60/84

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of :

SIMON NGOMA ..... appellant

versus

THE STATE ..... respondent

Coram: CORBETT, JOUBERT, NICHOLAS, JJA, GALGUT et SMUTS, AJJA.

Date Heard: 1 May 1984

Date of Judgment: 25 May 1984

J U D G M E N T

CORBETT JA

The deceased, Mrs G E Uys, lived with her husband, Mr G J C Uys, on the farm Elandshoek in the district of Cullinan. On the evening of Monday,

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15 November 1982, the two of them sat for a while in the lounge of their home watching television. At about 21h00 Mr Uys went to bed. It was their custom to sleep in separate bedrooms when one of them stayed up after the other had gone to bed. Mr Uys rose fairly early the following morning. He went outside into the garden to have a swim in the swimming pool. In passing the bedroom in which his wife was to have slept he noticed that the bed was undisturbed. Outside he further noticed that a pane of glass in a glass door giving access from the garden into the lounge was broken. He went to investigate and found his wife lying dead in the lounge. She had been shot. It

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was a clear case of murder. A wrist-watch which the deceased had been wearing was missing.

The police were summoned. They investigated the crime and three days later the appellant was arrested. In due course he appeared before a Judge and two assessors in the Transvaal Provincial Division on charges of (1) murdering the deceased and (2) robbing the deceased of her wrist-watch or, alternatively, of breaking into the home of Mr Uys with intent to steal and the theft of the wrist-watch. Upon arraignment the appellant pleaded not guilty to count (1), viz. that of murder, and guilty to the main charge under count (2), viz. robbery. The Court found him guilty on both counts

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and in regard to the murder charge held by a majority, one of the assessor members of the Court dissenting, that there were no extenuating circumstances. He was sentenced to death on count (1) and to three years imprisonment on count (2). The trial Judge granted appellant leave to appeal against the finding that in respect of count (1) there were no extenuating circumstances.

As the trial before the Court a quo progressed it became apparent that most of the material facts were not in dispute. The appellant is a young Black man. The determination of his age is a matter to which I shall allude later. He grew up in Delmas. At the time of the trial both his parents were deceased, but an uncle

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was evidently alive. At school he did not progress beyond the sub-A standard. He entered the employ of Mr Uys some time during 1982 and worked for him for about three months as an ordinary farm labourer.

About six weeks before the murder of the deceased the appellant and a companion broke into the farm house while Mr Uys and the deceased were away and stole various articles, including a ,22 rifle, a 9,3 mm Husqvarna rifle and a quantity of 9,3 mm ammunition. The appellant appropriated the 9,3 mm rifle and his companion the ,22 rifle. Appellant hid the 9,3 mm rifle and the ammunition in a field of long grass about 500 m from the farm house. Shortly thereafter and because of the breaking in

appellant absconded and disappeared from the farm.

On the day in question, 15 November 1982, the appellant travelled from the home of his sister in the Dennilton district, where he was staying, to Bronk-horstspruit. He was on his way to Boskop. Upon his arrival in Bronkhortspruit, he, so he says, purchased five cartons of sorghum beer. He drank three of those in Bronkhorstspruit. He then caught a train and travel-led by train as far as Van der Merwe station, where he alighted. There he drank the remaining two cartons of beer. This was at about sunset. Van der Merwe station is evidently situated fairly close to the farm of Mr Uys. The appellant then decided to go to fetch the

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rifle which he had stolen and hidden on the farm. He went there and found the rifle. He then proceeded to the farm-house, carrying the rifle with him. He stopped on a lawn outside the lounge about 25 m from the house. In addition to the glass door, the lounge had large glass windows on the side facing the lawn. The lights were on inside the lounge and the windows were uncurtained. Appellant saw the deceased in the lounge. He pointed the rifle in her direction and a shot was fired. The bullet went through a pane of glass in the glass door and struck the deceased from behind on her left shoulder, two cm. from the mid-line. It entered her neck and passed through her mouth. Fragments of the bullet were found in the lounge. It was a soft-

nosed bullet designed to do maximum damage on impact. In addition, the evidence of a ballistics expert indicated that the impact with the glass rendered the bullet an unstable projectile. The results of the bullet striking the deceased were devastating. It caused a large gaping entrance wound. It shattered the first neck vertebra, certain facial bones and portions of the skull. There was subdural and subarachnoid bleeding. The doctor who performed the autopsy gave, as the cause of death, this gun-shot wound "met misvorming en verbrokkeling van die rugmurg, skedel, gesigsbene en mond".

