137/87

THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DLOZILAKHE RICHARD MZINYANE ..... First Appellant

SIHLE MZINYANE ..... Second Appellant

VO VICTOR MZINYANE ..... Third Appellant

AND

THE STATE ..... Respondent

Coram: CORBETT, JOUBERT et JACOBS, JJ A

Heard: 6 November 1987

Delivered: 26 November 1987

J U D G M E N T

JACOBS, J A :

The three appellants were convicted by Galgut J and two assessors in the Northern Circuit Local Division at

Ladysmith .... / 2

Ladysmith, Natal, of murder without extenuating circumstances and sentenced to death. With the leave of the trial Judge the appellants appeal against the finding that there were no extenuating circumstances and against the death sentences. The allegations against them were that on the 3rd March 1986 and at or near the Mnweni River in the district of Bergville the appellants unlawfully and intentionally killed Mapegu Mtolo (the deceased). I shall for the sake of convenience continue to refer to the appellants individually as accused nos 1, 2 and 3 as they appeared before the trial Court.

The facts and circumstances surrounding the killing of the deceased which led to the convictions and sentences of the accused can be summed up as follows.

Accused no 1 had a relationship with the sister of

the .... / 2

the deceased as a result of which she became pregnant. At a tribal hearing which followed, accused no 1 was ordered to pay two head of cattle as damages. The deceased, as head of the girl's family, was apparently pressing for payment and accused no 1 was unable to pay. On the evening of Monday 3 March 1986 accused nos 2 and 3, who were cousins of accused no 1, arrived at the home of the deceased. They pretended to be policemen and told the deceased, his wife and her mother that they had come to fetch the deceased who, so they said, was wanted by the police. When asked what the deceased had done they said that further enquiries could be made by the family at the police station the next day. Accused nos 2 and 3 thereafter hand-cuffed the deceased with a pair of handcuffs which they had with them and took him away. I may perhaps at this stage say

that .... / 4

that the evidence was to the effect that the deceased was physically and sexually underdeveloped. He weighed approximately 40 kg and although he was approximately 37 years old, he had the general appearance of a 13 year old boy. Early the next morning the deceased's family went to the police station where they were told that the police knew nothing about the whole matter and that the deceased had not been fetched from his home by the police or by anyone acting on their behalf. A search for the deceased was then organised and later the same day his body was found in a deep pool in a river about 1½ km from deceased's home. The body was inside a synthetic plastic bag. In the bag were also three large stones which were obviously put there to keep the bag under the water. The findings of the doctor who performed the autopsy were that the deceased had not

died .... / 5

died of drowning, but of loss of blood caused by multiple stab wounds and lacerations on his neck and head, the most serious of which were three lacerations next to the right ear, which severed certain vital arteries or veins in the neck, and one stabwound near the Adam's apple.

The three accused were arrested a week or two after the discovery of the deceased's body and shortly thereafter each of them made a statement before a magistrate. Despite objections on accuseds' behalf these statements were, after a trial within a trial, admitted as evidence against the respective accused. In his statement accused no 1 admitted that, because the deceased had been pressing him for payment of the damages he had been ordered to pay, he decided to kill the deceased and for this purpose enlisted the aid of accused nos 2 and 3.

At .... / 6

At his request accused nos 2 and 3 fetched the deceased from his home and brought him to where he, accused no 1, was waiting. The three of them then cut the deceased's throat and put his body in a bag which they dumped in a pool in the river. In their statements accused nos 2 and 3 for all practical purposes confirmed accused no 1's version of the events and admitted the part they played in the commission of the crime.

After the close of the State's case, all three accused testified in their own defence. They merely repeated their evidence during the trial within a trial which was to the effect that what they had told the magistrate in their statements to which I have referred earlier was not true. Each one again relied on alleged assaults by certain policemen which assaults were aimed at forcing them to confess to the crime and

which .... / 7

which, so they alleged, resulted in them making the statements before the magistrate. Accused nos 2 and 3 in addition, as they did during the trial within a trial, relied on alleged promises by accused no 1 after their arrest that if they admitted to having assisted in the killing of the deceased he, accused no 1, would see to it that they would be acquitted should they appear before a Judge accused of committing the crime.

