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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PETER JOHN OOSTHUIZEN Appellant

and

THE STATE Respondent

CORAM : JOUBERT, MILNE et KUMLEBEN JJA

HEARD : 7 MAY 1991

DELIVERED : 23 MAY 1991

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA

The appellant, a 25 year old man, was charged in the Witwatersrand Local Division of the Supreme Court with murder (count 1) and robbery with aggravating circumstances (count 2), with the same victim involved; and robbery (count 3). He pleaded not guilty to count 2 but guilty to the others. The State tendered evidence on all three counts and he was convicted on each. Thereafter the appellant gave evidence, as did a psychiatrist, on extenuating circumstances. These were held not to have been proved and the death sentence followed. The court a quo granted leave to appeal against the imposition of the death sentence.

The State witnesses were found to be reliable and, in the light of the pleas of guilty, their testimony was not challenged in any material

respects. There were no eye-witnesses at the time of the actual killing, or shortly before or after. The appellant recounted to more than one State witness what he alleged had happened over this period. The court, with ample justification, found him to be a dishonest witness. I shall nevertheless take into account that portion of his evidence which is uncontradicted on the supposition that it may, as a reasonable possibility, be true. In this regard I refer to his own testimony and also to the evidence of certain State witnesses who related what he had told them. On this basis the relevant facts can be thus summarised with his evidence, or that which emanated from him, placed in parenthesis.

Mr Roderiques and his brother were the owners and proprietors of a café and an adjoining butchery in - to judge from the photographs - one of the less

salubrious suburbs of Germiston. Roderiques had known the appellant for about three years before the murder. The appellant used to drink to excess whenever he could and was a dagga smoker. He was a "down-and-out", in the words of one witness: unemployed and without a place to stay. Roderiques felt sorry for him and befriended him. He allowed him to occupy a room free of charge in the back yard of the butchery with members of his staff.

On the day in question, Saturday 9 July 1988, the appellant was in the café and under the influence of liquor. At about 3 pm a crippled man entered to buy something. For no good reason the appellant attacked him. (The appellant on reflection thinks that he was insulted by this customer.) The appellant rushed at him and punched him. The man fell and broke the glass of a display case. (He was in a blind rage

and continued to assault him although Roderiques ordered him to desist.) Roderiques summoned the police. The appellant was not arrested because his victim refused to lay a charge but the police, with the enthusiastic support of Roderiques, chased him from the premises.

By 8 pm he was again in the café. As it was being closed for the night, another customer arrived who turned out to be the deceased. After he had bought a cold drink from one of the staff, he asked for directions to a certain place. The appellant offered to accompany him and show him the way. They walked off together. (They drank some liquor and smoked dagga. The deceased offered him a place to stay. They walked in various directions, apparently in search of a place for the night. At some stage the deceased asked him for money. The appellant tried to get rid of him but

the deceased kept following him. This, and the fact that the deceased wanted money from him, caused him to attack the deceased. He grabbed his chest and struck him with his fists. He remembers nothing further. He just assaulted him blindly. When the deceased was lying unconscious in the road, he took off his clothes with a view to selling them. He, however, changed his mind and burnt them in a brazier not far from where the deceased lay. At some stage he returned to the body and cut the neck of the deceased with a piece of broken glass.)

The next morning, Sunday 9 July, when Roderiques came to open the café the appellant was sitting alone in the back yard of the premises. He "looked strange". He asked if he could speak to Roderiques alone and confidentially. He said that he had killed a man the previous night because he had

drunk his beer and taken his money. He proceeded to recount the assault substantially as already described. The two of them went by car to the place where the deceased lay only to find that the police were already at the scene. Roderiques suggested that the appellant should give himself up. He refused and so they returned to the café. At about 7 pm Roderiques persuaded him that this was the best course. He drove the appellant to the Germiston Police Station and dropped him off outside the charge office. He entered the police station but failed to confess to the crime. Instead he apparently offered to assist the police in identifying the body because he was taken to the mortuary and shown the deceased. He, however, falsely stated that he did not recognise him. The police drove him back to the vicinity of the café. The next morning he was arrested.

A post-mortem examination was conducted on the body of the deceased. As the photographic exhibits explicitly show, there were what the doctor described as "grazed and stamped abrasions" over almost his entire body. They could have been caused by hitting, kicking or the use of a blunt object of some kind, such as a stone, though some of the injuries may have been as a result of the body being dragged. A ruptured spleen was the fatal injury with bleeding on the brain perhaps a subsidiary cause of death. The medical evidence was that the cut wounds of the throat and neck were, despite appearances, superficial and in all probability inflicted after the deceased was already dead.

A subsequent incident has reference to count 3 but is to an extent relevant to the question of sentence now under consideration. On 2 December 1988

the complainant on this count, a Mr Faure, was in a large cell at the Germiston Police Station awaiting a bail application. The appellant and other arrested persons joined him. The appellant contrived to be alone with him. He robbed the complainant of his watch, ring and some money by threatening him and stabbing him in his side with a sharpened table iron.

