

CASE NO: 127/90
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the appeal of:

MONWABISI KHUNDULU

First Appellant
(Accused No 1 in court a quo)

and

NZEMENI DANSTER

Second Appellant
(Accused No 4 in court a quo)

versus

THE STATE

Respondent

CORAM: HOEXTER, MILNE JJA et KRIEGLER AJA

DATE OF HEARING: 4 March 1991

DATE OF JUDGMENT: 18 March 1991

J U D G M E N T

MILNE JA/.....

MILNE JA:

The two appellants and two other persons were charged with housebreaking with intent to rob and murder with aggravating circumstances, robbery, and two counts of murder, together with certain other offences not relevant to this appeal. The first appellant was Accused No 1 at the trial and the second appellant was Accused No 4. I shall refer to them as Accused No 1 and Accused No 4 respectively. Each of them was found guilty as charged. Each of them was sentenced to 20 years' imprisonment on the housebreaking with intent charge and 20 years' imprisonment on the robbery charge, such sentences to run concurrently. Each of them was sentenced to death on each of the murder charges, the trial court having found that there were no extenuating circumstances. Accused No 2 at the trial was also found guilty on these charges but the trial court found that his

age at the time when the offences were committed constituted an extenuating circumstance and there is no appeal in his case. Accused No 3 was discharged after the defence case had closed.

With leave of the trial court Accused 1 and 4 each appeals against his conviction and sentence on the housebreaking with intent charge, Accused No 1 against his conviction on the two murder charges, and each of them against the finding that there were no extenuating circumstances and, accordingly, against the sentences imposed on the murder charges.

These offences were all alleged to have been committed at Leeukloof Farm in the district of Cradock on 6 February 1987 and the alleged victims were a Mr and Mrs Palvie. Much of the evidence tendered by the State at the

trial was uncontested and the issues have been further narrowed by the acceptance of the trial court's findings in a number of respects, including an acceptance that it was correct in rejecting the evidence of the appellants wherever it conflicted with the probabilities or the evidence of any State witness in any material respect. Save for certain findings to which I shall draw attention, the correctness was also accepted of the following recital of the salient features of the State case by the trial court:

" During February 1987 Mr and Mrs Palvie occupied a farmhouse on the farm Leeukloof, in the district of Cradock, approximately 20 km from the town. Mr Boy Jordaan was the owner of the farm and Mr Palvie acted as his overseer.

Mr Palvie was a strong man, 1,8 m tall and weighed 85 kg. He was 62 years of age. Mrs Palvie was younger. She was 56 years of age, 1,65 m tall and was of slender build. Mrs Palvie was a chronically ill person.

Accused No 3's father, Boesman Ngolose, worked on Leeukloof as a foreman. Accused No 3 was at school in Cradock and stayed in Lingehile Township.

Accused No 1, No 2 and No 4 lived in Lingehile Township. Accused No 2 and No 3 were friends.

At about 6.30 p.m. on Thursday, 5 February 1987, the four accused were given a lift in a motor vehicle driven by Tosman Ralawe from the township to a farm on the way to Leeukloof. Ralawe did not know either Accused No 2, No 3 or No 4.

From where Ralawe dropped the four accused, they walked to Leeukloof Farm. There they were given accommodation for the night by Boesman Ngolose, No 3's father. Accused No 1, No 2 and No 4 told Mr Boesman Ngolose that the reason for their visit to the farm was that they were looking for work. He told them that Mr Palvie only had employment for a gardener.

The next day, the Friday morning, Mr Boy Jordaan arrived at the farm to count his sheep. After he had done so he left. The accused were aware of his arrival and his departure. At that stage Mr and Mrs Palvie were both in the farmhouse, which was very much in the minds of the three accused, Accused No 1, Accused No 2 and Accused No 4. During the afternoon ..."

(on the evidence the morning would be more accurate)
"... Mr and Mrs Palvie, after locking the house, drove off in their green coloured Volkswagen Golf motor car to sell vegetables in Cradock. Accused No 1, Accused No 2 and Accused No 4, who had been keeping an eye on the farmhouse, saw the Palvies drive off in their motor car.

