141/85

194/85

DAWID TIEMIE

ISMAEL LOFF

JOHANNES TIEMIE

AND

THE STATE

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DAWID TIEMIE	1st Appellant
ISMAEL LOFF	2nd Appellant
JOHANNES TIEMIE	3rd Appellant

AND

THE STATE	Respondent

CORAM: TRENGOVE, VAN HEERDEN, JJA et NICHOLAS, AJA

HEARD: 19 November 1985

DELIVERED: 27 November 1985

J U D G M E N T

NICHOLAS, AJA

Welbedagt is an agricultural settlement about

17 kms west of Oudtshoorn. It has a population of about 400. One of the residents was Johannes Stephanus Olivier. He was a 73 year old pensioner who had been the water-bailiff responsible for supervising the local water-furrows. Since the death of his wife in about 1980 he had lived alone in a house which lay about 500 m from his nearest neighbour. He received domestic help once a week from a female named Bettie Arries. He rarely went out at night.

On the morning of Friday 18 May 1984, Olivier collected his monthly pension of R146,00 from the owner of the local store and butchery, who was also the postal agent.

On .....

On the following day, at about 10 a.m., he was found lying dead on his back on the floor of a bedroom in the front of the house. His legs had been tied together with a shirt. There were signs that there had been a struggle in his bedroom which was next to the kitchen and separated from it by a passage: there were spots of blood on the floor and the blankets had been pulled off the bed.

On post-mortem examination it was found that his death had been caused by a fracture of the skull and injuries to the chest including rib-fractures. His nose had been fractured. There were numerous bruises over the whole of the body, particularly on the

face .....

face and head, and on the front and back of the chest. There were fractures of the sternum and of the right collar bone. On both sides of the chest, ribs 2 to 10 had been fractured. It was estimated that he had sustained about 20 blows. In the district surgeon's opinion, the injuries were consistent with blows inflicted by a blunt object applied with considerable force - e.g. the butt of a shot-gun, kicking with the booted foot, and trampling on the chest.

Arising out of Olivier's death, three persons were arraigned in the Cape Provincial Division, before a Court consisting of TEBBUTT J and two assessors. They were Dawid Tiemie as accused No 1, Ismail Loff as

accused No 2, and Johannes Tiemie as accused No 3.

The indictment contained two counts:

1. Housebreaking with intent to rob and robbery with aggravating circumstances as defined in s. 1 of Act 51 of 1977; and
2. Murder.

Each of the accused pleaded not guilty to count 1 as framed but guilty of housebreaking with intent to steal. To count 2 each of them pleaded not guilty. They were all found guilty on count 1 as charged, and on count 2 guilty of murder without extenuating circumstances.

Sentences were imposed as follows:

No 1 accused: Count 1: 12 years imprisonment.
Count 2: sentence of death.

No 2 accused: Count 1: 10 years imprisonment.
Count 2: sentence of death.

No 3 accused: Count 1: 12 years imprisonment.
Count 2: sentence of death.

Leave to appeal against the conviction and death sentence was granted by the trial judge to all three accused.

There is no appeal against the convictions and sentences on Count 1.

Apart from the accused, there were no eyewitnesses. The State's case rested on circumstantial evidence and on statements made by the respective accused.

Each of the accused gave evidence at the trial. As will appear, none of them was a credible witness, whose evidence, standing alone, could safely be accepted as true where it exculpated himself or inculpated his

co-accused .....

co-accused.

Nevertheless it is possible to extract from their statements on points where they are consistent with one another, and from their evidence where they are not in conflict with one other, a reliable general picture of the events of the night in question.

All of them are coloured men. Accused No 1 (a builder's labourer, aged 26) and accused No 3 (a labourer, aged 28) are brothers, who lived with their parents at Welbedagt. Accused No 2 (aged 22) was a friend of theirs.

On the evening of 18 May 1984 the three of them were at the Tiemie house, when they decided to go to a

dance .....

dance at the house of one Willem Floors. They set off at about 8 p.m. Their route took them past Olivier's house. In that vicinity, a proposal was made that they should go to the house of "Oubaas Hansie" (that is Olivier) to look for money. They discussed how they could gain access to the house, and decided on a plan to knock on the door and, when Olivier responded, to say that it was Bettie (Olivier's servant). When Olivier opened the door they would seize him, and enter the house and get hold of the substantial sum of money which they believed was kept there. The question was raised, "Wie gaan dan manstaan ..... as ons gaan arresteer word vir die misdaad?",

and .....

and it was agreed between them, "... die een wat eerste gearresteer word, sal manstaan."

