106/84

Bb

57/84

MCB

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JERRY BAPELA ..... First Appellant

JOHN SELEMBE ..... Second Appellant

and

THE STATE ..... Respondent

CORAM : KOTZÉ, MILLER, CILLIÉ, VILJOEN, JJA et ELOFF, AJA

HEARD : 14 SEPTEMBER 1984

DELIVERED : 28 SEPTEMBER 1984

J U D G M E N T

VILJOEN, JA

The two appellants appeared as accused 1 and 2 with one Harry Dire, as accused 3, (hereinafter referred

to as/.....

to as Dire) before Vermooten J and two assessors in the court a quo on various charges, all arising from the same event namely a robbery committed on Saturday 2 July 1983 at Jazz Stores, a smallish supermarket in Industria, Johannesburg.

The charges and the allegations in respect of each charge were the following:

1. Robbery with aggravating circumstances as defined in S 1 of Act 51 of 1977 in that the three accused robbed Gordon James Fleetwood, Michael John Cooper and Simon Lekaba of R3 962,07 in cash, a wrist watch and a wallet, aggravating circumstances being present.

2. Attempted murder in that they attempted to murder Simon Lekaba.

3. Assault with intent to do grievous bodily harm in that they assaulted Gordon James Fleetwood by hitting him with a steel rod with intent thereby

to inflict grievous bodly harm.

4. Assault with intent to do grievous bodily harm in that they assaulted Michael John Cooper by hitting him with a steel rod and kicking him with booted feet with intent thereby to inflict grievous bodily harm.

5. Unlawful possession of fire-arms to wit one 9 mm pistol and one,38 revolver without being the holders of licences in terms of Act 75 of 1969 to possess such arms.

6. Unlawful possession of ammunition while they were not in the lawful possession of fire-arms capable of firing that ammunition.

The first appellant pleaded guilty to counts 1 and 3 and not guilty to counts 2, 4, 5 and 6. The second appellant pleaded guilty to count 1 and not guilty to counts 2, 3, 4, 5 and 6. Dire pleaded not

guilty to all counts. Counsel for Dire applied for a separation of trials which the trial judge, without hearing full argument, granted on the sole ground, it seems, that Dire had pleaded not guilty while each of the other two accused pleaded guilty to one or more charges. Judging from his comments during the brief exchanges between himself and counsel for the State the learned judge considered that Dire might be prejudiced. He said:

> "Nouja hy kan mos nou benadeel word as hy moet nou oor, ten minste die getuienis wat aangebied word, of wat die geval ookal mag wees, as hy nou as een wat onskuldig pleit, in ander woorde, wat met die Staat in geding tree terwyl die ander twee nie, dan kon hy benadeel word" (underlining by me).

Another remark by the learned Judge was:

"Maar ek/.....

"Maar ek is begaan met die benadeling of potensiële benadeling van nr 3, as hy hier staan as 'n man wat in geding getree het met die Staat en die ander twee blameer hom. En hulle het nie 'n geding met die Staat nie. Nou ek gaan dit toestaan tensy u my kan gesag gee waarom ek dit nie moet doen nie."

Counsel for the State had no authority available and contented himself with remarking that he left the matter to the court's discretion. Had the learned Judge only taken the trouble to consult decisions such as R v Nzuza and Another 1952 (4) SA 376(A), R v McMillan 1958(3) SA 800(E) and R v Mfuduka 1960 (4) SA 770(C), or if he had only afforded counsel for the State, who was obviously caught by surprise, a proper opportunity to consult authority and to argue the matter, he might have been more cautious before deciding, in so summary

a fashion, to grant the application for a separation of trials. I point out that, even though the two appellants each pleaded guilty to one or more of the charges, a conviction did not follow there and then on those charges but the court heard all the evidence before convicting the two appellants. The first appellant was eventually convicted on counts 1, 2, 3 and 4 and was found not guilty on counts 5 and 6. The second appellant was convicted on all six counts. The first appellant was sentenced as follows:

Count 1: The death penalty was imposed.
Count 2: Five years imprisonment.
Count 3: Two years imprisonment.
Count 4: Two years imprisonment.

