

CASE NO 199/88
/mb

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

JAMES JANTJIES FIRST APPELLANT

WILFRED KWETANE SECOND APPELLANT

and

THE STATE RESPONDENT

CORAM : BOTHA, KUMLEBEN JJA et NICHOLAS AJA

HEARD : 11 NOVEMBER 1988

DELIVERED : 24 NOVEMBER 1988

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA

At dusk on 9 April 1986 Mr Wilson Mntengwana, who was travelling alone in his Colt Galant motor car, stopped it on the outskirts of King William's Town and gave the two appellants a lift. After he had proceeded a short distance, he was fatally shot in the head. The car was driven to Dimbaza in the Ciskei. There the two appellants buried the deceased in a shallow grave. They travelled in the stolen car to Welkom, purchasing petrol with cash they found in it. At Welkom they attempted to sell a Ceska pistol, which had belonged to the deceased and was also found in the car.

The appellants were in due course arrested, and charged before Jones J and two assessors in the King William's Town Circuit Local Division of the Supreme Court, with murder, robbery and unlawful possession of firearms and ammunition. This appeal is concerned only with the murder

charge. On this count they pleaded not guilty but were found guilty as charged. The court, having found no extenuation, sentenced each to death. It, however, granted first appellant leave to appeal against his conviction on the ground that the court may have wrongly held that he was a party to a preconceived plan to kill and rob the deceased. In the case of second appellant, he was given leave to appeal against the sentence imposed and, it follows, the finding that there were no extenuating circumstances.

The State sought to prove the crucial facts on each count, particularly the complicity of the appellants, by means of certain extra-curial statements, and the pointing out of objects and places, by each appellant. This entailed a "trial-within-a-trial", which accounted for the bulk of the evidence on record. As regards first appellant the State relied upon: a statement he made to a magistrate, a Mr Sauerman, on 16 April 1986 at East London; certain statements

made to Major Coetzee at about the same time; and the pointing out of the Colt motor car and certain other objects to Lieutenant Landman with accompanying statements. In fact only the admissibility of the last-mentioned was disputed. To implicate second appellant the State relied upon: a statement made on 30 April 1986 at Welkom to a magistrate, Mr Schoeman; and a similar pointing out with explanations to Lieutenant Landman. Second appellant objected to the reception of any of this evidence. The court at the conclusion of the "trial-within-a-trial" ruled this evidence to be admissible and the reasons for doing so are fully set out in the judgment on the merits. The correctness of this ruling was not challenged on appeal.

The material portions of the two statements recorded by the magistrates are as follows:

Statement of first appellant

"Ek was Woensdag saam met n maat. Ons was te King William's Town. Ons het daar n geleentheid gesoek na Fort Beaufort. Die oorledene, wie n voertuig bestuur het, het vir ons stilgehou. Hy wou R3,00 vir die rit gehad het. Ons sê ons het geld. Ons klim in kar en oorledene ry toe. Terwyl die voertuig ry, sien ek my maat haal n vuurwapen uit. Hy beveel die oorledene om stil te hou en uit te klim. Die bestuurder weier om te stop om uit te klim. Net na die oorledene so gesê het, het ek n skoot hoor afgaan. Ek sien die oorledene se nek word lam en hy lê eenkant toe. My maat, ROBERT, het toe die stuur vasgegryp en bestuur. Hy was agter die oorledene.

Hy het my beveel om die oorledene weg te trek, wat ek toe gedoen het, want ek was bang. Die oorledene se voet was nog op petrol en die motor het vinnig gery. Na ek bestuurder weggetrek het, het ROBERT oorgeklim en in die bestuurder se sitplek gaan sit. Hy stop toe die voertuig en draai dit om. Ons het toe na Dimbaza se rigting gery. ROBERT stop toe by sy ouerhuis en neem n graaf. Ons is toe weg om oorledene te begrawe.

