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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PIET DISTEN Appellant

AND

THE STATE Respondent

CORAM: JOUBERT, JACOBS, JJA et NICHOLAS, AJA

HEARD: 10 September 1987

DELIVERED: 24 September 1987

J U D G M E N T

NICHOLAS, AJA

Extension Inn is an hotel in the coloured area of Upington. It is situated on the east side of

the .....

the Keimoes road. On the west side of the road is a piece of vacant ground, which, though sometimes referred to as a "park", is no more than open veld with a few trees, and grass and stones. One tree stands about 22 metres from the western verge of the Keimoes road. It is about 4 metres high. At a point about 29 metres south of the tree, the road is joined by a footpath, which leads across the veld to Blikkies coloured township.

On the evening of Saturday 1 March 1985 there was a dance at Extension Inn. During the function, a man named Ricardo Clarke was stabbed, and, after it was over, a number of people were assaulted and robbed, and one was murdered.

Arising .....

Arising out of these incidents, three men stood trial at the end of April 1986 before the Orange Circuit Local Division of the Supreme Court sitting at Upington. The court consisted of BASSON J and two assessors. The accused were Petrus Phillips (accused No. 1); Charlton Esterhuizen (accused No. 2); and Piet Disten (accused No. 3). There were seven counts in the indictment.

Piet Disten was acquitted on counts 3 and 4 because of lack of evidence of identification. These counts will not again be referred to. On the other counts he was convicted and sentenced as follows:

Count 1.	Assaulting Ricardo Clarke with intent to do grievous bodily harm	2 years' imprisonment

Count 2 .....

Count 2.	Attempting to murder Patrick Jansen	5 years' imprisonment
Count 5.	Robbing Basie Titus with aggravating circumstances	$2^{1}/2$ years' imprisonment
Count 6.	Robbing Jacobus Booysen with aggravating circumstances	$2^{1}/2$ years' imprisonment
Count 7.	Murdering Jacobus Booysen without extenuating circumstances	Death

The trial judge refused an application by Disten for leave to appeal against the finding on count 7 that there were no extenuating circumstances and against the death sentence, but leave was granted on a petition to the Chief Justice.

The three accused were present at the dance. They were in a group which included Hendrik Tieties (a 16-year old youth and one of the main witnesses for the

State .....

State), and two others. During the evening they smoked dagga, and some of them consumed liquor. There was some evidence that Mandrax was added to the dagga pipe .

Tieties said in evidence that Petrus Phillips (No. 1 accused) smelt of liquor, and was under the influence, but he could still walk and talk properly. Piet Disten (No. 3 accused) was in the same condition. Piet Disten said when giving evidence that he consumed about five glasses of wine and beer. He was affected by the liquor ("die wyn het in my bloed ingewerk en ek het dronk geraak van die wyn"), and by the dagga. At some stage during the evening a friend dropped a Mandrax pill into his wine - "hy het gewerk aan my. Hy het my taamlik dronk gemaak."

In answer to questions by BASSON J, he said that the liquor made him drunk, but that he was not so drunk that he did not know what was going on about him. He could still think properly. He knew what he was doing and could appreciate the difference between right and wrong.

During the dance, a quarrel arose between Ricardo Clarke and one Gerrit Scheepers. They came to grips. Ricardo was getting the better of Scheepers. Disten was unarmed at that stage, but Charlton Esterhuizen handed him an Okapi knife, and Disten stabbed Ricardo with it in the back. Disten said that he would get Ricardo outside after the dance, but when the dance

was .....

was over,Ricardo had left. (This assault was the subject of Count 1.)

The dance finished shortly after midnight. People made their way out of the hotel and across the Keimoes road towards the path leading to Blikkies. A mobile police station unit was parked in the veld near the path, but because there was only one policeman on duty and he could not leave the unit, the police had no influence on the course of the events which followed.

The three accused and some others took up station under the tree. From there they sallied out from time to time to attack passers-by who were on their way home to Blikkies.

Basie .....