The second appellant received similar sentences on counts 1 - 4 and on counts 5 and 6, which were taken

together/.....

together for the purpose of sentence, a term of 2 years' imprisonment was imposed. Dire, who was separately tried before Margo J and assessors, was convicted on similar charges and was sentenced as follows:

1. On the charge of robbery with aggravating circumstances he was sentenced to 20 years' imprisonment.

2. On the charge of attempted murder involving the shooting of Simon Lekaba a sentence of 5 years' imprisonment was imposed.

3. On count 3 involving the charge of assault with intent to do grievous bodily harm on Fleetwood a sentence of 2 years' imprisonment was imposed.

4. On count 4 involving the charge of assault with intent to do grievous bodily harm on Cooper the learned Judge and assessors considered that part of the assault was aimed at inducing Cooper to submit to being robbed which factor"had been given

account" in the sentence of 20 years' imprisonment on count 1. For this reason the sentence imposed on count 4 was only 1 year's imprisonment.

5. On counts 5 and 6, the statutory counts of unlawful possession of the revolver and ammunition, 2 years' imprisonment was imposed.

The court ordered the sentences on counts 2, 3, 4, 5 and 6 to run concurrently with the sentence of 20 years' imprisonment on count 1.

An application for leave to appeal before the trial judge having failed both appellants petitioned the Chief Justice for leave to appeal against the convictions on counts 1 - 4 on the ground that there was an improper multiplication of charges, alternatively that the circumstances giving rise to charges 2, 3 and

4 should have been disregarded for the purposes of count 1 and that each appellant should have been convicted of robbery without aggravating circumstances. Leave was also sought to appeal against the sentence of death imposed on count 1.

The two appellants were granted leave to appeal against the death sentence on count 1 and against the convictions on counts 3 and 4. Counsel for both appellants have, however, abandoned the appeal against the convictions and have confined the appeal to one against the death sentence on count 1. In view of the arguments relating to sentence a brief resumé of the evidence adduced by the State, which was accepted by the trial court, is necessary.

The premises/....

The premises of Jazz Stores comprise two floors of a building in Kelvin Street, Industria, Johannesburg. The impression gained from the evidence is that, although a certain amount of business was done on the ground floor where there were two tills, the bulk of the business was conducted on the first floor. On Saturday, 2 July 1983, Gordon James Fleetwood, the local manager of the store, was standing on the first floor looking at a poster featuring the Durban July Handicap, which was due to be run that afternoon, when he became aware of two black men standing close to him. When, in a loquacious mood, he turned to these men to discuss with them the chances of the horses which were to run

in the/.....

in the race, he wasstruck by something on the jaw which caused his glasses to fall on the ground. He bent down to pick them up and as he put them back on his face somebody fired a shot. He thought the shot was directed at him. This shot missed him, he said. It is common cause that the person who struck Fleetwood was the first appellant. Simon Lekaba, an employee at the store, was busy sweeping the floor of the store when he saw three black men in the store. He suddenly heard Fleetwood's frantic call "Simon, help me" and noticed that the latter was being assaulted by the first appellant. He rushed to Fleetwood's aid and attacked the first appellant with a broom. A shot rang out, however, and Simon Lekaba realised that he had been shot

by somebody behind him. He was unable to say who this person was. The bullet passed right through his body. It can reasonably be inferred that this shot was the same shot which Fleetwood testified about. There is no evidence that, at about the time Simon Lekaba attacked the first appellant with the broom, more than one shot was fired.

