

Case No. 446/90

IN THE SUPREME COURT OF SOUTH AFRICA
Appellate Division

In the matter between:

SIMON BONGANI MAJOSI	First Appellant
MICHAEL ZONDI	Second Appellant
MNGXOBENI SOKHELA	Third Appellant
WILTON NOLZIMANDE	Fourth Appellant
THULANI Z M MAGUBANE	Fifth Appellant
and	
THE STATE	Respondent

CORAM: SMALBERGER, NIENABER JA et KRIEGLER AJA

HEARD: 9 SEPTEMBER 1991

DELIVERED: 26 SEPTEMBER 1991

J U D G M E N T

NIENABER JA:

On Sunday 29 May 1988 at about noon a robbery occurred at the Checkers supermarket in Hillbrow, Johannesburg. Two of its employees, Mrs Byrne and Mr Botha, a security guard, collected the cash takings of the morning from the various cashiers at the tills. The tills are lined up at street level and are open to the pavement outside. Mrs Byrne started collecting the money at the one end, Botha at the other. They moved from till to till. This was a regular daily or twice-daily operation, visible to anyone inside or outside the store. As part of the routine the manager of the supermarket, Mr Knight, and the assistant manager, Mr Glanz, had taken up positions on the pavement directly opposite the tills. When Mrs Byrne and Botha met in the middle he placed all the takings in a single yellow bag. It was afterwards calculated to have contained R28 600,00. They proceeded to the first floor. Botha was carrying the bag with the money. They had reached the top of a narrow stairway,

out of sight of the public, and were entering a security area when Mrs Byrne happened to glance back and saw that Botha was talking to two black men at the security gate which she had just unlocked and passed through. One of them was wearing a white dust-coat and the other was dressed in brown. They were obstructing Botha from closing the gate. She was not alarmed, believing them to be co-employees, but when she heard a noise she looked back again and saw that Botha was being pulled through the gate. It sounded to her as if they were tumbling down the staircase. She shouted to another co-employee, a Mr Azari, who was in the cash office nearby, and he rushed towards them. Botha was holding on to the man in brown. The latter had a gun. The two of them were struggling. Botha called on Azari to grab the gun but as Azari tried to do so the man in brown managed to toss it towards his companion who was then standing at the foot of the stairs. Azari testified as follows:

"When they were down at that spot, was Mr Botha still holding onto one of the robbers?
-- Yes, he was.

What did the other person who now had the gun do? --- He then told me that he was going to shoot.

That is now the man with the gun? ---
With the gun. I then lay down on the stairs.

Where were you at that stage? --- I was
.. (intervenes)

Were you still above the deceased, were
you then above the deceased? --- Yes, behind
the deceased.

Yes? --- And then the robbers, the guy
with the gun then went up two steps and shot
Mr Nols Botha."

Botha, fatally wounded, released the other man. The
two robbers then fled with the bag of money. They ran
past Knight and Glanz, who were still stationed on the
pavement outside the store, towards a Granada motor
vehicle which was double-parked in a nearby side street
some 100 to 250 metres away. Knight chased them but
the car drove off as soon as the two of them entered
it. Knight followed on foot for some distance. The
car drove at high speed through several red traffic
lights and eventually disappeared from sight.

According to the medical evidence the
deceased, Botha, was most likely killed by a single
shot, fired into his head from above and to the right
of him.

These events led to the trial, a year later,

of the five appellants in the Witwatersrand Local Division, before Smit J and two assessors, on four counts - count 1, the murder of Botha, count 2, robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act No. 51 of 1977; counts 3 and 4, the unlawful possession of a firearm and ammunition in contravention of the relevant sections of the Arms and Ammunition Act No. 75 of 1969.

None of the eyewitnesses to the robbery and the murder was able to identify any of the malefactors. All five appellants were nonetheless convicted, on one or more of the various counts. The conviction of each rested on a confession he had made to a justice of the peace. The admissibility of all of these statements was strenuously but unsuccessfully challenged in the court *a quo*. Largely on the basis of what was thus admitted three of them, appellants Nos. 2, 4 and 5, were convicted of murder, all of them were convicted of robbery with aggravating circumstances and two, Nos. 1 and 5, were in addition convicted of the firearm offences. The court furthermore found, applying the law as it then stood, that the three appellants

convicted of murder had not discharged the onus of proving that there were extenuating circumstances. The appellants were accordingly sentenced as follows:

The first appellant:

Count 2: Robbery with aggravating circumstances: sentenced to imprisonment for 14 years.