After Mr and Mrs Palvie had left, the three accused accompanied Dumeseni Ngolose ostensibly to have a swim in a dam near the farmhouse. When they reached the dam none of the three accused had a swim, but while Dumeseni Ngolose was having one, Accused No 1 and No 2 went to the farmhouse leaving Accused No 4 to distract Dumeseni Ngolose and at the same time to keep an eye on the farmhouse.

Accused No 1 and No 2 entered the farmhouse, and Accused No 4 was in a position to see them doing so, through a window of a vacant bedroom, adjacent to the bathroom and the kitchen. As soon as they entered the house Accused No 1 and No 2 rummaged through the various rooms, they ransacked the premises and packed various things belonging to the Palvies in two suitcases which they found in the premises.

While going through the various cupboards in the premises, they found a rifle, an axe, a hammer and a carving knife." (It was submitted on behalf of the appellants that there was no proof that Accused No 1 was aware of the presence in the house of the hammer and the carving knife during the first occasion that the house was broken into.) "These weapons are before Court.

On Accused No 1 and No 2 rejoining Accused No 4 at the dam, Dumeseni Ngolose, who had seen Accused No 1 and No 2 emerging from the farmhouse through the window, through which they had gained entry, asked them what they had been doing in the premises. He received a brush-off from Accused No 1.

The three accused then went to the labourers' houses to await the return of Mr and Mrs Palvie. While waiting for Mr and Mrs Palvie to return, they assisted in the slaughtering of some goats, but as soon as they saw the Volkswagen Golf in the distance returning to the farm, the three accused were galvanised into action. They immediately ran towards the farmhouse.

Now Accused No 1, 2 and 4 and Mr and Mrs Palvie arrived almost simultaneously at the farmhouse. While Accused No 1 kept a look-out from a small building nearby the farmhouse, Accused No 2 and No 4 entered the

premises. We have no eye witnesses as to what occurred after Accused No 2 and No 4 entered the premises, but it is common cause that Mr and Mrs Palvie were attacked. Mrs Palvie was rendered unconscious severely injured, and Mr Palvie was killed in the most gruesome manner.

At an opportune moment, Accused No 1 joined Accused No 2 and No 4 in the premises. There was work to be done. The three accused hastily removed the articles listed in the schedule to count 4, loaded them into the Volkswagen and drove off to Lingehile Township.

After off-loading the stolen goods in the township, the motor car was driven to a nearby cemetery where it was set alight and destroyed. Subsequently Accused No 4 changed his clothes and shoes because of blood on them and the three accused sold a wall clock and a suit of Mr Palvie to Mr Vusumzi Witbooi and Zolile Situngu respectively. At this stage Accused No 4 was in possession of the pistol (EXHIBIT 1), the magazine with ammunition (EXHIBIT 2) and a spent cartridge (EXHIBIT 3), while Accused No 1 had the suit (EXHIBIT 51) in his possession and did the talking." (These exhibits had been taken from the Palvies' farmhouse). "... Accused No 2 was also present but did not do anything.

For the moment I return to the farm Leeukloof. That afternoon Mrs Evelyn Matiwane, a 50 year old African woman, who worked for Mr and Mrs Palvie as a domestic servant, was also on the look-out for the Palvie motor vehicle. She had seen it leave for town after lunch,..." (here again, this should be about noon) "... after she had asked Mrs Palvie to buy

groceries for her, and when she saw the motor car return to the farmhouse she started to walk to the house to fetch her groceries. As she approached the farmhouse the Volkswagen Golf drove past her. She saw three persons, whom she described as 'black children', in the motor car which was travelling in the direction of Cradock.

When Mrs Matiwane reached the kitchen door of the farmhouse she found the door open and noticed Mrs Palvie's groceries lying scattered on the kitchen table. Mrs Matiwane called out, but there was no response from inside. While she was at the kitchen door she was joined by Mr Boesman Ngolose. They apparently spoke and he decided to call her husband, Mr John Matiwane. The three of them entered the kitchen and went into the empty bedroom where to their horror they saw Mrs Palvie lying on her stomach on the floor in a pool of blood. They immediately left the house. Mr Boesman Ngolose went on horseback to a local farmer, who arranged for the police to be informed of the shocking discovery.

