LL Case No 115/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

VALENTINE COTTON Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, MILNE, EKSTEEN, F.H. GROSSKOPF JJA et NICHOLAS AJA

HEARD: 29 NOVEMBER 1989

DELIVERED: 1 DECEMBER 1989

JUDGMENT

VAN HEERDEN JA:

Early in the morning of 14 February 1987 the body of the late C P Nell ("the deceased") was found in the bedroom of a flat in the Hilton Plaza Hotel ("the hotel") in Johannesburg. The cause of death was multiple penetrating wounds involving both lungs and the main pulmonary tract. Prior to his death the deceased had been the manager of the hotel and had occupied the flat.

It also appeared that the deceased's assailant(s) had removed an amount of R1 000 from a safe in the hotel. A bunch of keys, including the safe's key, which had been in the possession of the deceased prior to his death, was missing.

As a result of these events the appellant and two co-accused, Thring and Khumalo, were arraigned in the Witwatersrand Local Division on two charges, viz murder and robbery with aggravating circumstances. The appellant was convicted on both counts. His co-accused were acquitted on the first count and found guilty of

theft on the second count.

The findings of the trial court on which the appellant's convictions were based, may be summarised as follows. For a period of some three months from November 1986 the appellant was a lodger in the hotel. He shared the room with his mistress. At the beginning of February 1987 the deceased ordered the appellant to vacate the room. The reason was the appellant's failure to pay his account. The appellant and his pregnant mistress then had to search for other accommodation. On the evening of 13 February 1987 the appellant and his co-accused proceeded to the hotel. The appellant entered the building and later assisted Thring and Khumalo in gaining entrance through fire-escape doors. The threesome then made their way to the flat where, on the appellant's instructions, Thring and Khumalo took up positions in the kitchen and the bathroom. The appellant waited in the bedroom. When the deceased entered the flat he was grabbed and choked

by the appellant. Thereafter he was stabbed with a knife by the appellant and also by Thring and Khumalo, acting on the instructions of the appellant. Having regard to the weapon which was used and the part of the body of the deceased where the wounds were inflicted, the only reasonable inference was that the appellant intentionally caused the deceased's death.

The court also found that the appellant removed the deceased's keys, unlocked the safe and took possession of the aforesaid amount. Although not expressly so stated, the court was clearly of the view that a motive for the stabbing of the deceased was to get hold of the keys.

The appellant denied that he entered the hotel during the evening in question and said that he had no knowledge of the attack on the deceased. As is apparent from the above summary, his evidence was rejected by the trial court.

The appellant did not again testify when the

question of extenuating circumstances fell to be considered. His counsel, however, called a psychiatrist, Dr Berman. It then transpired that some time prior to the trial a magistrate had issued a direction in terms of s 78(2) of the Criminal Procedure Act 51 of 1977. This resulted in an enquiry into the appellant's criminal responsibility being conducted by Dr Berman, the senior psychiatrist of Sterkfontein Hospital, and by a private psychiatrist, Dr Fine. Eventually they brought out a joint report in which they concluded inter alia that the appellant was a psychopath, but that there was nothing to suggest that his ability to appreciate the wrongfulness of his acts at the time in question, or to act in accordance with an appreciation of such wrongfulness, was affected by mental illness or a mental defect.

When addressing the trial court on extenuating circumstances, counsel for the appellant submitted that the magistrate's direction did not

comply with the provisions of s 79(1)(b) of the Act inasmuch as he failed to enquire from the appellant whether the latter wished to appoint a third psychiatrist in terms of para (b)(iii). The trial judge (Vermooten AJ) then gave a ruling to the effect that the magistrate's direction "was not in accordance with law" and that the joint report therefore had no legal efficacy as a report in terms of s 79. The basis of the ruling was that the magistrate should have informed the unrepresented appellant of "his right to have his own psychiatrist appointed", and that his failure to comply with this duty constituted an irregularity.

After some further discussion the court found that there were no extenuating circumstances and imposed the capital sentence on the first count. On the second count the appellant was sentenced to 12 years' imprisonment.

