108/76

G.P.-S. J 445

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

(APPÈL DIVISION)
AFDELING)

APPEAL IN CRIMINAL CASE
APPÈL IN STRAFSAAK

A CÉSAR
Appellant.

versus/teen

DIE STAAT
Respondent.

Appellant's Attorney ..... *Respondent's Attorney* .....
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate R.S. Black *Respondent's Advocate* J. Slabbert
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 3 5 1976
Op die rol geplaas vir verhoor op

(KPA) Coram: Wessels, Trollip et Miller, AJJA
Slabbert - 9.45 - 9.50; 12.02 - 12.16
Black - 9.52 - 11.00; 11.15 - 12.02.

C.A.V.

The Court dismisses the said appeal.

(Judgment per Miller JA
23/11/76)

Registrar.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ANDREW CEASER Appellant

and

THE STATE Respondent

Coram: Wessels, Trollip et Miller, JJ.A.

Heard: 5 November 1976.

Delivered: 23 November 1976.

J U D G M E N T

MILLER, J.A.:

The appellant was convicted in the Cape Provincial Division (THERON, J., and assessors) of murder. (He was convicted at the same time of six other offences, to which further reference will later be made.) No extenuating circumstances having been

found.../2

found, he was sentenced to death. He was born on 5 September 1955 - the crime in respect of which he was sentenced to death was committed on 4 March 1975. He comes on appeal with the leave of the trial Judge. Although it is not very clear from the record whether the leave granted related not only to the sentence but also to the conviction, it was explained by Mr. Slabbert, who appeared for the State at the trial and on appeal, that what was sought by the appellant's counsel at the conclusion of the trial and granted by the trial Judge was leave to appeal against both, the appeal against the conviction, however, relating only to the question whether the appellant ought to have been convicted of murder or culpable homicide. It was not contended that he ought to have been acquitted on that charge.

In his heads of argument lodged some time before the hearing of the appeal, Mr. Slabbert contended, in limine, that the appeal ought to be struck off the roll on the ground that the trial Judge, when granting leave

to.../3

to appeal, applied a wrong test. It appears from the record that after appellant's counsel had moved from the bar for leave to appeal, the trial Judge said no more than that the application was granted because he considered that another court could possibly come to a different conclusion. When the appeal was called, however, Mr. Slabbert wisely abandoned the point in limine. The only purpose of here mentioning the point at all is to emphasize that the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal. I do not imply thereby that the trial Judge did not, in fact, apply his mind to the true test, for it is apparent that when making the very brief observation which is recorded, he was not stating his reasons in full.

The proper test has been stated by this Court over and over again but the matter having been raised in this case (in the somewhat novel form in

which.../4

which Mr. Slabbert chose to do so) it is as well to restate that test. Whatever variants there might sometimes have been in the words chosen to express it, the test is, in substance, whether there is a reasonable prospect of success on appeal. (R. v. Ngubane and Others, 1945 A.D. 185 at pp. 186/7; R. v. Baloi, 1949 (1) S.A. 523 (A.D.) at pp. 524/5). When the proposed appeal is against sentence or a finding that no extenuating circumstances exist, the prospect of success on appeal will obviously be assessed in the light of the frequently stated principles upon which the Court of appeal will act when deciding whether interference is justified. And even where the crime and the consequences thereof to the applicant are very grave, although those elements may be taken into account "in borderline cases, the "primary consideration" is whether or not there is a reasonable prospect of success. (See R. v. Muller, 1957(4) S.A. 642 (A) at p. 645 G; it was also pointedly observed by OGILVIE THOMPSON, A.J.A. (later C.J.) that refusal by the trial Judge of leave to appeal in capital cases does not preclude a convicted person, who has the right to petition the Chief Justice for leave to appeal, from further relief. See p. 645 H and also, with reference to the Executives prerogative of mercy and the function of the trial Judge in that regard, p. 645 B - C).