Constable Greyling received the report of the tragedy at approximately 19h40 at the Cradock Police Station. Upon his arrival at the farmhouse he found Mrs Palvie lying in a pool of blood in the empty bedroom. In the bathroom he found the body of Mr Palvie. In one of the bedrooms he found a chopper (EXHIBIT 7). In the kitchen he found a blue cap (EXHIBIT 44), which belonged to Accused No 4 and a large knife (EXHIBIT 46) on the kitchen table. In an empty bedroom which leads off the kitchen he found a hammer (EXHIBIT 45) on the window-sill.

At 20h35 the unconscious Mrs Palvie was removed by ambulance to the Cradock Hospital, where she was given

emergency treatment by Dr Schoeman, and then taken to Port Elizabeth Provincial Hospital.

Mrs Palvie was admitted to the hospital at about 2 a.m. on Saturday, 7 February 1987. It was found at the hospital that she had three serious head injuries for which she was treated, but she died in the Provincial Hospital on 19 March 1987.

At approximately 09h00 on Saturday 7 February a team of detectives from the Eastern Province Murder and Robbery Unit went to Leeukloof Farm. Among the squad of detectives were Warrant Officer Els (the investigating officer in this case) and ----- Warrant Officer Meyer, a fingerprint expert and photographer and an experienced criminal investigating officer. These two police officers did a very thorough investigation of the scene. Photographs were taken, a plan was drawn and most important fingerprints and bloody shoe prints were lifted. They discovered that entry had been gained through a window of the empty bedroom. A window pane had been smashed from the outside and a hand had been inserted through the opening. The fingerprints of Accused No 2 were found on the pane still in the window frame, on the window frame itself and on a piece of broken window pane found in the bedroom. According to Warrant Officer Meyer the fingerprints on the broken pane still in the frame had been left by a person standing on the outside of the building while attempting to remove the broken piece of window pane from the frame.

The palm prints of both Accused No 1 and No 2 were found on the mirror of a cupboard in one of the bedrooms. The bloody shoe prints of both Accused No 2 and Accused No 4 were found in the bathroom where Mr

Palvie's body was found, as well as in the empty bedroom where Mrs Palvie was found lying in a pool of blood. Their investigation and observations led Warrant Officer Meyer to conclude that Mr Palvie had been attacked by two assailants.

Shortly after noon on Saturday, 7 February 1987, and while the detectives from the Murder and Robbery Unit were on the farm Leeukloof, Captain Gouws and Lieutenant Goosen of the South African Police force Cradock were on patrol in Michausdal coloured township. They noticed Accused No 1, No 2 and No 4 walking on the side of the main street. The three accused aroused their suspicion. Captain Gouws and Lieutenant Goosen stopped and searched Accused No 1 and No 2. As they were doing so Accused No 4 moved away and was obviously trying to get away. Captain Gouws, an experienced and reliable and credible police officer, noticed this and promptly followed Accused No 4. As Captain Gouws approached Accused No 4 he saw Accused No 4 drop the pistol (EXHIBIT 1) in the road. The three accused were detained on suspicion of being in possession of stolen property of an unknown person or persons.

At the Cradock Police Station the three accused were thoroughly searched and various articles, reflected on EXHIBIT "H", were found on them. It later transpired that various articles found on each of the accused had been stolen from the Palvie couple. Captain Gouws questioned each of the three accused. He did so separately, and when he and the suspect were alone. Captain Gouws found the three accused very co-operative and from what the accused said the two police officers immediately suspected that they were involved in the crimes committed in the Palvie home the previous

day.

The detectives of the Eastern Cape Murder and Robbery Unit were immediately informed, and shortly thereafter the members of the Murder and Robbery Unit, under the command of Colonel Strydom, and including Warrant Officer Els, arrived at the Cradock Police Station and took over from Captain Gouws and Lieutenant Goosen.

