IN THE SUPREME COURT OF SO
(APPELLATE DIVISION)

In the matter between:

ROBERT JOHN McBRIDE ..... appellant

and

THE STATE ..... respondent.

CORAM: CORBETT, VILJOEN, HEFER, GROSSKOPF et VIVIER JJA.

Date of appeal: 26 February 1988

Date of judgment: 30 March 1988

J U D G M E N T

CORBETT JA:

Shortly after 21h30 on 14 June 1986 what is popularly known as a "car-bomb" exploded outside the Parade Hotel in Marine Parade, Durban. It was a Saturday evening and the two bars in the hotel, "Magoo's" and the "Why Not", were filled to capacity. These bars have windows in their

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outer walls and at night the people in the bars are visible from outside the hotel. The effect of the explosion was devastating. Three persons, all women, were killed and eighty-nine were injured. The Parade Hotel building was very badly damaged: the doors and windows were all blown out and there was structural damage as well on all floors of the hotel. Other buildings in the vicinity were also damaged, but not as badly as the Parade Hotel. Debris from the explosion was scattered over an area described by a circle with a radius of 500 metres from the detonation point. It was obviously a very powerful explosive device.

In February 1987 the appellant, Robert John McBride, and a Miss Greta Margaret Appelgren (I shall refer to her as accused no 2) appeared before Shearer J and two assessors in the Natal Provincial Division on a number of charges including three charges of murder (counts 14, 15 and 16), one of attempted murder (count 17) and one of con-

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travention of sec 54(1) of the Internal Security Act 74 of 1982 - terrorism (count 18). Charges 14 to 18 inclusive arose out of the car-bomb explosion at the Parade Hotel, the State allegation being, generally, that the appellant and accused No 2 were responsible for having planted the car-bomb, with the intent necessary to constitute the various offences charged. The other charges, some of which applied only to the appellant, related to various offences under sec 54 of the Internal Security Act (counts 1 to 5 inclusive, counts 12, 13 and 18 to 24 inclusive), another charge of murder (count 6) and four charges of attempted murder (counts 7 to 10 inclusive). Both accused pleaded not guilty on all counts.

After a lengthy trial the appellant was found guilty on the following counts: count 1 (furthering the achievement of the objects of the African National Congress ("ANC"); count 3 (terrorism, in the form of attempting,

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on 6 January 1986, to plant limpet mines on certain transformers at an electricity sub-station in Durban); count 4 (terrorism, in the form of the detonation of limpet mines at another electricity sub-station in Durban on 21 March 1986); count 5 (terrorism, in the form of an attack upon the home of a Mr and Mrs Y P Klein in Wentworth, Durban during the night of 30 April/1 May 1986, in which hand grenades were hurled into the bedroom of the house and both Mr and Mrs Klein were injured by shrapnel); counts 7 and 10 (lesser verdicts of assault with intent to do grievous bodily harm) and count 11 (aiding a prisoner to escape), these counts all relating to a commando-like attack upon the Edenvale Hospital, Pietermaritzburg on 4 May 1986, with the object of "rescuing" from police custody a prisoner known as Gordon Webster, who was being treated in the hospital, and to the successful achievement of this "rescue"; count 12 (concealing and harbouring a terrorist, to wit the aforementioned Webster, over the period 4 to 9 May 1986);

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count 13 (the placing of an explosive device in a parking garage in contravention of sec 54(2)(a) and (f) of the Internal Security Act, the evidence establishing that the intention was not that the device should explode, but that its discovery should cause disruption of traffic and general alarm); counts 14 to 18 inclusive, the substance of which has been stated, and in regard to the three convictions for murder (counts 14, 15 and 16) the Court found, by a majority, that there were *no extenuating circumstances*; count 19 (terrorism in the form of the detonation of a limpet mine, placed in a refuse bin, in a Durban street on 22 June 1986); count 20 (terrorism in the form of exploding limpet mines on a vegetable oil tank in Durban on 22 June 1986); count 21 (terrorism in the form of exploding explosive devices on certain oil pipe-lines in Wentworth, Durban on 22 June 1988) — the acts to which counts 19, 20 and 21 relate having been committed on a single expedition; count 22

