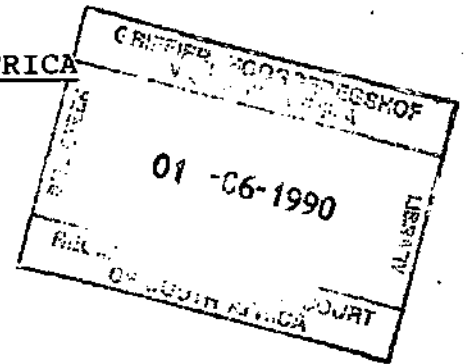


Case No 649/89.
/MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)



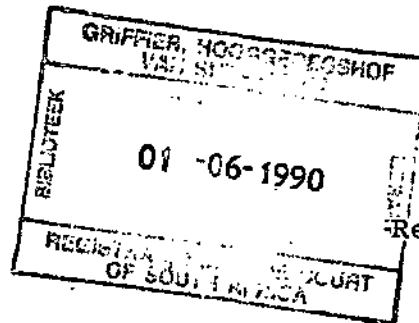
In the matter between

ROBERT MOSES ADAM ABRAHAMS

Appellant

- and -

THE STATE



Respondent

CORAM: CORBETT CJ et E.M. GROSSKOPF JA et
FRIEDMAN AJA.

HEARD: 23 May 1990.

DELIVERED: 1 June 1990.

J U D G M E N T

FRIEDMAN AJA:

This is an appeal in a murder case against a finding that there were no extenuating circumstances. The appellant stood trial in the Eastern Circuit Local Division of the Cape Provincial Division before BURGER J and assessors on a charge of murdering Emma Cloete in her home at Great Brak River in the Mossel Bay district on 24 March 1987. He pleaded guilty to murder with extenuating circumstances but this plea was not accepted by the State. He was also charged with six other counts ("the lesser counts") to all of which he pleaded guilty, which pleas the State accepted. Having found that there were no extenuating circumstances in respect of the murder charge, BURGER J sentenced appellant to death. On the lesser counts he

was sentenced to a total of $11\frac{1}{2}$ years imprisonment. An application for leave to appeal was refused by BURGER J but on petition to the Chief Justice, the appellant was given leave to appeal against the finding of no extenuating circumstances and it is on that basis that he now appeals to this Court.

Although this appeal is limited to the question whether the finding of the trial court that there were no extenuating circumstances was correct, it is necessary, because of the applications for a postponement which were made at the hearing of the appeal, to refer to the form which the trial took.

After the appellant's pleas had been entered, the State led evidence on the murder charge and the appellant testified in his defence. The evidence which he gave will be dealt with presently. Suffice

it to say, at this stage, that he admitted that he had killed the deceased but denied that he had intended to do so. At the close of appellant's case BURGER J delivered a short judgment in which he found appellant guilty on the count of murder as well as on the lesser counts. After hearing argument on extenuating circumstances, BURGER J delivered a judgment finding that there were none. Previous convictions were proved. The appellant was then sentenced to death on the murder charge and to imprisonment on the lesser charges. It is unnecessary to refer in any detail to the substance of the lesser counts, save to mention that counts 1 and 2 related to an occasion on 12 February 1987 when appellant allegedly broke into the home of a Mrs Venter, stripped her naked and robbed her.

There is no real dispute concerning the facts

of the murder charge. Approximately one week before the murder appellant was asked by a man whom the deceased had engaged to work in her garden, to assist him with that work, which he did. The deceased paid this man for his work but appellant did not receive any remuneration. He apparently felt aggrieved at this and accordingly on 24 March 1987 he set out for the deceased's home with a view to obtaining money.

He lay in the bushes behind deceased's house where he smoked two dagga cigarettes which, he testified, made him feel different ("anderste") and made his head turn ("Dit maak my kop n bietjie draai"). After he had smoked these two dagga cigarettes he noticed the deceased at the front of the house. He jumped over the wire fence and entered the house through the kitchen door which he said was open.

Having satisfied himself that there was no-one in the house, he decided to wait for the deceased in her bedroom which he identified as such by her spectacles which were on the dressing table in that particular bedroom. He hid behind the door and when the deceased entered the bedroom he pushed a towel which he had found in the bathroom, into her mouth. He hit her once on her cheek with his fist. The appellant and the deceased then fell to the floor. The appellant proceeded to throttle the deceased with his right hand while holding her head with his left hand. After he had throttled her, he tied her hands behind her back and threw a number of sheets and blankets over her head and packed items of furniture onto her body.