Subsequently the appellant obtained leave

from this court to appeal against his convictions, and also against the death sentence based on the aforesaid finding. As regards the convictions, leave was granted solely on the following grounds:

> "Het daar 'n onreëlmatigheid plaasgevind deurdat die landdros wat ... [die Petisionaris] kragtens Artikel 78(2) van Wet 51 van 1977 vir observasie verwys het t.o.v. sy geestestoestand blykbaar versuim het om by die Petisionaris te verneem of hy verlang om 'n psigiater van sy keuse aan te stel kragtens Artikel 79(1)(b)(iii), of hom van sy regte in dié verband te vergewis? Indien wel, raak sodanige onreëlmatigheid enigsins die Petisionaris se skuldigbevindings?"

The following rider was added to the order granting leave to appeal:

> "Afskrifte van die verrigtinge voor die landdros sover hulle betrekking het op die Petisionaris se verwysing vir observasie moet die appèloorkondes vergesel."

A transcript of the proceedings before the magistrate was not handed in at the trial. The ruling of Vermooten AJ was apparently based solely upon information supplied by counsel. However, it was not

common cause, or even contended, that there was a positive indication that the magistrate had failed to draw the appellant's attention to "his right to have his own psychiatrist appointed". Indeed, when addressing Vermooten AJ counsel for the respondent said:

> "... I do have the full court proceedings of the magistrate, there is no indication as to say whether the accused was offered an opportunity or not".

And

> "There is no evidence under oath before this court that the court [i e, the magistrate] did not in fact act in terms of section 79 ...."

It is therefore difficult to understand why, when giving his ruling, Vermooten AJ stated that "according to the information given by counsel" the magistrate failed to inform the appellant of his right to have a third psychiatrist appointed in terms of s 79 (1)(b)(iii).

In compliance with the aforesaid rider a

certified transcript of the relevant proceedings was placed before this court by counsel for the appellant. It transpires that on 17 June 1987 the appellant (as accused 1) appeared before the magistrate. With a view to the committal of the appellant for observation the prosecutor then led the evidence of a police officer. What occurred subsequently, is recorded as follows:

> "KRUISVERHOOR BESKULDIGDE (deur middel van tolk). Geen - ek stem met alles saam. Ek versoek om vir observasie verwys te word.
> State Prosecutor no further witnesses.
> Accused 1 nothing else to say.
> State Prosecutor no address.
> In terms of Section 78(2) of Act 51/77 the court directs that the mental condition of accused 1 should be enquired into and be reported on in accordance with provisions of Section 79.
> Accused 1 is referred to Sterkfontein Hospital."

It will be observed that it does not appear from the transcript that any psychiatrist was appointed by the magistrate. However, the magistrate also completed two J 138 forms, the heading of which is "Warrant for Removal of Person detained under

Provisions of Chapter 13 to Institution for Enquiry". From these it would appear that the magistrate in terms of s 79(1) (b) appointed Dr Fine and the Medical Superintendent of Sterkfontein Hospital (or presumably a psychiatrist appointed by the Superintendent).

In so far as it is material, s 79(1) reads as follows:

> "(1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and reported on -
>
> .....
>
> (b) where the accused is charged with an offence for which the sentence of death may be imposed ....
>
> (i) by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;
>
> (ii) by a psychiatrist appointed by the court and who is not in full-time service of the State; and

(iii) by a psychiatrist appointed by the accused if he so wishes."

In this court counsel for the appellant supported the ruling of Vermooten AJ. He submitted i) that the magistrate should have enquired from the appellant whether he wished to appoint a third psychiatrist under s 79 (1)(b)(iii); ii) that the magistrate failed to do so; iii) that this failure constituted an irregularity; and iv) that the subsequent trial of the appellant was tainted by the irregularity which prejudiced the appellant.

It is hardly necessary to say that if the second submission is not well-founded, the others need not be considered. For reasons which will appear, it is indeed unnecessary to do so, or to dwell on the question whether the appellant should not have applied for a special entry to be made on the record in terms of s 317(1) of the Act.

