164/86.

Case No.: 115/86

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GERHARDUS CHRISTIAAN MOSTERT	Appellant No. 1 (Accused 1 a quo)
IVAN LAURENCE NEUWERTH	Appellant No. 2 (Accused 2 a quo)
EDWARD HELGARD VAN DER MERWE	Appellant No. 3 (Accused 3 a quo)

and

THE STATE	Respondent

CORAM: HOEXTER, SMALBERGER, JJA et NICHOLAS, AJA

HEARD 18 November 1986

DELIVERED: 28 November 1986

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA,

This is a criminal appeal. During the night of Friday 4 January and the early hours of Saturday 5 January 1985 the deceased, a young man aged 24 years, was at various times severely assaulted, robbed of his money and his motor car, and finally done to death. His body was mutilated and an attempt was made to set his car alight. Following upon these events the three appellants (being respectively accused nos 1, 2 and 3 at their trial) and a man called Deuchar (who was accused no 4 at the trial) were jointly charged in the Witwatersrand Local Division with the following crimes: robbery with aggravating circumstances (count 1); murder (count 2); and malicious damage to property (count 3). The trial Court consisted of O'DONOVAN, J and two assessors. Deuchar was found guilty on count 2 of assault with intent to do grievous bodily harm and there is no appeal by him. On count 3 the third

appellant was convicted of malicious damage to property in respect of the deceased's motor car. On count 1 both the first and second appellant were convicted of robbery with aggravating circumstances in respect of the deceased's money and motor car. On count 2 all three appellants were found guilty of the murder of the deceased. In respect of the aforesaid convictions for murder the trial Court unanimously found that in the case of the third appellant there were extenuating circumstances but that there were no extenuating circumstances in the case of the first and second appellants. On count 2 the third appellant was sentenced to imprisonment for 7 years. The first and second appellants were both sentended to death. In respect of count 2, and with leave of the trial Judge, the following three appeals are before this Court. The third appellant appeals against his conviction of murder. The first and second appellants appeal against the trial Court's finding that in the case of neither, were extenuating circumstances present; and the

sentences .....

sentences of death passed consequent upon such finding.

At the time of the deceased's death the first and second appellants were respectively 22 and 24 years old. The third appellant was then 18 years old and doing his national military service. At the close of the State case each of the appellants testified in his own defence. From their own testimony it appears that each was seriously addicted to drugs; and that the first appellant was an alcoholic. The crimes of which the appellants were convicted were committed in the Florida/Maraisburg area of the West Rand, the actual killing of the deceased and the attempt to set alight his motor car taking place at the Cecil Payne Rifle Range. Although the third appellant's national service required his attendance daily at a military camp in Pretoria he spent his nights in Florida, where in Maud Street he shared a room with the first appellant in the house of one Trevor Morton. The second appellant lived with his father at

Plot 16, ...

Plot 16, New Unified, Maraisburg. In an adjoining house on Plot 15 there lived the second appellant's older brother, Mark Neuwerth, and the latter's wife to whom I shall refer in what follows as "Mrs Neuwerth."

The first and second appellants and the deceased encountered one another in the early evening of Friday 4 January 1985 at the Killarney Hotel in Florida. The first appellant had spent his whole day drinking in that hotel. Thereafter (save for a brief episode at about 2 am on the fol= lowing morning at New Unified, to which I shall later allude) the deceased remained throughout in the company of the first and second appellants until at some time between 3 and 4.30 am on Saturday 5 January 1985, when the deceased was murdered. The events of the night and early morning in question fall into three separate stages. It is necessary to deal briefly with each stage.

