal and callous manner. He obviously acted with dolus directus. His attacks on them were largely unprovoked. Moreover, no fault can be found with the trial judge's classification of appellant, consequent upon his psychopathic personality, as an extremely dangerous person whose removal from society was required. Of course, this approach could be said to be in conflict with that adopted when extenuating circumstances were being dealt with. Then, it was held that appellant's

psychopathy rendered him less blameworthy. Having regard to the serious nature of his disorder and its direct connection with the crimes committed, this was a justifiable finding (S v Pieterse 1982(3) S A 678(A)). For the purpose of sentence, however, it was regarded as aggravating and indeed as the main reason for the imposition of the death sentences. In principle, this is understandable. Whereas at the stage of considering extenuation the court was concerned with factors subjective to appellant, when it came to sentencing, the wider interests of the community had to be taken into account.

To revert to the issue that faced the trial judge, the question was whether the stated aim of protecting society was to be accomplished by the ultimate penalty or

by means of a lengthy period of imprisonment. Inherent in the approach of Lategan J was that it depended on appellant's prospects of rehabilitation. These, it was, in effect, held, were so slim as to exclude imprisonment as an appropriate alternative punishment. As I have indicated, this view was purportedly based on Dr Magner's evidence. It seems to me, however, and Mr Stowe, for the State, with commendable candour conceded as much, that the opinions he expressed were somewhat misconstrued or at least not given sufficient weight by the learned judge. It is necessary to quote them at some length. The doctor said:

> "(T)his sort of personality requires a prolonged period of attention wherever he goes. It's extremely difficult to treat... (W)hatever

attention/ .....

attention he is given, should be given over a prolonged period of time... I feel, in fact the panel felt quite strongly that he in fact should be removed for a considerable time from society because this sort of disorder just doesn't disappear ... With the present facilities that we have, I do not believe it is a curable disorder. Having said that, some cases over time, we use the term 'burn out' to a degree. They soften, become less aggressive, they find themselves a little corner in society where they're not really troublesome anymore. Some of them do, a small number, perhaps a third, the rest remain psychopathic for the rest of their days so it's not a treatable disorder as we have for mental illnesses. It's not something we can give a drug or thing to. The treatment programmes that are available to some degree help them adjust, help the sort of personality adjust. I'm not sure of the success rate of the treatment programmes myself. I find it a particularly intractable disorder.

What are the chances of him committing further crimes? ... (I)t is a difficult question to answer. The question of youth, if I can address that first. At this particular age there's a fairly well-formed personality. There is still time for the personality to change and adjust in the next five to seven years but the personality patterns are already well-established in this particular individual. I would - it's very difficult. A lot depends on the programmes

that are offered, how intensive they are and the success rates of the programmes that are used. We do not have that programme. I believe the Prison Services have some programmes but to my mind one is talking about periods of 10, 15 years of intensive working to effect some sort of possibility of a changed individual who may not be such a serious hazard to the community. That would be the sort of time that I would be looking at from my aspect but again, it's a difficult question and I don't think there's any categoric answer. There may be 15 years and comes out exactly the same. I cannot predict that. Would you say that his youth ... had any bearing on his ability to pass judgment in a certain given situation? To decide whether he should strike or not strike? You have seen him, you've observed him for a time. ... You know, he does behave in a fairly mature manner in the confines of observation. But then a person of 18 is fairly mature but not fully mature, so I think it must be considered as a factor. If he was just 18, one would expect that by the time he reaches 25, he will be fully mature and then he is as adult as he's ever going to be and he's not quite 25 yet and I would say it plays a small role but not a major role."

Clearly, then, the prognosis advanced by the psychiatrist was not a good one (in the sense that he was

not/ .....

not confident of appellant's psychopathy being curable). At the same time, however, he did not exclude the reasonable prospect of this happening or at least of the condition being alleviated. The finding that his evidence supported the conclusion that "selfs langtermyn gevangenisstraf nie die antwoord is vir 'n probleem soos jy nie" was therefore not warranted and constituted a misdirection. It should have been held that the real possibility existed that treatment in prison (which, it would seem, is available) would rid appellant of his psychopathic disposition to violent outbursts or at least substantially curb it. It must be borne in mind that the enquiry was not whether it was certain that appellant would not commit further crimes of violence should he not be condemned to death; what

had to be assessed was the degree of risk of this happening after a long period of imprisonment (S v Vaaltyn 1984(3) S A 524(A) at 526 G - I).

Another, allied, respect in which the judgment on sentence is open to criticism is that, contrary to the approach adopted when extenuation was being considered, it fails to regard appellant's youth as a factor in his favour. This will be apparent from a comparison of the relevant passages in the two judgments (which have been quoted). In my opinion it constituted a definite mitigating circumstance. Dr Magner's evidence was that he considered that appellant's youth played a role, albeit a small one, in his behavioural pattern; he was not fully mature. Miss Beukes was asked about his maturity. She said:

"En/.....

> "En dan sien ek hom as 'n volwassene volgens sy ouderdom. Maar sy totale persoonlikheid sien ek hom nog as 'n jeugdige. U bedoel daarmee dat hy nog nie 'n volslae gevormde persoonlikheid het nie? ... Dis korrek. Ek sien dit so dat hy het in 'n beskermde atmosfeer groot geraak. Hy het nog nooit besluite vir homself geneem nie, want sy ouers was nog altyd daar om vir hom dinge te besluit. En hy het nog verlede jaar skoolgegaan. So, hy was nog 'n leerling, 'n kind in die sin."

And, of course, the principle is that:

> "In cases where it (the death sentence) is not statutorily mandatory, it should rarely, if ever, be resorted to in the case of a youngster, if a long period of imprisonment, involving properly directed discipline and training, might well result in reformation."

(per Holmes JA in S v V 1972(3) S A 611(A) at 614 F).

To sum up, appellant was wrongly sentenced on the basis that he was, in substance, a mature adult whose violent character was not amenable to treatment. It follows that the trial court did not exercise its

discretion in a proper manner so that we are at large to consider the question of sentence afresh. The matter is not an easy one. It is a borderline case as to whether the death sentence, more particularly in relation to the murder of van Wyk, should be imposed. However, on a conspectus of all the circumstances (including the fact that neither murder was planned) I have come to the conclusion that imprisonment for life, though an unusual sentence, is the appropriate one in casu. It not only satisfies the deterrent and punitive aspects of punishment but has regard, in relation to the reformative aspect, to Dr Magner's inability to forecast with any precision what period of treatment will be required for appellant's hoped-for rehabilitation. The risk of this not being achieved

and appellant, if and when he is released, committing further crimes of violence, is one worth taking and is, moreover, outweighed by the consideration that the life of appeellant is being spared.

One final observation. We are not unmindful of the threat that appellant may present to the safety of his fellow-prisoners. No doubt the prison authorities will take appropriate steps to obviate this occurring.

The appeal succeeds. The sentences of death are set aside. There is substituted, on each of the convictions of murder, a sentence of life imprisonment. These are to run concurrently. The sentences of two years and six months imprisonment referred to earlier are also to run concurrently with such life imprisonment.

H H NESTADT, JA

HOEXTER, JA)
) CONCUR
STEYN, AJA)