61/1959

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPÈLLATE DIVISION).
AFDELING).

CAPITAL

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

(1) MBOMBOTO ZONELE (2) MAKETU CAZA (3) JOSEPH NTULI
Appellant.

versus/teen

THE QUEEN
Respondent.

Appellant's Attorney / *Prokureur van Appellant* — *Respondent's Attorney* / *Prokureur van Respondent*

Pro Deo

Appellant's Advocate / *Advokaat van Appellant* J. van Rensburg — *Respondent's Advocate* / *Advokaat van Respondent* J.E. Nöthling

ave - ECD

Set down for hearing on: / *Op die rol geplaas vir verhoor op:* Friday, 15th May, 1959.
9.45 - 12.55; 2.15 - 3.50 C.A.V.

3.4.8.10.11

(B)

29th May:

1. Appeal on the special entry dismissed.
2. Both questions of law reserved answered in ~~fav~~ the affirmative, that is, in favour of the Crown, upon the footing of aggravating circumstances having been found.
3. The appeal against the sentence in respect of all appellants dismissed,

Coram: Hoexter, deBeer, Ramsbottom, Holmes (Acty) et Rumpff (Acty) JJA.

[signature]
REGISTRAR 29/5/59

Record -

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

MBOMBOTO ZONELE	First Appellant
MAKETU CAZA	Second Appellant
JOSEPH NTULI	Third Appellant
and	
REGINA	Respondent

Coram: Hoexter,de Beer,Ramsbottom JJ.A.,Holmes et Rumpff A.JJ.A.

Heard: 15th May, 1959. Delivered: 29th. May. 1959

J U D G M E N T

RAMSBOTTOM J.A. :- I agree with the judgment of HOLMES A.J.A., but I wish to make a few remarks of my own. With regard to the special entry, these remarks are of a general nature.

The amendment of section 1 and section 329(1) of the Criminal Procedure Act by Act 9 of 1958 has introduced an important change in the sentence that can be passed in cases of robbery and housebreaking with intent to commit an offence. If "aggravating circumstances" are found to have been present, a person who has been found guilty of either of these offences may now be sentenced to death. Although the presence

of/.....

of aggravating circumstances affects sentence only, it is of great importance that a person charged with robbery or with housebreaking with intent to commit an offence should be informed, in clear terms, that the Crown alleges and intends to prove that aggravating circumstances were present.

It is desirable that the facts which the Crown intends to prove as constituting aggravating circumstances should be set out in the indictment, as was done in the present case. Without laying down any rule, I venture to suggest, for the consideration of Attorneys General, that it might be a good practice to go further and, in addition, to allege specifically that the accused is charged with robbery (or with housebreaking with intent to commit an offence) in which aggravating circumstances were present. I believe that a practice of this sort has been adopted in cases in which the accused is charged with with theft from a motor vehicle which was properly locked, - a fact that affects punishment - and I suggest that it might, with advantage be extended to indictments for robbery or housebreaking with intent to commit an offence.

When an accused pleads guilty to either of these charges, and it appears from the indictment that the Crown intends to prove that aggravating circumstances were

present/.....

present, the presiding judge will, of course, satisfy himself that the accused intends to admit not only that he is guilty of the offence charged but also that the aggravating circumstances were present. Unless the facts alleged to constitute aggravating circumstances are formally admitted they must be proved, and it is, naturally, essential that the exact extent of the admissions should be ascertained. I mention this because although the accused in the present case changed his plea from one of not guilty to one of guilty, when he came to give evidence in mitigation he denied that he had been a party to any of the acts which were said to constitute aggravating circumstances. Those facts were proved against him beyond all reasonable doubt and he suffered no prejudice, but I draw attention to a possible pitfall.

It is hardly necessary to remark that even though the accused has pleaded guilty the presiding judge has the inherent power to enter a plea of not guilty if for any reason he deems it advisable in the interests of justice to do so. (Rex v. Kumalo, 1930 A.D.193 at page 201). I only mention this lest it be thought that this power had been overlooked.

With reference to the questions of law that were reserved, I reach the same conclusion as HOLMES A.J.A. but by a slightly different route. By section 2 of Act 38 of 1877, "no Act passed or to be passed by the Parliament of this Colony"/.....