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(terrorism in the form of placing and detonating limpet mines on certain water pipes in the vicinity of the R628 freeway at Westville, Durban on the night of 29/30 June 1986); and count 23 (terrorism in the form of establishing certain caches containing arms, ammunition and explosives in Wentworth, Durban). It is not necessary to detail the counts upon which accused No 2 was found guilty, save to say that she was acquitted on all the charges relating to the car-bomb explosion at the Parade Hotel.

In respect of counts 14, 15 and 16 the trial Judge imposed death sentences on appellant; while in respect of the other counts on which he was found guilty the appellant was sentenced to various terms of imprisonment. Shearer J further granted leave to appeal to this Court against the finding, in regard to counts 14, 15 and 16, that there were no extenuating circumstances. That is the appeal now before us.

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The facts relating to the car-bomb explosion and appellant's participation in the crimes connected therewith are hardly in dispute and the following account is culled mainly from appellant's own evidence.

At the time of the car-bomb occurrence the appellant was 22 years and about 11 months old. He had met the aforementioned Gordon Webster in 1983 and a friendship had developed between the two of them. Webster was a member of the ANC and he recruited the appellant as a member towards the end of 1985. Appellant was assigned to the military wing of the ANC, known as "Umkhonto we sizwe", under the "special operations division" and received training in Botswana in the operation of weapons, such as rifles and pistols, and the use of explosives. Initially his function was to provide transport and establish arms caches in various places, under the command of Webster. Later he undertook responsibility for sabotage operations. He then

selected the targets and planned and, for the most part, executed the attacks. The convictions on the various counts detailed above bear witness to the scope of his activities in this sphere.

In June 1986 the appellant went to Botswana to try to arrange compensation for the dependants of an ANC member who was shot and killed by the South African police when Webster was arrested. He returned to his home in Wentworth, Durban on 13 June 1986. He thereupon learned that a nation-wide state of emergency had been declared and many people, including community leaders and certain of his friends, had been detained. He heard stories of police brutality. He himself saw people being rounded up for detention. He read reports of what was happening in the press. All this enraged him. He saw it as a "calculated form of repression" against his people. As a member of the ANC and "Umkhonto we sizwe", he felt that he had to do "something about it". He thought about it and on the

morning of 14 June decided to make a car-bomb. As he put it —

> "If they want war, I am going to give them war. That's what was going through my mind".

He then set about making the bomb. He purchased a motor car, a powder-blue 1978 Ford Cortina, from a used-car dealer and paid for it out of the compensation money which he had brought from Botswana. After that he went into town (ie Durban) to choose a target. He wanted a target that was centrally situated so that the effect of the explosion could not be hidden away. He eventually selected Hyperama House and Home ("Hyperama"), a large glass-fronted building in West Street. His intention was to "flatten that thing, destroy it". Later in the day, after dark, he fetched explosives from an arms cache. With these he constructed the bomb in the boot of the Cortina motor car. In addition to the explosive materials

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and detonating devices he also included 200 AK47 bullets and a number of pieces of burglar-proofing iron (which he cut for the purpose) to act as shrapnel when the bomb went off.

He had earlier told one of his ANC accomplices Matthew Lecordier (who gave evidence as a State witness) to make himself available that evening to meet some ANC friends. He fetched Lecordier at about 19h45. He had also arranged to meet accused No 2 on the pretext of going to a drive-in cinema. She came in her sister's motor car, a greenish-brown Mazda 323. Appellant and Lecordier drove off in the Cortina; and accused No 2 was instructed to follow in the Mazda, to park in Field Street, which turns off West Street close to Hyperama, and to wait for appellant and Lecordier. Appellant then headed for West Street. On the way he told Lecordier for the first time of the bomb in the boot of the car. (This