After the three accused were convicted of murder Dr Buccimazza was called as a witness by Mr Singh, who appeared on behalf of accused nos 2 and 3. He had examined these two accused for the purposes of establishing their respective ages. His opinion, which was based largely on the accuseds' tooth and sexual development, was that accused no 2 was in his early twenties. It was put to him that according to the accused he

was .... / 8

was born in 1967 which would have made him 19 at the time of the trial. His answer was that if he had to accept that accused no 2 was in fact 19 years old when he examined him, he would say that the accused was in any event closer to 20 than to 19. The doctor was of the opinion that accused no 3 was probably older than accused no 2 and he estimated accused no 3's age at 20-21. I may just add that accused no 1 testified that he was born in 1964 and this was apparently accepted by the trial Court.

Accused nos 2 and 3 were thereafter called to testify in extenuation. Their versions were for all practical purposes to the same effect and can be summarised thus. They both admitted that the evidence given by them during the trial within a trial as well as their evidence given after the close of the State case was untrue. They stated that they lived

about .... / 9

about three hours walk from where accused no 1 lived with his father, who is their uncle. On Sunday the 2nd March 1985 they were away from home and on their return in the late afternoon they received a message that during their absence their cousin, accused no 1, had been there and had left a message that accused no 1's father wanted them to come to his kraal. They immediately proceeded to their uncle's kraal but although accused no 1 and his father were there when they arrived, no one told them, nor did they ask anyone, why they had been called. Accused no 1 and his father merely told them to come back the next day. The next day, i e Monday the 3rd, they went back to accused no 1's home. On their way they were met by accused no 1 who bought some spirits at a store which he gave to the two of them to drink. On their arrival at accused no 1's

father's .... / 10

father's kraal they were given further liquor from a large bucket of beer. They were also given some dagga to smoke. Accused no 1 did not drink any liquor but he also smoked dagga. Late in the afternoon, when they were well under the influence of liquor and dagga, accused no 1's father told them that he wanted them to assist him and accused no 1 to kill the deceased because of the damages which accused no 1 was required to pay to the deceased. They at first refused to assist but accused no 1's father offered to reward them and also threatened them that if they refused to assist, they would not reach home that night, the implication being that they themselves would be killed. Because they were affected by the liquor and dagga, and because of the threats and the offer of a reward, they agreed to assist in the killing. That evening accused no 1 accompanied them

and .... / 11

and pointed out the deceased's home to them. Accused nos 2 and 3 entered the deceased's home and they pretended to be police-men who had come to arrest the deceased. They handcuffed him with a pair of handcuffs which accused no 1 had given them earlier and took him to a spot near the river where accused no 1 and his father were waiting for them. Accused no 1's father then told them to hold the deceased down and he, the father, cut the deceased's throat with a knife. The four of them there-after put the deceased's body in a sack which they had with them and threw the sack with the body into the river.

Accused no 1 gave no evidence in extenuation. His counsel, in cross-examination, put it to accused nos 2 and 3 that they were falsely implicating him and his father. It was further put to accused nos 2 and 3 that the first time accused

no 1 .... / 12

no 1 ever met the other two was after the three of them had been arrested and locked up together.

As already stated, the trial Court found that there were no extenuating circumstances and all three accused were sentenced to death. The principle is, of course, well settled that the question as to the existence or otherwise of extenuating circumstances is essentially one for decision by the trial Court, and that in the absence of misdirection or irregularity, this Court will not interfere with a finding that no extenuating circumstances were present, unless it is one to which the trial Court could not reasonably have come.