Colony", i.e. the Cape Colony, was to extend to the annexed Territories unless it was so extended either by "such Act" or by some other Act of Parliament or by the Governor with the advice of the Executive Council. The Acts that were not to apply in the Territories unless they were extended were Acts of the Cape Parliament. When Union was established, subject to the provisions of the South Africa Act, all Acts of the Cape Parliament were to continue in force in the Cape Province until repealed or amended. (South Africa Act section 135). Section 2 of Act 38 of 1877 therefore remained in force in the Cape Province, but it did not acquire greater efficacy than it had originally possessed. After May 31st 1910, as before, Acts of the Parliament of the Cape Colony did not apply to the Territories unless they were extended, but no such limitation was by section 135 or by any other section of the South Africa Act placed on Acts of the Union Parliament which took effect throughout the Union unless the sphere of their operation was expressly limited. Section 135 of the South Africa Act did not convert Act 38 of 1877 into an Act of the Union Parliament, and the references to "the Parliament of the Colony" and "Parliament" did not become references to the "Union Parliament". In my opinion what section 135 did was to keep alive pre-Union laws, and section 2 of Act 38 of 1877, which was itself kept alive, referred only to pre-Union Acts of the Parliament

of/.....

of the Cape Colony. In terms of sections 2 and 3 of the Interpretation of Laws Act, No. 5 of 1910, in the interpretation of every law in force in the Union, "Parliament shall mean the "Parliament of the Union" unless the context otherwise requires. In my opinion the context in which the words "the Parliament of this Colony" and "Act of Parliament" were used in section 2 of Act 38 of 1877 requires the meaning of those expressions to be limited to the Parliament of the Cape Colony and to Acts of that Parliament. That was decided in Rex v. Roodt (1912 C.P.D.606), and I see no reason to question the correctness of that decision. Acts of the Union Parliament, therefore, apply to the Transkei without having to be extended, and in so far as any Act of Parliament is inconsistent with the Cape Act No.24 of 1886(the Transkeian Penal Code) it repeals it to the extent of inconsistency. In so far, therefore, as Act 56 of 1955 and the Acts which amend it, including Act 9 of 1958, are inconsistent with the penal provisions of section 211 of the Cape Act 24 of 1886, the provisions of the Union Acts apply. That being so, the sentence of imprisonment for ten years with compulsory labour and a whipping of six strokes which was passed on the first appellant and the sentences of death that were passed on the second and third appellants were competent

sentences/.....

sentences.

I agree that there is nothing that would justify this Court in reducing any of those sentences and I agree with the order proposed by HOLMES A.J.A.

W. N. Runciman.

Runciman A.J.A. Concurs

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

MBOMBOTO ZONELE	..... 1st Appellant.
MAKETU CAZA	..... 2nd Appellant.
JOSEPH NTULI	..... 3rd Appellant.

versus

REGINA	..... Respondent.

Coram: Hoexter, De Beer, Ramsbottom, JJ.A., Holmes et Rumpff, A.JJ.A.

Heard: 15th May, 1959. Delivered: 29th May, 1959.

J U D G M E N T

HOLMES A.J.A.:

This case comes before us by way of a special entry, two questions of law reserved, and an appeal against sentence.

The three appellants, who are Natives, were charged before O'HAGAN J. and two assessors, in the Butterworth Circuit Local Division, with the crime of robbery in contravention of section 211 of Act 24 of 1886 (the Transkeian Territories Penal Code). All three of the appellants pleaded not guilty to the charge. But, before any evidence was led, the first appellant altered his plea to guilty. The trial

nevertheless ...../2

nevertheless continued against all three jointly. Counsel appearing for the first appellant was permitted to cross-examine [redacted] the witnesses in the case. The second and third appellants gave evidence in their defence. The first appellant gave evidence in mitigation of sentence after a verdict of guilty had been returned against all three appellants. The Court found that aggravating circumstances were present in the case of each appellant. The first appellant was sentenced to 10 years imprisonment with compulsory labour and to receive a whipping of 6 strokes. The second and third appellants were sentenced to death.

Arising out of the procedure adopted in the case, the trial Judge made the following special entry on the record, at the request of counsel for the defence:

> " That the proceedings in the trial court were irregular and calculated to prejudice the accused in their defence in that:
> (1) the trial of accused No. 1 who had pleaded guilty, was allowed to proceed jointly with the trial of accused Nos. 2 and 3, who had pleaded not guilty;
> (2) counsel for accused No. 1 was permitted to cross-examine both the witnesses for the Crown and accused No.3; and
> (3) the verdict against No.1 was delivered simultaneously with the verdict against accused Nos. 2 and 3 after all the evidence

in ...../3

"in the case had been led".

