Case no. 520/82.

m.c.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

LUCKY KALLIE NKOSI KHUMALO	.....	First Appellant
JOHANNES NYAKALE	.....	Second Appellant
ALFRED MDAWU	.....	Third Appellant

- and -

THE STATE	.....	Respondent

CORAM: CORBETT, CILLIé JJA et NICHOLAS AJA.

HEARD: 24 MAY 1983

DELIVERED: 30 MAY 1983.

J U D G M E N T

NICHOLAS AJA :-

In the Circuit Court sitting at Middelburg, Transvaal, the three appellants (I shall refer to them as "the accused") were convicted by a court consisting of CURLEWIS J and two assessors on two counts: murder, and robbery with aggravating circumstances. In regard to count 1 the court found that there were no extenuating circumstances, and the mandatory sentence of death was imposed on each of the accused. In regard to count 2, it was ordered that the sentences stand over.

The trial judge granted leave to appeal against the finding that there were no extenuating

circumstances and against the death sentences.

The facts may be briefly told.

Meshack Linda Mshayisa ("the deceased") was in his lifetime a schoolteacher employed at the Blinkpan Mine School. At about 2.30 p.m. on Monday, 6 July 1981 he left the school in his yellow Datsun motor car. He did not come to the school on the following day and he was not seen alive again.

On 15 October 1981 Sgt. Steenkamp of the South African Police pointed out to Det. Sgt. Pretorius of the Special Task Force of the police, an old mineshaft near the New Clydesdale Colliery, about 7 to 10 meters from the road. The shaft was fenced.

It was about 20 meters deep. Lying on the bottom was the body of a black man. Sgt. Pretorius extracted the body from the shaft. It was conveyed to the Government Mortuary at Pretoria.

There a post mortem examination of the body was conducted on 22 October 1981 by Professor J.D. Loubser, Chief Government Pathologist in Pretoria and head of the Department of Forensic Medicine at the University of Pretoria. He said in evidence that the body was in an advanced stage of decomposition. He could not see any external marks or injuries. A leather belt, 2cm wide, which had been pulled through the buckle, encircled the deceased's neck. He found an

appearance of bruising in the superficial muscles on the right side of the throat and over the tissues between the oesophagus and the spinal column. In his opinion the death was consistent with strangulation by a ligature, such as the belt found around the neck.

The body was identified by Sina Radebe as that of the deceased, who was her son. She also identified the belt as the deceased's property.

On 8 July 1981, only two days after the deceased's disappearance, Mr C.J.H. Kruger, a provincial traffic inspector, was patrolling the old Pretoria-Bronkhorstspruit road. Just outside Bronkhorstspruit he observed a yellow Datsun motor

car, with registration number CHW236T. It was travelling very slowly. The conduct of the persons in the car aroused his suspicions, and he instructed the driver to pull off the road. Sitting in the front of the car were two black men - the driver and a passenger; in the back was another black man. In the cubby-hole he found two identity books, one of which belonged to the driver. Kruger observed that the roof of the vehicle had recently been sprayed black: it still smelt of paint and a black Aerospray can was lying in the back of the car. He asked the driver to accompany him to the police. The driver got very agitated. He begged to be allowed to go free: he

would / .....

would be late for work and would be dismissed. He told all sorts of stories which Kruger could not remember. Eventually Kruger escorted him to the Bronkhorstspruit police station. There he handed him over to Cst. N. Smit, with whom he also left the Datsun motor car. The driver's fingerprints were taken at the police station.

It was clearly proved by reference to those fingerprints that the driver was no. 1 accused. It was also proved that the Datsun was owned by the deceased.

Between 6 and 8 July 1981, the three accused were seen in the Datsun by two witnesses.

One / .....

One was accused no. 3's mother, who on 6 July 1981 was driven in the car from Transvaal Navigation Colliery, where she was visiting, to her house. The other was Sonia Masango, who was at her uncle's place at Pieterskraal, near Dennilton, when the accused arrived during the day in a cream-coloured Datsun. No. 1 accused was driving. She recognized the car as one which belonged to a teacher at Blinkpan.

On 13 October 1981, accused no. 1 took Det. Sgt. Steenkamp to, and pointed out, the old mineshaft in which the deceased was found two days later. Later on the same day accused no. 2 took Steenkamp to the shaft and pointed it out. Accused

no. 3 also pointed out the mineshaft to Steenkamp - in April 1982.

Each of the accused gave evidence.

No. 1's defence was an alibi. He had no knowledge of the crimes alleged against him. He denied that Kruger had arrested him.

No. 2 accused said in his evidence that on the day in question the deceased agreed to drive him to Blinkpan. While they were en route they saw nos. 1 and 3 accused at a certain 4-way stopstreet. They were given a lift in the car. No. 2 then told a story of which it is unnecessary to give details. It was exculputory of himself and inculpatory of nos.