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does not accord with the evidence of Lecordier, who says that he was told about it earlier, but nothing turns on this. Appellant described to Lecordier his plan to park the motor car in West Street outside Hyperama and to detonate the bomb there. Upon their arrival at Hyperama appellant parked the Cortina and waited for accused No 2 to pass in the Mazda. She did. Appellant then told Lecordier that he was going to initiate the explosive device. Lecordier's response was to tell appellant that he was "wasting 50 kg's of explosives" there and he asked the appellant why he did not take the bomb down to the Marine Parade "because the people want White destruction". Appellant demurred, saying that it was not the policy of the ANC to attack White people. An argument then ensued, which became fairly heated. Ultimately appellant succumbed to Lecordier's persuasions and did not activate the bomb in West Street. In the course of the argument Lecordier had mentioned a verandah or balcony

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on the Marine Parade where White people sat and had suggested that the car-bomb be placed there. Appellant asked Lecordier to show him this place. Appellant and Lecordier then got out of the Cortina and walked to Field Street, where they joined accused No 2. They entered her motor car and she was instructed to proceed to the Marine Parade. They drove down the Marine Parade and at a certain point Lecordier indicated by gesture the hotel balcony in question.

They then drove back to the Cortina where it was parked in West Street. Appellant and Lecordier drove from there in the Cortina, accused No 2 having been told to follow in the Mazda. They parked the Cortina in Pine Street and then appellant got into the Mazda with accused No 2, leaving Lecordier in the Cortina. Appellant and accused No 2 proceeded in the Mazda from there back onto the Marine Parade via West Street. They passed the hotel with the balcony, but there was no available parking place outside

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it. They carried on and found a parking place outside the Parade Hotel and parked there. Accused No 2 waited in the Mazda, while appellant walked back to where the Cortina was standing. He got into the car with Lecordier and they drove to the Marine Parade to where the Mazda was parked. On appellant's instructions accused No 2 moved the Mazda out of the parking bay and parked it further down the road. Appellant parked the Cortina in the bay just vacated by the Mazda. Appellant then activated the bomb fuse, which was set for a maximum delay of 15 minutes. It was exactly 21h30. Thereafter he and Lecordier waited in the Cortina for about two minutes so as not to attract attention. They then walked to where the Mazda was parked and drove away in it. They first stopped at a filling station to fill up with petrol. Acting under appellant's instructions, accused No 2 thereafter drove to Ridge Road, via Sydenham Hill, and parked near the police radio station. Appellant's reason for instructing accused No 2

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to do this was apparently that he expected the police to seal off the area and start searching for the culprits soon after the bomb exploded; and he had been taught that if you follow those who are looking for you they will never catch up with you. At that stage appellant told accused No 2 about the bomb, which according to his calculations had by then exploded. She appeared to be shocked by this information. They then drove home to Wentworth.

On this and other State evidence the trial Court found appellant guilty of the murder of the three women who died when the car-bomb exploded. The Court further held that there was a reasonable possibility that accused No 2 had made no common purpose with appellant and Lecordier and for that reason she was acquitted on the murder counts and other charges arising from the Parade Hotel episode. Thereafter the Court heard further evidence on extenuating circumstances (certain such evidence having been led before conviction). To understand the judgments given on extenuation it is necessary to make some reference to this evidence.

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The causes of the appellant's behaviour, and in particular his actions in planting and detonating the car-bomb at the Parade Hotel, are to be found partly in his family background, his upbringing and early family life, the influence of his father, Derrick McBride, and the social circumstances in which he lived.