The facts relating to the charge of murder are relatively uncomplicated and are in dispute to a limited extent only. It was firmly established that on the night of 4 March 1975, shortly before 11 o'clock,

the.../5

the appellant, armed with a loaded pistol, entered the shop of the deceased at Dieprivier. On his own evidence, his purpose was to relieve the deceased of such money as he could find and to achieve that object with the aid of the pistol. Prior to entering the shop, the appellant had stood outside for a little while, waiting for an opportune moment to enter. That moment came when the last of the persons in the shop, other than the deceased himself, had left. According to the appellant's account the deceased was standing behind the counter, close to the cash register thereon. He asked the appellant what he wanted, to which the appellant replied that he wanted all his money. The deceased merely smiled and came closer to the counter, leaning forward with his right elbow resting on the counter and his left arm extended alongside the cash register. The appellant then took the pistol from his pocket and holding it in his right hand, pointing at the deceased, he approached

the.../6

the counter and rested his right elbow on it. The deceased, then very close to him, suddenly grabbed at the pistol in an apparent attempt to take it from the appellant who tried to pull the pistol back. It was then, according to the appellant, that the shot was accidentally fired. The deceased, clutching his abdomen, fell to the floor behind the counter and then started to crawl away on hands and knees, making his way towards the door giving access to the street. While the deceased was thus painfully attempting to make his escape from the shop, the appellant self-admittedly opened the drawer of the cash register, took money out of it and ran out of the shop, leaving the deceased to his own devices. People who had heard the sound of the shot and the cries of the deceased came to investigate and found him outside the front door of the house of a relative who lived nearby. He lay in a pool of blood. He was removed to a hospital where despite urgent medical attention he died about two hours later. According to the

medical.../7

medical evidence the deceased, who was about 39 years old and had a good, muscular physique, suffered fatal internal injuries as the result of a "gunshot" wound. The bullet entered the outer aspect of his right arm, shallowly traversed a part of the arm, then entered the abdominal cavity at a point about 5cm. to the right of the navel, travelled through the small intestine and finally lodged in the body of the fifth lumbar vertebra. The entrance wound on the arm had a "thin black wound-edge" but no singeing of hairs or skin could be observed.

The trial Court rejected as false the appellant's evidence as to the manner and the precise circumstances in which the deceased came to be shot. It found that the appellant was a blatantly untruthful witness in several material respects, which are referred to in considerable detail in the judgment. In particular the Court found that the appellant and

the.../8

the deceased were not positioned as closely to one another as the appellant described, that the evidence that the deceased grabbed at the pistol, thus causing the appellant to try to pull it backwards, out of his reach, was an afterthought and that the shot was not fired accidentally. It was contended by Mr. Black, who appeared for the appellant, that the trial Court erred in thus rejecting his evidence. He emphasized that the appellant's account of what actually happened in the shop was the only eye-witness account before the Court. That being so, and bearing in mind that the pistol was one which, by reason of its particular mechanism, could be unintentionally fired if, the safety catch being off, undue pressure was exerted against the butt (e.g. by its being pressed very firmly against the palm of the hand) the Court could not, he argued, exclude the reasonable possibility that the appellant was truthful when he said that the shot was

fired.../9

fired accidentally. The question, however, is not whether it is notionally possible that the pistol could discharge a bullet while being held by one who did not pull the trigger and had no intention of firing, but whether it is reasonably possible in the context of the evidence that that happened in this instance. The appellant's statement that the shot was fired involuntarily is essentially linked with his explanation of how that came about and if his explanation is false there is little virtue in the mere assertion or proof of an abstract possibility.