Ons het oorledene daar in veld begrawe en is weg met die motor. Ons is na Queenstown met die motor. Daar het ons petrol in motor gegooi en na Bloemfontein gery. By die spoorwegstasie het ons die oggend vroeg gekom en toe daar geslaap. Toe ons wakker word, is ons na Welkom met die voertuig. Ons het na die lokasie daar gegaan en die vuurwapen gaan verkoop.

.....
 Ek was nie bewus ROBERT was bewapen toe ons in motor klim nie. Toe hy wapen uittrek was ek te bang om hom te

keer, want hy kon my ook skiet. Ek het hom gehelp die man begrawe omdat ek bang was hy skiet my. Hy het my nie gedreig om dit te doen nie maar op pad na Welkom as ek een van sy sigarette neem dan sê hy ek moet los anders wys hy my 'n ding wat ek nie van sal hou nie. Ek wou na Fort Beaufort gaan om daar by die arbeiders wat na goudmyne gaan aan te sluit, want op King William's Town is die geleentheid maar skaars om werk op die goudmyne te kry. ROBERT het ook gesê ons moet daarheen gaan om aan te sluit."

Statement of second appellant

"Langs die pad het ek 'n Swartman met die naam JAMES JANTJIES ontmoet. Ek het toe die vuurwapen aan hom getoon. Ons het toe besluit om na 'n plek te gaan waar ons 'n geleentheid kon kry om met voertuie te ry. Dit was al laat die middag gewees toe 'n blou Colt Galant motorkar stilgehou het. Die bestuurder van die voertuig vra toe of ons geld het om vir hom te betaal. Ons sê toe vir hom ons het geld. Op daardie stadium het ek en JAMES alreeds ooreengekom om iewers 'n voertuig te kry om mee Welkom toe te kom om werk te kom soek. Die bestuurder van die voertuig het toe wel vir ons 'n geleentheid gegee. Ons is toe wel in die voertuig in. Nadat hierdie voertuig by 'n brug verbygery het en dit by 'n afdraend gekom het, het ek en JAMES na mekaar gekyk en ons oë geknip. Ek haal toe die vuurwapen uit en JAMES beveel toe die bestuurder om die voertuig tot stilstand te bring. Die vuurwapen was toe in my hand gewees en voordat die bestuurder geantwoord het, het ek hom geskiet.
.....
Ek het toe die voertuig bestuur en 'n U-draai gemaak en

teruggery in die rigting waarvandaan ons gekom het. Terwyl die voertuig in beweging was, het JAMES die bestuurder se sakke nagegaan. Ons het in die rigting van Tembasa gery. Toe ons by Tembasa kom, het ons eers na JAMES se woonplek gegaan. Ons het daar 'n graaf gaan soek ten einde die bestuurder van die voertuig te kon begrawe. Ons kon nie die graaf by JAMES se huis kry nie. Ons is toe na my woning waar ons 'n graaf gekry het. Ons het toe die lyk van die bestuurder begrawe. Ek en JAMES het toe daarna Welkom toe gery.

.....
Die daaropvolgende dag het ek na President Steyn Goudmyn No 4 Skag gegaan. Ek het my vuurwapen daar verkoop. Dit was op 'n Donderdag gewees."

It is unnecessary to refer to the other evidence (statements and pointing out) which were also held to be admissible. Such evidence is no more than corroborative of what is said in the two quoted statements.

Each of the appellants gave evidence after the close of the State case. The evidence of first appellant corresponded to a large degree with his statement to the magistrate. He was cross-examined on the differences. He agreed at one stage that he had changed his story and admitted that he

could give no satisfactory reason for having done so. He said in court that it was coincidental that both he and second appellant were given a lift; that second appellant suddenly and unexpectedly shot the deceased; and that he was thereafter compelled, or felt compelled, to participate to the extent that he did. The evidence of second appellant was also to a certain extent at variance with his statement to the magistrate. More particularly, in the witness box he said, referring to the time when they had stopped the car to enable the appellants to urinate:

"(A)ccused no 1 said that we must shoot this person. Then accused no. 1 said that we must take the car after we had shot the driver of the car, and proceed to Johannesburg. We then agreed to that; we went back to the car, he got into the car on the right-hand side and I went back to the left-hand side. The car proceeded. As the car was proceeding, he touched me and I then produced the firearm, taking it out from me. That was last for me when I was taking out the firearm, thereafter I do not know what happened in the car."