The appellant was born in Wentworth, Durban in 1963. In accordance with the race classification laws of the country he was classified as Coloured. Wentworth is a Coloured group area. His father was also classified as Coloured, but one of Derrick McBride's brothers is classified as White. Derrick McBride's mother tended to reject him because of his darker skin and general appearance. This embittered him and engendered in him an antagonism towards his brother. He became very active politically and, inter alia, was present at the meeting which produced the Freedom Charter. After an attempt to study medicine

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at the University of the Witwatersrand which was apparently frustrated by his mother, Derrick McBride eventually qualified as a teacher. He came to live in Wentworth in 1957, but did not settle down in the teaching profession. In the 1960's he abandoned teaching to become a welder and after a struggle established a welding business in Wentworth. In 1958 he had married Doris van Niekerk, the daughter of a White father and a Coloured mother. The appellant was their first child and only son. A close relationship developed over the years between father and son. Derrick McBride was evidently a man with a strong, assertive personality and he was a potent influence upon his son during the latter's formative years. He encouraged his son to read the political and history books which were available in their home and he imparted to his son his own political ethos, including his hatred of White people. He told his son that "he (had) never come across

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a White man in history who (had) done anything honest".

The appellant's schooling was in Wentworth, apart from a year (1976) spent at a school in Kimberley. During the period 1976-80 he was actively involved in the unrest which occurred in schools, boycotts and demonstrations, aimed at the achievement of better educational standards. He experienced several clashes with the police, which angered and depressed him. Appellant matriculated in 1980 and was accepted into the faculty of mechanical engineering at the University of Natal in 1981. He was a good scholar and a keen and talented rugby player. At this stage appellant endeavoured to become assimilated in the White community. Apart from attending a "White" university, he joined and played for a "White" rugby club. His girl friend at the time was fair-haired and "White-looking". This attempt to "try for White" (as it was described) failed. Appellant never felt accepted. On

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the rugby field he had to endure insults from opposing team members and even some of his own club members made snide remarks behind his back. When out with his girl friend, he found himself exposed to antagonistic comments and behaviour. His academic career at Natal University was also unsuccessful and he left at the end of June 1981. He joined his father's welding business and learned the welding trade. Towards the end of 1981 he joined a firm in order to qualify as an instrument fitter. This he did and thereafter worked for a while on the Sasol 3 project at Secunda. In February 1982 he returned to work as a welder in the shipyards at Durban. He then decided to become a teacher and in 1983 enrolled at the Bechet College of Education, a college for the training of Coloured teachers. It was here that he met Gordon Webster, a fellow student, and the two became close friends. Eventually, as I have indicated, Gordon Webster recruited the appellant for the ANC.

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Wentworth, where the McBride family lived, was described in evidence as a Coloured ghetto, "one of Durban's most depressed communities". The community was founded when the authorities moved Coloureds, made homeless by the Group Areas Act, into the military barracks at Wentworth which had fallen vacant. Housing and educational facilities were poor. Unemployment was high. Alcoholism, gangsterism and crime generally were rampant. Appellant's parents moved their home twelve times in their first four years of marriage before they were allocated a house; and then discovered that it was not the house they had been promised. They complained, but obtained no redress. Appellant had many clashes with gangsters. He was twice stabbed and on one occasion shot and killed a gangster in self-defence.

While at Bechet College appellant was angered by the poor facilities available. During the 30 years

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of its existence the college had not had adequate, fixed premises of its own. He was elected to the Students' Representative Council ("SRC"). During the period August to October 1985 students generally in the country were reacting to the political situation and venting their grievances by means of stay-aways and boycotts. At Bechet College the grievances of the students were focussed mainly on the lack of permanent premises. Appellant, as a member of the SRC, participated in attempts to obtain redress from the authorities. According to him, they had no success. On the contrary members of the SRC were victimized. They were suspended from attending classes and the SRC was banned. Asked during his evidence-in-chief about his feelings at this point (the end of 1985) as a Coloured person trying to advance himself, appellant replied:

> "Well, since we were suspended and banned, after dealing with the issue at Bechet in a peaceful, legal manner and what came out of it - that

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> we were suspended and so on - I decided that it can't work. If you can't progress from within the system in any way, your progress is determined by those who you have to work with, those in authority. And there is just no hope for a so-called Coloured person to really progress independent of the constraints of the authorities. In other words they channel you and your progress is channeled and it's inhibited and I feel it's designed in this way to keep a person just at a certain level where they want you".

This was clearly a watershed moment in appellant's life because shortly thereafter he joined the ANC and embarked upon a career of criminal violence.