They approached the house, and knocked on the door and at a window. There was no response. One of them broke a window and opened it, and through it all three of them entered the house. They went to the kitchen. They heard noises from a neighbouring bedroom and footsteps approaching in the passage, and they hid behind the kitchen door. Olivier came in and cried out, "Wat soek julle donners in die huis? Ek gaan julle nou skiet." He went back to his bedroom, and lit a candle, and took his shotgun from the wardrobe. As he emerged again into the passage,

accused .....

accused No 1 was waiting for him. He grabbed hold of the barrel of the gun and wrestled with Olivier for its possession. No 2 kicked Olivier's feet from under him, and Olivier and No 1 fell to the ground, still struggling for possession of the gun. No 3 got hold of it. There followed a violent assault on Olivier in his bedroom. He was struck repeatedly with the butt, until the gun broke in two. He was kicked and trampled on, and punched and slapped. No 1 intervened and stopped the assault and led Olivier to the front bedroom, and asked him for money. Olivier was there assaulted again, and his legs were tied together with a shirt, and he was left lying on the floor. .....

floor. The accused searched the house for money, but did not find an amount of about R400,00 which was in the inside pocket of a jacket in the house.

The three accused left. Accused No 3 was carrying the two pieces of the shotgun, which he threw into an old abandoned house. They proceeded to Willem Floors's house, where the three accused danced and played dice in a gambling school.

In their statements and in their evidence at the trial, the three accused gave conflicting versions of the part which each of them played in the attack on Olivier. The following is a summary.

<u>As to the part played by No 1 accused</u>.

No 1 said in his statement to the po-

lice .....

lice that he grabbed hold of the gun when Olivier came back with it, but he made no mention of a participation in any further assault upon him. His confession to the magistrate was on the same lines. In his evidence at the trial, he repeated that he had caught hold of the gun and tried to wrest it from Olivier. Apart from leading Olivier from his bedroom to the front bedroom, he did not otherwise lay a finger on him.

Accused No 2 said in his evidence that neither No 1 nor No 3 did anything to Olivier on the night of the robbery. "Hulle het niks gemaak in die huis nie ..... Hulle het net daar gestaan..... Hulle het maar net saamgegaan." When cross-examined by counsel

for .....

for the State, he refused to answer questions as to the participation of the other two accused, saying, "Ek sê dan ek staan hier in die hof, ek praat net vir myself allenig in die hof."

No 3 said in his evidence that when he entered the house, he found No 1 and Olivier struggling on the floor. "Toe is die oorledene reeds onder bloed." He did not see No 1 assault Olivier, whom No 1 took by the hand and led to the front bedroom.

As to the part played by No 2 accused, No 1 said in his evidence that it was No 2 who kicked Olivier's legs from under him while No 1 was struggling with Olivier for possession of the gun. No 3 got hold of the firearm and No 2 took it from him

and .....

and started belabouring Olivier with it. No 2 said that the deceased must die, because Olivier knew him and would be able to identify him. In the front bedroom, No 2 threw Olivier from the bed where he was sitting, and struck him again with the gun.

In his police statement, No 2 said that he had slapped Olivier "en ek het met my een voet in die ou-baas se wind getrap."

As indicated above, No 2 said in his evidence at the trial that he alone assaulted Olivier.

No 3 said that when he entered the house, No 2 had the gun in his hand and was striking Olivier with it. In the front bedroom No 2 again started hitting

the .....

the deceased with the gun. Only No 2 had the gun in his possession at any time. It was No 2 who killed Olivier.

As to the part played by No 3 accused, No 1 said in his evidence in chief that No 3 seized the gun from the deceased, and No 2 took it from No 3. No 3 kicked Olivier but did not strike him with the gun. Under cross-examination, however, he said that he did see him hit Olivier with the gun. He also saw No 3 punch him. Not only No 2 but also No 3 said that Olivier had to be killed because he knew them, and would have them arrested.

In his police statement No 3 said that No 2

had .....

had begun hitting the deceased with the gun, and he and No 1 struck and kicked him.