Simon was told to get up from the floor where he had fallen when the bullet struck him and he was told by two of the robbers to show them where the safe was. Accompanied by two men, whom he could not identify because he was in pain, he pointed out the safe. Thereafter he was made to lie down in the kitchen with certain other members of the staff. Fleetwood had,

in the/.....

in the meantime, with certain members of the staff, run to and entered a storeroom, the door of which they closed (it could not be locked) and which they barricaded by placing against the door objects which Fleetwood referred to as "pallets". They held these objects secure by lying on their backs and pressing against them with their feet. From this room, in which there was a telephone, Fleetwood telephoned the Langlaagte police and certain other branch store managers. In spite of attempts from the other side to break the door down and shouts that unless they opened the door they would be killed, the door was kept closed.

At approximately 13h05 Michael John Cooper, the area manager of Jazz Stores, who had arranged with

Fleetwood to pick him up when the store closed, arrived at the premises where he found the front door closed. When there was no response to his knocks nor to the blowing by him of the hooter of his car, he kicked the doors in and entered the premises. When he reached the first floor he noticed the first appellant walking into the manager's toilet. He entered the toilet, grabbed the first appellant from behind and enquired from him what he was doing there. The first appellant turned round and hit him with an iron bar on the forehead more or less on the hairline. He ordered Cooper to lie on the floor of the store with his arms outstretched. Cooper complied and while in that position he saw the second appellant standing with

a fire-arm/.....

a fire-arm in his hand. When he tried to look up to establish whether it was a real gun, the second appellant threatened to blow his brains out if he tried to identify him. He noticed, though, that the fire-arm which the second appellant held was an automatic pistol. He also noticed Harry Dire who held a revolver in his hand.

The first appellant searched Cooper and removed from his person his wallet containing approximately R40 - R50 in notes and some private papers. He also took his Rolex watch which Cooper valued at R900. The second appellant told Cooper to stand up and to accompany them to the back. When they reached the kitchen door Cooper pleaded with the first appellant

not to hit him again - he had a wife and children at home. The first appellant's response was: "Don't tell me stories," and struck Cooper another blow with the steel bar on the temple. As they proceeded past the kitchen door Cooper noticed some of the staff members kneeling on the kitchen floor with their heads down. It appears from evidence other than that of Cooper that Dire was standing guard over them. When they reached the door of the storeroom Cooper knocked on the door and asked Fleetwood to give him the keys of the safe because the robbers (who had at that stage already taken all the money from the tills) wanted more money. Fleetwood opened the door "in a flash", threw the keys out onto the floor outside and closed the door again. Cooper picked up the keys and

was told/.....

was told by the first appellant to open the safe in the office. He did so and, as ordered by the first appellant, dropped all the money in a rain-pack bag which they sold in the store. The first appellant was alone with Cooper. The other two robbers were somewhere else. From the office where the safe was the first appellant ordered him to go to the strongroom in which there was yet another safe. They were at this stage joined by either the second appellant or Dire. The first appellant told Cooper to open the safe (referred to by him as a cabinet) in the strongroom. Cooper knew that the key of this safe was not among the keys on the bunch which he had obtained from Fleetwood and told them he could not open it. Apparently to convince them

that he was speaking the truth he offered them the keys. The two left the room for some time but returned after a while and demanded more money. All of a sudden they left. With blood streaming from his face Cooper drew his revolver (which the robbers had failed to find on him) and fired one shot into the ground. Why he did that is not clear from the evidence.

Almost simultaneously another shot was fired. This turned out to be a shot fired by sergeant Elmon Nkosi who, presumably as a result of Fleetwood's telephone calls, just then appeared on the scene with several other policemen. The shot was fired because when the sergeant shouted to Dire to put up his hands the latter ran round a counter and tried, with a

shaking hand, to shoot at the sergeant. The sergeant then shot and wounded Dire. Sergeant Masigo kicked the fire-arm out of the hand of Dire who was arrested with the other two and the stolen money was recovered.

The pipe which the first appellant used and which some witnesses described as a steel pipe was actually no pipe at all but a solid lead bar. As a result of the blow inflicted with this bar Fleetwood's jaw was badly fractured. Cooper was also treated for his injuries and Simon Lekaba and Dire were treated for their gunshot wounds.