Now it is clear that when the first appellant pleaded guilty the Judge should have separated the trials, that is to say the case of the first appellant should have been dealt with separately from that of the other two appellants. There is no statutory provision making such a course compulsory (section 155 of Act 56 of 1955 merely authorizes it, if the prosecutor or any of the accused so apply) but it is an established and a prudent rule of practice. R. v. Fatshawa & Matluli 1930 T.P.D. 526. Its purpose is to save those who have pleaded not guilty from being prejudiced, for example by the cross-examination or evidence of those who have pleaded guilty; and vice versa. The basis of the rule is that when an accused pleads guilty there is no issue in regard to verdict (though there may thereafter be an issue in respect of sentence). between him and the Crown and there is no trial. Rotestrick v. Rex 1908 T.S. 617. R. v. Keeves 1926 A.D. 410 at 414. Thus there is no reason for conjoining him in a trial against others in respect of whom there is an issue as to verdict. This is certainly the position in superior court trials, for section 258(1)(a) of Act 56 of 1955 empowers the Court to sentence an accused who has pleaded guilty, without having

hearing ..../4

hearing any evidence. It is also the position in inferior courts, by reason of section 258(1)(b), because in trivial cases no evidence is necessary, and although in other cases there must be proof of the actual commission of the crime before conviction, there is no need to prove that the accused is the person who committed it.

Now the failure to separate the trials where one accused pleads guilty will not per se result in the convictions being set aside on appeal. It depends on prejudice. If the Appeal Court is satisfied that a reasonable trial court, proceeding properly, would inevitably have convicted, it will not interfere. See the proviso to section 369(1) of Act 56 of 1955, read in the light of the decisions of this Court such as R. v. Piek 1958 (2) S.A. 491 at 497. In the present case, the evidence against all three appellants is overwhelming. Indeed the first appellant pleaded guilty and the third appellant confessed. Furthermore the trial Judge directed the Court that the evidence of one accused was not admissible against another. In this he erred (R. v. Rorke 1915 A.D.

145 at 164) but it had the effect of minimising any prejudice to the appellants inter se. Recognising all this, Mr. van Rensburg, who appeared pro deo for the appellants, decided in the end not to press the appeal on the special entry. In this I think he exercised a wise discretion. I record at this stage that we are indebted to him for his thorough and able arguments on all aspects of the case.

I turn now to the questions of law reserved by the trial Judge at the request of counsel for the defence. ~~It was~~ THEY WERE framed as follows:

> " (1) Whether section 329(1) of Act 56 of 1955, as amended by section 4 of Act 9 of 1958, empowers a Superior Court to impose sentence of death upon a person convicted of a contravention of section 211 of Act 24 of 1886(C); and
>
> (2) Whether it is competent for a Superior Court to impose a sentence of imprisonment in excess of a term of seven years upon a person convicted of a contravention of section 211 of Act 24 of 1886 (C)".

The annexation of the Transkeian Territories by proclamation was provided for in Act 38 of 1877(Cape). The

preamble recites inter alia that it is expedient that a law should be enacted providing for the said Territories to become part of the Cape Colony but "subject to the laws in force therein only as the same may from time to time be applied and modified as hereinafter mentioned and hereinafter provided". The reason for the words which I have italicized is stated to be that the said Territories are "for the most part occupied by Natives who are not yet sufficiently advanced in civilization and social progress to be admitted to the full responsibility granted and imposed respectively by the ordinary laws of this Colony to and upon other citizens thereof".

Section 1 of the said Act (38 of 1877) provides for annexation by proclamation. This was duly done.

Section 2 provides inter alia as follows:

> " .... and no Act passed or to be passed by the Parliament of this Colony shall extend to or be deemed to extend to the said Territories or any or either of them unless such Act shall be extended thereto in express words either contained therein or in some other Act of Parliament, or unless the operation thereof shall be extended to any or either of such Territories by the Governor with the advice of the Executive Council .....".

Act 29/1897 (C) made it clear that the Governor could also repeal laws and make new laws in the Transkeian Territories.

~~Section 211~~

In 1886 the Cape Legislature passed The Native Territories Penal Code, Act 24 of 1886. It was a comprehensive penal code expressly for the Transkeian Territories. It contained 270 sections. According to Gardiner and Lansdown's Criminal Law and Procedure, Vol.1 Edition 6, it was drafted by "a body of eminent South African Jurists". I quote the following sections:

Section 2. " Every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be found guilty within the said territories on or after the said first day of January 1887 ...."