The reasons of the majority of the Court a quo for the finding of no extenuating circumstances were expressed by the trial Judge in the following words:

> "The question with which we are here concerned is whether there exist circumstances which mitigate morally albeit not legally the guilt of Accused no 1 in respect of the murders of Angelique Pattenden, Marchelle Gerrard and Emily van der Linde, all of

whom were found to be at a place where it would be expected that by far the most of the possible victims would be persons classified by the government of the day as White. That is the background against which the Court must conclude that there are or are not circumstances which morally redeem the actions of Accused no 1. I accept beyond question that Accused no 1 felt himself representative of people who had been relocated to Wentworth by Group Areas Legislation, that in the course of time a sense of deprivation had turned into frustration, frustration into anger and anger into violence. I accept also that the immediate spur of the actions with which we are now concerned was the proclamation of a nationwide State of Emergency on June 12th 1986. I suppose also that it is easy when you feel oppressed to associate the actions of those who made the proclamation with those who have a White skin.

We live in a country in which unhappily many of the normal incidents of freedom have been inhibited or removed by

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legislation in which long years of White domination have blurred the fine edges of moral judgment. The real dilemma that confronts this Bench is derived from the simple proposition that according to any morally acceptable code in any civilised country you do not punish persons presumed to be innocent for the sins of those who offend you. We do not know what were the political affiliations of Angelique Pattenden, Marchelle Gerrard or Emily van der Linde. To kill them for what you believe to be the sins of a government is to offend as surely against the primary moral code as those you believe to have offended, and to punish them for a skin presumed to be White is as racist as the very propositions that Accused no 1 opposes. In reaching this conclusion we, the majority, take into account all the aspects of the Accused's personal history that have been placed before us. The influence of his father which he rejected and then re-embraced, the inferior educational and other institutional facilities, the petty indignities inflicted on him by Whites, the inadequacy of any

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constructive protest machinery and then by the national emergency with its effect on the friends of Accused no 1 and the family of Accused no 2, and finally the persuasions of Lecordier. We have given all these factors weight. They explain that we must ask ourselves whether they give to the Accused's actions a sufficient modicum of excuse. The act, the explosion of an enormous bomb in the environment where it could cause massive injury to a large number of people is a gross, callous and atrocious act. The victims, I emphasise, were not faceless representatives of an oppressing authority. They were real people with families and a right to have their own vision of the future.

We cannot find the blandishments of Lecordier as material extenuation. Accused no 1 was aware of the hazard to life and limb with his first projected target, before it was moved to the Marine Parade. There was ample opportunity for reconsideration. And so, sadly, we must conclude that even considered in the context of frustration and anger, the circumstances

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operating on Accused no 1 fall short of those which would extenuate his guilt sufficiently to justify such a finding".

The reasons of the dissentient assessor, Prof J R L Milton, were read out by Shearer J. Prof Milton found that the following significant factors had a bearing on the appellant's mind "at the time he did what he did":

"1. His personal experience and family background in which the effect of his father's obsessive hatred of White people is an important feature.

2. His age. He is a young man of an age still suggestive of lack of maturity and a thoughtless susceptibility to the stress of intense emotions.

3. His emotional state on the day in question, the State of Emergency, the rounding up of people including close friends, reports of police violence embedded in him a state of mind in which rage reacted upon the deep frustrations that he had experienced as a young Coloured man in

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racialistic and racial society to lead to a compulsive, obsessive determination to strike out at those he regarded as his persecutors.

4. The fact that initially he intended to commit not homicide but the destruction of property.

5. The fact that the decision to place the bomb on the Marine Parade was made on impulse and under the influence of the emotional....(indistinct) of Lecordier".

He concluded that (a) the appellant's rage and anger on the day, arising as they did from a background of political deprivation, paternally induced racial bitterness and frustrations, (b) the nature of the appellant's original plan, viz to place the bomb in West Street, which "was motivated not by murderous desire but a desire to protest the state of emergency" and (c) the influence of Lecordier, who persuaded appellant to change the plan and who consequently bore a greater moral responsibility for what happened

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than the appellant, sufficiently diminished appellant's moral blameworthiness for it to be found that there were extenuating circumstances.