In his evidence at the trial, No 3 said that when he entered the house and found No 1 and Olivier struggling on the floor, he struck Olivier on the cheek with the open hand. He at no time had possession of the gun. Under cross-examination, he admitted that he had again struck Olivier when in the passage. He also admitted that he kicked Olivier a few times in the side "om hom seer te maak". He admitted further that he hit him, trampled, kicked and slapped him. He did not strike him with the gun.

The trial Court found (and its findings were

not .....

not challenged during the appeal, and were clearly correct) that No 1's evidence was unreliable; he was a lying witness; and no reliance could be placed on his evidence except where it fitted in with the proved facts. No reliance could be placed on the evidence of No 2. It is also clear that No 3 was a lying witness. Plainly No 1 and No 3 attempted to minimize the part that each of them played, and the part played by each other, and to fasten on No 2 the blame for the death. It is plain too that No 2 was lying when he sought in the witness box to take the whole blame, and to exculpate his co-accused. (This is a matter to which I shall return later in this judgment.)

The .....

The result is that there was no proof as against the individual accused that any one of them committed an act or acts which causally contributed to Olivier's death. Relying on the statement by VILJOEN JA in S v Maxaba en Andere 1981(1) SA 1148 (A) at 1155 F-G that

> "Moord is 'n gevolgmisdaad. Indien die Staat mededaderskap wil bewys, moet hy bewys, nie alleen dat elke deelnemer die nodige opset gehad het om die slagoffer te dood nie, maar ook dat sy aandeel bygedra het, daadwerklik of psigies, tot veroorsaking van die dood",

Counsel for No 1 argued that his conviction for murder could not be sustained.

Immediately after making the statement quoted,

the learned judge of appeal went on to say:

> "In S v Madlala 1969(2) SA 637(A) het HOLMES AR te 640 F *finem* gesê: 'It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -
>
> (a) that he individually killed the deceased, with the required *dolus*, e.g. by shooting him; or
>
> (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
>
> (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the

plan, yet he persisted, reckless of such fatal consequences, and it occurred; see S v Malinga and Others, 1963(1) SA 692 (A.D.) at p. 694F-H and p. 695; or

(d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder.'"

(It may be mentioned that HOLMES JA added

"It is, of course, plain that, in the absence of proof of common purpose, a Court cannot convict co-accused on the footing that one or the other or both of them must have done the deed, for that basis postulates the possible innocence of one of them.")

The .....

The present case does not fall within (a) or (b). In regard to (c), it was proved that each of the accused was a party to a common purpose to gain access to Olivier's house and there to commit robbery. Thus, the only question remaining is whether each of them had the requisite foresight.

What had to be proved in each case was subjective foresight, that is, that each of the accused subjectively foresaw (not merely ought to have foreseen) the possibility that one or more of their number would kill Olivier in the execution of their common purpose to rob. (See S v Malinga and Others 1963(1) SA 692(A) at 694.) "The foresight may of course be proved by inference; and remoteness of the possibility is relevant

to the subjective question of foresight thereof."(ibid)

I am of the opinion that in the circumstances of the present case, each of the accused must have foreseen, and therefore by inference did foresee, the possibility that in the course of overcoming any resistance which Olivier might offer, or in order to disable him from later bearing witness against them, one or more of them would inflict fatal injuries upon him.

To their knowledge Olivier was 73 years old. Although tall, he was sparely built, and had a frail appearance. The accused on the other hand were apparently vigorous young men in their twenties.

Each of the accused knew that Olivier might

well .....

well be at home - hence the ruse which they agreed on to get him to open the door to them. Each must have known that Olivier might not tamely submit to an invasion and search of his house, but might offer resistance which would, if they were to effect their purpose, have to be overcome. Each knew that their actions might lead to their arrest on serious charges - they even discussed what was to be done in the eventuality of one of them being apprehended. It was clear that No 1 was known to Olivier by sight, and that No 3 was well-known to him, having worked under him on the water-furrows, and it is probable on the evidence that No 2 was also known to him by sight. Despite this, there was no attempt at

disguise. .....

disguise. If each contemplated the possibility of arrest (as he did), he must also have contemplated the possibility that Olivier would identify them, and give evidence against them, if he survived. No 1 said in his evidence that during the attack on Olivier, both No 2 and No 3 said that Olivier must be killed, otherwise he would identify him. This statement of intent could not have come as any surprise to No 1: the possibility must have occurred to No 1 himself at any early stage. In the circumstances the possibility that one or more of them would kill Oliver was a very real and not a remote possibility.

