

14/87

EDWARD ENGELBRECHT

APPELLANT

and

THE STATE

RESPONDENT

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

EDWARD ENGELBRECHT

APPELLANT

and

THE STATE

RESPONDENT

CORAM: VILJOEN, SMALBERGER JJA et KUMLEBEN AJA

HEARD: 9 MARCH 1987

DELIVERED: 25 MARCH 1987

J U D G M E N T

KUMLEBEN, AJA:

The appellant was one of three accused

who/

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CORAM: VILJOEN, SMALBERGER JJA et KUMLEBEN AJA

HEARD: 9 MARCH 1987

DELIVERED: 24 MARCH 1987

J U D G M E N T

KUMLEBEN, AJA:

The appellant was one of three accused

who/

who stood trial in the Cape of Good Hope Provincial Division on 5 counts: housebreaking with intent to steal and theft; murder; robbery; and two counts of attempted murder. He was convicted on the first two counts and on one count of attempted murder. On the murder charge the death penalty was imposed, the court having found no extenuating circumstances. The appeal, leave having been granted by the court a quo, is directed solely at that finding.

The charges were based on what took place in Parow on the night of 29/30 March 1983. On the morning of 29 March 1983 the appellant and the two accused (who were accused Nos 1 and 3 at the trial), Grenville van Wyk and Andrew Basson, alias Kimberley, were present at the home of one John Pietersen, who was also there

They/.....

They started smoking Mandrax mixed with dagga. At a certain stage during the course of the morning it was decided that Kimberley, appellant, and the two accused would that night break into premises and steal. Pietersen, who was apparently the person who initiated this plan and chose the participants, discussed the details with them. It was arranged that van Wyk would take them by car to a shop known as "711 Superette" situated in Fifth Avenue, Parow where they were to break in and steal. At about midnight or soon after those who were sleeping were awakened and they set forth. Van Wyk drove the four of them to the shop. On route Kimberley produced a firearm and said that he would shoot any "boer" who disturbed them.

Van/

Van Wyk dropped them off not far from the shop and

left. Their attempt at breaking in was unsuccessful.

They proceeded to the club house of the Parow North Golf

Course but again failed to gain entry.

Their third target was the "Superette 711"

in Haydn Street, Parow. There Kimberley, accused No 1

and another, either appellant or No 3 accused, entered

the store whilst the fourth man remained outside to

keep watch. Unbeknown to the intruders, in breaking

in they had triggered off an alarm. This led to W/O

van Dyk and Cons van Wyk arriving in a patrol car at the

scene at about 4 am. By this time goods and money had

been removed from the shop. The policemen entered

with pistols drawn and initially noticed two persons

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in the shop. They turned out to be Kimberley and

accused No 1. When the police accosted them, Kimberley

fired a shot at van Wyk which instantly killed him.

Van Dyk had not released the safety catch of his pistol

and this prevented him from returning the fire. As

he fled he was shot by Kimberley in the thigh. Outside

the shop, after Kimberley had emerged from it, van Dyk

and Kimberley exchanged shots as the latter ran away.

In the meantime accused No 1 had taken possession of

van Wyk's pistol. He emerged from the shop at about

the same time that the flying squad van, driven by

Sgt Truter, arrived. Accused No 1 fired at it

with the deceased's firearm. A police dog was re-

leased from it and this led to his arrest. Whilst

inside/.....

inside the shop van Dyk clearly saw the movement of a third person also involved in committing the offence but was unable to identify him. This person and the watchman, that is to say, appellant and accused No 3, made good their escape.

In the case of the appellant it was short-lived. At about 5:40 am he was detected and arrested as he walked along the national road between Cape Town and Paarl. He was brought back to the shop and, after being briefly interviewed by Capt Britz, was taken to a magistrate as he was prepared at that stage to make a statement. He later changed his mind. He did, however, make one to Capt Britz that afternoon at the Bishop Lavis Police Station. At the trial its

admissibility/

admissibility was contested. After evidence had been adduced on this issue during a "trial-within-a-trial", it was ruled admissible and received in evidence as exhibit N.

The foregoing summary is based upon facts which were common cause, admitted or reliably proved by the State witnesses.

In its judgment on the merits the court held inter alia that the appellant was a willing and active participant in a planned robbery; that he knew that Kimberley was armed with a pistol; and that he realised that there was an inherent risk that he would use it, perhaps with fatal consequences, should the need arise. Thus, applying the doctrine of common

purpose,/.....

purpose, appellant was found guilty of murder.