He went on to say that what he recounted to the magistrate

about the shooting was told to him by first appellant; that he was forced by him to say so; and that he was having at the time an epileptic attack and only regained consciousness at Dimbaza when they were about to bury the deceased. According to this evidence, he was thus not in a position to controvert the evidence of first appellant that it was he, second appellant, who had done the shooting.

The court correctly concluded that the evidence of each appellant given in court, in so far as it was at variance with their respective statements before a magistrate, was unreliable and false. This was not disputed by counsel on appeal. In the light of this finding, the court - quite correctly - did not rely on evidence of one appellant implicating the other. Its approach was to decide on the statement of each, considered in conjunction with other reliable evidence, whether each was guilty of murder and whether there were extenuating circumstances. In doing so,

it held that first appellant had actively associated himself with the killing and robbery; that there was no reasonable possibility that he was acting under compulsion; and that the only reasonable inference was that he was a party to a pre-arranged plan to shoot the deceased and rob him of his motor car and perhaps other possessions. As regards second appellant, the court came to the conclusion that the State had proved beyond reasonable doubt that he was a willing party to this plan to kill and rob the deceased and that at the time he fired the shot he was conscious and in full control of his faculties.

Mr Brooks, who represented first appellant at the trial and on appeal, repeated his submission that the facts warrant the inference, as a reasonable possibility, that first appellant was not a party to any pre-arranged plan to kill or rob the deceased or to commit any other offence. Alternatively, he submitted that what was agreed upon may

have fallen short of a decision to shoot the deceased: they may have agreed to hijack the car and driver to reach Welkom and second appellant may have decided independently to shoot him. The evidence refutes both these propositions. First appellant immediately responded to the instruction from second appellant to pull the deceased from the driving position in order to remove his foot from the accelerator. This is inconsistent with the shot coming as a surprise to him. His active participation in all that took place after the shot was fired tends to confirm that they had planned this lethal attack beforehand. It is moreover most improbable that second appellant would have shot the deceased in the presence of a witness who was not associated with the crime or that second appellant would have done so whilst the car was in motion if the assistance and co-operation of first appellant was not assured.

As to the defence of compulsion, which was also raised

on appeal, the reasons given in the court a quo for its rejection are comprehensive and convincing. In this regard

Jones J said:

"The accused does not allege any overt threat. The threat arises from the conduct of accused no. 2 in shooting the deceased and his menacing and aggressive presence and attitude thereafter. Is it reasonably possible that he genuinely believed that he was in imminent peril from accused no. 2? He alleged that he acted out of fear in his statement to the magistrate in East London, EXHIBIT D and mentioned something of the sort whilst talking to Major Coetzee in the motor vehicle. But he did not mention it at all to Lieutenant Landman when giving his explanation of his association with the deceased's motor vehicle and in explaining the blood on his trousers. He did not raise it when pleading not guilty to the charge before the magistrate, King William's Town. If duress was really the single most important feature which induced him apparently to participate in the events, is it at all possible, let alone reasonably possible, that he would not have said so whenever he made an explanation? We think not."

I am therefore of the view that first appellant was correctly convicted of murder.

On the question of extenuation in the case of second appellant, Mr Schoeman, who appeared on his behalf, submitted in the first place that the court misdirected itself in deciding - to quote from the judgment - that "on his own account, he (second appellant) was the dominant partner in the commission of the offence." But this conclusion is fully borne out by the facts. It was he who shot the deceased, a task which could have been entrusted to either of them. He drove the car to Welkom, he conducted first appellant to his (second appellant's) home where they procured a spade to bury the deceased. He sold the Beretta pistol, which belonged to him and was used to kill the deceased.