Shearer J concluded his judgment by remarking that the two judgments differed in "their comparative evaluation of the weight to be given to the circumstances of the crime itself".

On appeal before us appellant's counsel, Mr Gordon, advanced various arguments to show that the majority of the Court a quo came to an incorrect decision and submitted that this Court should intervene and make a finding of extenuating circumstances. Before considering these arguments it is appropriate to re-state the principles by which this Court is guided when asked on appeal, in a case of murder, to reverse a finding by the trial Court that there were no extenuating circumstances. These are that the decision as to the existence or otherwise

of extenuating circumstances is, in the first instance, essentially one for the trial Court; and in the absence of any misdirection or irregularity this Court will not interfere on appeal with the trial Court's finding as to the non-existence of extenuating circumstances unless that finding is one to which no reasonable court could have come. This Court cannot substitute its view on the question of extenuating circumstances merely because it disagrees with the view of the trial Court. Nor, in the absence of good grounds for interference with the finding of the trial Court, does this Court express any view as to whether the trial Court could or should have found extenuating circumstances. These principles are so well-established and have been stated and re-stated so often by this Court that I do not deem it necessary to quote supportive authority.

As to what constitute extenuating circumstances,

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various descriptions have been given. In Rex v Fundakubi and Others 1948 (3) SA 810 (A), at p 815, Schreiner JA quoted with approval a passage from the judgment of Lansdown JP in the case of Rex v Biyana 1938 EDL 310, which contained the following:

> "In our view an extenuating circumstance... ..... is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt. The mentality of the accused may furnish such a fact".

In his judgment Schreiner JA (at p 818) emphasized the very great importance of the "subjective aspect" of the matter and added —

> "..... no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration".

In S v Babada 1964 (1) SA 26 (A), at p 27 G

/ Rumpff JA.....

Rumpff JA described an extenuating circumstance as a circumstance —

> "..... wat die beskuldigde se geestesvermoëns of gemoed beïnvloed het op so 'n wyse dat hy, wat sy wandaad betref, met minder verwyt bejeën kan word".

In a later judgment the same learned Judge of Appeal stated —

> "Na aanleiding van wat reeds deur ons Howe beslis is, kan miskien gesê word dat 'n versagtende omstandigheid 'n feit of feite is wat betrekking het op die gemoed of geestesvermoëns van die beskuldigde toe die moord gepleeg is en waardeur sy sedelike skuld, d.w.s. sy verwytbaarheid, ten opsigte van die dood van die oorledene, volgens die oordeel van 'n redelike persoon, verminder word".

(see S v Petrus 1969 (4) SA 85 (A), at pp 94H - 95 A).

These formulations have been followed in countless decisions of this Court. Whether the relevant factors should be confined to those which have a bearing on the accused's mental faculties ("geestesvermoëns") or state of mind ("gemoed") may be open to some debate. For example,

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this would hardly seem to cover the case where extenuating circumstances were found because the accused, one of a number of co-accused, played a minor role in the commission of the murder (see eg S v Dikgale 1965 (1) SA 209 (A), at p 214 E; S v Smith and Others 1984 (1) SA 583 (A), at p 596 D, 617 F-G) or the case where the murder was committed at the request of the deceased (see eg S v Robinson and Others 1968 (1) SA 666 (A), at p 678-9). In the latter case Holmes JA pointed out that in such circumstances the moral blameworthiness of the killer is reduced for the deceased is not deprived against his will of his right to live. In the vast majority of cases, however, the relevant factors would be ones having a bearing on the accused's mental faculties or state of mind.

The burden of proving, on a balance of probabilities, that there were extenuating circumstances associated with the commission of the murder rests upon the accused

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(S v Theron 1984 (2) SA 868 (A)).