Basie Titus, a 22 year old man, was one of them. He was in a group which included his girl-friend, Sarie Olivier; Jacobus Booysen; and Booysen's partner. After the dance they waited a while for transport and then decided to walk home. Near the footpath they were confronted by Phillips and Disten, both of whom had knives. Disten caught Titus by the shoulder, ordering him to stand still. He went through his pockets and took from him two amounts of R32,50 and R1,85 respectively, and Sarie's watch which Titus had in his back pocket. Disten tried to remove Titus's trousers, but Titus knocked away his hand. No. 1 accused stabbed towards his neck, but he ducked and sustained only a scratch. Disten then

stabbed towards Titus's chest, but caused only a superficial injury. Disten and accused No. 1 then turned to Booysen and searched him. Disten tried to drag Booysen to the tree, but Booysen resisted. Accused No. 2 went to Disten's help, and together they dragged Booysen to the tree. Disten took off Booysen's trousers and shoes and gave them to Esterhuizen. Disten stabbed Booysen on the chest. Booysen broke away in the direction of the mobile police station. He did not get far, but collapsed on the ground, and was later removed from the scene by ambulance.

Booysen died as a result of the injuries he sustained. On post mortem examination, the cause of death was established as a stab wound into the aorta.

The robbery of Basie Titus was charged in Count 5; the robbery of Booysen in Count 6; and the murder of Booysen in Count 7.

Another victim was Patrick Jansen, the complainant in Count 2. He was walking in the company of his wife Sarah and three other people. He had just crossed the road, when he saw three men emerge from under the tree and come quickly towards them. Jansen stood his ground. There was a struggle, in the course of which Piet Disten and accused No. 1 stabbed him, one in the chest and the other from behind. The three ran back to the tree. Jansen collapsed unconscious, and he knew nothing more until he woke up the next day in hospital.

When .....

When medically examined he was found to have sustained two stab wounds: one in the armpit, the other in the chest. He was in a critical condition, as a stab wound had punctured the right ventricle and he lost a great deal of blood. His life was saved only by emergency surgery.

In the trial court's judgment on extenuating circumstances, BASSON J referred to three matters as being possibly extenuating: Disten's background; his youth; and the influence of liquor, dagga and Mandrax. The conclusion of the court was that taking all these aspects into account, it could not, with the best will in the world, conclude that the accused's age showed that he was immature: the accused was an adult who lived like an adult

and .....

and wanted to live like an adult. The liquor and the drugs etc had no effect on him that evening: he conducted himself, as he himself said, like a sober person. The court could not in all the circumstances find any extenuation.

I shall deal in turn with each of these three matters.

BACKGROUND CIRCUMSTANCES.

Evidence in this regard was given by Piet Disten's mother, Mrs. Rachel Disten, and by a qualified social worker, Mrs. Van Rooy. Mrs. Disten, it appeared from her evidence, was a simple woman, uneducated and of low intelligence. She had difficulty in understanding

the .....

the questions which were put to her, and in answering them when she did understand. Mrs. Van Rooy had not interviewed Disten. She was in attendance at the trial because the senior public prosecutor had requested a probation officer's report concerning accused No. 2, and she was called by Disten's legal representative because of her general background knowledge. She knew something of the Disten family as a result of the case of Mannetjie Witbooi, who was convicted of murder (also committed at Upington) without extenuating circumstances in 1980. The finding of no extenuating circumstances and the sentence of death were set aside on appeal by this Court: see S v Witbooi 1982(1) SA 30 (A), especially at 34 D-F.

Mrs .....

Mrs Disten said that Piet was born on 25 September 1965. His father left Upington to look for work in Johannesburg when Piet was 5 years old. He never returned to Upington - he was murdered in Johannesburg. The mother was left without support, and had to bring up 8 children with what she could earn from washing and ironing. She was unable to exercise proper supervision over the children. Piet started school, but did not attend for long. He got into bad company and drank and smoked dagga. When his mother remonstrated with him, he said that he would do what she told him, but then did as he pleased. Unable to control him , she approached Welfare, and he was sent to a "verbeteringskool" where

he was kept for $2^{1}/_{2}$ years until February 1985, a month before the date of the crimes of which he was convicted.

Mrs. Van Rooy said that Disten had grown up in unstable family circumstances: the mother was alone responsible for supporting the children and she had to move from place to place in an effort to get suitable accommodation. At one stage they found a lodging at Witbooi's place. (It appears from the report of his appeal, that Mannetjie's stepmother was a Mrs. Hendrik Disten. She might well have been a relative.) Mannetjie was a gangster and his influence on Piet was very strong and very prejudicial. Piet got no recognition from his mother - she could not exercise sufficient supervision

and .....

and control; and he found recognition with the gang, by whom he felt accepted and with whom he felt at home.

