145/78/TMS

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PATRICK MFUBESI	First Appellant
SIMON MOLEFE	Second Appellant
SAMSON MOKONE	Third Appellant

and

THE STATE	Respondent

Coram: Wessels, Corbett JJ.A. et Viljoen A.J.A.

Heard: 2 November 1978

Delivered: 14 November 1978.

J U D G M E N T

WESSELS, J.A.:

Appellants appeared in the Witwatersrand Local Division before IRVING STEYN, J., and assessors on two charges; one of murder and one of robbery with aggravating circumstances. A plea of not guilty to both charges was entered on behalf of each of the appellants.

After...../2

After the verdict had been announced, counsel addressed the Court on the issue of extenuating circumstances. Counsel for appellants handed in reports from probation officers, but led no additional evidence on the issue of extenuating circumstances. It appeared from these reports that first appellant was born on 22 June 1957, second appellant on 15 July 1957 and third appellant on 8 September 1959. The crimes were committed on 24 March 1977, and third appellant was, therefore, under the age of 18 years when he was a party to the commission thereof. After counsel for the appellants and the State had concluded their addresses, the presiding Judge postponed the matter until the following day to enable the Court to consider the question of extenuating circumstances. At the resumption of the hearing, the presiding Judge dealt in great detail with the issue requiring determination. The introductory paragraph of the Court a quo's judgment reads as follows:

> "The accused were yesterday found guilty as charged in the indictment on two counts, the first count being one of murder and the

second...../3

second count being one of robbery with aggravating circumstances. Thereafter we were addressed by all three learned counsel for the Defence and learned counsel for the State in regard to the question of whether or not there are extenuating circumstances in respect of the first count of murder. We listened very carefully to the arguments and, as I will show in a moment, we thereafter, between yesterday and today, considered all the authorities quoted to us as well as the particular circumstances of the case and we had full regard to everything said to us. I may state that learned counsel for the three accused could only rely, and did rely, in the main on one possible extenuating circumstance, namely, the youth of each and every one of the accused, because in the circumstances of the case and the light of the evidence, even the evidence of the accused, there was hardly anything else they could rely upon."

The judgment concludes as follows:

In other words, we weighed up all the relevant circumstances, the youth of the accused, the probation officers' reports, the decided cases, the nature of the crimes committed and the motives therefor, and the need to protect society from people like the accused, and we have come to the conclusion that the youth of each and every one of the accused in the instant matter cannot, in the absence of other circumstances which have not emerged, be regarded by us as an extenuating circumstance. The finding of this Court,

which...../4

which is unanimous, is therefore that there are no extenuating circumstances in respect of each and every one of the accused."

It appears from the record of the proceedings that previous convictions were then proved in the case of first and second appellants. The presiding Judge was informed that third appellant was a first offender. Thereafter each of the appellants personally addressed the presiding Judge.

In conclusion, the appellants were sentenced to death on the murder charge. In so far as the second count is concerned (i.e., the charge of robbery with aggravating circumstances) the presiding Judge ordered that sentence thereon be postponed pending the decision whether or not the death sentence was to be executed.

The appellants' application for leave to appeal to this Court against their convictions and sentences was refused by the presiding Judge. In so far as the third appellant is concerned, the presiding Judge remarked as follows:

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"In so far as the sentence is concerned, I think the only real merit in these applications, if there is merit, lay in the application of the third accused who confined himself to an application for leave to appeal against the sentence only, because, as was pointed out, the accused was just over 17 years at the time of the commission of the crime, and it was submitted by Mr. Medalie on his behalf that another court may come to the conclusion that extenuating circumstances exist by reason of the youth of the third accused and by reason of the fact that he possibly acted under the influence of the other accused. In the application for leave to appeal there is no allegation made, and I do not think there are grounds for any such allegation, that I exercised my discretion wrongly in passing the ultimate penalty on a youth who was under 18 years at the time of the offence. There is no such allegation and I do not think that it can be said that I did exercise my discretion wrongly."

The matter now comes before this Court pursuant to leave granted in terms of section 316(8)(c)(i) of Act No. 51 of 1977 to appellants to appeal against the trial Court's finding in regard to extenuating circumstances and the sentence of death imposed upon them by the presiding Judge.