In the absence of any misdirections - and no others were suggested - this court is bound by the ruling of the court a quo that there were no extenuating circumstances unless it can be said that the conclusion was one which could not reasonably have been reached.

The following facts were relied upon as extenuation in the court a quo and were carefully considered by it: (i) the youthfulness of the second appellant; (ii) he was an epileptic and suffered grand mal seizures from time to time; (iii) he was an unsophisticated person with no more than a standard six education; and (iv) he comes from a community and background where human life is not held in high regard.

On appeal before us counsel relied firstly on the fact that second appellant was subject to epileptic attacks. As part of the State case a specialist psychiatrist, Dr Zabow, was called to give evidence. He had examined the second appellant clinically and kept him under observation for two periods at Valkenburg hospital. In his evidence-in-chief Dr Zabow dealt in detail with the nature and consequences of this mental disorder. His conclusion was that second appellant could not have been in the throes of such a seizure at the time the deceased was shot and that he was accountable

for, and conscious of, his acts at that time. In the course of cross-examination certain questions were put to this witness, no doubt with extenuation in mind. They canvassed the issue whether this disability could in this case be an extenuating factor. Dr Zabow said that epilepsy per se did not make a person less responsible for his actions (when not suffering an attack) than other persons. According to Dr Zabow, the fact that an epileptic of normal intelligence realises that he may lose consciousness at any stage and in any situation can make him dependent on others and thus vulnerable to their influence. Dr Zabow, however, conceded that this was a generalisation and that there were no facts in this case indicating that, if the evidence showed he was influenced by first appellant to take part in the commission of the crimes, epilepsy made him more susceptible to such influence. It was put to him that epileptics are more prone to acts of violence and aggression but he did not accept this as a general or invariable rule. In the result there

was therefore no evidence to prove that in this case the fact that second appellant was an epileptic had any bearing upon his decision to take part in the crime or reduced his moral blameworthiness for its commission.

The age of second appellant could not be fixed by any direct evidence. However, a medical doctor examined him thoroughly and carried out certain radiological and other tests to determine his age. He concluded that at the time of the offences appellant was at least nineteen and a half years of age and probably older. This estimate was accepted by counsel and by the court. The youthfulness of a convicted person is prima facie an extenuating factor. This has been stressed in a number of decisions of this court, for instance, in S v Lehnberg en h Ander 1975(4) S.A. 553 (AD), S v Ceaser 1977(2) S.A. 348(AD) and S v Ngoma 1984(3) S.A. 666(AD). In the first-mentioned case this court (per Rumpff, C.J.) at 561 said:

"Wat die probleem van versagting betref, behoort na my mening tienderjariges in die algemeen as onvolwasse beskou te word, en derhalwe geregtig op versagting, tensy die omstandighede van die saak van so 'n aard is dat 'n Hof homself genoop voel om die doodvonnis op te lê. Vanselfsprekend is daar grade van volwassenheid by tienderjariges, maar uiteraard het geen tienderjarige die rypheid van 'n volwassene nie. Jeugdigheid is onvolwassenheid, gebrek aan lewenservaring, onbesonnenheid, en veral 'n geestestoestand van vatbaarheid vir beïnvloeding, veral deur volwassenes. En 'n persoon van 18 of 19 jaar is, volgens my mening, onvolwasse of hy nog op skool of universiteit is, en of hy reeds 'n jaar of wat gewerk het. Om jeugdiges, sonder meer, met die dood te straf, is om die jeugdige met die maat te meet waarmee 'n rype volwassene gemeet word."

And concluded that:

"Weens hierdie oorwegings is ek van mening dat die doodstraf alleen dan op 'n tienderjarige, wat 'n moord gepleeg het, opgelê behoort te word, indien dit werklik blyk dat hy uit inherente boosheid gedood het."