Mr Bezuidenhout, on behalf of accused no 1, quite rightly, in my view, disavowed reliance on any misdirections on the part of the trial Court. His submissions were simply that no reasonable court

could .... / 13

could have come to the conclusion that accused no 1's youth and limited sophistication and the influence which his father probably had over him were not such as to sufficiently reduce his moral blameworthiness so as to constitute extenuating circumstances. As far as accused no 1's alleged youthfulness was concerned, he testified that he was born in 1964 which would mean that when the crime was committed in March 1986 he was at least 21 years old. He was therefore not a teenager any more but, as was pointed out by Rumpfff C J in S v Lehnberg en 'n Ander 1975 (4) SA 553 at p 561 H, a person of 20 years or older can also show, by acceptable evidence, that he was psychologically immature to the extent that his immaturity could serve in extenuation. As stated earlier, accused no 1 gave no evidence in extenuation and nothing was placed before the trial Court

to .... / 14

to show, on a balance of probabilities, that accused no 1 must be regarded as less mature than the average 21 year-old. Indeed, as the trial Court quite rightly pointed out he is, and was at the time of the commission of the crime, already married. It is also perhaps of some significance that accused no 1 himself testified that when the deceased's sister fell pregnant he discussed the possibility of marrying her, presumably as a second wife, with his father who pointed out that lobola had already been paid for his first wife. According to the accused his father added "that I had to see for myself as to what to do because I am now a grown-up man." As far as the submission, which was also made before the trial Court, that accused no 1 probably acted under the influence of his father the trial Court found that it had not been shown on balance that accused no 1

was .... / 15

was under his father's influence when the decision to kill the deceased was made and the plan devised to do so. The Court found that all the indications are that accused no 1 was as much in control of the whole situation as his father. Here again it is perhaps significant that when accused nos 2 and 3 arrived at the river with the deceased it was, according to the evidence of accused no 2, accused no 1 who did the talking and said:

> "You have helped me out. I have been looking for this dog a long time."

In my view nothing has been advanced which would warrant this Court interfering with the trial Court's finding that, as far as accused no 1 is concerned, no extenuating circumstances were present.

I turn now to the appeals by accused nos 2 and 3 against the trial Court's finding that, also as far as they were concerned, there were no extenuating circumstances. Before the trial Court Mr Singh, who appeared on their behalf, advanced the following facts and circumstances as constituting extenuation:

(a) Their alleged intoxication when on the Monday, according to them, they were told what they were expected to do and agreed to do so. In fact, according to them they were strongly under the influence of liquor when they fetched the deceased from his home and assisted in the killing;

(b) the alleged threats by the father of accused no 1;

(c) the probability that they were under the influence

of .... / 17

of accused no 1 and his father; and lastly

(d) the youthfulness and lack of sophistication and education of accused nos 2 and 3.

The trial Court fully considered the submissions made by Mr Singh and dealt with each and every one of the factors advanced by him. As far as the alleged intoxication and influence of dagga were concerned the trial Court was prepared to accept that on the Monday, i e the day the deceased was killed, accused nos 2 and 3 drank liquor and smoked dagga but the Court found that the effect thereof was exaggerated by both of them. The Court pointed out that the deceased's wife, Bushapi, specifically stated in her evidence that if the two accused had been drinking before they arrived at her home they certainly showed no sign of it. They also played their

role .... / 18

role so well that she, Bushapi, and obviously also the deceased's mother who was called before the deceased was taken away, were fooled into believing that accused nos 2 and 3 were in fact policemen. It is also significant that in their confessions before the magistrate neither of the accused mentioned a word about liquor or dagga having played a role in what they did. But on the question of the alleged intoxication, and this also has an important bearing on the alleged threats by accused no 1's father, the trial Court expressed the view that on the Sunday accused nos 2 and 3 already knew what the reason was for having been invited to the home of accused no 1's father and were already at that stage informed of the plan which had been devised to kill the deceased and the part they were expected to play. The trial Court was not prepared to accept that the two accused

would .... / 19

would have walked for three hours to get to the kraal of accused no 1's father and then when, as they wanted the Court to believe, no one told them the reason why they were called and they were simply told to come back the next day, they would not have asked for a reason. In my view the trial Court was fully justified in coming to this conclusion especially when one looks at their evidence in this regard. In answer to questions by counsel for the State, accused no 2 testified as follows:

> "Did they tell you at all why you had to come back the next day? .... No they did not tell us.
> So you spent 3 hours walking back to your home without being any the wiser? .... That is how it happened.
> Why did you not ask them 'what are you calling us all the way here for?' .... We did not think of asking them."