That the appellant was blatantly mendacious admits of no doubt. He repeatedly denied, for example, that he knew that the pistol, if fired, could kill a person. It was only after persistent cross-examination that he guardedly admitted, eventually, that he had some

realization.../10

realization of the dangerous potential of such a pistol. He also gave most unsatisfactory evidence, which was justifiably rejected, with regard to how he came to be in possession of the pistol. He said in evidence that he found the pistol by chance during or about September 1974, while he was walking along the sidewalk of a street in Heathfield. But the evidence of his friend, Botha, (whom the Court regarded as a truthful and reliable witness) shows that he told Botha that he had obtained the pistol in Port Elizabeth. Botha also said that the appellant entrusted the pistol to him, asking him to keep it for him because he did not want his parents to know that he possessed such a thing. Whenever the appellant required it, he fetched it from Botha and later returned it to his custody. When confronted in cross-examination with what Botha had said in evidence, the appellant confirmed that what Botha said was true

but.../11

but added that he had lied to Botha and gave a patently unacceptable explanation of why he found it necessary to tell his friend, Botha, that he had obtained the pistol in Port Elizabeth if in fact he picked it up on a street in Heathfield. In truth, the pistol in question (a 7,6mm. Browning) was identified by one Vermeulen as his property. Vermeulen identified it not only by its appearance but by comparing its number with the license certificate in his possession. He testified that the pistol, together with seven rounds of ammunition, were stolen from his home at Bergvliet, which was broken into, on 7 September 1974. That theft, I might mention, was the subject of one of the six other charges (count 4) against the appellant who pleaded not guilty to that charge but was convicted thereof. Another remarkable feature of the appellant's evidence is that he claimed to have been wholly ignorant of the fact that the pistol was loaded when he entered the deceased's shop. Count 5

in.../12

in the indictment upon which he stood trial was to the effect that on the very date upon which deceased was shot, the appellant robbed one Mrs. Ena Camp of money, after pointing a firearm at her, threatening to shoot her and actually striking her on the head and body. The appellant pleaded guilty to that charge and it was common cause that the firearm he then had was the pistol he carried when entering the deceased's shop. The offence against Mrs. Camp was committed at about 1.30 p.m. on 4th March. The appellant said in evidence that before entering Mrs. Camp's house that afternoon, he checked the pistol to ensure that it was not loaded, as he was concerned not to take a loaded pistol into the house lest it should go off accidentally. The check revealed that there were no bullets in the barrel or in the magazine. How, then, there came to be a bullet in the pistol when he confronted the deceased, was not explained by him.

Turning now to the circumstances and the

manner.../13

manner in which the deceased was shot, the physical juxtaposition of the deceased and himself was of the very essence of the appellant's account. According to that account, the appellant was standing on one side of the counter, with his elbow resting thereon, and the deceased on the opposite side, also resting his elbow on the counter. The end of the pistol's barrel pointed at the deceased, was a matter of very few inches from the deceased's body. But according to Sgt. Hagen, whose evidence the trial Court accepted, he and the appellant, after the latter's arrest, visited the deceased's shop, where the appellant pointed out to him where he had stood when the fatal shot was fired. What was indicated by the appellant on that occasion is incompatible with the appellant's description in evidence, for although the spot pointed out is close to the counter, when the width of the counter separating the deceased and appellant is taken into account, the extremity of the

pistol.../14

pistol could not have been a matter of only a few inches from the deceased's body. The trial Judge also referred to several improbabilities in the appellant's account; he considered it unlikely that the appellant would have approached the deceased so closely as to give the latter an opportunity of disarming him. (It is necessary to bear in mind that the appellant is a comparatively slight and short young man - hardly a match, physically, for the deceased. He would surely have recognized that the deceased was a more formidable opponent than Mrs. Camp had been.) He also considered it unlikely that the appellant would have assumed the position which he claims to have assumed at the counter - a position which, according to evidence and what was observed when the appellant, in Court, gave a demonstration of how he stood, his elbow on the counter, and how he held the pistol, appeared to be uncomfortable and unnatural. Indeed,

the.../15

the appellant admitted that it was an uncomfortable position. Moreover, the appellant was vague and vacillating in his evidence concerning the deceased's attempt to grab the pistol; his evidence left uncertain whether he claimed that the deceased actually attempted to grab the pistol or whether the appellant was merely conveying that he inferred that that was the deceased's intention. I would mention one further consideration, which arises from the appellant's evidence. He said that he was shocked when he heard the shot; in effect, his evidence is that nothing was further from his mind than to use the pistol for the purpose of shooting. The only purpose for which he took the pistol was that it would serve as a means of intimidation. If this was so, his conduct thereafter is difficult to understand. He did not go to the assistance of the deceased, whom he saw falling to the floor and thereafter crawling away.