After conviction the appellant testified briefly in extenuation. His evidence aimed at proving that he was under the influence of Mandrax and dagga at the time the offences were committed. The court on the question whether extenuating circumstances were present in the case of appellant said:

"He was born on 7 February 1962 and was thus 21 years of age at the relevant time. Although the probabilities are that he was in the shop at the time of the shooting we have decided that we should approach the present enquiry on the same basis as we did in the main judgment, namely that he was keeping watch outside and ran away when the police came. We do not think that his role as watchman outside diminishes his moral blameworthiness as compared to that of number 1 who was in

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the shop. On a moral basis they both equally participated in the setting of the scene which carried the risk of killing an innocent policeman. He is somewhat younger than number 1 and this we have considered. He gave evidence in mitigation and again lied about his own condition. He was totally unimpressive and unacceptable as a witness. He has obviously exaggerated the extent to which he might have been affected by dagga and mandrax. It is true, as argued by Mr De Kock on his behalf, that there are degrees of immaturity, but in our judgment of number 2 he is an adult with adequate maturity to bear the full moral responsibility of his actions. The whole long saga of that early morning shows only too clearly that all the accused had their wits about them. After all this was the third place they visited for the purposes of breaking into and stealing.

Much of what I have said in relation to number 1 applies equally to number 2, apart of course from the somewhat different roles they played in the operation. We have

carefully/.....

carefully considered the totality of the circumstances relating to number 2 and we are unanimously of the opinion that in his case, too, there are no extenuating circumstances."

Before us Mr Laubscher, who appeared for the appellant, submitted that this conclusion was wrong, and that the court ought to have found that the moral blameworthiness of the appellant was reduced, for one or more of the following reasons:

(i) The appellant was, or might have been, the

watchman in which event he played a "less
associative role".

(ii) The fact that the firearm was not used during

the two abortive attempts at breaking in would,
or could, have led the appellant to believe that

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the likelihood of it being used at all had

diminished.

(iii) Appellant's mental condition was adversely

affected by the dagga and Mandrax he had smoked.

(iv) Appellant did not have the direct or deliberate

intention of killing the deceased.

(v) It was the "evil influence" of Kimberley which

caused him to participate in the crime.

(vi) The "relative youthfulness" and immaturity of

the appellant justified the inference that his

complicity in the offence "was not tainted with

inherent vice."

Although it is the cumulative effect of any
proved extenuating factors which is to be assessed, it

is/

is in the first place necessary to examine each of the alleged grounds singly. In doing so one must bear in mind that the court a quo in the strongest terms, and with ample justification, rejected as false the evidence of the appellant given before conviction and on the question of extenuation. The evidence of the other two accused was likewise held to be untruthful. Thus each of the alleged grounds of extenuation is to be examined in the light of the dependable evidence of State witnesses and any evidence of the appellant which, despite his untruthfulness, can be accepted with assurance.

The trial court found that the evidence proved as a probability that appellant was the third person in the shop but fell short of proving this fact with

certainty./.....

certainty. It therefore assumed in appellant's

favour that he was the watchman. The court never-

theless held this not to be an extenuating factor.

There is much to be said for the view that the evidence

satisfactorily proves that the appellant was the person

in the shop. I however find it unnecessary to go into

this question. I shall also assume that he may have

been the watchman and consider the question of extenuation

on that footing. There are indubitably instances when

an accused's insistence or election to play a minor

part in the commission of an offence would indicate a

reluctance on his part to participate, or to participate

fully, in the commission of an offence. This is not

such a case. I share the view of the court a quo,

expressed/

expressed in the quoted passage from the judgment,
that keeping watch is as vital a form of participation
as any other on the facts of this case. Moreover
other evidence, to which I shall refer in due course,
shows that the appellant throughout played a prominent
rather than a subordinate role and was at all times a
willing participant.

The second point argued, as I understood
it, was that, inasmuch as there was no police or other
intervention during the first two abortive attempts,
by the time they reached the Haydn Street "Superette 711"
appellant would have, or might have, concluded that the
likelihood of Kimberley using the firearm had decreased.
For this reason, so it was submitted, his moral

blameworthiness/.....

blameworthiness was at that stage reduced. I see no merit in this submission. There is simply no reason for concluding that the likelihood of the firearm being used would decrease as suggested or why appellant should have thought so. In his evidence in mitigation appellant did not say that he entertained any such illogical thought. The pertinent fact is that at all times appellant realised that Kimberly would, if necessary, be as good as his word and use the firearm should they meet with resistance.

It is common cause, as I have said, that the appellant did smoke dagga mixed with Mandrax at the home of Pietersen before they set out. The only direct evidence/.....

evidence - such as it is - on how much, when they smoked and when each of them fell asleep is that of the accomplice van Wyk. Although his evidence was found to be substantially truthful, in the nature of things, since he was also a smoker, his evidence in this regard cannot be relied upon. One must rather have regard to the actions of the appellant in deciding whether this submission is sound. The following are relevant:

Appellant was the one who woke up van Wyk and perhaps others by saying "Ja, julle slaap op julle pos."