After firing this shot the appellant approached

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the house. He put his hand through the broken pane in the glass door and opened the door from within. He entered the lounge. He saw that the shot which he had fired had hit the deceased. She was bleeding. He could not tell whether she was alive or not. A handbag was lying next to the deceased. He looked inside this hoping to find money, but it contained only wool, presumably knitting wool. He then removed the deceased's wrist-watch from her body and left. He took the rifle with him and again concealed it on the farm, this time in a different place about 800 m from the house. He then returned to Van der Merwe station and continued on his way. The following evening he gave the wrist-watch to his sister,

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Johanna Ngoma, and told her that he had picked it up in a bus. On Thursday, 18 November 1982, appellant was arrested by the police and charged with murder and house-breaking. Appellant immediately admitted the house-breaking and later conceded that he had shot the deceased. He pointed out various places, including where he had concealed the rifle, both before and after the shooting.

The issue before this Court is whether in regard to the murder conviction the finding by the majority of the Trial Court that no extenuating circumstances existed should stand or not, but before I come to deal with this issue it is necessary to say something

about the appellant's age and the manner in which this issue was dealt with by the Court a quo.

When the appellant initially appeared before the magistrate of Cullinan, in terms of the provisions of s. 119 of the Criminal Procedure Act 51 of 1977, his age was stated in the charge-sheet to be 18 years. The record of these proceedings was placed before the Court a quo. Where a person convicted of murder was under the age of 18 years at the time when the crime was committed, the Court has a discretion as to whether to impose the death sentence or not. On the other hand, if the person concerned was not under the age of 18 years, ie was 18 years old or more, at the time of the commission of the murder, then, unless there were extenuating circumstances,

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the death sentence is obligatory. (See s. 277 (2) of Act 51 of 1977.) Thus only where the accused was not under the age of 18 years at the time when the offence was committed is it necessary for the court to decide whether extenuating circumstances, in the technical sense, were present (although naturally such circumstances would be relevant on the question of sentence where the accused was under the age of 18 years at the relevant time). Consequently the exact determination of an accused's age can be a matter of vital importance.

It was presumably because of the provisions of s. 277(2) and because, from the point of view of age, the appellant seemed to be a borderline case that the State caused appellant to be examined by Dr Burger,

the district surgeon of Pretoria, on 30 November 1982 and called Dr Burger as a witness at the trial. In evidence Dr Burger stated that as a result of his examination of the appellant he determined his age as being at least 19 years. He based this conclusion on the fact that on both sides of appellant's jaw the upper and lower three molars were well-developed and that appellant exhibited full secondary sexual development ("volledige sekondêre seksuele ontwikkeling"). Precisely what was meant by this latter criterion and how accurate it is, either by itself or in conjunction with other criteria, in determining age was never canvassed in the Court below. Dr Burger was, however, asked about the molar development

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test. He stated, during evidence-in-chief:

> "Dit word ervaar deur alle anatome en odontiste - ten minste in die Engelssprekende wêreld - dat een individu met drie kiestande aan beide kante, bo- en onderkaak, was reeds 18 jaar."

and —

> ".... Dit is só betroubaar wat die volle stel van kieste betref dat 'n mens met absolute oortuiging kan sê dat die persoon wat wel drie kieste het, bo en onder, was reeds 18. Dit het ek nie een keer nie, maar verskeie kere al bevestig met odontiste."

Under cross-examination Dr Burger reaffirmed this view in very positive terms:

> "Ek het vir u gesê drie kieste is teenwoordig alleen by mense wat 18 of ouer is. Ek kan dit nie duideliker stel as dit nie.... Maar is dit glad nie moontlik dat iemand voor 18 al drie kiestande kan hê

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> vanweë 'n vinniger ontwikkeling nie?--
> Volgens die opinie van professionele
> odontiste: nee. Daarom maak hulle
> die skeidslyn met absolute vertroue."