The first stage lasted from approximately 6 pm

on .....

on the Friday evening until about 2 am on the Saturday morning, and in the course of it the first and second appellants drank much liquor and used many drugs. During the first stage the first and second appellants and the deceased were in the company of various people including Deuchar, a young girl Jacqueline Munro who was Deuchar's girl-friend, and a man called James Proctor. During the first stage the deceased's motor car was driven by the appellant, with the deceased as a passenger in it, to and from various places such as Westbury, the Florida Primary School, the Lake Hotel, Florida, and the Fontana Restaurant in Hillbrow, Johannesburg. The car finally arrived at the New Unified Plots at about 1.30 am on the Saturday morning and, while it was parked outside the home of the second appellant, certain events were observed by Mrs Neuwerth and her husband. Here Deuchar and the first appellant assaulted the deceased and thereafter Deuchar and Jacqueline Munro left the deceased's car and walked home. The first stage ends with an abortive attempt by the deceased to escape from the clutches

of .....

of the first and second appellants. Jacqueline Munro, James Proctor and Mrs Neuwerth and her husband were all witnesses at the trial, and their testimony was accepted by the trial Court. From the evidence of Jacqueline Munro and James Proctor the learned Judge concluded that in their company the first appellant -

> ".....had throughout the night of 4/5 January adopted a very high-handed and aggressive attitude to the deceased. He insisted, for example, on driving, on the ground that the deceased was too drunk to drive. It is relevant to refer to an incident which occurred at 21h30 on the night in question, when the accused No 1 stopped at an Auto Bank where the deceased then drew the sum of R10 with the use of his bank card and his secret Auto Bank number. It appears from the evidence of the two witnesses ..... that the 1st accused thereupon asked the deceased for the money and asked the deceased why he had not taken more than R10. Accused No. 1 also stated in the course of this particular journey, with reference to the deceased, 'ek sal die ou vanaand doodmaak'.....
>
> The deceased himself at this stage expressed the desire to go home as his mother was unwell but this Accused No. 1 would not permit and refused to give back the keys of the car to the deceased."

When .....

When the car arrived at New Unified the deceased was sitting in the front passenger's seat next to the first appellant. On the rear seat were sitting the second appellant, Deuchar and Jacqueline Munro. Mrs Neuwerth was roused from her sleep by the arrival of the car and she went to her bedroom window. Her evidence describing the ensuing commotion is summarised thus in the judgment of the Court below:-

> "Accused No. 4....got out of the motor car, went to the passenger side, opened the front passenger door and kicked the deceased several times. She says that the deceased fell out of the car and was then struck by both accused No. 1 and No. 4 with their fists. The deceased fell to the ground and was then picked up by his assailants. This, according to her, occurred several times. The witness then called accused No. 2 to the window and asked why they were assaulting the deceased. Accused No. 2 remarked that his shirt was full of blood. He also said that the deceased had 'tried to rape Peter's chick'. This was a reference to Miss Munro.....When Mrs Neuwerth asked accused No. 2 why they had not taken the deceased to the police station he replied 'hy wil nie gaan nie'.

At .....

> At that time the assault on the deceased was continuing and she heard the deceased plead with his assailants, saying, 'take my money, take my car, but leave me'. The deceased had blood on his mouth and apparently did not try to defend himself.
>
> Mrs Neuwerth stated further that Accused No. 1 and, she thinks, accused No. 4, then tried to force the deceased into the boot. He had been forced almost entirely inside the boot when he managed to break loose, get out and fled into the veld, followed by accused No. 1."

The deceased was recaptured and his car, with the deceased in it, was driven further by the first appellant. The second stage lasts from the departure of the car from New Unified until its arrival at the home of Trevor Morton in Maud Street at about 3 am on the Saturday morning. It was during the second stage that the deceased was robbed of his money at the Auto Bank where he had an account. This chapter is summarised thus by the learned Judge:-

> "The Bank records disclose that a few minutes after 02h00 three amounts of R50 each were drawn in quick succession by somebody. This must have

> been done by either the first or second accused who had obviously succeeded in ..... extracting from him (the deceased) the secret number of his account in the Auto Bank. It is probable that the money was drawn by accused No. 1 from the Bank while accused No. 2 remained in the motor car to prevent the escape of the deceased. Accused No. 1 was later able to give R20 to accused No. 3 and woke up next day to find another R20 on his bedside table. According to his evidence he had spent all his own money the night before.
>
> The 1st and the 2nd accused implicate each other as the person who drew the three lots of R50 in notes."