Frequently in cases heard by the courts the

inference .....

inference of foresight of killing is based on the fact that, to the knowledge of his fellows, one of the members of a group embarking on a housebreaking expedition is armed with a firearm or knife. (See for example S v Malinga (supra).) In the present case, it is true, none of the accused was armed, but that fact by itself does not make it unsafe to draw the inference that the accused foresaw the possibility that something like what actually happened, would occur.

In his eloquent address on behalf of accused No 1, Mr. Schwietering made a submission based on evidence given by this accused that he intervened to prevent further assaults on the deceased by Nos 2 and 3. This con-

duct .....

duct, it was submitted, was inconsistent with an intention to kill.

The evidence referred to was the following.

After describing the assault by No 2 in Olivier's bedroom, No 1 said:

> "Ek ruk Ismail (that is, No 2) van agteraf weg van die oorledene af, vir nr 2 en ek sê toe vir nr 2, hy moet ophou met slaan. Dit is nie nodig om die oorledene aan te rand

nie .....

> nie, want ons het nou die vuurwapen, so ons kan hom maar net dreig, dat hy die geld gee .... so vat ek die oorledene aan sy hand .... en ek lei hom af in die gang, tot in die onderste kamer ... Toe ons onder in die kamer kom, toe het ek vir die oorledene gesê hy moet sit op die bed ... So het ek met die oorledene gepraat en gesê hy moet sy geld vir ons gee."

Later in his evidence he said,

> "Toe het ek vir hom gesê hy moet daar sit ..... hy moet sy geld vir ons gee. Toe sê die oorledene ons moet so 'n bietjie wag, maar hy het so seer..... Toe sê ek oubaas, die oubaas moet maar die geld vir ons gee. Ons het gekom vir die geld."

He agreed with a suggestion put to him by counsel for the State:

> "...Toe .....

> "... Toe jy vir die oorledene vra waar is jou geld, het jy nie vir hom dalk gesê kyk hier, jy het nou gesien 'n man kan seerkry as jy nou nie saamwerk nie, so gee maar liewer jou geld."

No 1's evidence gets some support from the prior statements of Nos 2 and 3. No 2 said in his confession to the magistrate -

> "Toe sê Johannes (i.e. No 3) hy gaan die oubaas doodslaan want die oubaas het hom herken ..... Toe hy die oubaas so slaan toe keer Dawid (i.e. No 1) hom en sê hy moenie die baas doodmaak nie ....."

In his police statement, No 3 said -

> "Dawid het toe gesê ons moet ophou slaan ....."

Strictly speaking, what Nos 2 and 3 said in extra-judicial

statements .....

statements was no more admissible in favour of No 1 than it was against him. In the circumstances, however, it would be unduly technical to ignore it.

Consequently, although No 1 was found by the trial Court to be a lying witness, there was probably some truth in the evidence which he gave on this point, although not all of it was necessarily true.

I do not think, however, that No 1 intervened out of solicitude for Olivier. His purpose was rather to get information from him as to the whereabouts of the money. When he failed, he left the front bedroom where, according to him, Nos 2 and 3 were again assaulting Olivier, and searched elsewhere in the house for money.

On .....

On his own evidence, he knew then that both No 2 and No 3 had said that Olivier must be killed, because he would identify them, and the inference is plain that he reconciled himself to such an outcome. He did not, he said,go back again to the front bedroom. He said:

> "Ek wou toe weer teruggegaan het, toe sê Hans vir my nee, kom ons loop maar. Ons kry dan nou niks nie en op die is ek toe nie weer terug nie."

In my view, when it is regarded as a whole, No 1's evidence in this regard does not support the submission made on his behalf.

The conclusion is that each of the accused foresaw the possibility that in the course of the execution of the common purpose to rob, the deceased would

be assaulted with fatal consequences. They were clearly reckless whether death ensued or not. The intention to kill must be imputed to each of them. The result is that they were all guilty of murder. (Cf. S v Malinga, (supra), at 695 B-C).

It is well settled that this Court cannot interfere with a trial Court's finding of the absence of extenuating circumstances, unless such finding is vitiated by misdirection or irregularity, or is one to which no reasonable court could have come. (See S v Ndlovu, 1970(2) SA 430(A) at 433-4).