1 and 3 accused, and it culminated in no. 1 and 3 taking something from the boot of the car and putting it in the old mine shaft, which he later pointed out to the police. He went on to describe how they had driven first to "T N C", where they had picked up no. 2's mother, and later to Dennilton where they stayed for two days. They then set out to return to Delmas via Pieterskraal and Bronkhorstspruit. At Bronkhorst= spruit they were stopped by a traffic officer (Kruger) who arrested no. 1 accused, but allowed nos. 2 and 3 to go.

No. 3 accused described how he and the other two accused were sitting at a 4-way stop street near Delmas. The deceased arrived in his Datsun. At

no. 2's signal, the vehicle stopped, and the three accused got in to it. No. 3 then went on to tell a story, exculpatory of himself, and inculpatory of nos. 1 and 2. He told how no. 1 had strangled the deceased with the latter's belt. They then drove to a place near Clydesdale Mine, where nos. 1 and 2 took the deceased's body from the car and threw it into an old mine shaft, which he later pointed out to the police. Subsequently they drove no.3's mother to her house, and then proceeded to Dennilton. There accused nos. 1 and 2 painted the top of the car black. Two days later they were stopped by a traffic inspector while

driving / ....

driving near Bronkhorstspruit, and no. 1 was arrested. He and no. 2 then went back to Delmas.

In giving judgment CURLEWIS J said that the court found that the evidence of the accused could not possibly be true: each of them had "told a pack of lies" and the court was satisfied "that each story is something cobbled up to suit himself and is a hotchpotch of lies". The court was satisfied that the accused robbed the deceased of his car, that they used the belt as part of the violence, and that they caused his death. The only inference to be drawn was that the people who robbed the deceased intended

to kill him. "One does not have to look far for the reasons ..... they did so (so) that he could not thereafter identify them. As I say if he was not dead before they threw him down the mineshaft, then they made perfectly certain that he would not be able to identify them by throwing him down the mineshaft."

It appears from the judgment of the trial court on the question of extenuating circumstances that the submissions made by defence counsel in the court a quo were substantially the same as those made to us on appeal. An appeal against the finding by a trial court that there were no extenuating circum= stances can succeed only if it appears that in con=

sidering the question the trial court misdirected itself or committed some other irregularity, or that the circumstance were of such a nature that no court could reasonably come to any conclusion other than that extenuating circumstances were present. (R v Balla and Others, 1955 (3) SA 274(A)).

In S v Babada, 1964 (1) SA 26(A) RUMPFF JA described (at 27 in fin - 28 A) the duty of the trial court in considering whether extenuating circumstances were present:

> "Die Wetgewer het dus op die Verhoorhof die plig gelê indien 'n beskuldigde aan moord skuldig bevind word, om vas te stel, eerstens, of daar omstandighede is wat betrekking kon gehad het op die geestes= vermoëns of gemoed van die beskuldigde;

> tweedens, om te oordeel of sodanige omstandighede die beskuldigde wel beinvloed het, en, derdens, om te oordeel of die be= invloeding van so 'n aard was dat die beskuldigde se daad, volgens die mening van die Verhoorhof, daardeur minder laak= baar beskou word sodat die Regter nie verplig hoef te wees om die doodstraf op te lê nie."

It was pointed out in the case of Grobbelaar v S (A.D., delivered on 24 May 1983, so far unreported) that the first two questions are ordinary questions of fact which must be answered by the trial court with reference to the evidence and having regard to the fact that the accused bears the onus. The answer to the third question is dependent upon the opinion of the trial court: it is a value judgment of a moral

nature which the trial court must make according to its own discretion.

Because of the rejection by the trial court of the evidence of the accused as to the circumstances of the commission of the crime, there is a dearth of evidence from them in regard to the first two questions referred to in Babada's case. Nevertheless it is the duty of the trial court to carefully weigh all the evidence, whether given on behalf of the State or on behalf of the defence, in order to determine on a balance of probabilities whether extenuating circumstances are present. (See Grobbelaar's case.)

In this case two submissions were common to the arguments on behalf of each of the accused and it will be convenient to consider them before I address myself to the individual cases. The submissions were.

(a) That the killing of the deceased was not pre-planned; and

(b) That the intent to kill took the form of dolus eventualis.

In regard to (a), there were no facts proved to support an inference that this crime was committed impulsively and on the spur of the moment. Counsel submitted that the fact that the deceased was strangled by his own belt, and not killed with a weapon with

which the accused had previously armed themselves, justified such an inference. I do not agree: it may well be that the accused had planned to overpower the deceased by using their bare hands. In the absence of any acceptable evidence from the accused on the point it was impossible for the trial court to find that it was probable that this murder was not planned in advance.

The same applies in regard to (b). It was submitted by counsel for no. 1 accused that it was a possible inference from the proved facts that the deceased died while the accused were trying to temporarily overcome his resistance in order to rob

him. This suggestion was based on evidence given by Prof. Loubser in regard to certain appearances observed in the deceased's left ventricle. He said that such appearances were consistent with a neurogenic cardiac arrest as a result of an application of force to the throat. This could occur even where the application of force was of very short duration. It was something that could happen by accident, e.g. in a love embrace, if the man hugged his girl too vigorously around the neck.

