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N v H

JABU DUBE / THE STATE

MILLER, JA -

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

JABU DUBE

Appellant

and

THE STATE

Respondent

CORAM: JANSSEN, MILLER, JJA, et GALGUT, AJAHEARD: 18 NOVEMBER 1985DELIVERED: 2 DECEMBER 1985

J U D G M E N T

MILLER, JA :

The appellant was convicted in the
Witwatersrand Local Division (FS STEYN, J, and two
assessors) on 5 counts of theft of a motor car,

5 counts /

5 counts of robbery with aggravating circumstances, one count of unlawful possession of firearms and one count of unlawful possession of ammunition. On each of the 5 counts of theft of a motor car he was sentenced to 4 years imprisonment, on the first of the five robbery counts (which was count 2 in the indictment) he was sentenced to 12 years imprisonment. On the second of the robbery counts (count 4) to 12 years imprisonment; on the third of the robbery counts (count 6) to 16 years imprisonment; on the fourth of the robbery counts (count 8) to 16 years imprisonment; and on the fifth of the five robbery counts (count 10 in the indictment) he was sentenced to death. On the 2 counts of unlawful possession of firearms and ammunition, which were treated

as one /

as one for purposes of sentence, he was sentenced to imprisonment for 2 years. The total of the periods of imprisonment to which he was sentenced was 78 years, but the Court ordered that the sentences should so run concurrently as to leave an effective period of 45 years imprisonment.

The appellant applied to the learned Judge a quo for leave to appeal, inter alia, against the sentences of imprisonment imposed in respect of counts 2, 4, 6 and 8, (i.e., the first four robbery counts) and against the death sentence imposed on the last of the robbery counts, viz. count 10. When granting the application for leave to appeal to this Court, the learned trial Judge said:

"I hold /

"I hold the view that the sentences, bar the sentence of death, cannot be faulted possibly by any other Court, but I do hold the view that the passing of a sentence of death in the case of robbery, where no grave violence was used and no one was seriously injured, is an exceptional decision - and I hold that another Court might possibly differ from the views expressed by myself, when imposing this sentence".

The learned Judge accordingly granted leave to appeal against the sentence of death and, because consideration of the sentence on count 10 might involve consideration by the Appeal Court of the other sentences imposed in respect of the robberies, he considered that it was advisable that leave be granted to appeal against all the sentences, which was done.

These most serious offences of which the appellant was convicted were not committed by him acting

alone /

alone; in the case of each of the robberies he acted together with others; they obviously formed a group of robbers who operated on a very large scale. Very substantial sums of money were stolen, mostly from banks and another institution. It is not a mere co-incidence that there were an equal number of car thefts and robberies; the modus operandi of the group appears to have been that they would steal a car, use it for purposes of the robbery and their "get-away" thereafter, and then abandon it. They had obviously attained a degree of expertise in their ill-chosen "profession", for the five robberies were very successfully committed within the period 7 October 1982 to 3 March 1983.

Each /

Each robbery was achieved with the aid of weapons which appear to have been used for the purpose of intimidating the victims rather than for the infliction of injuries, for a remarkable feature of these robberies is that nobody was injured by the weaponry or at all, except for an occasion when a bank employee received two punches to his body and an incident when a robber jumped over the counter of the bank being robbed, into the cubicle occupied by a female teller who fell under the impetus of the leap and sustained a minor injury to her hip. This incident occurred on the occasion of the third robbery, of which the Standard Bank was the victim. On that occasion the appellant actually fired one shot with a pistol at a time when there were present in the

bank /

bank, apart from its employees, several customers.

Nobody was injured. Whether or not the appellant, in

firing the pistol, aimed to miss or aimed to kill, or

maim, can only be matter for speculation. The weapons

carried by the robbers or some of them varied from

occasion to occasion. On ^{the} occasion of the first robbery

(at Barclays Bank) knives were carried and members of

the staff threatened therewith. On the second occasion

(at the office of an insurance company) a knife and firearm

were displayed and the knife was held to the person of an

employee. On the third occasion (to which I have already

referred) both firearms and knives were in view. On the

fourth occasion (at Standard Bank) only firearms appear

to have been carried and displayed to back up threats

and /

conduct which were described as brutal and insulting.

On the fifth and last occasion (at Barclays Bank at the corner of Troy and Commissioner Streets in Johannesburg)

a revolver and an "automatic gun" were in evidence, to back up dire threats in insulting and disgusting terms.

When sentencing the appellant the learned Judge a quo took pains to explain why, in respect of count 10 (the last of the robberies), he saw fit to impose the death sentence whereas in respect of each of the other robberies long terms of imprisonment were imposed.