All that was submitted on behalf of No 1 accused was that the lesser role which he played with

reference to the death of Olivier was a factor which reduced his moral blameworthiness. This was a matter which was duly considered by the trial Court.

In regard to No 3 it was submitted that the trial Court erred (a) in finding that he played a leading role in the assault on the deceased; (b) in holding that the absence of prior planning was not extenuating; and (c) in finding that he had a direct intention to kill Olivier out of fear that the deceased would identify him at a later stage.

In regard to (a), I do not think that the evidence justified the finding of the trial Court that No 3 played the leading role and that it was he who killed Olivier. But even if that finding is ignored there

are no circumstances which could serve as extenuation of the crime. So far as (b) is concerned, although Olivier's death may not have been planned, the house-breaking and robbery were planned, and the possibility of Olivier's death was foreseen at the planning stage. Finding (c) was fully justified on the evidence.

The case of accused No 2 requires closer examination. In the judgment on extenuating circumstances, TEBBUTT J said:

> "Wat beskuldigde nommer 2 betref, is dit inderdaad so dat daar getuienis is dat die beskuldigde na hy van Kaapstad teruggekom het, waar hy vroeër gewerk het, as gevolg van sy misbruik van dwelmmiddels, snaaks opgetree het teenoor sy medemens.

> Daar is getuienis dat hy hom by geleentheid ontbloot het en dat hy ook ander snaakse dinge aangevang het.
> Daar is getuienis dat hy 'n persoon is wat maklik verleibaar is.
> Dit is ook die getuienis van Dr Magner dat hy, (dr Magner) van oordeel is dat beskuldigde nommer 2 'n persoon is wat oop is tot beïnvloeding deur ander persone. Wat die eerste van die faktore is wat die Hof in aanmerking moet neem, betref, dit wil sê of daar feite is wat ter sake is by versagting, kom ons tot die gevolgtrekking dat daar wel sulke feite is, naamlik dat die beskuldigde 'n persoon is wat persoonlikheidsdefekte gehad het insluitende die feit dat hy oop is vir beïnvloeding."

Although there was no direct evidence from No 2 that he was in fact influenced, the trial Court took into account that he may well have been in a measure under the

influence .....

influence of No 3 accused. It considered, however, that in the light of the facts of the crime as a whole, any such influence as may have been present, was insufficient to lessen the moral blameworthiness of the accused in his participation in the crime. TEBBUTT J said:

> "Die Hof neem in hierdie verband in ag die brutaliteit van die misdaad wat daar plaasgevind het en die wreedheid daarvan asook die omstandighede omliggend die misdaad. Volgens sy eie erkenning is beskuldigde nommer 2 die persoon wat die venster daar stukkend gebreek het. Hy was die een wat eerste daar ingegaan het. Hy het later aan die aanranding op die oorledene deelgeneem. Hy het die oorledene se wind uitgetrap en hom geslaan. Hy was deel gewees van die

> drie mense wat die oorledene op brutale en kan ek maar byvoeg, sinnelose wyse eintlik, toegetakel het en hom so vreeslik aangerand het dat daar die talle frakture was wat die dokter beskryf het. Die wonde wat daar toegedien is, wys almal daarop dat hierdie 'n boosaardige en wrede aanval op hierdie bejaarde man was."

In my view, the trial Court erred in attaching so much importance to the matters referred to in the last two sentences of this passage. Clearly the facts of the crime are relevant to a decision whether extenuating circumstances are present. (See S v Petrus 1969(4) SA 85(A) at 95-6.) A distinction should, however, be drawn between acts committed by an accused person himself, and acts committed by others for the results of

which .....

which he is responsible in law. The enquiry at this stage is in regard to moral blameworthiness, not legal responsibility, and I do not think that on the proved facts No 2 is to be regarded as morally responsible for everything that was done to Olivier.

Nor do I think that the trial Court gave due weight to the evidence as to No 2's mental condition.

Daniël Lucas, a State witness whom the trial Court regarded as a very responsible person, said that when No 2 returned to Welbedagt from Cape Town in about 1981, "hy het deurmekaar geword":

> "Hy het snaakse dinge begin doen. Hom nakend gemaak en enige ding aan-gevang en mense probeer hinder sommer

so .....