The same afternoon the three accused pointed out various places and items associated with the present charges. That night Accused No 1 and No 3 were detained at the Algoa Park Police Station, Accused No 2 at Swartkops Police Station, and Accused No 4 at the Louis le Grange Square in Port Elizabeth.

At 10h33 on Monday, 9 February 1987, Accused No 1 made a statement (EXHIBIT "BB") to Lieutenant O'Connell. At 10h45 on the same day Accused No 4 made a statement (EXHIBIT "AA") to Lieutenant Ferreira. The next afternoon Accused No 1 made a statement (EXHIBIT "Z") to Mrs Botha, a magistrate. The same afternoon Accused No 4 also made a statement (EXHIBIT "Y") to Mrs Botha.

On 10 February 1987, Dr Schoeman performed a post-mortem examination on Mr Palvie. Dr Schoeman's report is EXHIBIT "I". Dr Schoeman came to the conclusion that Mr Palvie had died almost immediately from multiple head injuries.

On 20 March 1987, Dr Schoeman performed a post-mortem examination on Mrs Palvie. Dr Schoeman's report is EXHIBIT "J". Dr Schoeman came to the conclusion that Mrs Palvie had died of bilateral pneumonia which followed upon the head injuries inflicted upon her on 6 February 1987, and her subsequent immobilisation in

hospital. This finding is substantiated by Dr Keeley who treated Mrs Palvie.

The defence has conceded that the death of each of the deceased was caused by the injuries inflicted on them on 6 February 1987.

During the trial the State tendered as evidence the statement made by Accused No 1 to Lieutenant O'Connell and a statement made by him to Mrs Botha. The State also tendered as evidence the statement made by Accused No 4 to Lieutenant Ferreira and a statement he had made to Mrs Botha."

The admissibility of these statements was contested at the trial but it was rightly conceded on behalf of the appellants in the heads of argument that the trial court had rightly held them to be admissible.

With regard to the housebreaking charge, there is a strong if not overwhelming probability that there were two "breakings"; the first when Accused No 2 broke the window and he and Accused No 1 entered the house for the first time; the second when Accused 2 and 4 entered the house

after they had sighted the Palvies' car returning. It was argued that there was no proof of any "breaking" when Accused 2 and 4 entered the house because there was no evidence that either of them had moved any door or window or had done anything which would amount to a housebreaking. The evidence of Dumezweni Ngolose was, however, that after Accused 1 and 2 had climbed out of the window after the first "breaking" they closed the broken window after them. If, therefore, Accused 2 and 4 entered through that window just before the Palvies arrived then they would have had to open the window which would of course constitute a "breaking". Accused 4 said in his confession that they did enter through this window but this is not even admissible against Accused 1, leaving aside any question of reliability. If Accused 2 and 4 did not enter through the window then they must surely have entered through a door. It seems probable that if they took the trouble to close the

window after them after the first entry, they did so in order not to alert the Palvies and that they would accordingly, at the same time, have closed any door which they had opened. If that is so then whether they entered through a window or by means of a door there was a second "breaking" by Accused 2 and 4. I shall assume, however, that there was no adequate proof of a second "breaking". It follows that in order to establish the housebreaking charge the State would have to rely upon the first "breaking".

In order to establish the alleged intent of Accused 1 and 4 at the time of the first "breaking" it is necessary to find that there was a common purpose to rob and murder at the time when that "breaking" occurred. This follows from the fact that the trial court found that Accused No 1 was probably not present in the house when the murders occurred. In other words the State had to prove

that the plan to break in and rob the Palvies and to murder them had already been agreed upon before Accused 1 and 2 entered the house and that their entering the house in the absence of the Palvies and the packing of the suitcases was part of a pre-arranged plan which had been agreed between Accused 1,2 and 4. If, for example, at the time when Accused 1 and 2 broke in, they had all agreed to break in and steal but there had been no agreement that they should wait for the Palvies to return and then rob and attack them and that aspect was only agreed upon after the first break-in, then it is correct that the appeal would have to succeed in respect of this count and the conviction would have to be altered to one of housebreaking with intent to steal and theft. The court a quo however found as a fact that Accused 1, 2 and 4 had, before the first "breaking", jointly planned to break into the house occupied by the Palvies and attack and rob them in circumstances where each of the accused foresaw the

possibility of death resulting but nevertheless participated in the carrying out of the plan reckless whether the possible death of Mr and Mrs Palvie became a reality.