Section 6. " The following punishments may be inflicted under the Act:-

Death
Imprisonment with or without hard labour, and with or without spare diet
Flogging and whipping
Detention in a reformatory ~~institution~~
institution
Fine
Putting under recognizance".

Section 7. " The punishment of death shall be awarded for murder ....."

Section 211 .../8

Section 211. " Robbery is theft accompanied with actual violence or threats of violence to any person or property, intentionally used to extort the property stolen, or to prevent or overcome resistance to its being stolen, and shall be punished with imprisonment with or without hard labour for a term which may extend to seven years, or flogging or whipping, or any two of these punishments".

When Union came about in 1910, section 135 of the South Africa Act provided that "subject to the provisions of this Act", existing Colonial laws were declared to continue in force in their respective areas, until repealed or amended. Now one of the "provisions of this Act" is section 59 which reads "Parliament shall have full power to make laws for the peace, order, and good government of the Union". In my view it follows that all Union legislation applies to the whole of the Union, unless there is some exclusion. This is also the view expressed in Gardiner and Lansdown Vol.1 edition 6 page 8. R. v. Roodt 1912 C.P.D. 606 at 615, is authority for this view. Most statutes have no such exclusion, but a few have. For example section 114(4) of the Magistrate's Court Act 32 of 1944 provides that that Act shall not apply to the Transkeian Territories except in so far as it may be extended thereto by proclamation. It was so extended by Proclamation

Act 31 of 1917 is expressed by section 2 thereof to apply to "all criminal proceedings instituted or pending on or after the commencement of this Act, in respect of any offence in any part of the Union ....." In my view those express words contained in Act 31 of 1917 have the effect of extending such Act to the Transkeian Territories within the meaning of the requirement in section 2 of Act 38 of 1877 quoted earlier herein. Furthermore, Proclamation 218 of 1947 (by the Governor-General-in-Council) was published in the Gazette of 22nd August 1947 and also that of 29 th August 1947. (It will be recalled that section 2 of Act 38 of 1877 (Cape) empowered the Governor-in-Council to extend the operation of a Cape Act to the Transkeian Territories. In terms of section 16 of the South Africa Act the powers of a pre-Union Governor-in-Council now vest in the Governor-General-in-Council). And see R. v. Nowawuse 1913 A.D. 311). This Proclamation extends the Magistrates' Court Act 32 of 1944 as amended, to the Transkeian Territories. Chapter XII of that Act deals with criminal matters and there are several references therein to the Criminal Procedure and Evidence Act, 1917 in a manner which is consistent only with that Act being of application. And

indeed, .../11

indeed, section 101(1) specifically provides that "Nothing in this Proclamation shall be construed as affecting the operation of the Criminal Procedure and Evidence Act, 1917".

In the result I hold that Act 31 of 1917 was applicable in the Transkeian Territories. It was repealed and re-enacted by Act 56 of 1955. The references in Act 32 of 1944 to the Criminal Procedure and Evidence Act 1917 must now be taken to refer to Act 56 of 1955; see section 12(1) of the Interpretation Act 33 of 1957. And as Act 56 of 1955 was merely a consolidating statute, it is I think clear that it applies in the Transkeian Territories in place of Act 31 of 1917.

The question now arises whether section 329(1) of Act 56 of 1955 as amended by section 4 of Act 9 of 1958 (which gives a superior court power to impose the death sentence for robbery if aggravating circumstances are found) applies to the exclusion of the punishment provisions of sections 2 and 211 of the Transkeian Penal Code. It will be recalled that section 2 provides that every person shall be liable to punishment under that Code "and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be found guilty ....." And section 211,

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in defining robbery, provides for punishment by imprisonment "for a term which may extend to seven years, or flogging or whipping, or any two of these punishments".

In my view it is clear that as section 329(1) of Act 56 of 1955 as amended deals with punishment in special situations of "aggravating circumstances", it applies to the exclusion of the punishment ~~provides over the general~~ provisions in sections 2 and 211 in the Transkeian Penal Code. It follows that the Court has power to impose the death sentence in the circumstances prescribed in the later Act. The first question of law reserved is accordingly answered in the affirmative, that is, in favour of the Crown, in cases where aggravating circumstances have been found.