Detective warrant-officer Calitz picked up one discharged bullet on the scene. He also attached three fire-arms - the pistol which the second appellant had, the/.....

had, the revolver which Dire had and the revolver from which Cooper said he had fired one shot. The fire-arms and bullet were subjected to ballistic tests and it was found that the spent bullet had been discharged from the pistol handled by the second appellant. According to the evidence only three shots were fired, two of them at about the time when the police entered the premises. The possibility that Simon Lekaba was wounded by Nkosi or Cooper can be ruled out because that would be inconsistent with the shot which wounded him having been fired substantially before the firing of the two shots by Nkosi or Cooper. The possibility that Dire wounded Simon Lekaba can also be ruled out because only three shots

were fired - two from revolvers handled by Nkosi and Cooper and one from the pistol which the second appellant had. It is, therefore, a reasonable inference that the second appellant shot at and wounded Simon Lekaba.

In sentencing the appellants the learned judge, dealing first with counts 2 to 6 remarked that there was no doubt that the shot that was fired and hit Simon Lekaba could very easily have killed him. It is a miracle, said the learned judge, that he survived because one can only think - although the court had no medical evidence - that that bullet possibly went through the lung. The assault on Fleetwood with intent to do grievous bodily harm was

a serious/.....

a serious one, said the learned judge, which in itself merited severe punishment. The same considerations applied to the two assaults on Cooper, he said. He regarded the possession by the second appellant of the Beretta pistol and the ammunition as serious "because it is so often, as here, the reason why he had the courage to try and dominate other people and take their money". In assessing a fair punishment the court takes four factors into consideration, he remarked. "The first is the seriousness of the crime; the second the personal circumstances of the accused; the third, the interests of society; and fourthly, and overriding everything else, such mercy as the court feels that it can show in n particular case." The learned judge said he was aware of the personal circumstances of the

accused/.....

accused, which he had mentioned in reviewing their evidence and that he had listened to the evidence of the first appellant's wife who told him what suffering she and their five children had undergone because of what he, the breadwinner,did on that day. He thereafter dealt with count 1, robbery with aggravating circumstances, and told the appellants that they were both aware - their counsel must have told them - that the law allowed him the discretion of imposing the death sentence on that count. He proceeded as follows:

> "Now the circumstances of this case, with regard to count 1, are in my opinion extremely serious. No. 1 struck Mr. Fleetwood, the manager, with Exhibit "1", such a vicious blow in the face that No. 1 broke his jaw in three places and knocked off his glasses. And another of the robbers, as Fleetwood

bent down to pick up his glasses, fired a shot at him. Although he was unable to recognise accused No. 2, the probabilities are -and I put it no higher - that it was No. 2 who fired that shot, because it was No. 2 who a few moments later threatened Mr Cooper that he would blow his brains out if he tried to identify him. But No. 1 also struck Mr. Cooper on the forehead with Exhibit "1", again such a vicious blow that he now has a permanent scar there. But that was not all, when shepherding Mr. Cooper to the back, to the storeroom, to get the keys for the safe, and when Cooper was pleading with him, "Don't hit me again, I have a wife and children at home", No. 1 again hit him with Exhibit "1" on his left temple. Today No. 1 calls his wife to plead with me for mercy but when Mr. Cooper pleaded with him, there was no mercy. But that is not yet the full extent of the seriousness of this robbery because one of them shot Simon Lekaba through his body, almost causing his death. And that is yet not the end of the story because the two of you terrorised, not only the top management, Fleetwoord and Cooper, but the whole of the staff of that shop, some six or seven members of the staff.