The trial court found in this regard that

"... the first break-in should not be viewed in isolation, but must be seen as an important preparatory act and an integral part of the overall plan to subject the deceased to violence. From the moment the three accused [that is Accused Nos 1, 2 and 4] formed their gang, because that is what their little group became prior to their going to the farm, and between the time that they decided to go to the farm on the Thursday until their arrest on the Saturday, they jointly schemed, shared in confidences and acted in concert. Accused No 1 and No 2 were prominent members of the gang and each played a leading role in the execution of the common plan. Accused No 2 did not on the spur of the moment decide to attack Mr Palvie, nor did Accused No 4 on the spur of the moment decide to attack Mrs Palvie and participate in the attack on Mr Palvie; their joint attack on the Palvies was in furtherance of a prior agreement with Accused No 1.

In our unanimous view the attacks on Mr and Mrs Palvie were premeditated and part of the execution of the common plan and the only inference to be drawn from all the facts is that Accused No 1, Accused No 2 and Accused No 4 shared the common purpose alleged against

them by the State."
(My underlining).

The basis upon which the court concluded that there was such a prior agreement is the following:

- "1. Each accused believed that there were firearms in the farmhouse occupied by the couple.
2. Each accused believed that either Mr or Mrs Palvie or both might be armed.
3. The accused agreed that Accused No 4 would remain at the dam while Accused No 1 and No 2 broke into the farmhouse, searched for firearms and packed the articles which took their fancy in containers ready to be removed once the accused had overcome Mr and Mrs Palvie and obtained possession of the Volkswagen Golf.
4. While in the house Accused No 1 and No 2 discovered the three weapons in the house, namely the axe, the hammer, knife and a rifle.
5. Accused No 1 and No 2 knew that the weapons were readily available for use to overcome any possible resistance.
6. The accused knew that one or other or all of them would have to subdue Mr and Mrs Palvie by violence:
 - (a) to remove the stolen goods from the premises; and
 - (b) to obtain the key of the vehicle from Mr Palvie so as to convey the stolen goods to Cradock.

7. The accused knew that if either Mr and Mrs Palvie survived the assault they would be identified.
8. The assault upon Mr and Mrs Palvie was carried out swiftly and the goods were removed and the accused departed within a relatively short time of the attack.
9. The nature of the injuries and the weapons used are indicative of the murderous nature of the joint plan.
10. The accused set fire to the Volkswagen in a futile endeavour to cover up their tracks."

These findings were challenged in two respects only. Firstly, as already mentioned, it was submitted that there was no proof that Accused No 1 and No 2 had discovered the hammer and knife in the house on the occasion when they first broke in. It is true that there is no direct evidence to this effect and Accused No 1 denied that he had seen the hammer and the knife on this occasion. On the other hand, the evidence was that the hammer was kept in an open box in the kitchen, while the knife was usually kept in a cupboard in the kitchen; and Accused No 1 said in his evidence that on

the occasion of the first break-in "we left no stone unturned in our search for firearms". Furthermore, as pointed out by counsel for the State, Accused No 1 said that he, together with Accused No 2, thoroughly searched the house. What is more, the attack on the deceased was carried out in a very short time. The witness Matiwane saw the deceased returning in their motor vehicle and walked towards the Palvie's home in order to fetch the groceries which she had asked Mrs Palvie to buy for her. She was still far from the house when she saw Accused 1, 2 and 3 departing in the Palvie's car at high speed. On the evidence therefore the three accused had run to the house, Accused 1 and 2 had entered the house, the two Palvies had been murdered and the stolen articles had been loaded into the Palvies' car and it had been driven off from the farm house during the time that it took Matiwane to walk a few hundred metres. Furthermore it was clearly proved that a knife and a blunt instrument were

used to kill Mr Palvie and the hammer was used to kill Mrs Palvie. The probabilities are therefore strong, if not overwhelming, that at least the hammer had been observed and placed in a position where it was ready to hand when Accused 2 and 4 rushed into the house just before the Palvies arrived and made ready to attack them.