It is clear that the purpose with which the first and second appellants thereafter travelled to the house in Maud Street was to enlist the services of the third appellant. When they arrived at the home of Trevor Morton at 3 am on the Saturday morning the deceased was in the boot of the car. Trevor Morton was also a State witness. In the judgment of the Court a quo the following account is given of the grisly events of the third and final stage:-

"It .....

"It is clear that the deceased must have been seriously assaulted by Accused No. 1 by that stage, as indeed accused No. 2 testified, because Morton says that when he opened the door on which accused No. 1 had knocked he had observed that there was blood on the sleeve, arm and sides of the T-shirt which the 1st accused was wearing. The boot of the car had been tied by accused No. 2 who took a piece of the deceased's shirt for the purpose. Accused No. 2 says that accused No. 1 had told him to 'make sure that this chap does not get away.' According to Morton accused No. 1 was very tense and in extreme hurry to see accused No. 3. After accused No. 3 appeared both he and accused no. 1 went to accused No. 3's room at the back of the house. When they later emerged accused No. 1 had on a clean shirt. They then left the house. Accused No. 3 said that he would be back at 06h00. On leaving the house accused No. 3 was informed that there was a person in the boot of the motor car and that this person had tried to rape Miss Munro. Morton says that he again saw accused No. 3 at about 04h30 of 5th January. He then noticed blood on his trousers. Morton asked what had happened but received no answer. At about 05h10 he saw accused No. 3 again as he was leaving for the army camp to do guard duty. His clothes at that time were quite clean.....

.....

From Morton's house the 1st accused drove to the Cecil Payne Park, accompanied by the 2nd and 3rd accused and with the deceased still in the boot. The car was driven to a secluded point near the Rifle Range. There were only three eye-witnesses

> as to what happened there: the 1st, the 2nd and the 3rd accused. No one else is involved and it is therefore clear that one or more of the accused must have inflicted the terrible injuries which led to the deceased's death."

During the afternoon of Saturday 5 January 1985 the dead body of the deceased was found lying in some bushes in the vicinity of the Cecil Payne Rifle Range. The deceased's motor car was standing some 25 paces from the body. Except for stockings and shoes the body of the deceased was naked. Torn pieces of clothing were also found at the scene. The rear seat of the car was heavily stained with blood. The doors on the right-hand side of the car were badly dented and there were indications that attempts had been made to set the car on fire. The deceased had died of multiple injuries. These included no less than 43 stabwounds spread over almost his entire body. The right ventricle of the heart and both lungs had been penetrated by stab-wounds. There were incised wounds to the throat and contusions to the face. There was

subdural .....

subdural and internal brain haemorrhage. His penis and scrotum had been partially severed.

Lastly, and with a view more particularly to the appeal by the third appellant, it is necessary to look more closely at the evidence given by him at the trial. In the judgment of the Court below there is the following convenient summary of the third appellant's testimony:-

> "He (the third appellant) says ..... he was awakened at about 03h10 on 5 January by accused No. 1 who had come to the house. The latter's shirt was sprinkled with blood and accused No. 1 told him that he had been attacked and wanted to fight. He says that on leaving the house he saw someone in the boot of the car and he also saw accused No. 2 sitting on the boot. At about 200 yards into the Cecil Payne Park the boot of the car flew open and the deceased managed to get out of the car. Accused No. 1 then assaulted the deceased. Accused No. 3 says that on being told that deceased had tried to rape Miss Munro, he jumped up and kicked the deceased in the face. He was wearing army boots. He also .....put him back in the boot. He said he told the deceased to make things easier for himself by getting in. Accused No. 3 then tied the hands of the deceased, also using part of the deceased's clothing. He says that he did so because accused