Dr Burger was asked whether even with this molar development test a two-year tolerance ("tweejaar-speling") should not be allowed to cater for individual differences, but he said that this only applied in the case of persons who had not developed three molars and repeated the assertion that a person who had three molars was 18 years old or more.

Dr Burger was asked by the trial Judge, who appeared at that stage to have certain doubts, whether there was not another method of age determination involving X-ray photographs of the wrist bones. To

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which he replied:

> "O ja, Edelagbare, ja, maar dit is 'n baie duur proses. Ons kan dit onmoontlik nie met - ons doen so baie odonto's, dit sal die Staat 'n fortuin kos. Maar, aan die ander kant, Roëntgenbepalings doen ons vir absolute ouderdom, byvoorbeeld was die man 35, 40, 45? Was dit 'n kind van drie maande of 3 jaar oud? Dit is vir meer gedetaïlleerde bepaling van 'n spesifieke ouderdomsgroep. Die bepaling wat ons maak wat op die tande berus word hoofsaaklik gemaak om te onderskei tussen persone onder 18 en dié bo 18."

When he came to give evidence the appellant stated that he was 17 years of age. Under cross-examination, however, it appeared that this was a mere estimate and that appellant had no grounds for making this assertion.

In giving judgment the Court a quo did not refer to any of this evidence, nor indeed did it make

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any express finding in regard to the age of the appellant. The Court nevertheless appears to have proceeded on the basis that the appellant was at least 18 years of age for it found (by a majority) that there were no extenuating circumstances present and as a consequence thereof the Judge considered himself bound to impose the death sentence.

There are certain general observations which I wish to make. In a case such as the present one, where it appears that the age of the accused is near the critical borderline of 18 years, the correct determination of his age becomes a matter of the utmost importance. From the accused's point of view it may be a matter of life or death. And it would be palpably contrary to

public policy and to the intention of the Legislature if persons actually younger than 18 years were dealt with, in terms of s. 277(2), on the factual basis that they were 18 years or older.

This raises the question of the onus of proof, a matter left open by this Court in S v Tsankobeb, 1981 (4) SA 614 (A), at p 629 G - H; see also the discussion of this point in Schmidt, Bewysreg, 2nd ed, pp 64-5. Again, for reasons which will become apparent, I do not find it necessary in this case to decide whether in such cases the onus rests upon the State to prove that the accused is 18 years or older, as argued by appellant's counsel, or whether the burden is upon the accused to prove that he is under 18 years of age,

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as contended by the State, or whether the age of the accused is a matter which must be determined by the Court without reference to any onus. In general, however, whatever the position may be in regard to onus, I am of the opinion that in such border-line cases the trial Court is under a positive duty to investigate as exhaustively as is reasonably possible all evidence or possible sources of evidence which may assist it in the proper determination of the age of the accused and to make a specific finding in that regard (cf. S v Mohlobane, 1969 (1) SA 561 (A), at p 567 C - F). Obviously the best method of determining the age of a person is to establish his date of birth. There are

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various ways in which this may be done. Parents or close relatives may be able to give direct evidence of this. If the accused's birth was registered in terms of Act 81 of 1963 (or prior legislation), then the date of birth as recorded in the register and as certified would constitute prima facie proof of this date and therefore of age, and, in some instances, this would be the most reliable source of evidence. Baptismal certificates, though generally less reliable, may also assist. If the date of birth cannot be established, then other evidence tending to establish the age of the accused may be resorted to, eg. evidence of persons who have known the accused for an ascertainable period of

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time (which would establish that the accused was at least that age or older), and medical evidence. As to medical evidence, a proper clinical examination of the accused would include not only an observation of his general physical development, with special reference to his teeth, but also X-ray tests (see S v Mohlobane, supra, at p 567 F; S v Van Rooi en Andere, 1976(2) SA 580 (A), at p 583 H). As I understand it, these X-ray tests are directed at determining whether fusion of the epiphyses and the shafts of the long bones has taken place (see Gordon, Turner and Price, Medical Jurisprudence, 3rd ed, p 343 ff). Other facts which may also assist in the determination of age are referred

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to in S v Seleke en Andere, 1976 (1) SA 675 (T), at pp 689 H - 690 A.