He then went to the kitchen where he cooked bacon and eggs which he ate and helped himself to some

whisky from a bottle which he found in the kitchen. He also wanted to cook a chicken but was unable to dissect it because it was frozen and so he abandoned that idea. Having taken some R400 in cash, a blanket, a bottle of whisky and a portable radio, he left the house. Before departing, he cut the telephone wires and disconnected the panic buttons of the deceased's alarm system. He testified that he did not intend to kill the deceased but merely wished to render her unconscious ("ek wil haar net flou ge-'choke' het").

In his judgment on extenuating circumstances, BURGER J dismissed the argument that appellant had been affected by the dagga he alleged he had smoked and found that his actions indicated that he was thinking clearly and functioning normally.

In regard to the argument that the appellant

did not intend to kill the deceased, BURGER J referred to the medical evidence which was to the effect that the deceased had died of anoxia caused by strangulation which would have persisted for at least four minutes. The learned Judge also referred to the answers given by the appellant in the plea proceedings in the Magistrates Court in terms of sec 119 of Act 51 of 1977 ("the Act"), during which the appellant had admitted that he wished to kill the deceased to avoid being identified by her. The learned Judge stated, however, that he would not take that admission into account because it had been given in answer to leading questions by the Magistrate. BURGER J said that there remained only the appellant's youth which could serve as extenuation. The inference from this statement

is that appellant's evidence that he did not intend to kill the deceased was rejected by the trial court. In regard to appellant's youth it is common cause that he was born on 23 February 1969 and that he was thus 18 years and 1 month old at the date of the murder. However, the trial court found, with reliance on S v Lehnberg en h Ander 1975(4) SA 553(A), that because the appellant had acted from inner vice ("inherente boosheid"), his youthfulness did not constitute an extenuating circumstance. BURGER J advanced the following reasons for arriving at his conclusion that appellant had acted from inner vice:

1. The attack on the deceased was planned and executed with cruelty and indifference which could not be reconciled with youthfulness.

2. Appellant exhibited no remorse after he had strangled the deceased, as was apparent from the fact that he spent more than an hour preparing food and looking for money. This showed a lack of feeling which could not be expected of an immature person.

3. Little more than a month prior to the murder appellant had carried out a similar attack on Mrs Venter, i.e. counts 1 and 2. The learned judge pointed out that Mrs Venter was also an elderly lady, that he had choked her, hit her with his fist and tied her hands behind her back. If the appellant was immature, one would, said BURGER J, have expected an emotional reaction to that incident from the appellant, but he repeated

a similar attack on the deceased approximately one month later.

At the hearing of the appeal both the respondent's and appellant's counsel applied - for different reasons - for a postponement. The foundation for the respondent's application was that the trial court had committed an irregularity in that, in convicting the appellant on the lesser counts, the trial court had failed to comply with the provisions of sec 112 of the Act. Sec 112(1)(b) provides as follows :-

"Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea -

(b) the presiding judge shall, if he is of the opinion that the offence merits the sentence of death, or the presiding judge, regional magistrate or magistrate shall, if he is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a whipping or of a fine exceeding R300, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he has pleaded guilty, convict the accused on his plea of guilty of that offence and impose any competent sentence: Provided that the sentence of death shall not be imposed unless the guilt of the accused has been proved as if he had pleaded not guilty."

Sec 112(2) provides as follows :-

"If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection 1(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement."

The presiding judge did not question the appellant as he was required to do in terms of sec 112(1)(b), nor was a written statement handed in pursuant to sec 112(2). The trial court was

accordingly not entitled to convict the appellant on the lesser counts, despite his pleas of guilty. Counsel for the respondent urged the Court to set aside these convictions and refer the matter back to the trial court as provided in sec 312(1) of the Act. Respondent's counsel argued that although the present appeal was not directed against the appellant's conviction on the lesser counts, this Court - as the highest Court in the land - should, because of the exceptional circumstances, assume jurisdiction. Counsel referred, in this regard, to sec 22 of the Supreme Court Act no 59 of 1959 which provides as follows :-

"The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power -

- (a) on the hearing of an appeal to receive further evidence, either orally or by

deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and

- (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

He argued that the appellant would not be prejudiced if that course were adopted, as appellant had at all times intended to plead guilty. It would moreover be in the interest of justice if this Court were so to refer the matter back as that would avoid the possibility of appellant being obliged to serve sentences on charges

in respect of which he has not been properly convicted. Respondent's counsel is of course correct that the appellant was, because of the non-compliance with sec 112, not properly convicted on the lesser counts. However, as there is no appeal before this Court in respect of those counts, sec 22 of the Supreme Court Act has no application. Moreover, this Court's jurisdiction in criminal matters is determined by statute. It has no inherent jurisdiction to go beyond the terms of the relevant Acts (Cf Sefatsa and Others v Attorney General, Transvaal, and Another, 1989(1) SA 821(A) at 831I-834E and 839C-H. There is accordingly no merit in respondent's application for a postponement.