Count 3: Unlawful possession of a firearm: sentenced to imprisonment for one year, which it was directed was to run concurrently with the sentence on count 2.

The second appellant:

Count 1: Murder: sentenced to death.

Count 2: Robbery with aggravating circumstances: sentenced to imprisonment for 14 years.

The third appellant:

Count 2: Robbery with aggravating circumstances: sentenced to imprisonment for 14 years.

The fourth appellant:

Count 1: Murder: sentenced to death.

Count 2: Robbery with aggravating circumstances: sentenced to imprisonment for 14 years.

The fifth appellant:

Count 1: Murder: sentenced to death.

Count 2: Robbery with aggravating circumstances: sentenced to imprisonment for 14 years.

Count 3: Unlawful possession of a firearm: sentenced to imprisonment for one year, which it was directed was to run concurrently with the sentence on count 2.

Count 4: Unlawful possession of ammunition: sentenced to imprisonment for one year, which it was likewise directed was to run concurrently with the sentence on count 2.

All five appellants were granted leave to appeal by the court a quo: appellants Nos. 2 and 4 (but not appellant No. 5) against their convictions for murder; appellants Nos. 2, 4 and 5 against their sentences of death; and all five of them against the sentence of 14 years imprisonment imposed in respect of

the robbery charge.

In this court, unlike in the court a quo, the admissibility of the confessions made by each of the appellants was not in issue. What was strenuously disputed on behalf of appellants Nos. 2 and 4 was whether the statement of each contained sufficient admissions to render him criminally liable in terms of the so-called doctrine of common purpose. It was on that basis that the court a quo approached the matter.

I commence with the convictions of appellants Nos. 2 and 4 on the count of murder.

The conviction of appellant No. 2 of murder.

His statement, exhibit J, reads as follows (for the sake of convenience I insert a reference to the appellant concerned whenever a name is mentioned):

"Dit was op 'n Sondag, ek kan nie die datum onthou nie. Dit was ek (appellant No.2), Mgxobeni (appellant No.3), Xolani (appellant No.4), Bongani (appellant No.1) en Mbamsela (appellant No.5). Ons het 'n Ford Granada gery na Hillbrow. Ons het na 'n swartman Bheki toe gegaan. Ons het die vuurwapen van Bheki af geleen, en hy het die vuurwapen aan Bongani (appellant No.1) gegee.. Ons het vandaar na Checkers toe gegaan. Ek en Mgxobeni (appellant No.3) het te voet gestap. Die ander drie, Xolani (appellant No.4), Bongani (appellant No.1) en Mbamsela

(appellant No.5), het met die Granada gery na Checkers toe. Ek en Mgxobeni (appellant No.3) het buitekant die winkel gestaan. Xolani (appellant No.4) en Mbamsela (appellant No.5) het binne in Checkers ingegaan. Hulle was lank binne in die winkel. Ek het verskuif van waar ek gestaan het na die oorkant van die straat. Terwyl ek oorkant die straat was ek het 'n skoot van die vuurwapen gehoor.

Na die skoot ek het gesien Xolani (appellant No.4) en Mbamsela (appellant No.5) hardloop by Checkers uit. Hulle het uit sig verdwyn. Ek het na Noordstraat toe gegaan waar ek 'n taxi na Diepkloof gehaal het. By Diepkloof het ek 'n ander taxi gehaal na Dube hostel toe. Ek het Xolani (appellant No.4), Bongani (appellant No.1) en Mbamsela (appellant No.5) by die hostel gekry. Mgxobeni (appellant No.3) was nog nie daar nie. Hy het na my daar aangekom. Die tyd wat ek by Dube hostel kom ek het gemerk dat daar was 'n plastieksak van Checkers met geld daarin. Ons het daai geld tussen ons verdeel. Ek het R1200 ontvang. Ons het toe uitmekaar gebreek. Ek het by my woonplek gegaan by Mafolo."