In the present case there is no indication on the record that any steps were taken to ascertain whether the appellant's birth had been registered or to find out whether any relative or other person could give reliable evidence as to his date of birth. Certainly the Court itself does not appear to have made any such enquiries. Dr Burger's clinical examination did not include X-ray tests. His statement indicating that such tests were not done on the ground of expense should not, in my opinion, have deterred the Court from asking that appellant be tested in this way. Moreover, Dr

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Burger's evidence appears to me to be somewhat assertive. He quoted no authority in support of his views. Gordon, Turner and Price, op. cit., at pp 343-4, state that the combined data obtained from an examination of tooth development and the union of epiphyses —

> "..... allow one to determine the age to within about two years because it is necessary to allow for individual variations, the range of variation being approximately one year in either direction".

Although this point was raised in cross-examination, the views expressed in this authoritative work were unfortunately not put to Dr Burger. (Cf also S v Hlongwana, 1975 (4) SA 567 (A) at p 569 C - D.)

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Had the question as to whether or not appellant was under the age of 18 years at the time of the commission of the crime, been of critical importance, then, in my opinion, it would have been appropriate to refer the matter back to the Trial Court in order that it should hear further evidence on this issue, make a specific finding as to age and deal with the matter accordingly (cf S v Mohlobane, supra, at p 568 G - H). Since, however, I have come to the conclusion that, contrary to the finding of the majority of the trial Court, extenuating circumstances were present, the determination of age is not a vital matter and it is not necessary to remit the matter to the trial Court.

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I come now to the question of extenuating circumstances. All that was stated by the trial Judge in regard to extenuating circumstances was the following:

> "Die Hof het oorweeg of daar bewys is dat daar in hierdie geval versagtende omstandighede bestaan, en dit oorweeg in dié opsig of die optrede van die beskuldigde minder verwytbaar is onder die omstandighede wat voor die Hof gelê is, en die Hof het met 'n meerderheidstem tot 'n beslissing gekom dat daar geen versagtende omstandighede is nie. Die een afwykende beslissing het gevoel dat weens die jeugdigheid van die beskuldigde en sy algemene ongesofistikeerde agtergrond daar wel versagtende omstandighede bestaan, maar die meerderheidsbeslissing is dat daar geen versagtende omstandighede is nie."

In effect, therefore, no reasons were given for the majority finding on this issue. In this connection I would draw attention to the following remarks of JANSEN JA in S v Hlolloane, 1980 (3) SA 824 (A), a case where the trial Court had also found no extenuating circumstances without giving reasons, at p 825 C:

> "Dit is onwenslik dat 'n Hof so summier 'n kwessie van soveel wesentlike belang afhandel, en die gevolg in die onderhawige geval is dat by ontstentenis van die Verhoorhof se redes, veel geredeliker tot die gevolgtrekking geraak kan word dat die Verhoorhof sekere aspekte oor die hoof gesien het of verkeerd beoordeel het."

In view of the difference of opinion among the members of the Court as to the issue of extenuating circumstances in the present case it was, I think, particularly desirable that the reasons of the majority for a negative finding should have been stated.

The determination of the presence or absence of extenuating circumstances involves a three-fold enquiry : (1) whether there were at the time of the commission of the crime facts or circumstances

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which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation; (2) whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what he did; and (3) whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding (3) the trial Court passes a moral judgment. (See S v Babada 1964 (1) SA 26 (A), at pp 27-8; S v Letsolo, 1970 (3) SA 476 (A), at p 476 G - H; S v Sauls and Others, 1981 (3) SA 172 (A), at p 184 C - D; S v Smith and Others, 1984 (1) SA 583 (A), at pp 592 H - 593 C.)

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In the present case the following facts or circumstances were advanced as constituting extenuation:

(a) the age, background, immaturity and lack of education and sophistication of the appellant;

(b) the fact that appellant's mental intent in committing the murder was one amounting to dolus eventualis; and

(c) the fact that shortly before the murder appellant had consumed a substantial quantity of intoxicating liquor.