With brazen arrogance you demanded the keys of the safes, small and large, and removed Mr. Cooper's wallet with R40 or R50 in it in cash, out of his pocket and his R900,00 Rolex watch from his wrist. Honest law-abiding citizens are at the mercy of thugs like you. And when I say thugs, I mean it in the sense of the way you behaved on that day. Banks, Building Societies, smaller businesses like this one, not to mention the citizens in their homes, on trains and in the streets are in perpetual fear when darkness falls that people like you might attack and rob them. In my opinion you two are a menace to society and there is no doubt in my mind that the time has come for the Court to deal severely with persons like you who commit robbery with aggravating circumstances. I regard this as a very very serious case. It is just by the mercy of providence that Mr. Fleetwood and Mr Cooper were not killed, and indeed as I have said, Simon Lekaba, in which case you would have faced three additional charges of murder. It is no use No. 2 saying in his own mind that he did not do the hitting, No. 1 did. In our law No. 2 is as much responsible for the acts of No. 1 as if he had done them himself. And I will remind No.2 that it was he who threatened

to blow Mr. Cooper's brains out. It is a large amount of money that you have robbed, almost R4 000,00, and a wallet contained R40,00 to R50,00 and a very expensive Rolex watch, which was never recovered.

Your Counsel, both of them, have wisely not argued that you were under the influence of liquor when you committed this crime - these serious crimes - because they realised that by the time the warrant officer testified, Mr Calitz, there could be no further doubt that you were stone sober in that shop.. But even if you were affected by liquor, let me make it quite clear to you, that this is a case in which I regard the drinking of liquor as an aggravating circumstance. It would have been drunk for the very reason to enable you to have the courage to rob this shop, and indeed No.1 admitted as much in his evidence.

It is my duty to hold those four factors which I have mentioned to you in the beginning in fine balance and not to over-emphasize one at the cost of the other."

The learned judge thereupon first imposed the

sentences to which I have referred above on counts 2 - 6 and thereafter proceeded to impose the death sentence on count 1.

In imposing the death sentence the learned judge exercised his discretion in terms of s 277(1)(c)(ii) read with the definition of "aggravating circumstances" in s 1 of Act 51 of 1977. In S v Letsolo 1970(3) SA 476, a case in which the court, nothwithstanding a finding that extenuating circumstances existed, imposed, in the exercise of its discretion, the death sentence (cf the present s 277(1)(a) read with ss(2)), Holmes JA said at 476 (foot) - 477 (top):

> ".... the trial Judge has a discretion, to be exercised judicially on a consideration of all relevant facts including the

> criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme step of ordering him to forfeit his life; or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence. The possibility of such an alternative should be considered by the trial Judge, in view of the words "the court may impose any sentence other than the death sentence" in the proviso to sec. 330(1) of the Code. And it should be weighed with the most anxious deliberation for it is, literally, a matter of life and death."

In S v V 1972(3) SA 611 (A) at 614 F the same learned Judge of Appeal referred to the death sentence as "the incomparably utter extreme of punishment."

Did the learned trial Judge consider the possibility of an alternative to the death sentence with the most anxious deliberation? Margo J certainly

did. When he sentenced Dire, he remarked as follows:

> "I would have imposed the death sentence on you, had it not been for the statement by Holmes, J A in S v V 1972(3) SA 611 (A), at page 614 F. He there said that sentence to the gallows, is the incomparably utter extreme of punishment.
>
> He went on to say, in respect of young persons that where it is not statutorily mandatory, it should rarely, if ever, be resorted to, and that due account should be given to a long period of imprisonment, with all the consequences and deprivations that that would bring.
>
> That proposition has been explained, and in some respects watered down, in the cases to which Mr Oberholzer has referred me, namely, S v Sithole en Andere 1983 (3) SA 610 (A) at 614 H and 615 A , and S v Tshomi en 'n Ander, 1983 (3) SA 662 (A) at 666 E.
>
> Nonetheless, the broad principle remains, and it is one to which the Courts will continue to give effect, if I have understood the dicta correctly.

> We are a civilized country, and we do not put our citizens to death unless there is an absolute compulsion to that end, in order to maintain the proper administration of justice."