What the statement, taking it at face value, shows, either expressly or by implication, is that:

(a) the five appellants hatched the plan and formed the common purpose to rob the Checkers supermarket at Hillbrow;

(b) they borrowed a firearm which was patently to be used in the furtherance of that common purpose should the need arise to do so - which would be to threaten or intimidate their victims, to overcome any resistance or to engineer an escape;

(c) appellant No. 2 accompanied his associates on foot to Checkers;

(d) he took up a position in the street outside the building but within sight of the tills. It is fair to infer that he was assigned the function of keeping watch;

(e) appellant No. 2 did not personally participate in or witness the actual murder of the deceased. He did, however, hear a shot being fired which, being the only shot referred to by the eyewitnesses, must have been the one which fatally wounded the deceased;

(f) appellant No. 2 joined his companions afterwards and shared in the spoils of their joint enterprise.

What the statement does not reveal is a prior agreement or common purpose between the five appellants

to murder, as opposed to rob, anyone. (*S v Yelani* 1989 (2) SA 43 (A) at 46E-G.) Accordingly the murder of the deceased by appellant No. 2's associates can only be imputed to appellant No. 2 if his situation corresponds to paragraph (c) of the oft-quoted dictum of **Holmes JA** in *S v Madlala* 1969 (2) SA 637 (A) at 640F-H:

"Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -

(a) that he individually killed the deceased, with the required *dolus*, e.g. by shooting him; or

(b) that he was a party to a common purpose to murder, and one or both of them did the deed; or

(c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequences, and it occurred; see *S v Malinga and Others*, 1963 (1) SA 692 (AD) at p.694F-H and p.695; or

(d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder."

(See, too, *S v Petersen* 1989 (3) SA 420 (A) at 425E-F;
S v Nzo and Another 1990 (3) SA 1 (A) at 7C-D.)

That appellant No. 2 was a party to a common

purpose to commit armed robbery is undisputed. The real issue, therefore, is whether appellant No. 2 foresaw and reconciled himself with the risk that any of his associates, in the course of the execution of their plan to rob, might cause the death of someone - in which case he would be guilty of murder - or, if he did not, that he ought reasonably to have foreseen that consequence - in which case he would be guilty of culpable homicide. (S v Nkwenja en n Ander 1985 (2) SA 560 (A); S v Mbatha en Andere 1987 (2) SA 272 (A) at 283B.) The enquiry is directed to the state of mind of appellant No. 2 at the time he embarked on the venture (S v Shaik 1983 (4) SA 57 (A) at 62G-H), although his act of association, for the purpose of his common purpose to rob, must exist at the time of the offence. (S v Nzo supra at 11H.)

It was argued on behalf of appellant No. 2 that he cannot be said to have foreseen death as a possible consequence of the planned robbery, firstly, because the State failed to prove that he knew that the firearm which was to be used in the robbery was in a working condition, secondly, because it was reasonably

possible that he may have thought that appellant No. 1, who, like himself, had not entered the premises, retained possession of the firearm; and thirdly, because he may have believed it to be a mere "smash and grab" operation in which the need to use a gun would never arise.

The difficulty with this argument is that appellant No. 2 never said so - neither in his confession nor in evidence.

The probabilities, moreover, count heavily against the points which counsel sought to make on his behalf. The five appellants, quite plainly, banded together as a gang. The robbery was discussed and carefully planned. This was no rash, impulsive, amateurish exploit. The hold-up was to take place in broad daylight, in a densely populated area, at one of the busiest supermarkets in Johannesburg, at one of the busiest times on one of the busiest days, when it could be expected that the spoils, on the one hand, would be most lucrative but the security personnel, on the other, would be most alert. Banditry on such a scale would not likely have been undertaken unless the gang

equipped themselves in advance with the means to pull it off. A firearm or firearms with which to threaten or terrorize others or protect themselves, would have been virtually indispensable. The appellants went to the trouble of borrowing one. In the absence of evidence from any one of them as to his contrary belief at the time, it is inconceivable that all of them would not have appreciated that it might have to be used. Each member of the gang was assigned a specific and presumably vital role during the robbery. Not all of them would handle the gun. Appellant No. 2 was one of those who would not do so: his function was to keep watch outside. But that does not mean that he was not aware of the gun or its purpose. He mentions the gun in his statement. On the overwhelming probabilities all of them must have contemplated and reconciled themselves with the possibility that the gun might have to be used, not only to intimidate but to subdue, and that someone might be injured, even fatally, in the process.