In any event it is quite clear that Finding No 5 above was fully justified on the evidence. Finding No 7 is put too positively. It may be correct to say that the accused knew that if either of the Palvies survived the assault they could be identified since the robbery and the attack were carried out in broad daylight, but whether in fact the Palvies would have been able to identify their attackers would have depended on a number of circumstances and in particular how long after the commission of the offence they were arrested and what opportunities the

Palvies may have had for seeing their attackers.

Subject to these minor qualifications the numbered findings of the trial court are undoubtedly correct. Furthermore, counsel for the State submitted that the evidence established that

- (a) Accused 1, 2 and 4 had planned from the beginning to go to the farm to break in and take money and firearms from the Palvies' home.
- (b) They procured a lift to the farm without arranging for any transport home.
- (c) They arrived after dark and kept out of sight until the Palvies had left the next day and then broke into the house.
- (d) The telephone wires were cut by Accused 1 or 2 on the occasion of the first break-in.
- (e) Accused 1 and 2 closed the broken window after them

after the first break-in.

(f) Accused 1 was posted close to the house on the occasion of the second break-in either to deal with the Palvies' son in case he accompanied them home as he apparently sometimes did, or to cut off the Palvies if they managed to escape from Accused 2 and 4.

I agree with these submissions. The evidence shows a clearly orchestrated and methodical approach to the whole enterprise which is consistent only with Accused 1, 2 and 4. having planned from the beginning to commit a robbery and to use such violence as might be necessary to enable them to carry out the robbery and to escape with their booty in the Palvies' motor car. It necessarily flows from the facts already mentioned and in particular the fact that they believed (as it turns out, correctly) that one or both of the Palvies might be armed, that in the particular

circumstances of this case the accused foresaw from the beginning of their joint enterprise, as a reasonable possibility, that one or both of the Palvies might be killed in the course of effecting their purpose.

It follows that Accused 1 and 4 were correctly convicted of housebreaking with intent to rob and murder. It also follows that Accused 1 was correctly convicted of murder on both counts notwithstanding that he was not present in the house when the murders were carried out. The requirements of common purpose set out in S v Mgedezi & Others 1989(1) SA 687 (A) at 705 - 706 apply, as BOTHA JA said at p 705I "in the absence of proof of a prior agreement ...". Here there was such an agreement. It is also clear that despite Accused No 1 having foreseen the death of the Palvies as a reasonable possibility, he persisted in the execution of the planned attack and robbery reckless of such fatal consequence.

As already mentioned, the court a quo found that there were no extenuating circumstances in the case of Accused 1 or 4 in respect of either of the murder charges and they were, accordingly, sentenced to death on each of these counts. That was before section 4 of the Criminal Law Amendment Act, 107 of 1990, introduced an entirely new approach to the death penalty making its imposition discretionary, even in cases such as this one which had concluded before the amendment came into operation. The first step which must now be taken is the identification, evaluation and weighing up of aggravating and mitigating factors.

The aggravating factors are obvious. Firstly, this was a coolly planned, premeditated attack. Secondly, it was committed in the execution of a robbery committed solely

for gain. Thirdly, it was committed against a solitary couple, well-advanced in years. Fourthly, it was a savage attack - the horrifying savagery is painfully clear from the photographs taken by the police of the bodies of the two deceased. The assault with a hammer on Mrs Palvie was so severe that the police found a fragment of her skull on the floor where she was found. Fifthly, there is the undeniable fact that murderous attacks of this kind on solitary couples living in isolated places are on the increase and the deterrent effect of the sentence to be imposed must, in the circumstances, loom large. I am well aware that, as pointed out in S v Khulu 1975(2) SA 518 (N) at 521F, an "exemplary" sentence is inherently unjust and may be justified only where the injustice thereby done to the individual is "moderate". On the other hand, there is a further factor which is relevant in this regard and that is that both Accused 1 and 4 had previous convictions. Accused 1 had