This is what he said:

"Maar in hierdie aanklag Nr. 10 vind ek dat die misdaad gepleeg is as die klimaks van 'n stygende crescendo van boosheid en anti-maatskaplike minagting van die wet en orde in ons land. Die eerste uitsonderlike faktor wat ek vind is die ontsnapping uit die gevangenis waar die

beskuldigde /.....

beskuldigde moet straf uitdien vir 'n poging tot roof en dat hy na sy ontsnapping voortgaan en die misdaad herhaal en herhaal en herhaal en herhaal tot hy vir die vyfde maal binne ses maande hierdie bank beroof. Ek vind in die tweede plek die uitsonderlike omstandigheid dat by aanklag Nr. 10 'n toenemende graad van gesofistikeerde beplanning aan die dag gelê word. Hier word 'n werknemer van die bank, Prince Morare, wat miskien sonder die verleiding wat in sy pad geplaas is 'n eerbare lewe kon gevolg het, betrek by die beplanning en herhaardelik besoek en herhaardelik gevra om die rowers behulpsaam te wees deur die teken te gee as die buit vet sal wees. Ek vind 'n derde uitsonderlike faktor by hierdie misdaad en dit is die toenemende gewelddadigheid. Met die eerste en tweede misdade is die geweld gepleeg deur messe te vertoon. Met die roof by Lenasia, die derde een of die vierde, is die bestuurder wel uitgevloek en gedreig met die dood maar met hierdie vyfde en laaste misdaad word die tellers, toevallig vroue, uitgevloek op 'n brutale en vernederende wyse en met die dood gedreig. Daar is 'n toenemende gewelddadigheid in die sin van die uitvloek van die slagoffers. In die tweede plek is daar 'n toenemende gewelddadigheid deur die bewapening.

Hier was /

Hier was twee pistole en 'n outomatiese geweer op die toneel gebring. Hierdie crescendo van boosheid styg saam met hierdie toenemende gewelddadigheid. En die vierde en laaste faktor wat ek wil noem in verband met hierdie misdaad is dit betoon 'n toenemende vermetele durf om die misdaad te pleeg, feitlik in die middestad van Johannesburg. Die ander misdade is gepleeg op die periferi van die stad maar hier kom die misdadigers na die hart van die stad. En as ek al hierdie faktore saam oorweeg dan vind ek dat hierdie faktore saam hierdie roof 'n roof gemaak het van sulke uitsonderlike vermetelheid en getuienis is van sulke volhardende misdadigheid en 'n uiting is van sulke misdadige gewelddadigheid dat dit met die uiterste gestraf moet word."

The first factor contributing to the learned

Judge's conclusion that the offence committed in count 10

was the climax of a rising "crescendo" of wickedness,

related to the frequency of the commission of the offences -

the /

the circumstance that after his escape from prison the appellant again committed a similar offence "en die misdaad herhaal en herhaal en herhaal". It was, of course, proper for the Judge to take into account for purposes of sentence that the appellant had within a short space of time repeatedly committed similar offences, and also his previous convictions. But it was not simply on that account that the appellant was sentenced to death on count 10. After mentioning the multiplicity of the offences, the learned Judge turned his attention to the gravity of the offence committed as charged in count 10 and it is very clear from the above extract from his reasons for sentence that he regarded the commission of the fifth robbery as manifesting an increasing degree of sophisticated planning, an increasing degree of violence /

violence, and a choice of weapons with increasing potential of violence. Comparisons were made between the nature of the robbery in count 10 and those in the other counts of robbery, and the conclusion reached was that this robbery was the worst of the five; that it reached new heights of criminality in the several respects mentioned and that it was of such a degree of "volhardende misdadigheid" that it demanded the ultimate punishment.

There is nothing to show that the weapons used in the last robbery (an automatic gun and a revolver) were more deadly or fearsome or of greater potential for violence than those used on previous occasions, viz., revolvers and knives. In two of the earlier robberies

shots /

shots were actually fired at a time when there were, apart from members of the bank's staff, several customers in the bank. On the occasion of the third robbery the shot fired very nearly struck a teller. It is true that in connection with the fifth robbery a young man was persuaded to provide information which would assist the robbers, which may conceivably be regarded as evidence of sophistication, and it may be that a robbery in central Johannesburg would be more daring and potentially more dangerous to the public than a robbery on the outer fringes of the city. But I am unable to say that a robbery

committed /

committed just outside Johannesburg in which shots were fired and a man very nearly killed, would be less serious than a robbery within the city when no shots were fired and no person injured or exposed to the real risk of being killed.

The learned Judge also made a point of the circumstance that in the fifth robbery, offensive and insulting language was used and brutal threats made. But that was also the case in the third and fourth robberies.

It appears to me that the learned Judge misdirected himself in finding that the fifth robbery was so much more serious an offence than the others that it merited a more severe sentence. The facts show that the five robberies had very much in common; they followed a pattern

which /

which, generally speaking, was common to them all.

In these circumstances this Court is at large
in regard to the sentence imposed on count 10. I recognize
to the full the gravity of the offences so brazenly
committed by the appellant and there is no doubt in
my mind that the public needs and is entitled to protection
against him. That protection would be effectively
given by the imposition of a long term of imprisonment.

In my judgment the circumstances of the fifth
robbery were not such as to warrant the passing of

the death /

the death sentence on the appellant.

Needless to say, the total effective period of imprisonment to be served must be reduced to a realistic level.

The appeal is allowed.

The sentence of death imposed in respect of count 10 is set aside and there is substituted therefor a sentence of 16 years imprisonment. The sentences in respect of the other counts are confirmed but it is ordered that all the sentences imposed are to run concurrently to such an extent that the appellant's effective sentence is imprisonment for 25 years.



S MILLER

JUDGE OF APPEAL

JANSEN, JA)
GALGUT, AJA) CONCUR