> No. 1 told him to do so. They then drove on past the gate, along the rough track that I have already mentioned, to a spot where the vehicle stopped and where the deceased was assaulted. At one stage of the attack on the deceased the deceased was lying next to a fence in front of the car but stood up, and the 1st and 2nd accused, according to the 3rd accused, then assaulted him. The 3rd accused says that the 2nd accused then told him, 'go for him', and he, the 3rd accused, was afraid to disobey. The deceased, according to accused No. 3, was then placed in the back seat of the vehicle and accused No. 1 asked accused No. 2 to give him the knife .....
> .....
> According to accused No. 3, accused No. 2 said 'this guy must die tonight.' He says he was asked again to assault the deceased and he did so by kicking the deceased. The deceased then, according to accused No. 3, moved into the bushes and that was the last he saw of him .....
> Accused No. 3 then assisted in the attempt to set fire to the car and to roll it over. The motor car got dented in the process. Accused No. 3 says that he then left the scene on foot. Accused No. 1 followed and caught up with him, and later on gave him R20 in bank notes."

A reading of the record in this case reveals, in my opinion, that the third appellant was a poor and unconvincing witness. Nor, for that matter, did the first and second

appellants .....

appellants fare any better in the witness-stand. In testifying each appellant in turn was evasive more particu= larly in regard to the one crucial issue in the case: in what circumstances did the witness see the deceased for the last time? And in what condition was the deceased then? The reason for their extreme shiftiness on this point is, of course, not far to seek. In the situation which obtained in the early hours of that Saturday morning at the Cecil Payne Rifle Range an admission on the part of any of the three appellants that he had seen the mutilated corpse of the deceased would at once have called for awkward explanations. The evidence of the third appellant that his last glimpse of the deceased was that of the latter walking away into the bushes is a statement which, in all the circumstances of the case, hardly merits serious consideration; and it was rightly rejected as false by the trial Court. All three appellants were transparently untruthful in trying to explain the purpose of their visit to the Cecil Payne Park. Their story

was .....

was that they went there to smoke dagga and that after their arrival the second appellant gave his knife to the first appellant in order to enable the latter to prepare a dagga pipe. I might here add that in the course of his evidence the third appellant persisted with the ridiculous suggestion that while he was witnessing (and participating in) serious assaults upon the deceased he (the third appellant) nevertheless cherished the hope that the expedition to the Cecil Payne Park would end with the deceased amicably joining the three appellants in a quiet dagga smoke. In connection with the purpose behind the visit to the Cecil Payne Park the learned Judge correctly observed in his judgment:-

> "There was no need to take the deceased with them to smoke dagga. There was no reason to go to the Rifle Range at all for that purpose. They could much more easily and conveniently have smoked dagga outside Morton's house where according to Morton they had in the past smoked dagga. Their actions at the Rifle Range were not the actions of persons wishing to smoke dagga and they did not in fact smoke any dagga at the Rifle Range."

The trial Court came to the conclusion that the three appellants took their captive to the Cecil Payne Park in order to murder him there. In my view the inference is irresistible that when the party departed from Maud Street such was indeed the common intention of the first and second appellants. Whether such intention was already at that stage shared by the third appellant appears, in my view, to be open at least to some doubt. However that may be, it is quite clear, I think, that very soon after the first appellant had driven the car into the Cecil Payne Park there was no vestige of uncertainty in the mind of the third appellant that his two companions intended to kill the deceased. It is no less clear that thereafter the third appellant himself acted in furtherance of that object, and fully associated himself therewith, by taking an active part in the serious and sustained assaults which culminated in the callous butchering of the deceased. In my view there are no valid grounds for

disturbing .....

disturbing the trial Court's conviction of the third appellant of the murder of the deceased.

I consider next the appeals of the first and second appellants. What looms large in this inquiry is the true motive which impelled the decision of the first two appellants to kill their captive. Dealing with the evidence of Mrs Neuwerth that the second appellant had given as a reason for the assaults committed upon the deceased during the first stage that the deceased had tried to rape Jacqueline Munro, the trial Court in its judgment on the merits pointed out the following:-

> "It is to be noted that Miss Munro herself emphatically denies that the deceased made any sexual advances to her, or that he tried to do so, and the Court is satisfied that the reference by the second accused, and later on by accused No. 1, to an attempted rape is a pure fabrication."