In S v Ceaser at 353 the concept "inherente boosheid" is discussed in more detail:

"A finding that a person acted from inner vice in the commission of a crime does not imply that he has manifested vicious or wicked propensities throughout his life; nor is a long history of wickedness necessary to such a finding. Primarily, the question in any given case (in the context under discussion, i.e. with

reference to youth as a mitigating factor) is whether the crime in question stemmed from the inner vice of the wrongdoer, whether he be a first offender or one with many previous convictions. It is in order to answer that question that the Court will examine, and take into account as indicia, the wrongdoer's motive, personality and mentality, past history and whatever else is relevant to the enquiry. And, of course, it will take into account the nature of the crime and the manner of its commission. (See the passage quoted above from the judgment of the CHIEF JUSTICE in Mapatsi's case.) The concept of inner vice as the genesis of a grave crime committed by a youth throws into proper contrast the case of a crime (perhaps equally dastardly) committed by another youth who has, largely because of his youth and its attendant degree of inexperience, acted in response to outer influences; e.g. under the pressure and stress of intense emotions induced by another (cf. Lehnberg's case) or under the direct or indirect influence of one older than himself, or under circumstances which to him, because of his youth and inexperience, were provocative or emotive."

The indicia referred to in the above-mentioned passage were taken into account and carefully considered by the court. It had the advantage of observing the appearance and demeanour of the second appellant during the trial as an aid in the assessment of his maturity. As I have observed, the court was correct in concluding that second appellant played a dominant

role. On the evidence he was not in any way influenced by first appellant. Taking all relevant facts into account, the court on this issue concluded:

"It seems therefore that the role played by accused no. 2 in the commission of the offence was anything but the role of an immature youth who, through inexperience and lack of self-control does not know how to behave himself properly. Indeed, the dominance of the role he played and the motive for gain indicate tht this offence was committed out of some inherent wickedness or vice, referred to as 'inherente boosheid'".

It cannot be said that the court erred in reaching this conclusion.

Grounds (iii) and (iv) referred to above, were correctly - in my view - not relied upon on appeal. In the result the finding of the court a quo that there were no extenuating circumstances was based on a proper exercise of its discretion and cannot be disturbed.

Before the hearing of the appeal unsigned copies of a notice of motion, with accompanying unsigned affidavits, were lodged in this court on behalf of second appellant. The application was aimed at reopening the case in order to lead further evidence. When the case was called, the original signed papers were not yet to hand. (They were subsequently filed after judgment had been reserved.) In the circumstances counsel was obliged to apply for a postponement of the application at the start of the hearing. It was refused with the intimation that reasons would be furnished in this judgment.

The application for the leading of further evidence, which was opposed by the State, was based on an affidavit of one Raymond Shozi. The latter stated that he was in custody in the Pretoria maximum security prison, having been sentenced to death. There he met first appellant who gave the following account of how the deceased

came to be killed. The two appellants decided to rob the deceased. At a stage when they were in the car, second appellant had an epileptic seizure, during which time he (first appellant) shot the deceased. When second appellant regained consciousness first appellant told him to say that he (second appellant) had fired the shot. Second appellant complied because first appellant was a member of a gang and second appellant was afraid of him. According to this account, one notes, second appellant was not told that he had in fact (unconsciously) shot the deceased but that he was to say so.

For the application for a postponement to succeed it was necessary for the applicant to satisfy the court that there was a reasonable prospect that the court would grant leave to reopen. The requirements for such an indulgence are thus summarised in S v de Jager 1965(2) S.A. 612 (AD) 613:

"(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

Requirement (b) above is in no way satisfied. It is highly unlikely, in fact hardly conceivable, that second appellant would have falsely admitted to having fired the fatal shot because he was frightened of first appellant. Had second appellant not shot the deceased, the significance of such a false admission would not have been lost on him. Yet in his confession to the magistrate, in his statement to

another magistrate when pleading in terms of sec 119 of the Criminal Procedure Act 51 of 1977, and at the trial itself, he consistently acknowledged that he had shot the deceased. It is also most improbable that first appellant in the knowledge that his appeal against his conviction was pending, would have made such an admission. For these reasons the application was refused.

The appeals of both first and second appellants are dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

BOTHA J.A.)
NICHOLAS A.J.A.) - concur