That this is so as far as appellant No. 2 is concerned emerges further from his conduct after the

event. He heard a shot being fired inside the building. Yet he met up with his companions afterwards at the Dube hostel. There is nothing in his statement to indicate that he enquired whether the shot had been fired by a confederate or that he expressed surprise or outrage or that he dissociated himself in any way with the shooting that had taken place earlier. On the contrary, he accepted his share of the plunder. The conduct of a man after the event may well serve as an indication of his state of mind at the time. In *S v Petersen supra* at 425E-F it was said:

"Nou is dit so dat, in gevalle waar twee persone deelneem aan 'n roof, en die een van hulle in die loop van die aanranding die slagoffer dodelik verwond, en die ander daarna optree op 'n wyse wat daarop dui dat hy hom vereenselwig met wat gebeur het, sodanige latere optrede dikwels aangewend kan word as die grondslag van 'n afleiding dat hy die moontlikheid voorsien het dat die slagoffer gedood kon word en onverskillig daarteenoor gestaan het."

Appellant No. 2, knowing that the gun had been fired, shared in the spoils. That fact reinforces the impression that what had happened earlier was not at odds with what might have been expected to happen when

the robbery was planned, namely, that resistance could lead to violence. (*S v Goosen* 1989 (4) SA 1013 (A) at 1021A-B.) Appellant No. 2 was not present during the actual shooting. Even so, on a fair reading of his statement, and in the absence of a contrary explanation from him, appellant No. 2 must subjectively have foreseen, when he participated in the robbery, that someone might be killed in the course thereof. Appellant No. 2 was accordingly correctly convicted of murder. (*S v Mbatha en Andere* supra 284B-C; 284J-285C; *S v Mthembu and Others* 1988 (1) SA 145 (A) at 152E.) His appeal against his conviction on count 1 must fail.

The conviction of appellant No. 4 of murder.

Appellant No. 4's statement was exhibit L. It reads as follows, again with the interpolation of references to the various appellants:

"Ek werk daar by Dube saam met my vader. Hy verkoop medisyne. Zondi (appellant No.2) het daar by my aangekom en my versoek om met Gwala te praat om 'n vuurwapen vir my te leen aangesien daar mense is wie hom pla by die besigheid. Zondi het my meegedeel dat ons geld in die dorp moet gaan kry en dat ek ook 'n deel sal kry indien ek saamgaan.

Ek het na Gwala toe gegaan en die

vuurwapen gekry en dit na Zondi geneem.

Ek het teruggekeer na my vader se besigheid en weer teruggekeer na Zondi se plek. Met my aankoms by Zondi se plek het ek hom (appellant No.2), Bongani (appellant No.1), Themba (appellant No.3) en Mbasela (appellant No.5) daar aangetref.

Ons het met Themba (appellant No.3) se motorkar, 'n Granada, dorp toe gery. Met ons aankoms in die dorp het Bongani (appellant No.1) gesê dat hy 'n ander vuurwapen by sy broer wil gaan haal. Met sy terugkoms het myself (appellant No.4), Mbasela (appellant No.5) en Zondi (appellant No.2) Checkers winkel ingegaan. Zondi (appellant No.2) het voorgeloop, Mbasela (appellant No.5) het tweede geloop en ek was derde. Met my inkoms by die winkel het ek gesien dat Zondi (appellant no.2) 'n blanke man aanhou met 'n vuurwapen.

Die blanke man het vir Zondi gegryp. Zondi het die vuurwapen na Mbasela gegooi en Mbasela het 'n skoot afgevuur.

Ek kon nie sê wat daar gebeur het nie maar ons is daar uit. Toe ons buitekant kom het ek gesien dat Mbasela (appellant No.5) 'n vuurwapen in sy regterhand het en geld in sy linkerhand.