Accused no 3, also in answer to questions by counsel for the State, testified as follows:

"Why .... ? 20

"Why were you not curious to find out what this was all about? .... We did not find out. We thought they were going to tell us because they are the ones that had called us.

Yes, and when they didn't tell you why didn't you enquire? .... It did not occur to us to ask them, because they had called us.

You were quite happy to walk for 6 hours and not to know what was going on? .... We were just taking a walk. We were not in a hurry to get anywhere."

At no time was there any suggestion that on the Sunday accused nos 2 or 3 had been given or had partaken of any liquor or that they were threatened by accused no 1 or his father should they refuse to take part in the plan. Once therefore the trial Court found that the two accused were already told on the Sunday what the plan was, their versions when they gave evidence that they agreed to the plan because they were intoxicated or because they were threatened were devoid

of .... / 21

of all truth. On the Monday the two accused, out of their own free will, proceeded to the kraal of accused no 1's father well knowing why they were going there. The probabilities seem to be that any liquor which they may have taken thereafter, and which in any event as the Court found had no visible effect on them, was taken to fortify themselves to enable them "insensitively to carry out (their) fell design", to use the words of Holmes JA in S v Ndhlovu (2) 1965 (4) SA 692 (A) at p 695 D-E. As regards the alleged influence of accused no 1 and his father over accused nos 2 and 3 the trial Court found that there was nothing in the evidence to show that their relationship was such that accused nos 2 and 3 were compelled to go along with the plan devised by the former two and that there was no suggestion that accused no 1 or his father were in any way in

authority .... / 22

authority over accused nos 2 and 3.

I come now to deal with the last, and perhaps the most important, factor advanced on behalf of accused nos 2 and 3 as constituting extenuation, namely their youthfulness and lack of sophistication. There was no evidence as to their exact ages or the years in which they were born. I have already referred to the evidence of Dr Buccimazza who examined the two accused for the purposes of establishing their approximate ages. He consider ed that they were at the very youngest 19 at the time of the com- mission of the offence but said that if he had to accept no 2's statement that he was 19 years old at the time of examination he, the doctor, would say that he was closer to 20 than 19 which woul have made him closer to 19 than 18 at the time of the offence. I its judgment on extenuating circumstances the trial Court approached

the .... / 23

the matter on the basis that accused no 2 might have been as young as 18 years and accused no 3 as young as 19 years at the time of the offence. This was also the basis upon which Mr Singh presented his argument before this Court. The two accused were therefore both teenagers when they committed the crime which meant that they were both prima facie to be regarded as immature. It would follow from this that a court would normally be reluctant to find that there are no extenuating circumstances unless there are present other factors such as eg the manner of and the motive for the commission of the crime and whatever else is relevant to show that the crime stemmed from inner vice ("inherente boosheid"). This, in summary is the broad effect, as I understand it, of some of the leading cases on the problem of sentencing a youth found guilty of murder (see

S v Lehnberg .... / 24

S v Lehnberg en 'n Ander 1975 (4) SA 553 (A); S v Mapatsi 1976 (4) SA 721 (A); S v Ceasar 1977 (2) SA 348 (A) and S v Ngoma 1984 (3) SA 666 (A). The concept of "inherente boosheid" was explained by Miller JA in Ceasar's case (supra) as follows (at p 353 C-F):