In Sithole's case referred to by Margo J it was said by Cillié JA (at 614 foot) that the words "extreme case" can give rise to a misunderstanding and in Tshomi's case a warning was issued (666F) that these words should not be construed literally. It was pointed out, further, by Cillié JA in Sithole's case that the possibility that a convicted robber may be rehabilitated does not mean that a term of imprisonment is therefore the only appropriate sentence (615C). The learned Judge of Appeal proceeded:

> "Dit is maar net een van die omstandighede wat die Verhoorregter saam met die besonder ernstigheid van die misdryf en al die ander relevante omstandighede, verswarend en

versagtend, by die oplegging van 'n gepaste vonnis moet oorweeg."

I agree, however, with Margo J that subject to these considerations the broad principle remains and that is that the death penalty should only be resorted to where, having regard to all the relevant considerations, it is the only appropriate sentence to be imposed. The consideration should always bethat which was expressed by Holmes JA in Letsolo's case supra in the following words:

> "....whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of punishment."

A perusal of the learned trial judge's remarks on sentence on count 1 satisfies me that, in

spite of his assertion that he held all the factors in fine balance and that he was cautious not to over-emphasize one at the cost of the other, he laid particular stress on the seriousness of the offence and he failed to weigh this up properly with the mitigating factors. In rather emphatic language the learned judge remarked upon the vicious blows dealt Fleetwood and Cooper, the threat that Cooper's brains would be blown out, the lack of mercy shown by the first appellant, the shot through Lekaba's body "almost causing his death", the terrorisation not only of the top management but the whole staff, the brazen arrogance with which the keys of the safe were demanded and with which Cooper's wallet and his watch were removed from

his person and the mercy of providence that Fleetwood and Cooper were not killed. Admittedly it was a serious case but there is no indication in the judgment on sentence that the learned trial judge considered whether an alternative sentence, such as a lengthy term of imprisonment, would not sufficiently have satisfied the deterrent, punitive and reformative aspects of punishment. Save for emphasizing the seriousness of the offences he has not stated why he regarded the death sentence as the only appropriate sentence. Apart from this failure on the part of the learned judge, I point out that he also committed a factual misdirection. This consisted in his reference to

a shot having been fired at Fleetwood. As I have pointed out that is not a reasonable inference to draw from the evidence. It is significant in this regard that the State did not charge the appellants with attempted murder involving a shot fired at Fleetwood. I do not, however, attach much independent importance to this particular misdirection. It is a relatively minor one and I view it in the context of the general approach of the learned trial judge to which I have referred above.

It was also argued on behalf of the appellants

that, on the authority of S v Giannoulis 1975 (4) SA 867(A), this Court should interfere because Dire did not receive the death sentence while the two appellants did. It was contended that the complicity of all three in the robbery itself was about equal. In fact, it was pointed out, Dire had a worse record than either of the two appellants and it was submitted that, for that reason, the two appellants should have been treated more leniently than Dire. In view of the conclusion, set out above, to which I have come, I do not deem it necessary to deal with this submission.

Inasmuch as Vermooten J had misdirected himself, it is the duty of this Court to impose sentence afresh.

It emerges from the evidence of first appellant that at the time of the commission of the offence he was 43 years of age and worked for himself as a paper hanger, earning approximately R400 - R500 per month. He has a wife and five children to support. His wife, Bertha Bapela, testified that all five children are daughters who are still at school. She begged the court to have mercy upon her husband. After his arrest she struggled financially and had to beg food from her neighbours, she said. She could not pay for their accommodation and had already been threatened with ejection. She herself is sickly - she suffers from arthritis.

The first appellant has one previous conviction involving the theft of a carpet valued at R40 for which he was sentenced on 29 November 1966 to 3 months imprisonment.

The second appellant told the court that before his arrest he was a motor mechanic working

for himself and earning approximately R350 per month. He is 37 years old, is married and has two children aged 13 and 10 years respectively. He has no previous convictions.

Dire has, indeed, a worse record than either of the two appellants. In this regard Margo J remarked as follows:

> "You have been guilty of two previous acts, which I must take into account against you.
>
> In 1968 you were convicted of housebreaking with intent to steal and theft, and you were sentenced to two years imprisonment. And in 1975 you were convicted of robbery, involving an amount of R6 000,00 approximately, for which you were given three years imprisonment.
>
> You have other offences against you here on your record, including two counts of theft as far back as 1966. But the only convictions to which I pay regard, are those which I have just mentioned."