BASSON J said in the course of the judgment on extenuating circumstances:

> "Die Hof moet natuurlik ook die beskuldigde se agtergrond in ag neem, maar die beskuldigde se moeder het hier vir ons getuig dat sy het haar bes probeer met die beskuldigde. Sy het in moeilike omstandighede die beskuldigde grootgemaak, maar die beskuldigde het hier van 14/15 meen ek, het sy gesê, het hy al sy eie pad begin volg en alhoewel hy vir haar gesê het hy sal doen soos sy sê, het hy kort daarna net weer anders gedoen. Die beskuldigde het doodeenvoudig sy eie kop gevolg. Dit het genoodsaak dat die beskuldigde na 'n verbeteringskool moes gaan, soos nou deur die Verdediging uitgebring, waar hy ongeveer twee en 'n half jaar was. Hy was net uit die verbeteringskool uit toe kom hy hier in Upington en die aand maak hulle amok kan 'n mens sê."

In my opinion the trial court here adopted a wrong approach.

It appears to have formed the opinion that Disten was of bad character. That opinion was probably correct, but it was irrelevant. What the Court should have considered was whether the accused's bleak and dispiriting background, over which he had no control (such as his disadvantaged childhood, the almost total lack of supervision and good example, and the dire influence of Mannetjie Witbooi) had formed him into the person who committed the murder. By failing to consider this aspect, the trial court failed to consider whether his background was an extenuating circumstance, and so misdirected itself.

It is a matter for comment that the accused's background was not more fully investigated. The trial

Court .....

Court should have been in possession of reliable information in regard to such matters as the accused's stage of maturity, his experience of life, his powers of judgment and his susceptibility to influence by others. Without such information, particularly in the case of a teenager such as the accused, it is difficult to conceive that a trial court can make a proper finding on the life-and-death question of the existence or not of extenuating circumstances. (Cf. S v Van Rooi en Andere, 1976(2) SA 580 (A) at 585 A-B.) At the least the trial judge should have called for a probation officer's report and for evidence from the staff of the reform school. It is not known whether a psychological assessment of Disten could have

been obtained, but it was almost a prerequisite to a proper assessment of his case.

YOUTH.

Disten was born on 25 September 1965, so that he was still a teenager on 1 March 1985, the date of the murder.

In the judgment of the trial court on extenuating circumstances, BASSON J said:

> "Maar die blote feit dat die beskuldigde destyds 19 was, beteken nie dat hy onvolwasse is nie. Die Hof moet dit ook oorweeg. Beskuldigde verskyn nou voor die Hof. Hy is nou 'n jaar ouer, maar daar is by die Hof geen twyfel dat die beskuldigde soos hy vandag hier voor die Hof staan 'n volwassene is nie. Om vir die beskuldigde vandag nog as 'n kind te behandel sal die

> grootste fout van 'n mens se lewe wees, die beskuldigde is nie meer 'n kind nie, hy is 'n volwassene, hy kom en gaan soos hy wil, hy doen soos hy wil, hy neem sy eie besluite, hy is nie meer 'n kind wat vatbaar is vir dissipline van 'n ouer en dié soort mense nie."

Here the trial court seriously misdirected itself. The fact that Disten was a teenager at the date of the crime shows prima facie that he was immature. (See S v Lehnberg en 'n Ander, 1975(4) SA 553 (A) at 561.) Whether he was mature at the date of the trial (April 1986) (a matter on which BASSON J laid emphasis) was irrelevant: what was important was his level of maturity at the date of the crime.

The important question - namely, whether Disten's conduct ought to be regarded as less blame-

worthy .....

worthy because of immaturity, lack of experience of life, undeveloped judgment, etc., does not appear to have been considered by the trial court.

Nor in my opinion did the trial court have before it information on which it could properly come to the conclusion that the accused was an adult. The fact that Disten came and went and did as he pleased, and that he did not accept the shackles of discipline, is not necessarily evidence of maturity. On the contrary, all it may show is that he is a wayward youth. Moreover, he had been submitted to the discipline of a reform school for $2^{1}/_{2}$ years, and there had not been time before his arrest for an assessment to be made of his maturity or his adjustment ...

adjustment to a free life.

INFLUENCE OF ALCOHOL, DAGGA AND DRUGS.

BASSON J said that the trial court accepted that Disten had consumed liquor on the night in question, and smoked dagga and possibly had taken other drugs. He said that what the court had to consider was their effect on the accused. The conclusion was that his conduct was not that of a person who did not know what he was doing: he did not act impulsively - his acts were indicative rather of planning, and deliberate execution of the plan over a period. The learned judge said that the accused himself said that he was normal, and that other witnesses said that he knew what he was doing.

