RAYMOND KISTEN and KISTEN (SELVIN) MOODLEY

- and -

THE STATE

JANSEN JA.

266/82.
M.C.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between

RAYMOND KISTEN ..... First Appellant.

KISTEN (SELVIN) MOODLEY ..... Second Appellant.

and

THE STATE ..... Respondent.

CORAM: JANSEN, KOTZé JJA et
VAN WINSEN AJA.

HEARD: 2 NOVEMBER 1982.

DELIVERED: 1 December 1982.

J U D G M E N T.

JANSEN JA :-

The / .....

The appellants and two others (referred to in the Court a quo as accused Nos 1, 2, 3 and 4 respectively, which designation will be retained in this judgment) were charged in the Durban and Coast Local Division of, first, kidnapping and holding one Seenavasan (Raj) Chetty during the period 2 October 1981 to 6 October 1981, and , second, of murdering him on 6 October 1981. The Court (BOOYSEN J and assessors) convicted all the accused on the first charge, but only Nos 1, 2 and 4 on the second. No extenuating circumstances were found in the respect of the murder charge and those convicted were sentenced to death. On the kidnapping charge

accused No 1 was sentenced to 10 years imprisonment and the others to 12 years each. By leave of the Court a quo, accused Nos 1 and 2 appeal against the finding that there were no extenuating circum= stances in respect of the murder and against the death sentences imposed upon them.

The case against the accused rests almost exclusively on the evidence of one Stanley Munsami, an accomplice. The Court came to the "conclusion beyond all reasonable doubt that Munsami is telling the truth about the participation of each of the accused in the kidnapping and the murder". It may be explained that none of the accused gave any

evidence at all save No 2, who did so on the question of extenuation only and he was disbelieved.

In the main the facts are clear enough. Accused No 3 had a grievance, with ample justification, against the brother of the deceased who had done the accused's mother down in some transaction. Failing by lawful means to recover the money he believed he and his mother were entitled to, he conceived the idea of kidnapping either the brother of the deceased or his son, in order to obtain redress. He recruited the assistance of the other accused and that of Munsami. They were apparently willing to assist, either as a result

of being related to No 3 or on grounds of friendship. The kidnapping took place under the direction of No 4, but the deceased fell into the trap instead of either of the intended victims. Certain demands for payment were made to the deceased's brother, but they need not be detailed here. The Court a quo accepted the reasonable possibility that No 3 had no intention of killing the deceased at any stage and, therefore, acquitted him on the murder charge. Moreover, it accepted as a reasonable possibility that the question of actual killing only arose late on 6 October 1981 as a result of a newspaper report brought to the attention of No 4 accused.

It dealt with the kidnapping of Raj Chetty. The Court a quo summarises the evidence of Munsami as to what ensued as follows :-

> "According to him accused No 4 closed his eyes and told No 2 accused to drive to the Point, to the North Pier, after they had dropped the girl friend. Accused Nos 1, 2 and 4, he said, went into or onto the pier. They came back and accused No 4 told accused No 2 to sit with the key ready in the ignition. Accused No 4 and accused No 1 then took the deceased along the pier. He, Munsami, apparently out of curiosity according to him, followed. He saw No 4 put a sock in deceased's mouth. Deceased cried out, took off his shoes and ran into the pier. Accused Nos 1 and 4 chased the deceased and then two White men caught hold of him and No 4. Accused No 4, however, told them that the deceased was mad and that he got fits and that the deceased's mother had said they should look after him. Accused No 4 apparently broke away and ran off. These two men asked Munsami to show

them their car and he took them to the car where accused Nos 2, 4, 1 and the deceased were in the car. Accused No 4 then, according to him, said to the men, 'You see he's mad. Look, he's quiet.' The deceased then spoke up saying, 'If anything happens to me you all will know.' He said at this stage the deceased was full of blood and wet, although he did not see where the blood came from. He said that No 4 then said to No 2 accused, 'Let's drive to Mayville,' and they drove to the spot off Candella Road. This was now between 11.30 pm and 11.40 pm on the night of 6th October. According to him accused No 4 told all of them to jump off. As I understand it after the deceased had got out of the car he said, 'I know you are going to kill me,' and he asked for a cigarette. No 1 accused gave him a cigarette, which he smoked. Accused No 4 had a nylon rope. Munsami said that he had not seen it before and did not know where he had got it. Accused No 4 put it around deceased's neck. He then took off the deceased's red checked shirt and tore it into strips. He pushed the socks into the mouth of the deceased and tied up his mouth with strips of this

shirt. He gave strips to accused No 2 to tie the deceased's hands behind his back, which accused No 2 did. Accused No 4 then told No 1 accused to hold the rope and walked down the lane. Accused No 4 then told accused No 1 to take the rope up the tree and tie it up there. According to him accused No 1 did so. He, Munsami, said he was told to go up and assist No 1, but he only went up to a lower branch and looked away as he did not wish to see the deceased die. Accused Nos 2 and 4 picked up the deceased and the deceased was left hanging for about ten minutes. They all left him hanging there and he said he was hanging as appears on the photograph, Exh F, which was taken subsequently apparently some days after the death of the deceased. They all then went to Phoenix. Then No 4 decided that accused No 3 should be told and they went to his home in Mobeni where accused No 3 was woken up and told."