In favour/....

In favour of Dire Margo J took into account that there was no evidence that he himself perpetrated any of the acts of violence against the individuals concerned. He proceeded:

> "It is true that you used a revolver to threaten some of your victims, but it was not you who struck Messrs Cooper or Fleetwood, and on the evidence it has not been shown that it was you that fired the shot which injured Simon Lekaba."

I do not think that it can be said that any particular one of the three was the mastermind behind the robbery or that one influenced the others. On the accepted evidence they planned this enterprise together. As far as the two appellants are concerned they did perpetrate acts of violence against Fleetwood and Cooper. What I regard as particularly serious is the shot which

appellant 2 fired at Lekaba which could very easily have resulted in his death had it penetrated a vital organ of his body. On the other hand the second appellant is a first offender and the first appellant has only one previous conviction as opposed to Dire's fairly bad record. In such a serious case as this the hardship suffered by the families of the appellants is not a factor which can be accorded much weight. Regard being had to all the factors referred to and weighing up the aggravating and mitigating factors in respect of each of the two appellants and comparing it with Dire's sentence I consider that the two appellants should each receive the same sentence which was meted out to Dire on count 1 viz twenty years imprisonment.

Inasmuch/.....

Inasmuch as a term of imprisonment is now substituted for the death sentence on count 1, the question arises whether the various terms of imprisonment imposed on the other counts should not be ordered to run concurrently with the twenty years. Margo J ordered accordingly and in my view that is the proper order to make in the present case. From the learned trial judge's judgment on sentence it appears that, in dealing with counts 2 - 4, he took into account the seriousness of the attempted murder on Lekaba and the assaults on Fleetwood and Cooper as by themselves meriting severe punishment. He took these assaults into account once more as aggravating circumstances for the purposes of count 1. In

S v Moloto 1982(1) SA 844 Rumpff CJ said at 854 E - G:

"Wanneer dit kom by vonnis, en die oorweging van die bestaan van verswarende omstandighede by roof, waarvoor art 277(1)(c) van die Strafkode voorsiening maak, sal 'n Hof wat nie die doodstraf op roof met verswarende omstandighede oplê nie, in oorweging neem dat by die oplegging van 'n vonnis vir poging tot moord die erns van die aanranding reeds by die vonnis ten opsigte van roof in aanmerking geneem word. Dit blyk duidelik uit wat te 383D - F in die Cain-saak 1959 (3) SA 376 (A) gesê is, nl:

'Were a sentence other than death to be imposed for the robbery, it would, no doubt, be appropriate, when assessing the sentence to be imposed for the separate charge of shooting, to pay regard to the fact that such shooting had already operated to make the sentence on the robbery charge more severe; but that would not affect the 'presence' of the shooting as an aggravating circumstance in the robbery'".

There is/.....

There is no appeal against the sentences on counts 2 - 4 and this Court cannot interfere with those sentences on the ground that the learned trial judge has wrongly taken into account the seriousness of the attempted murder and the assaults both for the purpose of finding aggravating circumstances on count 1 and for the purpose of sentence on counts 2 - 4. What this Court can do, however, is to order that the sentences on counts 2 - 4 run concurrently with the sentence of 20 years now imposed on count 1.

In the result the appeal of both appellants against the death sentence on count 1 succeeds and the following order is made:

1. The sentence of death on count 1 in respect of both appellants is set aside and a sentence of 20 years' imprisonment is substituted.

2. In/.....

2. In respect of the first appellant the sentences on counts 2 - 4 are ordered to run concurrently with the sentence on count 1.

3. In respect of the second appellant the sentences on counts 2 - 6 are ordered to run concurrently with the sentence on count 1.

JUDGE OF APPEAL

KOTZé)
MILLER) - JJA
CILLIé) - Concur

ELOFF - AJA