It is, of course, true that the transcript of

the proceedings in the magistrate's court does not reflect that the appellant's attention was directed to the provisions of s 79 (1) (b) (iii). In my view, however, the silence of the transcript in this regard does not give rise to an inference that the magistrate in fact did not refer the appellant to the said provisions. It will be recalled that the transcript also does not reflect the appointment of psychiatrists under s 79 (1) (b) (i) and (ii). It may therefore well be that in the magistrate's view nothing more had to be recorded than the substance of his direction in terms of s 78 (2); i e, his decision that an enquiry be made into the criminal responsibility of the appellant. When it came to the mechanics of giving effect to that decision, the magistrate completed the J 138 forms. It was only at this stage that the question of the appointment of a third psychiatrist could have arisen. And since the appointment of psychiatrists under s 79 (1) (b) (i) and (ii) was not recorded - otherwise than

by the completion of the forms - it cannot be deduced that, when turning his attention to s 79 (1), the magistrate did not ask the respondent whether he wished to exercise the right conferred by s 79 (1) (b) (iii).

There are indeed indications that the magistrate did make such an enquiry. During examination-in-chief on the merits the appellant disclosed that he had been examined by two psychiatrists - obviously Dr Berman and Dr Fine. His counsel refrained, however, from eliciting from the appellant the reason why he had not been examined by a third psychiatrist. And when Vermooten AJ heard argument before he gave his ruling, counsel for the respondent pointed to the failure of the appellant to testify that the magistrate had not drawn his attention to his right to appoint a third psychiatrist. As appears from the extracts quoted above, counsel for the respondent went on to make the further point that there was no evidence that the magistrate had failed to do

so. Had counsel for the appellant been instructed that the appellant had in fact not been informed of his said right, one would have expected him to apply for leave to recall the appellant on this point. Yet he did not do so. In fact, he did not proffer a reply to the argument of counsel for the respondent. In the result it cannot be inferred that the magistrate committed the alleged irregularity.

In passing I should mention that Mr Marais, who appeared in this court for the appellant, did not represent him at the trial.

I turn to the trial court's findings on extenuating circumstances. The court took into account the appellant's age (the crimes were committed on his 19th birthday) but held that he had acted from inner vice. The only other factor relied upon at the trial and considered by the court, was the appellant's psychopathic condition. The court was of the view, however, that the careful planning and preparation

leading up to the murder ruled out any question of diminished responsibility because of that condition.

In this court counsel for the appellant submitted that the combined effect of four factors constituted extenuation, viz, the appellant's youth, his psychopathic affliction, his low intelligence and a clouding of his mind as a result of the intake of liquor or drugs. In regard to the fourth factor the submission lacks any factual foundation: the appellant's version that he went to bed early on the evening of 13 February 1987 because he was drunk (and that he consequently was not in the hotel when the deceased was murdered), was rejected by the trial court, and it does not appear from the evidence of his co-accused that the appellant was at all under the influence of alcohol or drugs. As regards the third factor, Dr Berman did say that the appellant's intelligence is "borderline, verging on dull/normal", but it also appears that the appellant passed standard

7 at school and that at some stage he was in full-time employment as a security guard at a salary of R800 per month. He is therefore not dim-witted in any sense of the word. Moreover, there is no indication that his relatively low intelligence played any part in the planning and the execution of the attack on the deceased.

The appellant's age is, of course, a prima facie indication of immaturity. However, the crimes were planned well in advance; the appellant was the prime instigator, and it was he who directed the execution of the design. Hence there was no question of the appellant acting in response to influences exerted by his co-accused. As regards other possible influences, the appellant may have felt aggrieved (although he did not say so when testifying) because the deceased had in effect evicted him and his pregnant mistress from the hotel. It does not appear, however, that the eviction caused stress which, because of his

youth, the appellant could not cope with. Indeed, although vengeance may have played a part, on the probabilities the primary motive for the attack on the deceased was to get hold of his keys and thus to gain access to the hotel's safe. Finally, on the aspect under consideration, there is Dr Berman's expressed impression that the appellant "is handling his immaturity remarkably well".

The trial court dealt fully with the appellant's psychopathic condition and it suffices to say that the appellant failed to show that that condition was related to the commission of the murder. So, for instance, Dr Berman concluded that "his being a psychopath did not affect his control over his actions" at the time in question.

In sum, the trial court did not misdirect itself in regard to extenuating circumstances and its finding was not one at which no reasonable court could have arrived.

The appeal is dismissed.

H.J.O. VAN HEERDEN JA

MILNE JA

EKSTEEN JA

CONCUR

F.H. GROSSKOPF JA

NICHOLAS AJA