It follows from what has just been said that once aggravating circumstances have been found, even if the death sentence is not imposed, the punishment provisions of sections 2 and 211 of the Transkeian Penal Code do not apply. To put it another way, when aggravating circumstances have been found, the Court's discretion in the matter of punishment extends all the way to the death sentence. The second question of law reserved is therefore also answered in the affirmative, that is to say in favour of the Crown, in cases where aggravating circumstances have been found.

I proceed now to deal with the appeal against sentence, upon the footing that the Union Act 56 of 1955, as

amended ..../13

amended, is applicable. Mr. van Rensburg's first submission in this connection was that the trial Court erred in finding that there were "aggravating circumstances" as defined in section 1 of Act 56 of 1955 as amended by section 1 of Act 9 of 1958; and that therefore it was not competent to impose sentence of death in terms of section 329 of Act 56 of 1955 as amended by section 4 of Act 9 of 1958. Aggravating circumstances in relation to robbery "means the infliction of grievous bodily harm or any threat to inflict such harm".

In the present case the appellants did not inflict any grievous bodily harm on the complainants or on anyone else. Mr. van Rensburg's submission was that they did not even threaten to inflict such harm. This submission necessitates a reference to the facts. The complainant, Roberts, is a European, and is a country storekeeper in the district of Mqanduli. His house is next to the store. On the night of 28th May 1958 he was driving his wife in a car towards their home. On the way he pulled up because he noticed a

Native lying on the roadside with his horse riderless nearby. This was a pre-arranged ruse on the part of the appellants, and when the car stopped they (including the one who had been lying down) came up to the car. The third appellant fired a revolver shot into the ground, put his arm around Roberts' head in a "scissors grip", pressed the revolver into his neck, and said " This is a hold-up, I want your money". The second appellant pointed a fire-arm at Mrs. Roberts. (It was apparently not in working order). The first appellant tied the Roberts' hands with rope. The second and third appellants then drove off with Mrs. Roberts to the store, leaving Roberts behind, guarded by the first appellant, who was armed with a sheathed sword. At the store and the house Mrs. Roberts, under compulsion, showed her captors where certain valuables were. They took, inter alia, £169, two guns, ammunition, a saddle, a primus stove, and an overcoat. They then drove back to the spot where they had ~~inf~~ left Roberts. There they tied up Roberts with his wife, and rode off on their horses.

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On the foregoing facts I have no doubt whatever that, by conduct,

> (a) the third appellant threatened Roberts with grievous bodily harm when he fired a shot into the ground, pressed the revolver into his neck, and said "This is a hold-up, I want your money". It amounted to the traditional threat of the highway man - "Your money or your life".
>
> (b) the second appellant threatened Mrs. Roberts with grievous bodily harm when he pointed a fire-arm at her in the car. The fact that it was not in working order seems to me irrelevant.
>
> (c) the first appellant threatened Roberts with grievous bodily harm by ~~waiting~~ mounting guard over him with a sword. The fact that it was still in its scabbard seems to me irrelevant. In effect he was saying to Roberts "If you attempt to escape I shall draw and use this sword".

As there were these individual threats of grievous bodily harm, it is not necessary to consider Mr. van Rensburg's submission, which he said was based on Sisilane v. R. 1959 (2) S.A. 448 (A.D.), to the effect that common purpose is irrelevant to "aggravating circumstances" and that the person sentenced to death must himself have been guilty of the conduct therein defined.

To sum up so far, in my view the trial Judge rightly held that there were "aggravating circumstances" in relation to each of the appellants. Sentence of death was therefore competent in each case. (As already mentioned it was imposed

on ..../16

on the second and third appellants. The first appellant's sentence was 10 years and 6 strokes.)

With regard to the third appellant, the question arises whether the trial Judge was entitled to take into account in considering, on 18th March 1959, whether to impose the death sentence, two admitted convictions in February 1959, they being subsequent to the date of the robbery in the present case (May 1958). One was for housebreaking and theft, in respect of which he was sentenced to 4½ years imprisonment with compulsory labour and 6 strokes. The other was for armed robbery, for which he was sentenced to 4 years imprisonment with compulsory labour and 6 strokes (the latter being suspended). The trial Judge states that these convictions and sentences appeared to him to indicate the character of the man, and moved him to impose the death sentence, which he might not otherwise have done.

