Case No. 202/90
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ANTON LEE	FIRST APPELLANT
EBRAHIM ADAMS	SECOND APPELLANT
MOGAMMAT ABAS LEE	THIRD APPELLANT
PIETER WILLIAMS	FOURTH APPELLANT

and

THE STATE	RESPONDENT

CORAM: NESTADT, F H GROSSKOPF JJA et
VAN DEN HEEVER AJA

DATE HEARD: 20 AUGUST 1991

DATE DELIVERED: 2 SEPTEMBER 1991

J U D G M E N T

NESTADT, JA:

This is an appeal against the death

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sentences imposed on the four appellants by MARAIS J sitting in the Cape Provincial Division consequent upon their convictions of murder without extenuating circumstances. The learned judge, being of the view that the case was not one "in which there is little to be said for the accused" granted leave to appeal to this Court.

The crime took place shortly before 10 o' clock on the night of Monday, 21 March 1988. First, second and fourth appellants, wearing masks, entered the Housewife Supermarket in the district of Goodwood in the Cape. One was armed with a knife. Another had a firearm in his possession. The shop was still open. The owner, a certain Jamal Hoosain (aged 30) was confronted. He was ordered to hand over his watch and ring. He refused to do so. His attackers then attempted to take what they wanted by force. A

struggle ensued. During the course of it, one of the robbers (possibly accidentally) shot Hoosain in the chest. It produced a superficial wound. Thereafter Hoosain was shot again, this time in the back of his neck. This, so it would seem, took place after he had managed to unmask one of his assailants and after he (Hoosain) had been dispossessed of a firearm which he had on him. First, second and fourth appellants then fled out of the shop and made good their escape in a car which, driven by third appellant, had been waiting for them in the vicinity. Besides Hoosain's firearm, they also stole an amount of about R500 in cash from a till in the shop. The second shot (which it is to be inferred was fired with dolus directus) proved fatal.

By reason of the coming into operation of the Criminal Law Amendment Act, 107 of 1990 (the Act)

on 27 July 1990, we, unlike the trial court, have to decide whether, having regard to the presence or absence of any mitigating or aggravating factors, the death sentences are the only proper sentences. In other words, the issue of extenuating circumstances in the manner it used to arise, no longer does. And contrary to the position before the Act, we are now bound in reconsidering sentence to exercise an independent discretion.

There can be no doubt that there are a number of aggravating features about this murder. It was committed during the course of a robbery (of which appellants were also convicted by the court a quo). The prevalence of this type of crime is well known. Appellants went into deceased's shop armed. MARAIS J, in his careful judgment, rejected an argument that

the killing was either spontaneous or impulsive. It would seem that deceased was cold-bloodedly shot from behind. As will appear, some of appellants have previous convictions for crimes of violence. The lesser (active) participation of third appellant can hardly redound to his credit. The trial judge correctly found that "hy was 'n belangrike rat in die masjien en hy het homself volledigliik met die doen en lates van sy medebeskuldigdes geassosieer". Finally there is the consideration that the day before the murder of deceased appellants, during the course of a robbery of a garage called John Ramsay Motors, shot and killed a security guard there; and that after the robbery at Hoosain's premises, they continued with their rampageous conduct by committing another armed robbery of a shop within half an hour of leaving the Housewife Super-market. In the case of first, second and third

appellants they participated in two other robberies or attempted robberies in the same week. (Appellants stood trial before the court a quo on and were convicted by it of these charges as well. There were some 19 counts some of which were for the unlawful possession of firearms and ammunition. The murder of Hoosain was count 8.) In the case of the murder of the security guard extenuating circumstances were found and a sentence of imprisonment was imposed on each appellant. (Similarly, sentences of imprisonment were imposed in respect of the other robberies.) However, having regard to appellants' conduct before and after the attack on Hoosain, MARAIS J held that extenuating circumstances had not been established in respect of his murder. The learned judge's reasoning is reflected in the following passages from his judgment:

"Die vier beskuldigdes het aan hierdie verdere rooftog deelgeneem met kennis van die tragiese gevolge van die rooftog op John Ramsay Motors die vorige dag. Hulle het geweet dat in daardie geval die risiko wat hulle geloop het verwesentlik was. Die teoretiese moontlikheid dat iemand doodgeskiet sou word het 'n realiteit geword. Met daardie wete het hulle nog 'n gewapende rooftog op die Housewife Supermark uitgevoer. Niks is werklik gedoen om 'n herhaling van wat by John Ramsay Motors plaasgevind het, te verhoed of te vermy nie. Die beskuldigdes se bereidwilligheid om nog sulke risikos te loop nieteenstaande die feit dat hulle alreeds vir die dood van mnr Petersen verantwoordelik was, is 'n faktor wat moreel gesproke sterk teen hulle moet tel selfs wanneer dit opgeweeg word teen die ander gunstige faktore waarna ek alreeds verwys het .... Die posisie word vererger, na die Hof se mening, wanneer ons kyk na hulle optrede na die doodskietery van mnr Hoosain. Hulle het dieselfde aand nog 'n gewapende roof uitgevoer te Victory Supply Store. Nrs. 1, 2 en 3 het 'n paar dae later weer 'n gewapende rooftog te Goodhope Home Video uitgevoer en 'n gepoogde roof te Belhar Mini Mark. Dit is aanduidend van 'n traak-my-nie-agtige houding jeens die lewensverlies wat plaasgevind het te John Ramsay Motors en Housewife Supermark wat so afkeurenswaardig is dat dit uiters moeilik is om te aanvaar dat hulle geestestoestand

> onmiddellik voor die skietery te Housewife Supermark heelwat anders was en heelwat minder afkeurenswaardig was. Al die aanduidings is ten gunste van die afleiding dat hulle nie eintlik omgegee het indien iemand doodgeskiet sou word nie."

Murder is of course almost always a serious crime. What has been stated makes this one particularly serious. On the other hand, there are certain mitigating factors and other considerations that must, in assessing whether the death sentence is the only proper sentence, be taken into account. The court a quo was unable to find which of appellants who entered the premises of deceased shot him. Their (and third appellant's) convictions therefore rested merely on a finding of common purpose and dolus eventualis, ie, that knowing that one of the

group possessed a firearm, they each foresaw that the shop owner might be shot and killed in the robbery. The trial court, in considering sentence, regarded this factor as being in appellants' favour (in the sense that it reduced their moral blameworthiness). The same applies to a finding that appellants were at the time under the influence of drugs, namely a combination of dagga and mandrax. I do not propose to set out what evidence each gave in this regard. It is sufficient to state that MARAIS J held that this materially contributed to their actions. It seems to me that this must reduce the force of the court a quo's reasoning to which I earlier referred. It is reasonably possible that appellants' appreciation of the risk of another shooting taking place was blunted by their intake of drugs. And the subsequent robberies must be looked at in the

light of the fact that they too were committed by appellants whilst under the influence of drugs. It was further found that first, second and fourth appellants had probably acted under the influence of third appellant (though as regards third appellant this was not taken into account against him). Both first and second appellants are youths. First appellant was little more than 18 at the time. Second appellant was just over 21. He is a first offender. As I have indicated earlier, the other appellants have certain previous convictions. Those of first appellant are for rape and robbery. Third appellant (aged 32) has convictions but not for crimes of violence. Fourth appellant (aged 24) has previously been convicted of assault.

Having regard to the mitigating and aggravating factors referred to, is the death sentence the only proper sentence? I have come to

the conclusion that, giving full weight to the interests of society, the answer is in the negative. I cannot, despite the heinousness of their crime, say that the death penalty is imperatively called for. In my opinion a lengthy term of imprisonment would, in the case of each appellant, be an appropriate sentence (as was decided in the broadly similar matter of S vs Ntuli 1991(1) SACR 137(A); see too S vs Ndinisa en Andere 1991(2) SACR 117(A)). Perhaps, in the case of first appellant, a social welfare report should have been produced, but for reasons which will appear it would not serve any purpose at this stage. In the case of first and second appellants a sentence of 18 years' imprisonment will, in my view, be an appropriate sentence. This takes account of their youthfulness and, in the case of second appellant, his clean record. Third and fourth appellants, being older and more mature, are deserving of a heavier sentence

viz, 21 years' imprisonment.