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It is not necessary for the purposes of this appeal to sketch in detail the circumstances leading up to the brutal murder of the deceased during the early evening of 24 March 1977 and the robbery which was committed on the same occasion. The learned Judge dealt exhaustively with the evidence in the judgment of the Court a quo, and I only propose to refer briefly to those findings which are relevant to the issues which arise for determination by this Court. It is common cause that the deceased was a member of the Reading Golf Club in the Alberton district and that he had had a game of golf there during the afternoon of 24 March 1977. He knew first appellant, who was employed as a caddy at the golf course. Appellants, who were friends, were seen in each other's company at the course during the afternoon in question. During the late afternoon first appellant approached deceased in the parking area when the latter was on the point of leaving for his home and asked for money. After deceased had given him a small sum of money, first appellant requested

deceased...../7

deceased to convey him and his two friends in his motor car. This request was acceded to, and the applicants thereupon got into the motor car; first appellant sat on the front seat next to deceased, whilst second and third appellants occupied the back seat. Shortly after moving off, deceased was threatened with a knife by first appellant, who demanded money. Deceased stopped his motor car and hurriedly alighted in an attempt to escape. Either before, or immediately after, alighting from the motor car, deceased was stabbed several times by one or other or all of the appellants. The appellants, or at any rate second and third appellants, drove off in the motor car. The following morning deceased's body was found in the veld some short distance from the spot on the road where he had first been stabbed. His jacket had been set on fire. It was not disputed that first appellant had done so during the early morning before deceased's body was discovered. Deceased's wrist-watch had apparently been removed by first appellant. Deceased's motor car was abandoned in a black township and

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was eventually recovered in a burnt-out condition. In so far as the guilt of the appellants is concerned, I refer to the following passage in the judgment of the Court a quo:

> "We are prepared to proceed on the basis that this idea of robbing the deceased may have occurred to them when they were sitting loafing outside the club near the car and that they may have hatched this plan when accused no. 1 handed the jungle knife to accused no. 3, and that thereafter and after they were given a lift by the deceased they acted with the common purpose to rob him and in the execution of that common purpose one or other or all of them stabbed the deceased to death. So that even if it was a robbery committed on the spur of the moment and the murder followed upon that robbery, they nevertheless acted with a common purpose, and if any one of them did not stab the deceased he must have seen the other two stabbing the deceased and they were all aware of the fact that the deceased would probably meet his death so that he could not identify accused no. 1. Even on the basis, therefore, that the robbery and murder were not preplanned days in advance, but on the basis of either a planned robbery just prior to their being given a lift by the deceased or a robbery planned during the course of that lift, the murder of the deceased followed as day upon night after or during the robbery which was executed by all three of them jointly."

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In dealing with the question of extenuation, the Court a quo had due regard to the youth of the appellants in the light of principles set out in several recent judgments of this Court. I find it unnecessary to compile a catalogue of the cases in question. In applying the aforementioned principles to the facts of the present case, the Court a quo concluded that the youth of the appellants did not furnish a basis for finding that extenuating circumstances existed in the case of any one of them. The imposition of the death sentence was, therefore, regarded as mandatory in the case of each of the appellants.

Before this Court, it was submitted on first appellant's behalf that the trial Court had misdirected itself in regard to the part played by him in the commission of the crimes in question. In my opinion, there is no substance in this submission. The evidence supports the finding of the trial Court that first appellant was "the prime mover in both the robbery and murder". Nevertheless, it was held that there was "no direct evidence to

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the effect that anybody influenced anybody else". Although the idea to commit robbery no doubt originated with first appellant, the trial Court did not deal with his case on the footing that he caused the other appellants to become implicated by reason of his influence over them. It is apparent from the judgment of the trial Court that it gave due consideration to all the relevant circumstances in concluding that in the case of first appellant, the crime stemmed not from youth, inexperience or outer influences, but in the main from his own inner vicious propensity. In my opinion, the submission that in his case the trial Court erred in its conclusion on the issue of extenuating circumstances cannot be upheld.

The submissions by counsel on second appellant's behalf are, in my opinion, also devoid of any real substance. Counsel sought to rely on a possible lesser degree of active participation by second appellant in the fatal assault upon the deceased. In my opinion, however, it does not lessen his degree of moral blameworthiness in the circumstances of this case. Where three persons, as in

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this case, act in concert and with a common intention to commit a murderous assault with robbery in mind, the mere fact that one of them played a less active role in achieving this common purpose, does not ordinarily serve to lessen his moral culpability. Counsel also submitted that the evidence justifies a finding that second appellant acted with dolus eventualis. Assuming this to be so, I am of the opinion that, in the circumstances of this case, that factor does not serve to lessen his moral blameworthiness. In his case, too, the trial Court has not been shown to have erred in concluding that his youth did not constitute an extenuating circumstance. The evidence supports the finding of the trial Court that, notwithstanding his youth, second appellant's criminal conduct stemmed in the main from inner vice, and not from outer influence of a kind furnishing a basis for holding that extenuating circumstances exist in his case.