> "A finding that a person acted from inner vice in the commission of a crime does not imply that he has manifested vicious or wicked propensities throughout his life; nor is a long history of wickedness necessary to such a finding. Primarily, the question in any given case (in the context under discussion, i e with reference to youth as a mitigating factor) is whether the crime in question stemmed from the inner vice of the wrongdoer, whether he be a first offencer or one with many previous convictions. It is in order to answer that question that the Court will examine, and take into account as indicia, the wrongdoer's motive, personality and mentality, past history and whatever else is relevant to the enquiry. And, of course, it will take into account the nature of the crime and the manner of its commission. (See the passage quoted above from the judgment of the CHIEF JUSTICE in

Mapatsi's ..... / 25

Mapatsi's case.) The concept of inner vice as the genesis of a grave crime committed by a youth throws into proper contrast the case of a crime (perhaps equally dastardly) committed by another youth who has, largely because of his youth and its attendant degree of inexperience, acted in response to outer influences; eg under the pressure and stress of intense emotions induced by another (cf Lehnberg's case) or under direct or indirect influence of one older than himself, or under circumstances which to him, because of his youth and inexperience, were provocative or emotive."

In its judgment on whether, because of their youthfulness, the accuseds' moral blameworthiness was diminished, the trial Court said the following:

"The difficulty, however, is that the facts surrounding the killing of the deceased show that it was a most despicable crime. It was premeditated and carried out in a careful and cowardly manner. They gained control of the deceased by means of a ruse. Four people killed him by holding him and cutting his throat while he struggled and screamed. He was a man with the build of a 13 year old, as Dr Prins testified and as confirmed by the evidence of Cebelchulu. He was, therefore, completely helpless. Another matter

which .... / 26

which is most disturbing is that the whole thing was done with money as a motive.

Accused No 1 sought to kill the deceased because he intended thereby to avoid paying a debt that he owed. Accused Nos 2 and 3 apparently took part for personal gain. In our view, the whole matter should fill any right-thinking person with revulsion."

Referring to the above passage in the trial Court's judgment Mr Singh submitted, and I quote from his heads of argument:

"The Honourable Judge correctly described the crime as a 'most despicable crime' that 'should fill any right thinking person with revulsion'. With respect, however, the learned Judge misdirected himself in testing the extenuating factors argued on behalf of the second and third Appellants against the horrible circumstances under which the deceased met his death; for any cold-blooded murder is always an evil and despicable one."

For the submission that the trial Court misdirected itself, Mr Singh relied exclusively in what was said by this

Court .... / 27

Court in S v Van der Berg 1968 (3) SA 250 (A) on page 252C - 253A and particularly on the following passage appearing on page 252H:

> "n Verhoorhof sou dus, by oorweging van die gepaste vonnis in 'n geval van 'n skuldigbevinding aan moord met versagtende omstandighede, tereg die aard van die versagtende omstandighede sowel as die aard van die moord in aanmerking kon neem, maar, by oorweging van die vraag of 'n bepaalde omstandigheid as 'n versagtende omstandigheid aangemerk behoort te word, kan die aard van die moord nie relevant wees nie."

The judgment in Van der Berg's case was considered by this Court in S v Petrus 1969 (4) SA 85. In the latter case, the appellant, a youth of 18, was with two others convicted of a murder in which the deceased received 70 stab wounds. He was sentenced to death. It was also, relying on the judgment in Van der Berg's case, argued before this Court -

> " .... dat die Hof, by oorweging van die vraag van minder

verwytbaarheid .... / 28

verwytbaarheid, misgetas het deur die wreedheid van die misdaad daarby te betrek en sodoende die aanwesigheid van 'n versagtende omstandigheid verwerp het uit die aard van die misdaad."