If.../16

If his apparent callousness in that regard could be attributed to fright and shock, it would perhaps be understandable if his first instinct was to run away. But the appellant neither went to the aid of the deceased nor immediately ran away; he deliberately completed his mission by opening the drawer of the cash register and taking therefrom cash in the sum of approximately R100. Only thereafter did he run away.

I do not think any purpose would be served by mentioning several other factors emerging from the evidence and referred to in the thorough and carefully reasoned judgment of the Court a quo, which are adverse to the appellant's account of what happened. Sufficient has been said to show that the trial Court's assessment of the appellant as an untruthful witness cannot be faulted. Nor is there any justification for interference with the trial Court's findings of fact or its conclusion that the shot which killed the deceased was

deliberately.../17

deliberately fired by the appellant in furtherance of his purpose of robbing the deceased. The trial Court did not feel fully justified in finding that the appellant had the deliberate intention of killing the deceased; it accordingly found that the appellant was guilty of murder in that he fired the pistol in the realization that he might kill the deceased and reckless as to whether he killed him or not. There is no justification for disturbing the verdict, which must stand.

The appeal against the sentence necessarily depends upon the contention that extenuating circumstances were present and that the trial Court's finding to the contrary should be reversed. The appellant was in his twentieth year at the time of the commission of the crime. This circumstance formed the foundation of the argument addressed to us by Mr. Black, who relied strongly on S. v. Lehnberg en 'n Ander, 1975(4) S.A. 553 (A) and more

particularly.../18

particularly on the passages in the judgment of the Chief Justice at p. 560 F - H and p. 561 A - C and F - H. The appellant's youth, he contended further, ought to be considered in conjuction with the trial Court's finding that the case was not one of dolus directus but of dolus eventualis and that, when so considered, they extenuated the crime. (See S. v. Mohlobane, 1969(1) S.A. 561 (A) at p. 568 and S. v. Van Rooi en Andere, 1976 (2) S.A. 580 (A) at p. 584). It does not follow, of course, that the combined effect of these two factors (viz., tender years and absence of dolus directus) is to constitute extenuating circumstances. It is clear from the very passages referred to above in the judgment in Lehnberg's case, supra, that when the youth of the murderer is advanced as extenuation, other considerations play a part in the decision of the question whether or not extenuating circumstances exist. Such other considerations do not lose relevance in cases where there is superimposed on the youth

factor,.../19

factor, the absence of direct intent to kill. The general nature of the other considerations which are always relevant in cases of this kind, involving youths, has recently been indicated by the Chief Justice in an as yet unreported judgment (Mapatsi v. S., 3 September 1976). I quote from the judgment:

> "Die uitdrukking in die uitspraak van die Lehnbergsaak 'tensy dit blyk dat die boosheid van sy daad sy onvolwassenheid uitskakel' is nie 'n korrekte weergawe van wat die bedoeling was nie, indien na die samehang van die uitspraak in sy geheel en na vorige beslissings van hierdie hof gekyk word, en die uitdrukking kan klaarblyklik tot misverstand lei. Moord is altyd 'n bose daad en wanneer oorweeg word of die jeugdigheid van 'n beskuldigde nie as versagting kan dien nie, moet nie alleen die aard van die daad oorweeg word nie, maar ook die motief waarmee die daad gepleeg word, die persoonlikheid van die beskuldigde en ander relevante faktore wat in 'n besondere geval mag te voorskyn tree, om vas te stel of die daad gepleeg is uit inherente boosheid van die beskuldigde."