As to the age of the appellant, the Court, as I have said, made no specific finding, save that it

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proceeded on the basis that he was not under the age of 18 years. The proper determination of the appellant's age was relevant not only to the question as to whether the Court had a discretion (in terms of s. 277(2)) in regard to punishment, but also to the question of extenuation, see S v Mohlobane, supra, at pp 567-8. And, as was pointed out in the case just cited, the younger an accused is the more relevant evidence concerning his background, education, level of intelligence and mental capacity in general becomes when the question of extenuation is being considered (at p 567 F - G).

Dr Burger expressed the opinion that the appellant was at least 19 years of age. As appears

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from the passages from his evidence quoted above, the application of the molar development test did not enable him to say more than that the appellant was already 18 years of age. He did not explain why he found the appellant to be at least 19 years old and not 18 years old. It was very fairly conceded by Mr De Beer, who represented the State, both before us and in the Court below, that the evidence did not establish that appellant was more than 18 years of age and he presented his argument on that basis.

The role which youthfulness may play in the determination of extenuating circumstances has been fully canvassed by this Court in the cases of S v Lehnberg

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en 'n Ander, 1975 (4) SA 553 (A); S v Van Rooi en Andere, 1976 (2) SA 580 (A); S v Mapatsi, 1976 (4) SA 721 (A); S v Ceaser, 1977 (2) SA 348 (A).

It is not necessary to repeat what was said in those cases. It does, however, appear from those decisions that a teenager like appellant should prima facie be regarded as immature and that the court is reluctant to find that there are no extenuating circumstances and to sentence such a person to death, unless it feels compelled to do so by the circumstances of the case.

Because the trial Judge did not give reasons for the majority decision concerning extenuating circum-

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stances we do not have the benefit of the Court's impressions of the appellant, whether he appeared to be immature and so on. It would seem, however, that the assessor member of the Court who dissented probably regarded the appellant as being immature because of his youthfulness. This appears to be borne out by the appellant's conduct in general, much of which seems to lack a rational foundation. He stole the rifle in the first place in order, according to him, to shoot animals such as hares and guinea-fowl, yet he hid the rifle in a field and, according to him, did not use it prior to the murder and did not know how it operated. The rusty state of the bore of the rifle at the time when it was

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retrieved by the police tends to bear out the former averment. This was also confirmed by the ballistics expert, Lieut. Du Plessis, who expressed the opinion that the rifle could not have been used for practice-shooting during the time that it was out of Mr Uys's possession. The appellant's explanation of how the shooting occurred, viz. that he pointed the rifle in the direction of the deceased and looked through the telescopic sight and that he did not know how the rifle went off, was naive in the extreme and rightly rejected by the trial Court. Nevertheless, it is difficult to find a rational basis for his actions. When he appeared before the Magistrate the appellant, in answer to the

Magistrate's question as to why he shot the deceased, stated: "Dit was 'n ongeluk. Ek wou haar net skrik maak". This may be nearer the truth. Nevertheless, accepting that he wished to frighten the deceased into submission in order to steal money or other valuables, the firing of the shot was calculated to raise the alarm and he must have known that Mr Uys was probably in the house. He was not to know that Mr Uys was sound asleep and in fact would sleep through the whole episode. After his arrest the appellant seems to have co-operated fully with the police, showing them where he hid the rifle and ammunition and pointing out various relevant places. He made no attempt to deny

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his involvement in the initial breaking-in when the rifles were stolen and, after initially prevaricating, he admitted shooting the deceased as well.

Of the appellant's general background little is known. He is virtually uneducated and seems unsophisticated. His parents are no longer alive. His only previous convictions related to the housebreaking when the rifles belonging to Mr Uys were stolen. These convictions took place in April 1983, after the commission of the offences with which he was charged in the Court below. This is the type of case in which, in my opinion, the trial Court could have profited from a report by a probation officer (cf. S v Jansen and Another

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1975 (1) SA 425 (A), at p 427 H - 428 A; S v Hlongwana 1975 (4) SA 567 (A), at p 570 H - 571 A).