In the course of his evidence the first appellant testified to the effect that already when the car was parked

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at the home of the second appellant the deceased had made unwelcome homosexual advances to him; that the deceased did the same while he and the first appellant were seated in the car at Cecil Payne Park; and that the first appellant was so angry at the last-mentioned conduct of the deceased that he struck out violently at the deceased while he (the first appellant) had the knife in his hand. In this connection it is enough to say that I agree entirely with the following remarks of the learned trial Judge:-

> "It is not reasonably possible that a person who had been subjected to the kind of treatment that the deceased had endured at the hands of the first and second accused for a number of hours would make homosexual advances towards one of his assailants."

Counsel for the first appellant conceded that the charges that the deceased had been guilty of sexually molesting either Miss Munro or the first appellant himself were entirely groundless. Counsel nevertheless urged upon us that since

the first appellant had spent the whole of the Friday drinking at the Killarney Hotel, and much of the night in drinking and smoking a mixture of dagga and Mandrax, some idea of sexual misbehaviour on the part of the deceased may have implanted itself quite arbitrarily in the befuddled mind of the first appellant; and that he might have been actuated to violence by an honest if entirely mistaken belief. In regard to the existence of extenuating circumstances the onus was on the first appellant, and he showed himself to be a lying witness. The possibility here raised by counsel amounts, I think, to no more than speculation. Then it was said that the trial Court had paid insufficient regard to the fact that the first appellant had an anti-social personality. It is likely, I consider, that most criminals who commit crimes involving serious violence on others exhibit this personality trait. But whether or not a convicted murderer's psychopathic personality is to be regarded as an extenuating circumstance is a matter for the trial Court in the light of the particular

facts of the case before it. In the present case the trial Court had the advantage of full evidence affecting the first appellant's personality, and in the exercise of its discretion it considered that his anti-social tendencies did not represent an extenuating circumstance. As is well-known, the decision as to the existence or otherwise of extenuating circumstances is, in the first instance, essentially one for the trial Court.

In its judgment dealing with the issue of extenuating circumstances the trial Court said of the first appellant:-

> "The Court finds that while the accused may have been influenced to some extent by the use of alcohol and drugs this did not affect him to such an extent as to reduce his moral blameworthiness. The intention to kill was not one formed on the spur of the moment; on the contrary the deceased was held as a prisoner and taken against his will to a place where he was to be killed."

On behalf of the second appellant it was submitted that at the relevant time he was obviously under the influence

of .....

of the stronger personality of the first appellant. This fact, however, was fully appreciated by the trial Court. Of the second appellant it was said in the judgment on extenuating circumstances:-

> "Accused No. 2 was plainly influenced by accused No. 1 who was the dominant personality and actor, to the extent that accused No. 2 did what he was told to do. We have taken this factor into account as well as the fact that in his case too there is a history of drug addiction and abuse of alcohol. He had also partaken of drinks and drugs on the night in question but again, we find, not to the extent of reducing his moral blame= worthiness for the crime he committed. He had every opportunity to disassociate himself from the purposes of the first accused, but instead of availing himself of the opportunity he co-operated fully in carrying them out."

For both the first and the second appellants much was sought to be made in argument of the so-called sub-culture or twilight world to which, as drug-addicts, they belonged. It was said that their wretched way of life involved a system of abnormal and debased social and moral values. Perhaps this is so; but it cannot alter the fact that in weighing the

moral reprehensibility of their crime a Court will be guided by the more conventional social and moral values generally accepted in a normal community.

Having paid due regard to all the arguments advanced on behalf of the first and second appellants I remain unper= suaded that in considering the issue of possible extenuation in their cases the trial Court misdirected itself in any way, or that it committed any irregularity. Having regard to all the circumstances of this case I further agree with the submission of counsel for the State that it can hardly be said that the trial Court's finding on this issue was one to which no Court could reasonably have come. Accordingly there is no valid reason for disturbing the finding of the Court below.

In the result the appeals of the first, second and third appellants are dismissed.

G G HOEXTER, JA

SMALBERGER, JA)
NICHOLAS, AJA) Concur