The.../20

The circumstances personal to the appellant were canvassed at some length at the trial. Not only did his mother testify to his general behaviour and characteristics as a child and in more recent years, but a probation officer who is a university graduate in social science and has had training in the field of social welfare work, carried out a full investigation of the appellant's history and background and gave detailed evidence thereof. It appears from all that evidence that the appellant enjoyed the benefit of careful upbringing at the hands of apparently stable and reasonable parents. The family of which he is a member appeared to be well-knit ahd secure and as a child he gave no indication of the propensities which the seven crimes of which he was convicted by the Court a quo demonstrate. He was co-operative, obedient and unaggressive. His schooling was limited - he passed the sixth standard and then left school, apparently because the family was at that stage experiencing financial difficulties. Whether, but for

financial.../21

financial problems, he would have progressed much further at school may be doubtful, because the report received from the school by the probation officer indicated that, scholastically, he fared poorly. After leaving school, he earned money doing "odd jobs", but in 1973 he was employed as an office-messenger at the Simonstown docks, where he worked for five months. Thereafter, during 1974, he was employed by the S.A. Railways as a trainee-chef. He remained in that employment until about a month before his arrest in respect of the crimes to which I have referred. He continued throughout, but with some interruptions, to live in the family home which according to the probation officer is a comfortable home, adequately furnished and obviously neatly kept and cared for. During his employment by the S.A. Railways he received a salary which apparently varied according to hours of work but sometimes approximated to R200 per month. There was no history or present indication of any psychopathic tendencies or of any

mental.../22

mental disturbance or of serious illness of any kind; nor is there any history of previous behavioural deviations or aberrations. The appellant informed the probation officer that when his parents were away he sometimes smoked dagga with friends. He also told her that when he committed the crime with which this appeal is concerned, he was under the influence of liquor and dagga and felt very brave. (There is, however, no evidence to support that statement by the appellant; when giving evidence at the trial, the appellant repeated that on the day in question he had strong drink and smoked dagga with friends, at Retreat, but his evidence was vague and he was disbelieved by the Court. The learned Judge pointed out that not one of the friends with whom he claimed to have been drinking and smoking was called to testify, nor was it even suggested that they were not available.)

In the light of the facts discovered in the course of her investigation, the probation officer found

it.../23

it difficult to explain the appellant's conduct during 1974 - 1975, which she said appeared to be irreconcilable with his earlier pattern of behaviour. She tended to attribute the recent conduct to his youth and immaturity and, in a measure, relying upon what he told her, to drink and dagga. With regard to the degree of his immaturity, there is nothing in her evidence to suggest that she regarded the appellant as less mature than the average nineteen-year-old; indeed, she considered that he had for the past few years been leading an adult life although this expression of opinion is necessarily qualified by her view that the age of 19 does not signify full adulthood.

The learned Judge a quo, when giving reasons for the finding in regard to extenuating circumstances, took into account the cumulative impact of appellant's youth and the absence of dolus directus, but said, in effect, that the Court's finding was that the appellant had committed the crime out of "inherente boosheid", which was manifested by his conduct, and that there were

no.../24

no extenuating circumstances. It has long been established that this Court may properly interfere with a finding in regard to extenuating circumstances only if the Court a quo has misdirected itself in a material respect (in which event this Court would review the matter and reach its own conclusion) or if the decision was one to which a court, properly applying its mind to the matter, could not reasonably come. (R. v. Taylor, 1949(4) S.A. 702 (A) at pp. 717/8). Mr. Black contended that when finding that the appellant was "n bose persoon", the Court a quo had not given proper weight to his unblemished conduct prior to the commencement of the cycle of crimes he committed during 1975 and that this constituted a misdirection; or, as I understood the argument, that the finding that the murder stemmed from "inherente boosheid" was so incompatible with the appellant's behaviour from childhood onwards, that it was one which could not

reasonably.../25

reasonably be made.