There was, however, no evidence that the deceased died in the way suggested by counsel. That was mere speculation. And the heart appearances

were at least equally consistent with a violent application of force, such as would be exerted by the pulling tight of the belt. If, as is probable, the deceased died as a result of strangulation with his belt, that would point to a direct intent to kill. That was the finding of the court a quo. CURLEWIS J said :-

> "As I pointed out yesterday in our judgment there could be no other inference that any person could possibly come to but that they had had the direct intention to murder this unfortunate teacher. A moment's consideration of the facts, as I said yesterday, show this. If they had simply wanted to put him out of action while they got away with the car, all they had to do was tie him up. We don't want to have vague speculations and suggestions and

> arguments. It is quite ridiculous. They used his belt to murder him. If they had wanted to incapacitate him, put him out of action while they got away with his car, they could have used that belt to tie him up, torn strips off clothing, done whatever they wanted to. Then they chucked his body down a mine= shaft. We have not the slightest doubt that they did all this so that he would not later be able to give evidence against them and identify them."

I see no reason to disagree with that conclusion.

In this connection it is not without significance that no. 2 accused was known to the deceased, who, if he had survived, would have been able to identify him.

There/ .....

There is, therefore, no substance in the second general submission.

I turn now to the cases of the individual accused.

It was submitted on behalf of no. 1 that his age (21 years at the date of the trial - October 1982) was such as to diminish the blameworthiness of his act.

It was for the accused to show, by acceptable evidence, that his mental immaturity was such as to serve as extenuation (See S. v Lehnberg, 1975(4) SA 553 (A) at 561 G).

His counsel submitted on behalf of no. 1

accused that his immaturity was to be inferred from his naïve, lying alibi as well as from the amateurish way in which the deceased was killed. In my view this shows not immaturity but stupidity, which is not the exclusive preserve of the immature. Counsel also submitted that no. 1's conduct when confronted by Kruger clearly showed his immaturity. In my opinion that was the conduct, not of an immature man, but of a desperate man who could see retribution looming.

CURLEWIS J said in his judgment on extenuating circumstances,

> "As far as their age is concerned, they are all well beyond the years of discretion,

both / ....

both in appearance and in their manner of giving evidence. They were not children. They were not youths in the sense that is being used by counsel here. "

It has not been shown that the trial court erred in making that finding. The commission of the crime was deliberate and ruthless, and their conduct was that of adults, not of immature youths. In the case of no. 1 accused, there is the added fact that he had been employed by a mine for $2\frac{1}{2}$ years as a lorrydriver.

In / .....

As to (a) it has not been shown that the finding of the trial court was wrong so far as he was concerned.

As to (b) it was submitted that no. 2 played a subordinate role. Because no. 1 did all the driving, the inference was that he was the leader of this excursion. Because nos. 1 and 3 were related to each other, the inference to be drawn was that he was a bystander who was influenced by these two family members. Each of the suggested inferences is a non sequitur.

In my opinion there is no basis for differing from the trial court in regard to accused

no. 2.

In regard to no. 3 accused, it was submitted that the following circumstances were extenuating :-

(a) He was under the influence of liquor ;

(b) His youth - he was 20 years old at the date of the commission of the crime;

(c) He was subjected to duress and intimi= dation.

As to (a), no. 3's evidence was that he had drunk "sewe lang blikkies bier" before the incident. He said he had stopped drinking at about 5 p.m. and was still under the influence of liquor ("maar nie so veel nie") when the incident took place at about

6.30 p.m. He said he could feel the effects of the liquor, and did not walk normally.

This submission depends solely on the ipse dixit of a man who was found by the trial court to be a lying witness. There was no suggestion in the evidence of his mother that he was under the influence of liquor. In the long and detailed statement which he made to a magistrate, he made no mention of having consumed liquor. CURLEWIS J said in the judgment on extenuating circumstances,

> "However, we have taken into account his evidence and given it such weight as it can bear."

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That weight, it is clear, is very slight.

As to (b), this was considered by the trial court, and there is no reason to differ from its finding in this regard.

As to (c), the alleged intimidation rests solely on his own evidence, and he was found to be a lying witness. It was no part of his defence that he was in any way forced to take part in the attack on the deceased. He said that he refused to parti= cipate, and refused to help when the deceased was thrown into the shaft. It was only when he was asked in cross-examination why he did not go to the

assistance of the deceased (at a time when, according to no. 3, he was the innocent spectator of an attack on the deceased by nos. 1 and 2) that he said that he was frightened of them - "hulle is mense wat altyd met messe in hulle besit loop".

The conclusion in regard to accused no. 3 is the same as that in regard to the other two accused.

The appeals are dismissed.

H.C. NICHOLAS AJA.

CORBETT JA.
Concur.
CILLIé JA.