Appellant, like the others, was quite capable of walking from the first shop to the Golf Club House and then a further distance of 3 to 4 kilometres to the second shop. There at about 4 am they were busy committing

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the offence when the police arrived. Appellant had the presence of mind, ability and agility to flee from them. Not long afterwards, when Sgt Briers arrested him at about 5:40 am, he was walking normally and according to this witness there was nothing to indicate that he was under the influence of the dagga or Mandrax. His evidence in mitigation was intended to substantiate the ground of alleged extenuation. It reads unconvincingly and was rejected. In any event it said no more than that he was "nog aangetas".

Bearing in mind that he bore the onus of proving not only that he smoked dagga and Mandrax, but also the extent to which this affected his powers of judgment and self-restraint, it cannot be said that a

case/

case for extenuation on this ground has been made out.

It is also of importance to point out that the decision to break into the premises appears to have been taken soon after they arrived at Pietersen's home and apparently before the smoking was seriously under way. The appellant therefore certainly did not discharge the onus of proving that when he was a party to the decision to commit these offences his mental condition was anything but normal.

That the intent of an accused is categorised as dolus eventualis does not, in itself, constitute an extenuating circumstance. It depends on the facts of each case. In the present one the possibility that the pistol may have been used with fatal consequences was

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in no way a remote one. Appellant realised that, as part of a planned crime of housebreaking and theft, it was the settled - and expressed - intention of Kimberley to shoot to kill if necessary. There was throughout a very real prospect of him having to do so. Appellant, moreover, knew that Kimberley was a vicious and dangerous character. In his statement to Britz the following question and answer appear:

"Vraag:" Het jy geweet hy het 'n vuurwapen op hom toe julle na die plek toe loop om te gaan inbreek?

Antw: Ja meneer, hy's mos 'wanted' vir nog 'n moord."

In such circumstances the nature of appellant's intent (dolus eventualis) cannot serve as a mitigating factor.

In/

In this regard, and generally on other grounds argued, the following passage quoted from S v Mafela and Another 1980(3) S A 825 (AD) at 828 H to 829 B is pertinent:

"The argument is that, as the Court found that the appellants had only dolus eventualis in respect of the killing, the planned nature of the robbery is not relevant to the question of extenuating circumstances and that consideration of an aggravating factor such as "callousness" is not appropriate. This, however, disregards the fact that the planning of the robbery necessarily involved consideration of the means by which the deceased was to be overpowered; the use of the knife, and the risks to life involved, must have been within the appellants' contemplation. Even in the possible absence of an initial determination to kill, there must at least have been the deliberate acceptance of a plan to put the deceased's life at risk.

Moreover,/.....

Moreover, in the circumstances the matter of 'callousness' is highly material to the appellant's state of mind. It serves to emphasize that, not only in the planning, but also in its execution, there was a deliberate and total disregard of the risk to life involved."

In that decision, the facts of which in many material respects bear a marked similarity to those in this case, the court held that no extenuating circumstances were present.

Mr Laubscher rightly conceded that there was no evidence to support the submission that Kimberley had influenced or persuaded the appellant to participate.

Appellant himself did not state this to be the case either in his statement to Britz or in his evidence in mitigation.

The/

The final submission relied upon was that appellant is "youthful" and "immature" and that this should be regarded as extenuation. The facts convincingly controvert this. Though he was just over 21 years of age at the time, he was anything but immature. According to the witness Lionel Wilson, who was described by the court as an "excellent witness", appellant and Kimberley were seen by him at John Pietersen's house a week or two before the offences were committed. Both of them had firearms in their possession tucked into the waistband of their trousers. They loosened their waistbands to smoke the dagga in greater comfort and the firearms were placed next to them. Thus appellant quite openly, if not brazenly, revealed the fact that he was armed.

Other/

Other evidence makes it plain that he was a regular associate of Kimberley, who was a hardened criminal.

At the time he made his statement to Britz he was conscious of the fact that Kimberley and van Wyk had not been arrested and for this reason he initially only made reference in his statement to accused No 1, whom he knew had been arrested. He only mentioned Kimberley's name when questioned by Britz and was required to explain his inadvertent reference to "hulle". This is not the conduct one would have expected from an immature person in the unaccustomed role of a criminal.

In the result it cannot be said that the court a quo misdirected itself in any respect on the question of extenuating circumstances or that it

failed/.....

failed to exercise a proper judicial discretion in
reaching its decision in this regard.

The appeal is dismissed.

M E Kumleben

M E KUMLEBEN, AJA

VILJOEN, JA	)	
	)	
	)	CONCUR
	)	
SMALBERGER, JA	)	