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\CCC CASE NO 487/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CHRISTOPHER PIETERSEN APPELLANT

and

THE STATE RESPONDENT

CORAM: NESTADT, VAN DEN HEEVER et HOWIE JJA

DATE HEARD: 8 MARCH 1994

DATE DELIVERED: 24 MARCH 1994

NESTADT, JA:

This is an appeal against the death sentence. It was imposed by WILLIAMSON J sitting in the Cape Provincial Division consequent upon the appellant having

been found guilty of murder.

The crime took place on the evening of 11 August 1990 in the district of Kuilsriver. It was preceded by a series of events which occurred earlier that day and which it is necessary to briefly recount. The appellant was in the company of two others. They decided to embark on what may be described as an orgy of violence. The appellant in his evidence explained their state of mind thus:

> "Ja mnr Pietersen u het getuig dat die drie van u die Saterdag toe hierdie dinge gebeur het, feitlik the hele dag uit was om te beroof soos u dit gestel het. --- Korrek.
> Dit beteken soos ek dit verstaan dat al drie van u wou daardie Saterdag rooftogte pleeg. --- Korrek.
> En elke keer as daar 'n geleentheid was om 'n rooftog te pleeg, dan was die drie van u van plan om iemand te beroof. --- Korrek."

Within the next few hours they carried out their nefarious intent. They randomly committed a number of

robberies. But the appellant, who was armed with a panga, went further. He also killed two people. One was a woman who was raped before being stabbed and strangled. In each case the victims were innocent people whom the appellant's group came across in the area. Details of these crimes appear from the judgment a quo. This is because they formed the subject-matter of various other counts that the appellant (with the two others as co-accused) faced in the court below. In the case of the appellant, he was convicted of two counts of robbery (with aggravating circumstances), one of culpable homicide, one of rape, one of murder (of the woman who was raped) and one of assault with the intent to do grievous bodily harm. He was sentenced to a total period of 30 years imprisonment for these crimes.

It was shortly after the last of the crimes

referred to that the murder with which this appeal is concerned was committed. The trial judge succinctly described what happened as follows:

> "Na die vorige insident is die beskuldigdes dans toe. By die dans ontdek beskuldigde 3 sy klere is bloedbevlek. Hulle besluit om na beskuldigde 3 (the appellant) se huis te gaan om ander klere aan te trek. Op pad kom hulle Solomon teë. Beskuldigde 3 vra hom vir geld en gryp hom om sy nek. Hy skud hom en kry R2,50. Daarna besef hy dat Solomon die man is by wie hy Mandrax koop en dat hulle mekaar ken. Hy dink Solomon sal later wraak neem en hy besluit dat Solomon doodgemaak moet word. Solomon word toe met die panga aangeval en op 'n afgryslike manier stukkend gekap. Hy is doelbewus deur beskuldigde 3 doodgemaak."

(Arising from the theft of the R2,50, the appellant was convicted on a further count of robbery. For this he was sentenced to two years imprisonment. His total period of imprisonment was thus 32 years.)

Our task is to determine whether, having due regard to the presence or absence of any mitigating or

aggravating factors as also the purposes of punishment, the death sentence is the only proper sentence. Plainly, what has been stated proclaims a number of seriously aggravating factors. The deceased (aged 35) was a defenceless victim of a ruthless and calculated decision by the appellant to kill him. The appellant's motive was a base one. It arose from his realisation that Solomon knew him. The appellant feared that having robbed him "hy gaan my weer kry...hy en sy...bende...of hy kan vir die polisie gaan sê". The appellant, having urged his two co-accused to help him kill the deceased, attacked him in a most brutal, vicious manner. The doctor who performed the post-mortem examination summed up his findings by saying that there were "'n enorme klomp steekwonde" and that the cause of death was "veelvuldige beserings waarby

prominent is die kopbeserings en die beserings aan die borskas". Obviously the appellant's intention was one of dolus directus. The trial judge's impression was that he was not remorseful of what he had done. And finally there is the consideration that the appellant had shortly before killed two others. So he would seem to have had little regard for the sanctity of human life. This must make the crime even more serious. In all the circumstances there can (subject to what I say later regarding the appellant's innate disposition) be no quarrel with the view of WILLIAMSON J that:

> "(J)ou misdade (was) gruwelik, uiters selfsugtig en baie wreed...jy is a gevaarlike mens en jy het geen respek vir jou medemens. Die doelbewuste en koelbloedige manier waarop jy besluit het om Solomon te vermoor sodat hy nie wraak vir die roof op hom teen jou kan neem nie, laat 'n mens sidder".