Ons het teruggehardloop na die kar en terug gereis na Dube. Themba (appellant no.3) was nie saam met ons nie. Hulle het gesê dat hy per taxi sal terugkeer. Zondi (appellant No.2) het gesê dat ons die aand moet terugkeer sodat ons ons 'share' kan kry van die geld.

Ek het daar weggegaan en die aand teruggekeer en hulle almal daar gekry. Zondi

het my R1000 (een duisend rand) gegee.
Dit is al."

This statement must be read in the context of the evidence as a whole, without regard to any material contained in any of the statements of any of the other appellants which may incriminate him. It reveals, either expressly or by implication,

(a) that appellant No. 4 agreed to participate in an armed robbery together with the other appellants, for which they obtained two guns;

(b) that appellant No. 4 entered the premises of Checkers with appellants Nos. 2 and 5;

(c) that appellant No. 4 was present during the entire incident when one of them (identified by appellant No. 4 as appellant No. 2) confronted the deceased with a gun, and who, when the deceased grabbed him, tossed the gun to appellant No. 5 who fired a shot;

(d) that he was with appellant No. 5 when they left the premises;

(e) that appellant No. 5 had the gun in his one hand and the money in the other;

(f) that he escaped together with appellant No. 5 in the car;

(g) that they all met that evening when he was given R1000 as his share of the spoils.

According to the statement appellant No.2 accompanied them into Checkers. This is in conflict with the statement of appellant No. 2 which, of course, is irrelevant for the purpose of assessing appellant No. 4's own involvement. What is, however, telling is that appellant No. 4's statement is inconsistent, in this single respect, with the evidence of Byrne and Azari. According to their uncontested evidence the incident took place inside a narrow corridor, out of sight of the public and, what is of particular significance, only two robbers were involved. Knight and Glanz saw only two robbers emerge from the shop. One of them, on all accounts, was the man in the white dust-coat who fled with the money and the gun. Counsel who appeared for both appellants Nos. 4 and 5 rightly conceded, on the basis of what appellant No. 5 admitted in his statement, that appellant No. 5 must have been the man in the white dust-coat. On appellant No. 4's

version, as contained in his statement, the other man must therefore have been either himself or appellant No. 2. Appellant No. 4 places himself on the scene. He describes the entire incident in such detail that he must have witnessed it. His description accords almost exactly with that of the eyewitnesses, save of course for the interposition of a third gangster. But there was no third gangster who entered the building with the other two. It was never even remotely suggested to any of the State witnesses that there was or might have been such a person; and it is idle to speculate, on the basis of what appellant No. 4 said in his statement, but was not prepared to repeat in evidence, that appellant No. 2 was the other man involved in the murder, and that appellant No. 4 may have been a mere spectator lurking somewhere in a corner. The fact is that only two men fled from the building, ran past Knight and Glanz, and were followed by Knight until they reached the car and escaped. In his statement appellant No. 4 admits "Ons het teruggehardloop na die kar". He was accordingly one of them. The other was the man in the white dust-coat. Appellant No. 4 was

therefore the man in brown. What appellant No. 4 had to say about the presence of appellant No. 2 is pure fiction and a transparent attempt to exculpate himself at the expense of the latter.

The court a quo, applying the guidelines itemized in **S v Mgedezi and Others** 1989 (1) SA 687 (A) at 705I-706C, convicted appellant No. 4 on the basis of the doctrine of common purpose. But of course if appellant No. 4 was the man in brown, as he must be found to have been, the doctrine of common purpose is irrelevant. If appellant No. 4 was the man in brown he was a co-perpetrator who passed the gun to appellant No. 5 when he was being held by the deceased to enable appellant No. 5 to shoot the deceased. Appellant No. 4's actions contributed causally to the death of the deceased. His liability is direct, not imputed. His appeal against his conviction must fail.

The sentences of appellants No. 2, 4 and 5 on the murder count.

All three these appellants were sentenced to death by the court a quo. This was on 6 December 1989.

Since then the law relating to the imposition of the death penalty has undergone a radical transformation, the creation of the Criminal Law Amendment Act 107 of 1990. Its impact and implications have been discussed in divers recent decisions of this court and need not be re-stated. The onus is now on the State to prove aggravating and to disprove mitigating factors.