three previous convictions of theft, two previous convictions of housebreaking with intent to steal and theft, and two previous convictions of assault with intent to commit grievous bodily harm. The offences with which this court is concerned in this case were committed a mere nine months after Accused 1 had been released from prison. Accused 4's record is in certain respects even worse. He had two previous convictions of theft, two previous convictions of housebreaking with intent to steal and theft, a conviction of assault and a conviction of robbery with aggravating circumstances in respect of which he was sentenced to 12 years' imprisonment. This sentence was imposed on 29 November 1977 and Accused 4 had also only been released from prison 9 months before he committed the offences with which we are concerned in this case. It follows that the prospects of reform are, in the case of both appellants, remote.

It was submitted that there were mitigating factors present. In the case of Accused No 1 it was submitted that since the intention to kill existed in the form of dolus eventualis this was a mitigating factor. The mere fact, however, that the agreed plan of action placed Accused 1 outside the house as a guard, not only to keep watch but, if necessary, to use force to overcome the son of the deceased, does not, morally speaking, distance him sufficiently from what actually happened in the house, to justify a finding that the particular form of his intent to kill constitutes a mitigating factor. Accused 1, 2 and 4 were co-planners and co-executioners of that plan at every relevant stage.

After the accused had been convicted, Mr Meyer, a clinical psychologist, testified on their behalf.

In the case of both accused it was submitted that the factors referred to in the evidence of Mr Meyer constituted mitigation. With the assistance of an interpreter he

interviewed Accused 1 and 4, and made a psychological assessment of them (which revealed no abnormality of any kind). He prepared a report which was put in as an exhibit. In this report he summed up their family background as follows:

"... they both came from large, lower socio-economic families who knew life's hardships intimately. Despite this both families were apparently contented, the members were co-operative with one another and they generally lived in a peaceful, loving atmosphere which was strongly rooted in Christianity and around the church. Neither of the accused came from obviously pathological families."

Accused No 4 "suffered from the early loss of his father which caused acute financial hardships to the family, resulting in him being forced to abandon his education in Std 4" (at the age of 15). Similarly Accused No 1 was "also forced to drop out of school in Std 8" (at the age of 17), "due to financial reasons, unequipped to offer the open labour market any sought after skills". Mr Meyer was, of course, dependent upon the accused for information and it is

apparent that in certain respects the information furnished was incorrect. For example, Mr Meyer's report states that Accused No 1's first offence was one of housebreaking committed at the age of 19. In fact, his first offence was just before he turned 15 when he was convicted of theft of cheques and forgery and uttering of the cheques. This offence must have been committed while Accused No 1 was still at school, as indeed it seems probable was his subsequent conviction for assault with intent to commit grievous bodily harm involving the use of a knife in August 1976. Nevertheless, it is a real factor, as Meyer stated, that

"It is a well-known social-psychological fact that school drop-outs find themselves at a serious disadvantage in an increasingly technological society and are forced to take low paying menial jobs which perpetuates their culture of poverty and increases the disposition towards delinquency and crime."

Mr Meyer also gave the trial court the benefit of his interesting analysis of revolutionary violence particularly

in black residential areas and referred to the consequent breakdown in traditional structures maintaining law and order. In his evidence he developed this theme in the following words:

"That extenuation refers to the fact that the accused living under circumstances which some have described as a war-zone in which there was a heavy police and military presence in the township, that there was extensive violence in the township at the time, that these circumstances model aggression, that aggression becomes part of daily life, and that type of factor put into a context of their poor socio-economic circumstances within a system in this country which discriminates against black people."