I must say that these factors would normally

compel one to conclude that the death penalty had to be imposed. There are, however, certain weighty mitigating factors that must be taken account of. The appellant is a first offender. Obviously this is an important consideration in his favour. But of even greater significance is the appellant's age. He was at the time nineteen years and five months. He was therefore still a teenager. The tendency of our courts is not to impose the death sentence on persons of this age (S vs Dlamini 1991(2) SACR 655(A) at 666-8). They are prima facie regarded as emotionally and intellectually immature (S vs Cotton 1992(1) SACR 531(A) at 536 c). In casu, even though the appellant (who reached standard five at school) worked as a fisherman, there is no reason to think that he had a maturity beyond his years. I say this notwithstanding

the fact that he was, it seems, the leader of the group. Thirdly, it is clear that the appellant acted (to some extent impulsively) under the influence of alcohol and drugs. I do not propose to describe what was consumed and when this took place. It suffices to say that at regular intervals during the day the appellant drank beer and wine and also smoked what he referred to as "buttons". This is apparently a mixture of dagga and mandrax. Of more importance is what effect these had on him at the time of the murder of Solomon. The appellant's testimony in this regard was the following:

> "(H)et u nog ge-'float'" --- Ja...Wat het u bedoel deur 'float'? --- Ek het dronk geraak in my kop...So het u die hele tyd ge-'float' so. --- Soos ek daar gestaan het ja het ek duiselig geraak in my kop.
> Sal u vir ons kan miskien verduidelik wat dit beteken, wat is dit. Is dit soos 'n droom? --- Ja so, hy gee jou 'n wrede gevoel ook."

He goes on to describe how he felt after killing the

deceased. He intended to return to his house. Instead "het (ek) in die bos ingehardloop en daar...gebly...Daai is die tyd wat - toe kan ek mos nou nie glo van die dinge nie, want - want ek was - wat ek weer by my vollende positiewe kom, en wat die goed nou uit my uittrek, toe kan ek nou nie glo van die dinge - toe het ek in die bos ingehardloop". The impression one gains from this is that the appellant may not be a naturally callous person and that his conduct on the evening in question was possibly out of character. It is true that the appellant concedes that the plan to rob was made before he began to drink; and that he realised that his actions thereafter were wrongful. Moreover the appellant was mindful of the need (as he saw things) to prevent the deceased from later identifying him; and that he asked his two co-accused to help him kill the

deceased. Even so, it is clear that by the time various crimes were committed and in particular the murder of Solomon, the appellant's senses were materially blunted. This is the effect of his evidence. And the court a quo, with justification, found the appellant to be a particularly candid witness. Finally there is the consideration that it can hardly be said that the appellant, by the time the murder of Solomon was committed, had had time to reflect on his previous crimes.

The value judgment that has to be made, namely whether the death sentence is imperatively called for, is in the circumstances of this case not an easy one. I do not underestimate the gravity of the appellant's crime; nor the feelings of outrage that it would cause society to have. Obviously the retributive and

deterrent purposes of punishment must be satisfied. But looking at the whole picture, including the cumulative effect of the mitigating factors referred to, I do not believe that the death sentence is the only proper sentence. In my opinion a proper sentence is one of 25 years imprisonment (to run concurrently with the appellant's other sentences). I should add that there is reason to think that the appellant's consumption of drugs is due to an addiction. Presumably the prison authorities will provide the appellant with treatment for this.

The appeal succeeds. The death sentence is set aside. There is substituted (in respect of count 3, being the murder of Jan Johannes Solomon) a sentence of 25 years imprisonment. This sentence is to run concurrently with the other sentences of imprisonment

imposed on the appellant.

H H NESTADT, JA

HOWIE, JA - CONCURS

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J U D G M E N T

VAN DEN HEEVER JA

Despite the comparative youth of appellant and his having had liquor before he killed Jan Solomon, I do not, with respect, agree that those were mitigating factors in the circumstances of this case. That he had no previous convictions also carries little weight. True, he had not previously been convicted in a court of law. A criminal record normally gives the court an indication of the manner of man it has to deal with. The mere listing of the other counts on which appellant was convicted in the present case, does not reveal the awesome extent of the violence and brutality of which he is capable. The incidents which preceded the slaying of Solomon ("the deceased") and took place over many hours gives similar insight into his personality and propensities. The deceased did not die as the result of a momentary impulse, the squeezing of a trigger, but in deliberate, persistent, personal and bloody attack. The photograph of and post mortem report relating to the deceased, show that his face was segmented by four deep

parallel blows. Two of them shattered bone after cleaving flesh. There were wounds of the same kind to the torso and left arm and - apart from a number of lesser injuries - at least three penetrating wounds in the abdomen through which the gut had been eviscerated. Those lesser wounds which appellant did not inflict personally, he insisted his companions do.