On this version (accepted by the Court a quo) it is

clear /....

clear that accused Nos 1 and 2 were directly concerned in intentionally hanging the deceased in order to kill him.

In extenuation it is argued on behalf of accused Nos 1 and 2 that they were youths, dominated and influenced by accused No 4 to participate in the murder. At the time of the murder accused No 1 was 21 years old and accused No 2 22 years old. Accused No 4 was 26 years old and obviously directed the murderous proceedings on the night of 6 October 1981.

The Court a quo dealt with the question of extenuation as follows :-

"We / ....

"We have found, and for the purposes of deciding whether there were extenuating circumstances, we find that accused No 4 decided, after reading the newspaper report, that the deceased should be murdered. Whether accused Nos 1 and 2 also decided that this should be done before they left for the North Pier is not that clear. But that both of them knew the deceased was going to be killed at the North Pier once they were there is quite clear. Accused Nos 1, 2 and 4, according to Munsami, first went into the pier, as he put it, and then upon their return accused No 2 was told to sit in readiness to drive off after the murder, and that is what he did and that was the reason for his sitting in the car. There is no suggestion from Munsami that accused No 2 was then reluctant to do so or that any threats or coercion was brought to bear. Accused No 1 and accused No 4 took the deceased onto the pier clearly in order to murder him at that stage, and no threats were made or suggested against No 1 to do this. Indeed, when this poor man, the deceased, broke away in his fear, cutting his feet and his legs

probably on the barnacle-encrusted rocks, accused No 1 chased him and, either on his own or with the assistance of No 4, caught him. Then at the scene of the killing after the deceased and all of them had got out of the car the deceased said that he knew they were going to kill him and asked for a cigarette. No 1 gave him a cigarette. Once again none of them could have doubted for a moment after that incident that the deceased was to be killed. According to Munsami they, that is he and No 1 and No 2, said to No 4 or pleaded with him that they should let the deceased go. Neither according to Munsami's evidence nor on that of anyone else is it suggested that accused No 4 then threatened anyone that if they did not participate they would come to any harm. Accused No 2 has said that he thought he might be injured or killed, as I understood him, but we reject this as a lie. Whilst the deceased was smoking, and thereafter, accused Nos 1 and 2 had ample time to reflect on the matter to decide to prevent the killing or to refrain from parti= cipating in it. Neither of them has even suggested that they thought of preventing it,

and the only influence they rely on is that accused No 4 spoke angrily to them when he told each to do the tasks which they did perform. No 2 accused tied the deceased's hands behind his back and helped to pick up the deceased and held the deceased's legs when he wriggled whilst suffocating. No 1 accused actually tied the rope at the top, making a very thorough and complicated job of it as is apparent from the photograph, Exh F, basically, as we understand it, b ecause he was told to do so in some angry manner. Having regard to No 1's earlier conduct at the pier and his onduct at the hanging, it is clear that there was little if any real reluctance on his part to kill the deceased and that very little influence was brought to bear on him b y No 4 in order to get him to do so. In our view the overwhelming factor motivating their killing the deceased was that they, in common with accused No 4, believed that they should do so in order to kill a damning witness against them in respect of their crime of kidnapping. Even though a horrifying step it was certainly a logical one. They killed

stances in respect of accused Nos 1 and 2."

The Court, therefore, came to the conclusion that accused Nos 1 and 2 were not immature, that "their relative youth did not influence their mental faculties or minds to any extent" and that accused No 4 did not influence them "to any but a negligible extent".

The Court a quo gained the impression that accused No 2 was not immature to some extent from his performance in the witness box. That this is not a very reliable source appears from a case such as S v Van Rooi en Andere (1976(2) SA

580(A), at p 585 E-F). Moreover, there is very little on record to show that accused Nos 1 and 2, despite their avocations, were not still subject to the weaknesses usually present in young men of their age. A most important aspect of the case is, however, that the Court a quo understood Munsami to have said in evidence that "he and accused Nos 1 and 2 pleaded with accused No 4 to leave the deceased, this was at the scene where the deceased was finally killed, but to no avail"; and the Court apparently accepted this in its main judgment as being the truth and the Court also

attitude and actions. On the probabilities this seems to be the true position, and in my respectful view the disregard of this aspect constitutes a misdirection. On the probabilities as seen above it must be found, in my view, that there were extenuating circumstances.

It will be expedient in the present case for this Court to impose appropriate sentences for the murder. Accused Nos 1 and 2 are each to serve 18 years imprisonment, with which the sentences in respect of the convictions for the kidnapping are to run concurrently.

The / .....

The appeals of both appellants are allowed. For the death sentence in the case of each appellant a sentence of 18 years imprison= ment is substituted; the sentence imposed by the Court a quo upon each in respect of the kidnapping is to run concurrently with the sentence for the murder.

E.L. JANSEN JA.

KOTZÉ JA. Concur.

VAN WINSEN AJA.