It has further been held by this Court that —

> "The determination of the presence or absence of extenuating circumstances involves a three-fold enquiry: (1) whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation; (2) whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what he did; and (3) whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding (3) the trial Court passes a moral judgment".

(see S v Ngoma 1984 (3) SA 666 (A), at p 673 H - I; and see also S v Letsolo 1970 (3) SA 476 (A), at p 476 G - H). This and other similar formulations are no doubt helpful and conducive to clarity of thought on the topic, but they should not be treated as if they are statutory injunctions. What is essentially a flexible enquiry

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should not be so shackled.

Mr Gordon's first submission was that the majority of the Court a quo misdirected themselves in finding (and placing reliance on the finding) that —

> "The act, the explosion of an enormous bomb in the environment where it could cause massive injury to a large number of people is a gross, callous and atrocious act".

Developing this submission, counsel contended that the manner in which an accused person commits the crime of murder is irrelevant to the enquiry as to extenuating circumstances and he referred in this connection to the judgment of this Court in S v Ndwalane 1985 (3) SA 222 (A), at p 227 E-F. In that case the accused waylaid the deceased at a taxi rank and while the deceased was sitting in his taxi talking to a young girl the accused walked up to him and shot him at close range. The evidence established that the accused committed this murder

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because he believed (on good grounds as it later turned out) that the deceased had been responsible for the assassination of one Dube, a former community leader and close friend of the accused's, and was distressed by this fact; and because of his frustration at the fact that the deceased, whose conduct was brazen and provocative, appeared to be going unpunished. The trial Court took account of these facts but also emphasized that the accused's crime was "a premeditated and cold-blooded assassination executed in furtherance of a plan which was formulated some two weeks previously" and held that there was no extenuation. On appeal this decision was reversed. In his judgment Viljoen JA stated (at p 227 E - F) —

> "As I read the judgment it would appear that the Court found that, because the factors which otherwise would have been extenuating, influenced the appellant to take the law into his own hands and, by a carefully planned stratagem, exact revenge for Dube's death, any extenuation was wiped out or neutralised. Such reason-

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> ing postulates a weighing up of, or a comparison between the extenuating circumstances and the nature of the crime. In so doing the Court a quo, in my view, misdirected itself. The inquiry is whether the factors which subjectively influenced the mind of the offender to commit the murder are extenuating or not; the manner in which he committed the murder is irrelevant".

The judgment goes on to refer to and quote from the cases of S v Van der Berg 1968 (3) SA 250 (A) and S v Petrus 1969 (4) SA 85 (A).

In Van der Berg's case Botha JA stated (at p 252 F - G):

> "Dit is dus voor-die-hand-liggend dat, ofskoon in die aard van die wandaad 'n aanduiding van die gemoedstoestand van die dader gevind mag word, die vraag of 'n bepaalde omstandigheid as 'n versagtende omstandigheid aangemerk behoort te word, wat 'n subjektiewe ondersoek na die gemoedstoestand van die wandader verg, nie aan die aard van die wandaad getoets kan word nie. So kan provokasie bv. 'n dader se gemoed so beïnvloed dat dit aanleiding kan gee tot die pleging

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> van 'n afskuwelike daad, maar die afskuwelikheid van die daad kan die provokasie nie as 'n versagtende omstandigheid uitwis nie".

There are certain observations to be made in regard to this dictum. To begin with, it would seem, on the face of it, that there is a measure of conflict between it and what was stated by Schreiner JA in Rex v Fundakubi and Others, supra, at p 819, where he indicated that a belief in witchcraft might not be treated as an extenuating circumstance where the accused had "consciously used unnecessary cruelty in bringing about the death of the victim"; and by the same learned Judge (as ACJ) in R v Myeni 1955 (4) SA 196 (A), at p 199 C - D where he stated, upholding a finding of no extenuating circumstances, that the appellant's belief that Z (who was considered to be an "mtagati" or sorcerer) had caused the deaths of certain members of his family did not sufficiently diminish the appellant's blameworthiness "to override the callousness involved

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in burning three innocent persons to death". The facts were that the appellant attempted to kill Z by burning down his hut, well-knowing that at the time there were present in the hut not only Z but also three other innocent persons. Z escaped, but the others were burned to death. The trial Judge observed that extenuating circumstances would probably have been found had the victim been Z alone, but the Court refused to make such a finding where the appellant knew that he was probably going to cause the deaths of persons who, even by his lights, were quite innocent. Neither Fundakubi's case nor Myeni's case appears to have been brought to the attention of the Court in Van der Berg's case.