In S v CEASER 1977 (2) SA 348 (A) at 353 B-F, Miller JA had this to say of "inherente boosheid" or inner vice:

> "A finding that a person acted from inner vice in the commission of a crime does not imply that he has manifested vicious or wicked propensities throughout his life; nor is a long history of wickedness necessary to such a finding. Primarily, the question in any given case (in the context under discussion, i.e. with reference to youth as a mitigating factor) is whether the crime in question stemmed from the inner vice of the wrongdoer, whether he be a first offender or one with many previous convictions. It is in order to answer that question that the Court will examine, and take into account as indicia, the wrongdoer's motive, personality and mentality, past history and whatever else is relevant to the inquiry. And, of course, it will take into account the nature of the crime and the

> manner of its commission ... The concept of inner vice as the genesis of a grave crime committed by a youth throws into proper contrast the case of a crime (perhaps equally dastardly) committed by another youth who has, largely because of his youth and its attendant degree of inexperience, acted in response to outer influences; e.g. under the pressure and stress of intense emotions induced by another ...

(I interpose, as Cotton was found to have acted in the case referred to in the majority judgment)

> or under the direct or indirect influence of one older than himself, or under circumstances which to him, because of his youth and inexperience, were provocative or emotive."

Appellant and his two companions decided already during the morning to embark on a day spent in robbery. Appellant took the lead in the events that followed. There is no suggestion that in doing what he did he was acting in response to any pressure, stress or intense emotion. On the far-fetched assumption that he lacked the imagination to envisage the damage he would cause by wielding the panga as vigorously as he did, by the time the deceased was killed his lack of imagination had been

supplemented by experience.

Appellant's deeds belie his words in the passage in appellant's evidence from which the inference is drawn that he is not naturally a callous person. There are rare cases where the violence involved in robbery amounts to no more than snatching away by force the handbag of a woman whose hand has not the strength to retain possession of it. Normally robbery is doubly callous, of both the person and the pocket of the victim. Appellant and his friends were on the prowl and prepared to prey on whoever came their way from the time that they came to their decision. He was already armed, and the panga was an improved replacement for what he had had earlier, not a sudden temptation.

It is against that background also that the effect of the liquor he had consumed must be assessed. In S v NDHLOVU (2) 1965 (4) SA 692 (A) at 695 C-F. Holmes JA said:

> "Intoxication is one of humanity's age-old frailties, which may, depending on the

> circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness. ... as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design."

So too the learned author of Hiemstra's SUID-AFRIKAANSE STRAFPROSES (5th ed p 680-1) agrees that:

> "(a)fstomping van die mens se oordeelsvermoeë, selfbeheersing en verantwoordelikheidsin deur drank- of ander bedwelming is sedert die dae van Noag 'n bekende menslike swakheid ... Vanselfsprekend is dit 'n relevante faktor waar die doodvonnis oorweeg word. ... Ewe vanselfsprekend is dit nie drank- of dwelminname as sodanig waaraan oorweging gegee word nie maar die uitwerking daarvan op die beskuldigde se vermoëns, hetsy normatief, kognitief of affektief".

The decision to indulge in violence had been taken long before appellant's faculties were affected. His evidence of events before the three met up with the deceased does not suggest a befuddled mind. Having

slashed at the woman who had been raped to silence her, he did not brandish the panga as they proceeded to the dance hall, but hid it under his clothing at his side. He knew better than to take it into the hall with him, so hid it under a rubbish bin at the gate outside. As soon as he got into the hall and the light, he noticed the blood on his trousers and shoes, and took a logical self-interested decision: "... daar het ek toe ... gesê ons moet gou-gou huis toe gaan, want ek wil my ander klere gaan aantrek, ek is vol bloed". When they left the hall for this purpose, he took the panga and again concealed it at his side. And the robbery which led to the death of the deceased was merely a continuation of conduct which had been decided on earlier, albeit the liquor probably exaggerated appellant's innate callousness and capacity for violence beyond what might otherwise have found expression.

A sentence of imprisonment (moreover one that, being less than the total imposed in respect of the

other events of the evening and to run concurrently with that, amounts to a declaratory order rather than a punishment) does not in my view satisfy the usual sentencing criteria in the circumstances of this case. I would dismiss the appeal.

L VAN DEN HEEVER JA