Certain aggravating features are common to all three appellants. All of them were active participants in the robbery which led to the death of the deceased. It was a carefully planned and executed operation. They armed themselves in advance and each of them, whatever his allotted role, appreciated that the firearm which they had jointly procured might have to be used in the execution of the robbery, possibly with fatal consequences to others. What eventually happened, the death of the deceased, fell well within the compass of their contemplation.

Turning to the individual appellants, appellant No. 2's situation differs markedly from that of the other two in that, perhaps fortuitously, he was the man deputed to keep watch outside and

accordingly did not accompany the other two into the building where the killing took place. Consequently he was unaware of what actually happened when his associates confronted the deceased. His involvement in the killing of the deceased was therefore more remote and less immediate than in the case of the other two. His form of intent was *dolus eventualis*. Those are reasons enough, in my view, for not imposing the death sentence on him.

Appellant No. 4, unlike appellant No. 2, was present in the passageway where the deceased was killed. His involvement in the death of the deceased was direct. The deceased was busy holding him. He managed to fling the gun towards appellant No. 5, evidently to enable appellant No. 5 to extricate him from the deceased's grip and so to make good their escape. Clearly he expected appellant No. 5 to use the gun. But can it be said with certainty that appellant No. 4 must have realised that appellant No. 5 would necessarily shoot to kill? The evidence does not suggest that the deceased was armed and that he might therefore be expected to retaliate, at the risk of

their lives, as soon as he released appellant No. 4. To shoot to kill was not appellant No. 5's only or even most obvious option. He could as readily have been expected to point the gun at the deceased with the threat that he would shoot if the deceased should refuse to release appellant No. 4. Only then, on the deceased's refusal to do so, would appellant No. 5 have been left with little choice other than to shoot. But instead of doing so appellant No. 5 announced generally that he was going to shoot, causing Azari to lie down. He then marched up to the deceased and despatched him with a single shot to the head. That appellant No. 5 might have done just that was of course always a possibility, and one with which appellant No. 4 identified, but I am not convinced that one can confidently assert that he must have regarded it as inevitable that the deceased would be killed by his confederate. Although this is certainly a border-line case appellant No. 4's form of intent, I believe, could be *dolus eventualis* rather than *dolus directus*. That is not necessarily a reason for declining to impose the death sentence. It all depends on the circumstances.

In this case, if one takes into account that appellant No. 4 did not pull the trigger and that he did not have **dolus directus**, his situation falls just short of the point where the death sentence is imperatively called for.

That brings me to appellant No. 5. He pulled the trigger. He did so gratuitously, in cold blood and at point-blank range. According to the evidence he bluntly announced that he was going to shoot. He did not allow the deceased a real opportunity of releasing appellant No. 4. He simply shot him. Nor did he shoot to incapacitate - he shot to kill. He was not in a state of panic when he did so. His actions were cool and deliberate. What prompted him to act was not an unforeseen eventuality with which he had to cope on the spur of the moment. The gun was taken along for precisely that reason, to overcome resistance or to facilitate an escape. The risk that it might have to be used, perhaps with fatal consequences, was always a high one. It matters not, in my opinion, that it was appellant No. 4 and not appellant No. 5 who had the gun in his possession initially; nor that appellant No. 5

shot the deceased not to obtain the money but to escape with it. All of this fell within their prior design. The difference between the two of them, the only one, lies in the ruthless and brutal manner in which appellant No. 5 disposed of the deceased.

Appellant No. 5 was 23 years old at the time. No previous convictions have been proved against him. The absence of previous convictions is not in itself a bar to the imposition of the death sentence; recidivism is not a prerequisite for the death penalty. An unblemished record is nevertheless an important mitigating factor (*S v Ndinisa en Andere* 1991 (2) SACR 117 (A) at 127f) and a fair indication of reasonable prospects of rehabilitation. (*S v Makie* 1991 (2) SACR 139 (A) at 143e.) But, once again, that factor, weighty as it undoubtedly is, must yield to considerations of retribution and deterrence when the horror of the crime, the callousness of the criminal, and the frequency of its recurrence generally, are such that the perceptions, sensibilities and interests of the community demand nothing less than the extreme penalty.