> so. Soos 'n mal mens en later het sy pa hulle kon nie meer hou met hom nie, toe het hulle dat die wet hom kom haal en die wet het hom toe na 'n malhuis geplaas."

In March 1984 No 2 accused was admitted to Valkenburg Hospital suffering from a drug-induced psychosis. He was discharged on 2 May 1984, some two weeks before the commission of the crime. Daniël Lucas did not consider that he was then entirely normal.

> "Hy het so 'n bietjie verbeter en dan begin dit sommer weer ... Dan lyk dit of hy reg is en as jy nou weer hom kry, dan is dit maar weer dieselfde storie."

He said that No 2 was a man who was readily influenced by others. "As jy vir hom iets sê dan doen hy dit."

Oktober .....

Oktober Dawids, another State witness, said that he saw the three accused on the night of the crime. No 2 was "daardie tyd nie reg in sy kop nie ... Hy is altyd so deurmekaar in sy kop gewees ... daardie aand was hy ook nie reg in sy kop nie."

Moreover, some of the police witnesses considered that No 2 acted strangely after his arrest.

No 2's conduct at the trial was bizarre, but the trial Court considered that it was quite clear (and said that that was also the opinion of Dr Magner) that he tried to simulate his mental capacity and give the impression that he was not normal. I do not think, however, that Dr Magner was of the view that No 2's behaviour in the Court was wholly due to simulation.

He .....

He said that the symptoms which he presented were not those of an established mental illness. But No 2 was a man with personality problems: he had not socialised very well; he had not formed meaningful relationships with the opposite sex; he tended to be dependent on his family and other people and was somewhat easily influenced by others. He was insecure and unsure of himself in relation to other people, rather unassertive and introverted, and probably had a high anxiety level. He was a person who was a follower. He was "a relatively unsophisticated, person and they tried to respond to very stressful situations in some cases with bizarre symptoms." There was .....

was "great difficulty in deciding what is a degree of non-voluntary and to what degree is voluntary." He could not say to what degree simulation was present. He agreed that possible influence by the other accused was "a very important factor in this case".

Recalled after No 2 had given evidence, Dr Magner said that No 2's bizarre behaviour in the witness box was what he had expected. He considered that there was "a major stress factor" operating on the accused and "that this particular man, faced with stress such as these, would respond with obviously contradictory statements and clearly quite ridiculous statements as he has done at this stage .... understandable in

terms .....

terms of the nature of the stresses this man is under and his personality resources his methods of coping with difficulties .... the odd-looking behaviour that he presented in the witness box is also in keeping with the anxiety-generated symptoms of smiling inappropriately failing to concentrate and answer fully on questions, the apparent absences ... I think there is an element of simulation and there is an element also of fear which is making it difficult for him to answer questions. To what degree he is simulating I cannot say."

There were many pointers in the evidence of influence and threats by the other two accused, and the very fact that No 2 gave evidence (which was clearly false) inculpating .....

inculpating himself and exculpating the others is a strong indication of such influence, especially when it is borne in mind that Nos 1 and 3 in their evidence sought to put the main blame on No 2.

It was the opinion of Dr. Magner, that No 2 ac-

cused .....

cused was fit to stand trial, and that on the night of the crime and at the time of the trial he was not suffering from any mental disorder. But, as COLMAN J pointed out in S v Khumalo 1968(4) SA 284(T) at 285-6, there are degrees of intellectual disability falling short of mental disorder which affect volition and responsibility, and a personality factor may make an accused a person to whom the normal tests of moral culpability do not fully apply.

In my view No 2 accused is such a person. Although reference is made in the judgment to the accused's "persoonlikheidsdefekte", it does not appear that the trial Court considered them from this point of

view .....

view.

In the circumstances, I think that this Court is free to interfere with the trial Court's finding of no extenuating circumstances, and the verdict will be altered accordingly. In my view an appropriate sentence would be one of 12 years imprisonment, with which the sentence of 10 years imposed on Count 1 should run concurrently.

The appeals of accused No 1 and accused No 3 are dismissed.

The appeal of accused No 2 is upheld in part. The verdict and sentence on Count 2 are altered to read: "Guilty of murder with extenuating circumstances.

The .....

The accused is sentenced to 12 years imprisonment, with which the sentence on Count 1 is to run concurrently."

H C NICHOLAS, AJA

TRENGOVE, JA
VAN HEERDEN , JA } Concur