Rob 87/92

601/91
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WILLIAM MALATJIE .... APPELLANT

and

THE STATE .... RESPONDENT

CORAM : VAN HEERDEN, KUMLEBEN JJA et HARMS AJA

HEARD : 14 MAY 1992

DELIVERED : 25 MAY 1992

JUDGMENT

KUMLEBEN, JA/...

KUMLEBEN, JA:

The appellant was one of four accused who stood trial in the Witwatersrand Local Division of the Supreme Court on two counts: murder and robbery with aggravating circumstances. The appellant and one other accused, despite their pleas of not guilty, were convicted on both counts. In the case of the appellant as regards the murder conviction no extenuating circumstances were found to be present and the death penalty was imposed. This led to his case being referred to the panel in terms of s 19(8) of the Criminal Law Amendment Act, no 107 of 1990. The panel was of the view that this sentence would probably have been passed had s 277 of the Criminal Procedure Act, no 51 of 1977, existed in its present form at the time of sentence. Thus the matter is before this court in terms of s 19(12)(a) of the former Act. This sentence is to stand if this court, having regard to

any mitigating and aggravating circumstances, concludes that it is the only proper one.

The deceased, Isaak Marais van den Berg, was 63 years old at the time of his death. He lived alone in a house in Carlton Street, Venterspos. His servant, Miss Tawana, lived in separate quarters on the premises. She had a relationship with the appellant and he used to visit her there from time to time and on occasions did some work for the deceased. The deceased's daughter last saw him alive on 29 March 1989. When she went to her father's house on 12 April 1989, having learned of his death, she found it in a state of disarray and saw that possessions of her father were missing. These included a fire-arm, motor vehicle, a television set and items of clothing.

As part of the State's case a confession made by the appellant was received in evidence. In it the appellant gave the following account of his

involvement in the events on the day in question. He said that he lived on the premises. (The true position as I have said, is that he used to visit his girl friend there, and he sometimes spent the night there.) On the night the deceased was killed the two of them, the appellant and the deceased, were watching television in his house. The attack upon the deceased had been planned by the appellant and three others who were outside. When the appellant said he was going to bed the deceased accompanied him. In the yard the appellant stabbed him with a knife. His associates, who had been waiting just beyond the wall of the premises, joined him. One of them stabbed the deceased twice more and used a bandage to gag him. The appellant fetched a spade from the garage and each of them lent a hand in digging a shallow grave, in which the body of the deceased was buried. They returned to the house and made themselves at home. Having searched

the house, they sat down and ate some food before watching television. For three nights the appellant remained on the premises, sleeping in the servant's room, whilst the other three slept in the house itself. During the day they distributed amongst themselves and removed certain of the deceased's possessions.

When testifying in court the appellant told a different story. In brief it was that there was trouble between him and the deceased because the latter was on a footing of undue intimacy with Tawana and that at the time when he stabbed the deceased he was acting in self-defence. This was a fabrication from first to last. I need not refer to it in any detail. Mr Mundell, who appeared for the appellant before us, quite correctly conceded that this account was correctly rejected and that, to the extent that mitigating or extenuating factors depend upon what the appellant said, his confession is the evidence

to be relied upon.

On this basis one is hard-pressed to point to any mitigating circumstances. Counsel submitted that it is reasonably possible that the form of intent involved was no more than dolus eventualis. The facts refute this. The appellant was well-known to the deceased and it was necessary to eliminate him to pursue their plan to rob and to avoid detection. Moreover, to stab a person, as described by the appellant, in the back of the neck, in itself leads to the inescapable inference that it was done with the deliberate intention of killing the victim. Mr Murdell next submitted that the appellant ought to be regarded as a first offender inasmuch as his one previous conviction was for theft of R9,00 at a time when he was a juvenile. I agree. His clean record, apart from this offence, is a mitigating consideration that ought to be taken into account. It must, however, be weighed

against the substantial aggravating features, to which I now turn.

It was a planned attack on a defenceless man in his home with a view to ransacking it and stealing. As I have said, the killing was essential to the robbery. It is obvious from the part played by the appellant throughout the episode, and the respective ages of the participants (he was about twice the age of the others who were teenagers), that the appellant played a leading role in all that took place. The calculated callousness of their conduct is exacerbated by the fact that, after burying the deceased, they brazenly stayed on at his house for a number of days.

Finally counsel submitted that the appellant was not incapable of rehabilitation and that a long prison sentence might serve this purpose. This cannot be ruled out, but in my view the aggravating factors in this case are of such cogency that, bearing in mind the

need to satisfy the retributive element of punishment, the sentence imposed is the only appropriate one.

The appeal is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

VAN HEERDEN JA) - Concur
HARMS AJA)