It was submitted that appellant No. 5 is uneducated, a man of rural values, and that those are sufficiently cogent mitigating factors to rule out the necessity for imposing the death sentence. But one does not have to be learned and sophisticated to appreciate that a murder which is committed during and as part of an armed robbery is particularly reprehensible. Appellant No. 5 had been living in the Johannesburg area for five years prior to the commission of this crime. His participation in a carefully planned robbery, involving the use of a gun and a get-away car, is not the act of an artless rustic whose behaviour is ruled by impulse. He has shown no signs of remorse. In my view this is one of those extreme cases where a long term of imprisonment, even one for life, would be inadequate and hence inappropriate, and where the imposition of the death sentence is imperatively called for as the only proper sentence. I would accordingly confirm the sentence of death imposed on appellant No. 5.

That leaves the question of the sentences of appellants Nos. 2 and 4 in respect of the murder count.

Appellant No. 2 was 27 years old at the time of the offence. He has no previous convictions involving crimes of violence. He has been unemployed since 1985 and apparently earned his living by selling liquor. None of this is particularly helpful when it comes to the sentence for a crime as serious as this murder. The circumstances of his involvement in the murder have been detailed earlier in this judgment. Having regard to all the relevant factors a sentence of imprisonment of 15 years would in my view be appropriate.

Similar considerations apply to appellant No. 4. He was 27 years old at the time, a first offender, with little schooling, who assisted his father in the latter's business as a medicine man. His involvement in the killing of the deceased was more direct than that of appellant No. 2. For that reason a more severe sentence is justified. Such a sentence, in my view, should be 18 years imprisonment.

Sentences of all the appellants in respects of the count of robbery

The court a quo treated all five appellants

on the same footing and sentenced each to 14 years imprisonment. It has not been shown, notwithstanding the argument of counsel for the appellants, that the court a quo committed any misdirections in doing so. The issue, therefore, is simply whether the sentences are so disproportionately harsh as to justify an adjustment on appeal. Fourteen years imprisonment is a severe sentence for robbery, especially when the death of the deceased is deliberately to be disregarded - in the case of appellants Nos. 2, 4 and 5 because they have been sentenced for it, in the case of appellants Nos. 1 and 3 because they have somehow been acquitted of it. The offence, as the court a quo emphasized, was an extremely serious one involving a substantial amount of money, and the frequency with which armed robberies of this sort occur nowadays is a matter for alarm. These are considerations against which the personal circumstances of the various appellants pale into insignificance. Even so, the court a quo took them into account. It also had regard to the period each appellant spent in custody awaiting trial. I agree with the court a quo that there is insufficient reason

to differentiate between the various appellants as far as the sentence for the robbery is concerned. Nor do I think that it would be appropriate, in the circumstances of this particular case, to suspend any portion of any of the sentences. There should, however, be a measure of concurrence between the sentences of imprisonment imposed in respect of the murder and the robbery convictions. Although, as I have said, the sentences are severe, doubtless more so than the sentence I would have imposed as a judge of first instance, I do not believe the disparity is such as to warrant interference on appeal. The appeals of the appellants against their sentences on count 2 are accordingly dismissed.

The following orders are accordingly made:

(1) The first appellant's appeal against his sentence on count 2 is dismissed.

(2) The second appellant's appeal against his conviction on count 1 is dismissed. His appeal against the imposition of the death sentence is upheld. A sentence of 15 years imprisonment is substituted for it. His appeal against his sentence on count 2 is

dismissed but it is directed that a period of 8 years thereof is to run concurrently with the sentence on count 1.

(3) The third appellant's appeal against his sentence on count 2 is dismissed.

(4) The fourth appellant's appeal against his conviction on count 1 is dismissed. His appeal against the imposition of the death sentence is upheld. A sentence of 18 years imprisonment is substituted for it. His appeal against his sentence on count 2 is dismissed but it is directed that a period of 8 years thereof is to run concurrently with the sentence on count 1.

(5) The fifth appellant's appeal against the imposition of the death sentence is dismissed. His appeal against the sentence on count 2 is likewise dismissed.

Rud Niënaber
NIENABER JA

Smalberger JA)

CONCUR

Kriegler AJA)