Most .....

Most of this is beside the point. At this stage of the case the question was not whether the accused knew what he was doing. The question now was whether the liquor and drugs he had taken had blunted his normal judgment, or made it more difficult for him to control himself, or made him reckless, or otherwise reduced the blameworthiness of his acts. These matters the trial court did not consider and the omission constituted a misdirection.

CONCLUSION.

Because the trial court misdirected itself in the respects indicated, it now becomes the duty of this Court to consider the question of extenuating circumstances .....

cumstances afresh; and if it finds that they were present, to substitute its opinion for that of the trial court.

The applicable principles were put in a nutshell in the judgment of JOUBERT JA in S v Mongesi en Andere, 1981(3) SA 204 (A) at 207 C-H:

> "Die bewyslas om die bestaan van versagtende omstandighede op 'n oorwig van waarskynlikhede vas te stel, rus op 'n beskuldigde. Ten einde dit te kan doen, moet daar 'n feitebasis vir die Verhoorhof wees waarvan die bestaan van die versagtende omstandighede afgelei kan word. (S v Ndlovu 1970(1) SA 430 (A) te 433H.) 'n Versagtende omstandigheid is 'n baie wye begrip omdat dit dui op 'n feit of omstandigheid, aanwesig by die pleeg van die moord, wat die morele skuld, die verwytbaarheid, van die beskuldigde ten opsigte van die dood van die oorledene verminder of minder laakbaar maak. (S v Petrus 1969(4) SA

85 (A) te 94 in fine-95A.) Die benadering wat deur 'n Hof in 'n bepaalde geval gevolg moet word by 'n ondersoek om die bestaan van versagtende omstandighede vas te stel, is deur hierdie Hof soos volg neergelê:

(1) of daar omstandighede is wat op die geestesvermoëns of die gemoedstoestand van die beskuldigde betrekking kon gehad het, indien wel

(2) of sodanige omstandighede in die bepaalde geval die geestesvermoëns of gemoedstoestand van die beskuldigde subjektief beïnvloed het, en

(3) of die subjektiewe beïnvloeding van die beskuldigde se geestesvermoëns of gemoedstoestand van so 'n aard was dat die beskuldigde se optrede ten opsigte van die dood van die oorledene volgens die objektiewe oordeel van die Hof daardeur minder laakbaar of verwytbaar word."

In regard to (1), it is clear that there exist such circumstances in the present case, namely, Disten's background; his youth; and the fact that he had taken liquor

(including .....

including Mandrax) and smoked dagga on the evening in question. These are all circumstances which bear on his state of mind at the time of the commission of the crime. In regard to (2), such circumstances in their cumulative effect probably did affect his state of mind. As to (3) the influence on his state of mind was in my opinion of such a nature that his conduct in regard to the death of Booysen was, viewed objectively, less blameworthy. The accused was prima facie immature, and one gets the impression that this was in part a brutal game, committed by irresponsible youths, aimed not so much at plunder, as at exercising power in order to intimidate, by depriving victims of their trousers and shoes. In addition, there was

the effect of liquor and drugs, and the accused's back-ground.

The conclusion is, therefore, that the finding of the trial court should be varied.

Counsel for both the State and the appellant were agreed that this Court should itself impose sentence if it should find extenuating circumstances. The crime of which the appellant was convicted was a serious one, and it calls for condign punishment.

The three accused,with others, lay in wait in the darkness of the tree, in order to descend upon innocent passers-by (some of whom were probably not in a state of sobriety to offer serious resistance). They

used .....

used knives wantonly, and with a reckless and callous disregard for the consequences to their victims.

After serious consideration however, I have come to the conclusion that the case does not call for the ultimate punishment, and that a sentence of imprisonment should be imposed. For the protection of the community it must necessarily be for a long term, but there must be considered the cumulative effect of this sentence and the sentences imposed on the other counts.

The appeal is upheld. The verdict on Count 7 is varied and the sentence set aside. For the verdict and sentence on that count the following is substituted:

"Accused No. 3 is found guilty of murder with extenuating

circumstances .....

circumstances. He is sentenced to 15 years imprisonment.

All the sentences in respect of Counts 1,2,5,6 and 7 are ordered to run concurrently."

H C NICHOLAS, AJA

JOUBERT, JA }
JACOBS, JA } Concur