This argument tends, I think, to misconceive the concept of "inherente boosheid" as it was explained in Lehnberg's case. A finding that a person acted from inner vice in the commission of a crime does not imply that he has manifested vicious or wicked propensities throughout his life; nor is a long history of wickedness necessary to such a finding. Primarily, the question in any given case (in the context under discussion, i.e. with reference to youth as a mitigating factor) is whether the crime in question stemmed from the inner vice of the wrongdoer, whether he be a first offender or one with many previous convictions. It is in order to answer that question that the court will examine, and take into account as indiciae, the wrongdoer's motive, personality and mentality, past history and whatever else is relevant to the inquiry. And, of course, it will take into

account.../26

account the nature of the crime and the manner of its commission. (See the passage quoted above from the judgment of the Chief Justice in Mapatsi's case). The concept of inner vice as the genesis of a grave crime committed by a youth throws into proper contrast the case of a crime (perhaps equally dastardly) committed by another youth who has, largely because of his youth and its attendant degree of inexperience, acted in response to outer influences; e.g. under the pressure and stress of intense emotions induced by another (cf. Lehnberg's case) or under the direct or indirect influence of one older than himself, or under circumstances which to him, because of his youth and inexperience, were provocative or emotive.

It has not been shown that the Court a quo did not take into account as relevant material, the appellant's clean record and apparently good behaviour

prior.../27

prior to the commission of the offences of which it convicted him and no misdirection has therefore been shown. The remaining question is whether the conclusion that the appellant acted from inner vice and that his youth (whether considered on its own or in conjunction with the finding of dolus eventualis) was not in the circumstances an extenuating factor, was one to which a court could not reasonably come. It is not necessary to repeat the circumstances of the crime. The appellant's predetermined purpose in entering the deceased's shop was to rob him. He was resolved to achieve his object with the aid of a loaded pistol ready for firing, the safety catch having been released by him before entering the shop. There is nothing to suggest that he acted under any influence other than his own evil desire and scheme to obtain money by dangerous, violent means. It is clear that he showed a callous disregard for human life in the achievement of his objective. He had less than twelve hours before, robbed Mrs Camp - I

have.../28

have already referred to that offence. During February 1975 he robbed a woman by threatening to shoot her with the self-same pistol. (Count 3 in the indictment). On 22 April 1975, some seven weeks after the murder of the deceased, the appellant returned to the scene of that crime and robbed the deceased's widow at the point of the pistol and, in addition to threatening to shoot her, assaulted her by catching her by the neck and attempting to throttle her. (Count 6). On 17 July, 1975, he again attacked the woman who was the complainant in count 3, attempting to rob her by threats of violence and injury. (Count 7). To all these other charges he pleaded guilty. True, as his counsel pointed out, he did not in those instances carry out his threats of shooting, but he was then robbing women whom he could, apparently, overpower without resorting to the most drastic means at his disposal. When his victim was a strong man, however, he used the pistol with the results I have described. The other offences to which I have referred could properly be taken into account by the Court when considering the question of extenuating circumstances, because of their

relevance.../29

relevance to the appellant's character, disposition and motives, all of which were germane to the question whether the appellant's youth constituted an extenuating circumstance. (Cf. R. v. Owen, 1957(1) S.A. 458 (A) at p. 462; R. v. Zonele and Others, 1959(3) S.A. 319 (A) at pp. 330/331).

When the nature of the crime, the manner of its execution and all the other factors bearing upon the appellant's conduct before, during and after its commission are borne in mind, it cannot be said that the decision of the trial Court that there were no extenuating circumstances was unreasonable in the sense indicated above and this Court therefore cannot interfere with that decision on appeal.

The appeal is dismissed.

S. MILLER.
JUDGE OF APPEAL.

WESSELS, J.A.)
TROLLIP, J.A.) Concur.