The application for a postponement which was made by appellant's counsel was cast in somewhat wider

terms. Appellant's counsel argued that because of irregularities committed by the trial court, appellant's conviction, both on the murder charge and on the lesser counts, was liable to be set aside. A postponement was accordingly sought to enable appellant to approach the trial court for leave to appeal on all the convictions (including that of murder) or to have special entries made on the record with the same objective.

Appellant's counsel submitted that the convictions on the lesser counts were irregular by reason of the non-compliance with sec 112. The fact that the conviction on the lesser counts was irregular, has no bearing on the present appeal. Whether this appeal proceeds or not, does not affect appellant's right to approach the trial court and to seek leave to

appeal against his conviction on the lesser counts. This irregularity therefore does not constitute a valid reason for postponing the appeal.

It was further submitted by appellant's counsel that the trial judge had failed to comply with sec 146 of the Act in that he had failed to give reasons for his findings and that this was an irregularity which vitiated the conviction on the murder charge. The relevant provisions of Sec 146 read as follows :-

"A judge presiding at a criminal trial in a superior court shall -

(b) whether he sits with or without assessors, give the reasons for the decision or finding of the court upon any question of fact."

That portion of the judgment of the trial court which deals with appellant's conviction on the murder charge reads as follows:-

"Die enigste uitstaande punt is die kwessie van moord waarop jy skuldig gepleit het aan moord, maar met versagtende omstandighede. Die kwessie van versagtende omstandighede laat ek oorstaan om dit later te beslis.

Ek bring nou net n bevinding op hierdie klagtes uit. Jy het hier skuldig gepleit en die getuienis wat ek ten opsigte van die moord gehoor het, dui baie duidelik daarop dat jy die vrou gedood het en dat die wurgery die oorsaak van haar dood was.

Onder die omstandighede kan ek nie anderste nie as jou SKULDIG te bevind aan moord."

Leaving aside the lesser counts in respect of which it is common cause the conviction was irregular

by reason of the non-compliance with sec 112, the trial court did explain, albeit somewhat cryptically, why it found the appellant guilty of murder. Appellant's counsel argued, however, that there had not been compliance with sec 146 as the learned judge did not, in his judgment, deal with the question of mens rea, i.e. he did not state whether he had found the appellant guilty on the basis of dolus directus or dolus eventualis. This, so it was argued, prejudiced the appellant as he did not know, when he came to deal with extenuating circumstances, on what basis he had been found guilty. There is no merit in this argument. On a charge of murder, an accused can be found guilty whether his mens rea takes a direct or indirect form. It is not incumbent on a trial court, when convicting an accused, to indicate whether it

finds a direct or an indirect intention. This distinction may become important at the next stage of the enquiry, viz when extenuating circumstances are investigated. At that stage, however, the onus rests on the accused to establish extenuating circumstances on a balance of probabilities. If he should seek to rely, as a basis for extenuation, on the fact that his mens rea took the form of dolus eventualis, as opposed to dolus directus, he would have to establish that by evidence or argument on the basis of evidence already on record and it would then be incumbent on the trial court to make an appropriate finding on the question.

For these reasons I consider that the judgment of the Court a quo, although lacking in detail, complied with sec 146. However, even if it could be said that the judgment did not comply with the

section, this did not prejudice the appellant. The court proceeded to the second stage and appellant was not precluded from leading such evidence or presenting such argument as he might have been advised, in order to establish that he did not have the direct intention of killing the deceased. An application for leave to appeal on the ground that sec 146 has not been complied with would be without substance. This so-called irregularity therefore does not afford a ground for postponing the appeal.

Sec 317(1) of the Act provides that when application is made for a special entry, such a special entry shall be made unless the court or judge is of opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the

court. To my mind an application for a special entry on the grounds advanced by appellant's counsel would be manifestly without substance and there is accordingly no prospect of such a special entry being made. Appellant's desire to apply to the trial court for such a special entry to be made on the record, does not, in the circumstances, afford a ground for postponing this appeal. I might add that appellant's counsel - like respondent's - urged us to assume an inherent jurisdiction and to deal with the irregularities of which he complained, ourselves. For the reasons mentioned above, this Court has no jurisdiction to do so, even if there were merit in the allegation of irregularities, which there is not.