Plainly, provision must be made for all or part of these sentences to run concurrently with the sentences imposed in respect of the other crimes which, as I indicated earlier, appellants were found guilty of. First appellant's effective sentence for them is 25 years; that of second appellant 20½ years; that of third appellant 20 years and fourth appellant's is 22 years. First appellant's effective sentence is a heavy one. In my view it would be wrong to add to it. I propose therefore to direct that the 18 years' imprisonment to be imposed on him run concurrently with the sentence he is now serving. The sentence to be imposed on second appellant will run concurrently with his existing sentence so that he is in the result sentenced to an effective 22 years' imprisonment. The sentences to be imposed on

third and fourth appellants will run concurrently with their respective existing sentences so that they each receive an effective sentence of 25 years' imprisonment.

In the result the following order is made:

(1) The appeal of appellants against the death sentence imposed on each of them for the murder of Jamal Hoosain (count 8) succeeds. Such death sentences are set aside.

(2) In the case of first and second appellants a sentence of 18 years' imprisonment will be substituted. In the case of third and fourth appellants a sentence of 21 years' imprisonment will be substituted.

(3) The said periods of 18 and 21 years' imprisonment are directed to run concurrently with the other sentences

imposed by the court a quo as follows:

(a) The 18 years' imprisonment imposed on first appellant will run concurrently with the period of 25 years to which first appellant was effectively sentenced. His effective sentence will therefore remain at 25 years' imprisonment.

(b) 16½ years of the 18 years' imprisonment imposed on second appellant will run concurrently with the period of 20½ years to which second appellant was effectively sentenced. His effective sentence will therefore be 22 years' imprisonment.

(c) 16 years of the 21 years' imprisonment

imposed on third appellant will run concurrently with the period of 20 years to which third appellant was effectively sentenced. His effective sentence will therefore be 25 years' imprisonment.

(d) 18 years of the 21 years' imprisonment imposed on fourth appellant will run concurrently with the period of 22 years to which fourth appellant was effectively sentenced. His effective sentence will therefore be 25 years' imprisonment.

NESTADT, JA

F H GROSSKOPF, JA CONCURS

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CORAM: **NESTADT, F H GROSSKOPF JJA et VAN DEN HEEVER AJA**

HEARD: **20 AUGUST 1991**

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J U D G M E N T

VAN DEN HEEVER AJA

I too am not satisfied that the death sentences are the only appropriate sentences on count 8, but arrive at that conclusion by a somewhat different route to that followed by the majority of the court.

As I understand the reasoning of the court a quo, it generously listed findings which could weigh in favour of all four appellants under four headings, and then set out factors specific to appellants 1, 2 and 6. The factors passed the third test posed in S v BABADA 1964 (1) SA 26 (A) in regard to the murder of Petersen by serving "in the minds of reasonable men to diminish morally albeit not legally the degree of the prisoners' guilt" (R v BIYANA qouted with approval by Schreiner JA in R v FUNDAKUBI AND OTHERS 1948 (3) SA 810 (A) 815) but failed that test in regard to count 8 because of what had gone before and the conduct of appellants after Hoosain had been shot.

The approach in BABADA'S case holds good in my

view, despite the amendment of the Criminal Procedure Act, in this sense, that the factors of common purpose and **dolus eventualis** must ordinarily carry ever less weight as mitigating factors with each successive death arising out of the criminal activities of a gang, and also the better organized that gang is.

Here appellants' informal gang was well-organized. The task of each participant in each of the robberies was pre-ordained: everyone knew what to do without orders or discussion on the scene. The events at John Ramsay Motors were educational to any possibly naïve participant, as to the consequences to a victim, of resistance.

None of the appellants claimed that drugs blunted their intellect. The habit - long standing in every case - at most slackened inhibitions and made an actor bolder or more susceptible to temptation. In that respect the drugs contributed materially to the

commission of the offence, without that necessarily constituting an appreciable mitigating factor.

Having regard, as the trial court was neither obliged nor empowered to do, to factors **dehors** the offence itself, I agree that the interests of society do not demand the destruction of appellants as the only proper sentence on count 8. In doing so I would stress the youth of first appellant, since he is the only one of the four with a previous record of violence sufficiently serious to have otherwise satisfied me that the appropriate sentence would have been the death sentence.

I concur in the order proposed.

L VAN DEN HEEVER AJA