In the Court a quo where Van der Bergh's case was also relied on, Tebbutt AJ had problems with the passage in this Court's judgment which I have quoted above. He - inter alia said the following:

"Myns insiens het die geleerde Appèlregter deur die woorde 'kan die aard van die moord nie relevant wees nie', bedoel dat daar nie aan die gruwelikheid of die wreedheid van 'n besondere moord teveel gewig gegee behoort te word nie. Ek glo nie dat hy - met die hoogste eerbied - bedoel het dat daar nie na die omstandighede van die misdaad gekyk kan word nie. As dit wel so was, dan sou dit beteken dat, byvoorbeeld, by 'n vergiftigingsaak waar daar miskien drank deur die dader gebruik was sou die Hof gebonde wees om nie na die omstandighede van die misdaad, naamlik die vergiftiging te kan kyk nie om te oordeel of enige drank wat gebruik is wel die dader so beïnvloed het dat dit sy misdaad minder laakbaar maak en sy morele skuld verminder. Myns insiens, soos alreeds gesê, het die geleerde

Appèlregter .... / 29

Appèlregter dit nie bedoel nie. Die hele trant van die uitspraak in die saak van Van der Berg, met eerbied, wys daarop dat die Appèlregter nie so bedoel het dat daar nie na die omstandighede van die geval kan gekyk word nie, en ek het ook my Assessore so ingelig."

Steyn, CJ in Petrus' case does not specifically refer to the above quoted passage appearing in Van der Berg's case but from his judgment, with which Jansen JA concurred, read as a whole, I think it is quite clear that he approved of the interpretation of Tebbutt AJ of this Court's judgment in Van der Berg's case. On page 91 E-G the CHIEF JUSTICE, after referring to section 330 (1) of the Criminal Procedure Act, 56 of 1955 (section 277 of the present Act) says the following:

"Dit gaan hier om 'n bepaalde dader, die beskuldigde, en die moord wat hyself gepleeg het, en dit laat verder vermoed dat die Wetgewer hier omstandighede in die oog het wat as versagtend beskou word in die samehang van die feite wat betrekking het op die bepaalde dader en sy wandaad, soos hy

dit .... / 30

dit gepleeg het, en nie in samehang van ander feite wat op 'n ander denkbeeldige of 'n ander veronderstelde gewone dader en daad betrekking sou hê nie."

What clearly emerges from the judgment of Steyn CJ in Petrus' case, and is in fact clearly stated in the seperate judgment of Rumpff JA, is that the atrocity of the crime as such cannot exclude or wipe out such extenuating circumstances as there may be but, in the words of Rumpff JA at page 95 H of Petrus' case:

"Om vas te stel of daar versagtende omstandighede is of nie, spreek dit m i vanself dat die feite van die misdaad sowel as die moontlike omstandighede wat as versagting sou kon dien oorweeg moet word. Die erns of afskuwelikheid van die misdaad, as sodanig, kan nie die moontlikheid van versagtende omstandighede uitsluit nie. Ek dink nie iemand sou dit ooit wil beweer nie. Wat wel kan gebeur is dat wanneer die versagtende omstandighede oorweeg word in die lig van die feite van die misdaad, 'n Verhoorhof sou kon bevind dat die beweerde omstandighede in die besondere geval nie volgens sy mening as versagting kan geld nie."

In .... / 31

In my view the trial Court in the present case did not, in the passage of its judgment relied on by Mr Singh, say or even suggest that the "horrible circumstances under which the deceased met his death" per se exclude any extenuating circumstances flowing from the youthfulness and prima facie immaturity of accused nos 2 and 3.

As I read the judgment the trial Court paid due regard to the youthfulness of the accused but when it came to the third part of the threefold enquiry as outlined in the case of S v Ngoma (supra) at p 673 H, and other cases, the Court in having to pass a moral judgment came to the conclusion that, taking all the circumstances into consideration, it had not been shown that the moral ~~balmewirthiness~~ blameworthiness of accused nos 2 and 3 was reduced.

In .... / 32

In my view it has not been shown that the trial Court had misdirected itself nor has it, also as far as accused nos 2 and 3 are concerned, been shown that the finding that there are no extenuating circumstances is one which the Court could not reasonably have come to.

The appeals of all three the accused are dismissed.

H R JACOBS, JA

CORBETT, JA)
JOUBERT, JA) concur