Sections 301 to 303 of Act 56 of 1955 provide for the proof of previous convictions, and section 303(5) is in the following terms:

> " If any previous conviction is lawfully proved against the accused or if he has admitted such previous convictions, the Court shall take it into consideration in awarding sentence for

the ..../17

the offence to which he has pleaded, or of which he has been found guilty".

A previous conviction may be described as one which occurred before the offence under trial. Generally speaking, previous convictions aggravate an offence because they tend to show that the accused has not been deterred, by his previous punishments, from committing the crime under consideration in a given case. One knows, from practice and from thousands of review cases, that judicial officers usually confine their attention, as far as convictions are concerned, to previous convictions. But I can see no reason why a judicial officer, in deciding what particular form of punishment will fit the criminal as well as the crime, should not be informed of subsequent convictions, because of the light they may throw ~~on the accused who stands before him, and~~ on the form of sentence which will be the most appropriate. There is nothing in sections 301 to 303 of Act 56 of 1955 which ousts such a view. On the contrary, section 186(2) seems to me to sanction it. It provides that the court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to

be ...../18

be passed. I do not consider that the word "evidence" in the above section, was intended to have its strict meaning as would be the case in respect of evidence prior to conviction. I agree with respect with the following remarks by SELKE J. - concurred in by HATHORN J. - in Mbuyase and Others v. Rex 1939 N.P.D. 228 at 231:-

> " Now to enable a magistrate, or for that matter, anyone exercising judicial functions, to decide upon what is an appropriate sentence in the case of an individual accused, he is entitled to avail himself of many sources of information, and of many circumstances affecting that individual, some of which it would not be proper for him to regard in coming to a conclusion as to whether that accused were guilty or not guilty".

The foregoing remarks were described by ROPER J. (with whom CLAYDEN J., as he then was, concurred) as "very apt"; see R. v. Swart 1950 (1) S.A. 818 at 824.

Furthermore in R. v. Liebenberg 1924 T.P.D. 579, a Bench consisting of MASON J.P., DE WAAL and TINDALL JJ., agreed that a magistrate was entitled to take into account, in considering whether to give the accused a suspended sentence, the fact that he had just previously been convicted

and ..../19

and sentenced on a charge of theft, although the latter crime was committed after the one for which he was then being tried.

All this is consistent with what was said in this Court by SCHREINER J.A. in R. v. Owen 1957(1) S.A. 458 at 462 (F-G) namely "When it comes to the imposition of sentence the judicial officer is no doubt entitled to take a wide range of factors into account, including the accused's bad or good character, his apparent reformability and the like".

In the present case the trial Judge, having convicted the appellants and found that there were "aggravating circumstances", had to decide whether sentence of death was a proper punishment. In the case of the third appellant, the trial Judge took into account subsequent convictions and sentences for serious crimes (including robbery) in order to inform himself as to the proper sentence to be passed. I hold that he was entitled to do so.

Mr. van Rensburg went on to submit that all the sentences were excessive. The principle is well settled. Punishment is pre-eminently a matter for a trial Court's discretion. If a sentence is competent, and the trial Court has applied its mind without misdirection to the

law ..../20

law and the facts, a court of appeal will not interfere unless the sentence is so severe as to be unjust. And an accepted test for determining this is to enquire whether the sentence gives the court of appeal a sense of shock; see the recent decision in this Court in R. v. S. 1958 (3) S.A. 102 at 104, and also R. v. Lindsay 1957 (2) S.A. 235 (N) which referred to another decision of this Court. In the present case the trial Court took into account all the factors urged by Mr. van Rensburg, and gave adequate reasons for differentiating between the sentence of the first appellant and the sentence of death in respect of the other two. The paramount fact is that this was a planned and shocking outrage which, as the trial Judge put it, "has struck at the security of every person living in these Territories". I find myself unable to interfere with the trial Judge's view that sentence of death was the proper punishment in the cases of the second and third appellants, and that 10 years imprisonment and 6 strokes was reasonable in the case of the first appellant.

To sum up:

1. The appeal on the special entry is dismissed. ..../21

dismissed.

2. Both questions of law reserved are answered in the affirmative, that is, in favour of the Crown, upon the footing of aggravating circumstances having been found.

3. The appeal against the sentence in respect of all appellants is dismissed.

Neville Holmes

(Signed) NEVILLE HOLMES.

HOEXTER, J.A.
DE BEER, J.A.
~~RAMSBOTTOM, J.A.~~.
RUMPFF, A.J.A.

} Concur.