A psychiatrist, Dr Shevel, was called by the defence on the question of extenuating circumstances. He was one of the medical specialists who had observed the appellant and had submitted a report in terms of s 79 of the Criminal Procedure Act, 51 of 1977 ("the Act"). They were agreed that the appellant was legally accountable for his unlawful conduct and was fit to stand trial. In addition, in the course of a comprehensive report, Dr Shevel gave his reasons for concluding that the appellant was a psychopath, in fact

in his view a "five-star psychopath". After setting out the criteria customarily used to decide whether a person should be thus classified, Dr Shevel considered them in reference to the accused before deciding that he had this personality disorder. From an early age he had failed to conform to reasonable social norms or to behave in a disciplined fashion. He, for instance, at school played truant and committed offences. He spent a large part of his youth in correctional institutions. Later his aggressive behaviour led to his being convicted twice, in 1985 and 1987, of assault with intent to commit grievous bodily harm: the weapon involved in each case was a knife. (In addition he has two further convictions: for impersonating the police; and for committing the offence of housebreaking with the intent to steal and theft.) His personal history revealed other symptoms of psychopathy inter alia an incapacity to hold down

any job; impulsivity; inability to learn from experience; and lack of remorse for harm caused to others. That he is a psychopath is, in Dr Shevel's opinion, in part due to the fact that he is of low intelligence and suffered a severely deprived childhood with no stable family relationships. Dr Shevel considered his killing of the deceased to have been a typical example of a sudden outburst of irrational anger and aggression.

The decision in the court a quo that extenuating circumstances were not proved was based on the legal principles applicable before s 277 of the Act was amended by s 4 of the Criminal Law Amendment Act, 107 of 1990 ("the 1990 Act"). The effect of this amendment has been discussed in a number of decisions of this court. The essential features of the change in the law regarding the imposition of the death penalty

are comprehensively set out in the judgment of Nestadt JA in S v Nkwanyana and Others 1990(4) S.A. 735(A) 742I to 745G. It is unnecessary to repeat them. Shortly stated, this court must, with due regard to the mitigating and aggravating factors, decide whether the death sentence in all the circumstances is the only proper one. One must thus in the first place decide on what mitigating and aggravating features are present and determine the weight to be attached to each.

In this regard I must revert to the evidence of Dr Shevel. Mr Tee, who appeared on behalf of the appellant, sought to rely on the finding that the appellant was a psychopath as a mitigating factor, whereas Mr de Beer, for the State, submitted - though more tentatively - that this might be regarded as an aggravating one. After some debate both counsel, correctly in my view, conceded that such a finding in

itself takes the enquiry no further. This has been said repeatedly by this court: see S v Kosztur 1988(3) S.A. 926(A) 938 D - F and the decision cited in that passage. The question in each case depends upon the nature of the aberrant behaviour and the role it played in the commission of the crime under consideration.

The most significant and obvious mitigatory feature is that this was an impulsive, irrational act on the part of a person of low intelligence, whose mind at the time was befogged by his consumption of liquor: a mind which at the best of times would seem to have been incapable of sound reasoning and responsible conduct. The inescapable impression is that the wellspring of his misconduct was his inadequacy as a human being rather than inner vice or calculated cruelty.

Mr Tee relied on two further factors which in my view carry little or no weight. He referred to the finding in the judgment on the merits that as regards the murder this was a case of dolus eventualis. I am not certain whether the facts bear out this conclusion (or on what degree of proof it was based). But, since Mr de Beer conceded this lesser degree of intent as a reasonable possibility, it can be accepted as correct for present purposes. Nevertheless it hardly serves as mitigation. It was a sustained and brutal attack, and, on the supposition that the appellant foresaw the fatal consequences of his act (since the correctness of the conviction is not contested), he must have appreciated that death would most probably ensue. The fact that the appellant did not possess or use a weapon was also mentioned as an extenuating circumstance. I cannot agree. To kill a person in the manner in which the deceased met his

death was, in my view, a sustained and particularly barbaric act.

This feature and the appellant's previous convictions were the principal aggravating factors relied upon by Mr de Beer. They are significant and carry considerable weight. Nevertheless, in the course of argument Mr de Beer was, quite correctly in my view, inclined to concede that the substitution of a sentence of life imprisonment would satisfy the retributive element of punishment and serve as a deterrent to others. He however questioned, with reason, whether the appellant could ever be rehabilitated and whether the death sentence was not imperative in the interest of the community. These concerns were canvassed by Dr Shevel. He said inter alia that: "I don't think we really know enough about the cause of psychopathy to find ... an effective treatment at this stage"; that

"if he was just left to his own devices he would be dangerous beyond control"; that "I am sure that even after 40 the aggressive psychopath would remain aggressive"; and finally that "[he] has a poor prognosis." Should life imprisonment be substituted, the danger of the appellant presenting a threat to the open community after release from prison is, as far as possible, eliminated by the provisions of s 64 of the Prisons Act, 8 of 1959 as amended by s 18 of the 1990 Act. As pointed out in S v Mdau 1991(1) S.A. 169 (A) 176D - 177A, a person serving a life sentence may in future only be released from prison on the authority of the Minister of Justice acting on the recommendation of the Release Advisory Board. (As to the composition of that body see s 5B of the Prisons Act as amended.) In the circumstances it cannot be said that the risk of his behaving aggressively and unlawfully, before or after release, is sufficient to warrant the death

sentence in the light of the other relevant considerations.

The appeal against sentence is upheld. The death penalty is set aside and one of life imprisonment substituted. The sentences imposed on count 2 and 3 are to run concurrently with this substituted sentence.

M E KUMLEBEN
JUDGE OF APPEAL