I proceed now to consider the merits of the appeal. Appellant was only 18 years and 1 month old

at the date of the commission of this offence. A youth of this age is prima facie regarded as immature. That would constitute an extenuating circumstance and result in the death sentence not being imposed unless the court feels compelled to do so by the circumstances of the case. See Lehnberg's case, supra, at 561; S v Mapatsi 1976(4) SA 721(A) at 724; S v Ceaser 1977(2) SA 348(A) at 351, 353; S v Ngoma 1984(3) SA 666(A) at 674 E-F. The approach adopted by the trial court was that for the reasons stated by it, the appellant had acted from inner vice and that that vitiated such extenuation as might have arisen from his youthfulness. One of the reasons advanced by the trial court for arriving at that conclusion was that the appellant had committed a similar offence approximately a month before this murder, i.e. counts 1

and 2. It is clear from the judgment that the Court a quo was strongly influenced in its decision by this factor. Respondent's counsel conceded that the trial court was not entitled to take this factor into account having regard to the irregularity concerning appellant's conviction on counts 1 and 2. Respondent's counsel argued, however, that the trial court's misdirection was not material. I do not agree. It is clear from BURGER J's judgment that the trial court regarded appellant's conviction on counts 1 and 2 as an important consideration in arriving at the conclusion that he had acted from inner vice. The trial court's misdirection was, in the circumstances, material and entitles this Court to disregard the finding of the trial court and to reach its own

conclusion.

Murder is always a vicious and serious crime. That is why, when the question is considered whether an accused's youthfulness in fact constitutes an extenuating circumstance, the court looks not only at the nature of the crime, but also at the accused's motive, his personality and all other relevant factors. See Mapatsi's case, supra at 724 C-D. If one has regard to the appellant's motive, it appears that he was completely misguided. There was no rational basis upon which he could have been under the impression that he should have received payment from the deceased. She did not engage him, nor did she request him to assist the other man. It was the latter to whom appellant should have looked for payment if he felt he was entitled to be remunerated for his assistance.

Although the attack on the deceased was planned, in the sense that he waited for her to be out of the house before entering and then waited for her to enter the bedroom, the murder seems to have been carried out in a confused and muddle-headed fashion. He obviously strangled the deceased until her resistance ceased and she was dead. There appears to have been no logical reason for him to have thrown blankets, towels and even items of furniture on her. Under cross-examination he conceded that he had done this so that, if she were not dead, that would have ensured her death. He similarly stated that he had tied her hands behind her back to avoid any "mistake". When asked by the trial court whether the "mistake" that he envisaged was that the deceased could come alive again, he answered affirmatively. Although the appellant tried to avoid

being captured by the police, when he was eventually taken into custody he made no attempt to prevaricate or to conceal what he had done and co-operated fully with the police in their investigation.

Far from being mature, the appellant comes across, on a conspectus of the evidence, as an unsophisticated, extremely naive and callow sort of person. I am accordingly of the view that the prima facie inference of immaturity which arises from his youthful age, has not been displaced and that this justifies a finding of extenuating circumstances. The appeal should therefore succeed.

I turn now to the sentence. Appellant was at the age of 11 declared to be a child in need of care and was thereafter placed in various institutions. He was ultimately at the age of 16 discharged from the

last institution he attended, namely an industrial school, at which stage he had progressed to, but not passed, standard three. He then went out to work.

He has three previous convictions for housebreaking and theft, one for theft, one for assault and one for sodomy. The sentences for all these convictions were non-custodial, ranging from caution and discharge through juvenile cuts to a suspended sentence. The present offence is a serious one and warrants a lengthy period of imprisonment. To my mind a period of twelve years would be appropriate. However, taking into account the cumulative effect of such a sentence and the sentence which he is at present serving, I consider that half the sentence which this Court imposes should run concurrently with the sentence he is at present serving.

In the result -

1. The applications for postponement are refused.
2. The appeal succeeds. The trial court's finding of no extenuating circumstances is set aside and the following substituted therefor :-

"The accused is found guilty of murder with extenuating circumstances".

3. The death sentence is set aside and the following substituted therefor :-

"Twelve (12) years imprisonment, one half of which shall run concurrently with the sentences appellant is at present serving."


G. FRIEDMAN AJA

CORBETT CJ)

Concur.

E.M. GROSSKOPF JA)