CASE NO. 211/86

/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

T.M.S. APPELLANT

and

THE STATE RESPONDENT

CORAM: BOTHA JA, BOSHOFF et NESTADT AJJA

HEARD: 14 NOVEMBER 1986

DELIVERED: 27 NOVEMBER 1986

JUDGMENT

NESTADT, AJA:

This/ ...

This appeal is against the death sen-tence imposed on appellant, consequent upon him having been found guilty of murder. The issue is whether the trial court, consisting of Page J and two assessors sitting in the Natal Provincial Division, was correct in finding that no extenuating circumstances existed.

The crime took place on the morning of 20 November 1985 in the rural area of Inhlazuka in the district of Richmond. The deceased was a black, fourteen year old girl. She had been sent by her mother to buy some groceries at a shop in the vicinity of their kraal. On her way back home she was accosted by appellant who, in a nearby secluded spot, raped her and then killed

her by cutting her throat with a knife or similar instrument.

Appellant was born on 16 December 1966, He was therefore approximately 18 years and 11 months old at the time of the offences (he was found guilty of rape as well). This meant that, being a youth, he was prima facie to be regarded as immature. It would follow from this that extenuating circumstances existed unless, having regard to factors such as his mentality, education and past history as also the nature of the crime and the manner of and motive for its commission, his personality or development was, afterall, such that the inference of immaturity was rebutted or neutralised.

In this event he could be regarded as having acted from inner vice (inherente boosheid) thus justifying a finding that no extenuating circumstances existed. This, in summary, is the broad effect, as I understand it, of the leading cases on the problem of sentencing a youth found guilty of murder (see S v Lehnberg en 'n Ander 1975(4) S A 553(A); S v Mapatsi 1976(4) S A 721 (A); S v Ceaser 177(2) S A 348(A) and S v Ngoma 1984(3) S A 666(A)).

The trial court, though hampered by the absence of any credible evidence by appellant, adopted this approach. After having, on the issue of extenuation, heard the somewhat unhelpful testimony of a social worker who had interviewed appellant, it found the following:

(i) Appellant had had a disturbed home background but this did not cause him any significant psychological trauma.

(ii) He was of limited intelligence. He had in 1981 left school before completing Std 3. Nevertheless, he gave the impression, in the witness box, of being a relatively mature person for his age. This was confirmed by his ability to devise the untrue defence which he advanced the day after the crime and subsequently.

(iii) The murder was not to be viewed in isolation; it was intimately connected with the rape that preceded it. And the latter crime,

being dictated by,"the passion of lust" and committed on the spur of the moment, was to some degree attributable to appellant's inability to control his emotions as effec-tively as a more mature person would have.

(iv) On the other hand there was no suggestion that the deceased had enticed appellant to have intercourse with her or provoked him in any way. (v) The murder was committed with dolus directus.

(vi) Appellant's motive was to silence the decsased so that she could not bring him to bcck for the rape. On the authority of

S v / ....

S v Ramatsheng 1977(3) S A 510(A), this was not mitigating.

(vii) In acting as he did appellant was not subject to anyone's influence.

Based on these findings the trial court's conclusion, was:

> "Giving full weight to the fact that his immaturity and consequent lack of emotional control had a bearing on his decision to rape the deceased and even accepting that these factors also had some bearing on his decision to kill her thereafter, we are unable to accept that such bearing operated in any way to lesson the moral blameworthiness of that decision... (W)e consider that the decision of the Accused to murder the deceased was so inherently evil that it must have originated from innate vice."

In argument on behalf of appellant, it was suggested that there were certain blemishes in the court a quo's reasoning:

(i) One is its reliance on appellant's demeanour in the witness box to infer that he was mature. In S v van Rooi en Andere 1976(2) S A 580(A) at 585 E, Corbett JA cautioned against doing this in the following terms:

> "Ek mag ook byvoeg dat ek nie oortuig is dat 'n jeugdige se graad van volwassenheid so geredelik aan sy optrede in die getuiebank gemeet kan word nie."

It is apparent however,that it is not stated that it is wrong to do it. Moreover, in casu, it was not the only factor that was used to assess appellant's

maturity. His resourcefulness

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in fabricating a false defence was also (correctly, in my view) taken into account in this regard. (ii) Another possible criticism is the finding that appellant killed the deceased in order "to stop her cries which could attract people in the vicinity" (as also to forestall any possi-bility of her subsequently identifying him as her assailant). I am not sure that this is justi-fied on the evidence. It was that she was heard to scream. But this may have been whilst she was being killed. However, this is not a criticism of any significance. It cannot'affect the

conclusion as to the motive for the murder. (iii) Lastly, there is the court's reliance on the principle of S v Ramatsheng (supra). That was factually a different case. There the accused was an adult aged 24, and the crime preceding the murder was not one of rape but of robbery. Nevertheless, bearing in mind that Page J was fully alive to its dis-tinguishing features,I do not think anything turns on this point.

Indeed,counsel for appellant disavowed reliance on any misdirections. And rightly so. It was not shown that the trial court in assessing whether

extenuating/ ..

extenuating circumstances existed failed to take into account any relevant factors. The suggestion advanced in argument that appellant, in killing the deceased, acted in panic, is not borne out by any evidence; it is simply speculation. In these circumstances the submission was simply that no reasonable court could have come to the ccnclusion that appellant's youth was not such as to sufficiently reduce his moral blame-worthiness so as to constitute extenuating circumstances. In this regard S v Matabane 1975(4) S A 564(A) was re-ferred to. Here the death sentence on a seventeen year old, convicted of murder, was set aside and a period of 20 years imprisonment substituted. That was a

case, however, not where extenuating circumstances were in issue but whether the court's discretion had been properly exercised. In any event each case must be decided on its own particular facts. Here the crime was a particularly heinous one. The medical evidence was that the wound had laid the neck open to the spine; all the antericr neck structures had been severed; it would have taken some considerable force to inflict the injury. This was not a case where death ensued as part of the rape itself; the murder was a separate and subseguent act. Appellant would not appear to have shown any remorse. He failed (or was unable) to satisfactorily explain what caused him to act as he

did.

In my opinion, the careful judgment of Page J was a balanced one. Looked at in the light of all the relevant factors the conclusion,. inherent in it, that the prima facie inference of immaturity arising from appellant's youth, had been rebutted and that appellant had accordingly failed to prove extenuating circumstances, cannot be faulted.

The appeal fails and is dismissed.

NESTADT, AJA

BOTHA, JA)
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BOSHOFF, AJA)