As to the appellant's mental intent when he shot the deceased, the Court a quo left open the question as to whether it was dolus eventualis or dolus directus. There was no need to make a finding as to which form of dolus had been proved when bringing in the verdict of guilty of murder, but it was important to decide which of the two it was when weighing the question of extenuating circumstances.

In my opinion, the State evidence does not establish more than dolus eventualis. In other words,

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the appellant fired the shot, not with the direct intention to kill the deceased, but knowing that the bullet might strike and kill her and indifferent to this possible result. There are three factors which tend to indicate this. Firstly, it seems fairly clear that, putting it at its lowest, appellant was not adept in the use of firearms and it seems doubtful as to whether, even at that short range, he would have had the confidence to hit a target at which he aimed. Secondly, there is the possible deflection of the bullet by the pane of glass through which it passed. Thus he may not have been aiming the rifle precisely in the direction in which the bullet ultimately travelled. Thirdly, he stated in evidence that when the rifle went off the deceased

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was in the process of rising from her chair. There is no reason to reject this evidence. In fact the circumstantial evidence, as interpreted by Lieut. Du Plessis, substantiates it. Having regard to the bullet's trajectory and the height thereof above ground and floor level, as reconstructed by Lieut. Du Plessis from the point where the bullet penetrated the pane of glass and from certain marks on the opposite wall of the lounge made by bullet fragments after passing through the deceased's head, it seems clear - and this was Lieut. Du Plessis's positive opinion - that the deceased could not have been sitting in a chair when the bullet struck her. If then the deceased was shot while in

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the process of rising from her chair, it seems reasonably possible that the appellant did not aim the rifle directly at her, but merely in her general vicinity. This would fit in with his explanation to the Magistrate that he wanted to frighten the deceased.

The trial Court made no finding in regard to the appellant's state of sobriety. It merely referred to his evidence of having consumed a quantity of sorghum beer. Although appellant mentioned the drinking of the sorghum beer in his evidence-in-chief, he did not allege in-chief that this liquor affected him or that it had anything to do with the commission of the crimes of murder and robbery. It was only under cross-

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examination that he averred that he was to some extent under the influence of liquor ("ek was nie so baie dronk gewees nie") on the night in question. It should also be noted that although he gave the Magistrate a fairly full account of what happened that day, he made no mention of having drunk any sorghum beer. I do not think that appellant established the consumption of intoxicating liquor as an extenuating circumstance.

Having considered all the relevant circumstances, the youthfulness and immaturity of the appellant, his lack of education and unsophisticated background and the circumstances of the crime, and paying some regard to the fact that it was committed with dolus eventualis, I am of the opinion that the only reasonable conclusion is that extenuating

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circumstances were present. I do not think that in all the circumstances the commission of the crime should be attributed to inherent wickedness ("inherente boosheid") on the part of the appellant. The majority finding of the Court a quo that there were no extenuating circumstances should consequently be set aside and a verdict of murder with extenuating circumstances substituted.

The consequence of such a finding is that in respect of the murder conviction the death sentence is not obligatory and that sentence must be considered afresh. Counsel were agreed that that should be done by this Court. All the facts relevant to the question of sentence on the murder conviction which appear

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from the record having already been stated in considering the question of extenuating circumstances. Obviously the crime committed by the appellant was a very serious one. The deceased was shot while she was relaxing quietly in the apparent security of her home; and the appellant then proceeded to steal the deceased's wrist-watch. Having considered all the circumstances I think that an appropriate sentence in respect of the conviction of murder is 15 years imprisonment. The sentence of 3 years imposed by the trial Court in respect of the conviction of robbery with aggravating circumstances should run concurrently.

It is accordingly ordered that the appeal is allowed; the verdict of the Court a quo convicting

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the appellant of murder with no extenuating circumstances and the death sentence imposed by the Court a quo are set aside; and there are substituted a verdict that the appellant is guilty of murder with extenuating circumstances and a sentence of 15 years imprisonment. It is further ordered that the sentence of 3 years imprisonment imposed by the Court a quo in respect of the conviction of robbery with aggravating circumstances shall run concurrently with the aforesaid sentence of 15 years.

M M CORBETT

JOUBERT JA)
NICHOLAS JA)
GALGUT AJA) CONCUR.
SMUTS AJA)