In so far as third appellant is concerned, it was submitted by his counsel that the learned Judge a quo

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had misdirected himself in imposing the death sentence on the basis that, in the absence of extenuating circumstances, he had no jurisdiction to impose a sentence other than the death sentence. Although respondent's counsel did not in argument concede the validity of the submission, he found himself unable to argue to the contrary on the record of the proceedings before this Court. Third apellant was under the age of 18 years when the crimes were committed, and it was, therefore, competent for the presiding Judge to have imposed a sentence other than death on the murder charge irrespective of any finding by the trial Court in regard to the existence or otherwise of extenuating circumstances. The issue relating to extenuating circumstances, in respect of which the onus of proof rests on the accused, is only relevant to the jurisdiction of the presiding Judge to impose a sentence other than the ultimate penalty. With respect to the learned Judge a quo, and notwithstanding his remarks in the above-quoted passage from his judgment on the application

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for leave to appeal, I am of the opinion that he probably overlooked the fact that in the case of third appellant it was competent for him to consider the imposition of a sentence other than death, notwithstanding the finding of the trial Court in regard to the question of extenuating circumstances. It appears from the record that neither third appellant's counsel nor counsel for the prosecution pertinently raised this matter before the presiding Judge. No evidence (apart from that furnished by the probation officer's report) was placed before the presiding Judge to assist him in imposing an appropriate sentence in the case of third appellant who, although having a more robust physique than first and second appellants, was about two years younger than they were. It is to be noted, too, that the learned Judge a quo did not furnish third appellant any opportunity of leading evidence on the question of sentence, and, moreover, gave no reasons for imposing the death sentence rather than some other form of punishment.

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In my opinion, therefore, the argument of counsel on third appellant's behalf must be upheld. It was submitted on his behalf that this Court should itself consider the question of sentence and impose one which it regards as appropriate in all the circumstances. In this regard counsel submitted that third appellant was two years younger than first and second appellants and, moreover, was a first offender. The information about his background and personality contained in the probation officer's report indicated that his association with the older appellants stemmed from an immature but nevertheless keenly felt need to identify himself with friends and thus to accept their norms of conduct in order to prove his acceptability within the group. It was, further, submitted that in a civilised community, where the death sentence is still retained as a discretionary form of punishment in the case of a limited number of crimes, it should only be imposed in the most serious cases, having regard, inter alia, to the nature of the crime, the need to protect

society...../15

society and the personal circumstances of the offender, particularly where the offender is not only a youth but also a first offender. Respondent's counsel associated himself with the request that this Court should impose an appropriate sentence.

There is considerable substance in the submissions made by counsel for third appellant. After giving the matter serious consideration, I am of the opinion that the better course is to remit the matter to the presiding Judge with a direction to him to exercise his discretion and to impose an appropriate sentence. My reasons for preferring this course are the following. Ordinarily, the question of sentence is a matter to be dealt with by the presiding Judge. In this case sentence on the robbery charge has been postponed. This procedure is not in accord with what has been laid down in recent judgments of this Court, namely, that even in cases where the death sentence is imposed, the presiding Judge should impose an appropriate sentence in respect of other charges on which the accused is found guilty at the same trial. Upon a remittal of the

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matter, therefore, the learned Judge a quo will have the opportunity of imposing an appropriate sentence in regard to the robbery charge. In the event of the death sentence not being imposed by him, the presiding Judge will no doubt have regard to the cumulative effect of such sentences of imprisonment as may be imposed by him. Third appelant's counsel may also consider it advisable to lead evidence on the question of sentence, if such evidence is available.

In the result it is ordered:

1. That the appeals by first and second appellants be dismissed.
2. That third appellant's appeal be allowed and that the sentence of death imposed upon him be set aside.
3. That in the case of third appellant, the matter be remitted to the presiding Judge to enable him to consider afresh the question of an appropriate sentence

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in the light of the remarks set out above.

Leave is granted to both the third appellant and the State to lead evidence relevant to the question of sentence and to address the presiding Judge thereon.

P. J. WESSELS, J.A.

Corbett, J.A.
Viljoen, A.J.A. } Concur.

PATRICK MFUBEZI & OTHERS

v.

THE STATE