This evidence is entitled to considerable weight. In the first place, it is clear that Mr Meyer was an impressively objective witness. The trial court described him as "an honest reliable and sensible witness". I fully agree. What is more, it cannot be doubted that there was a real factual basis for his expert opinion, bearing in mind that he was testifying in October 1989 and referring to events which took place in February 1987. The fairness of Mr Meyer is

demonstrated by the question and answer which followed immediately after the evidence quoted above:

"Mr Meyer, I would understand that if this was a case of perhaps where one or two policemen during the course of a violent unrest situation had been killed by the two accused, I would understand that, but in a cold blooded, premeditated murder of two old people on a farm completely away from the township, would you say that those or political motives and poor socio-economic situation could be an extenuating factor? --- Your Lordship, I do not want to give the court the impression that - as a witness, I'm not taking into account the very aggravating circumstances of this case to which counsel for the State refers, I think these are highly pertinent and very obvious one, however, I do believe that within circumstances whereas there is considerable violence being modelled, that violence is part of the state they live in, that that can have an effect on what one sees as legitimate action in a black-white crime. Not wishing by any stretch of the imagination to condone the very brutal killing of two innocent people."

In fact, Mr Meyer's report concludes with the following passage:

"In the above situation the arms and ammunition which were stolen from the Palvie home, possibly being the prime motive for the crime, have a ready market value. However the question arises, if this was the motive for

the crime, why the callous disregard for the lives of Mr and Mrs Palvie? Why did the accused not simply break in, steal the arms and flee from the scene of the crime by making prior arrangements for transport from the farm in the same way as they had arranged to arrive at their destination? These remain unanswered questions.

In conclusion, Accused 1 and 4 were able to distinguish between right and wrong at the time of the crime, and there is no acceptable evidence before the court regarding any extenuating circumstances existing at the time of the crime. Nevertheless, it is the examiner's submission that the broader socio-economic and political context described above should be taken into account when considering an appropriate sentence."

What Mr Meyer referred to as "unanswered questions" do indeed remain unanswered questions.

These are difficult and complex questions. As already pointed out Mr Meyer readily admitted in evidence that he had been entirely dependent on Accused 1 and 4 for information regarding their background and as already mentioned, some of the information furnished was incorrect.

No doubt the accused suffered from frustations as a result of being poor and badly educated but this was not the major factor relied upon on behalf of the appellants. What was principally relied upon was what one might call the "modelling" factor or the "desensitisation" factor. The effect of the evidence is that when a person particularly one of low educational standard is exposed, as it were, to a daily diet of violence where even the authorities as personified by the police are, rightly or wrongly perceived as perpetrators of violence, that person becomes "desensitised" to violence ; his sensibilities are blunted and he is more ready to abandon the restraints which he would otherwise have against the use of violence. These are prima facie valid considerations and may, in a proper case, indeed constitute mitigating factors. They are, however, in the particular circumstances of this case, very much weakened, if not entirely countered, by two factors. The first is that

referred to in Mr Meyer's report as "unanswered questions" and this clearly influenced the trial court in its conclusion that there were no extenuating circumstances. The crimes in question were not committed with any political motive. What is more, we are not here dealing with teenagers or even young men in their early twenties. Accused 1 was 27 and Accused 4 was 34 years of age at the date when these offences were committed. The very serious waves of violence which swept through the black residential areas commenced, on the evidence referred to in Mr Meyer's report, in 1984 at a time when the accused were no longer impressionable youths. What is more, in the twelve years between September 1974 and May 1986 Accused No 4 spent nearly 10 years in gaol - in fact from November 1977 to 28 May 1986 he was continuously in gaol where he was in no position to witness or participate in what was taking place in the black residential areas. In the 6¹/₂ years from November 1979 to May 1986 Accused No 2 spent

3¹/₂ years in prison. In other words, both the accused were well set on a course of crime long before 1984.

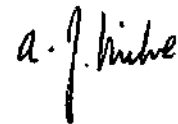
To sum up:

- (a) The aggravating features far outweigh the slight mitigating factors;
- (b) the prospects of reform are remote;
- (c) the deterrent factor must, for the reasons mentioned, play an important role;

and one is driven to the conclusion that this is one of those exceptional cases where the death sentence is imperatively called for.

I wish to express our indebtedness to counsel for the appellant and counsel for the State for the clear and objective manner in which they presented their arguments.

The appeals of both the appellants against their convictions and sentences are dismissed.



A J MILNE
Judge of Appeal

HOEXTER JA)
KRIEGLER AJA) CONCUR