The facts of Myeni's case resemble those of a hypothetical case that was put to appellant's counsel during the course of argument, viz a husband enraged by his wife's adultery and in order to punish her murders

/ her .....

her child. I cannot believe that the fact that the victim was an innocent child would not be relevant to the determination of extenuating circumstances.

Moreover, an examination of many reported judgments of this Court, and some unreported ones as well, convinces me that it is not the practice to ignore the nature of the crime or the manner of its commission where these facts are relevant to the determination of extenuating circumstances. In order not to overload this judgment with authority I shall refer only, by way of example, to certain more recent judgments: S v Mnyanda 1976 (2) SA 751 (A), at p 767-8 ("'n beplande roof, met volkome onverskilligheid of die slagoffer mag sterf of nie"); S v Mafela and Another 1980 (3) SA 825 (A), at p 828 H - 829 B ("the planned nature of the robbery and the excessive violence and callousness which accompanied it"); S v Modisadife 1980 (3) SA 860 (A), at p 862 H - 863 E

/ ("appellant.....

("appellant doelbewus en met voorbedagte rade die meisie (an innocent victim) doodgemaak het"); S v Hlatswayo 1982 (4) SA 744 (A), at p 746 A-B ("....this was a fatal mission of lawlessness at its worst; gangsterism akin to terrorism..."); S v Masuku and Others 1985 (3) SA 908 (A), at p 913 F ("... a prolonged, brutal and agonizing assault and the fact that he (the appellant) may not have had a direct intention to kill does not make his conduct less blameworthy"); S v Kavandara 28.11.86 ("Hy het vir persoonlike gewin twee mense koelbloedig en met berekende planmatigheid vermoor. Dit was 'n wreed-aardige en snode daad, die verwytbaarheid waarvan nie deur sy jeugdigheid verminder is nie"); S v Sekgobela 3.3.87 ("koue, gevoellose optrede"); S v Mzinyane and Others 26.11.87 ("... a most despicable crime. It was premeditated and carried out in a careful and cowardly manner.... the whole matter should fill any right-thinking

/ person.....

person with revulsion"). Compare also S v Caeser 1977 (2) SA 348 (A), at p 354 D-E.

The particular passage in the judgment in the case of S v Van der Berg, supra, which is quoted above was commented upon in S v Petrus, supra, by Steyn CJ and Rumpff JA. The Chief Justice's closely reasoned judgment cannot easily be summarized, but his conclusion appears to be expressed in the following passage (at p 92 D-G):

> "Dit beteken egter nie dat die aard van die wandaad, in die sin van die moord en die wyse waarop dit uitgevoer is, by die beoordeling van versagtende omstandighede buite rekening gelaat moet word nie. Vir sover feite wat met die moord in verband staan, by bedoelde beoordeling ter sake is, kan hulle vanselfsprekend nie uitgesluit word nie. Die manier waarop die dader te werk gegaan het sou kan aantoon dat hy bv. nie so dronk was as wat hy voorgee nie, of dat beweerde voorafgaande provokasie geen noemenswaardige nawerking by die daad gehad het nie. By 'n vooruit beplande moord sou uit die

> omstandighede met volkome sekerheid afgelei kan word dat 'n bewese hoë graad van dronkenskap tydens die daad, geen aanleiding hoegenaamd tot die daad gegee het nie, dat dit die dader glad nie beïnvloed het nie, en daarom nie as versagting gereken kan word nie. Die feit dat derglike aspekte van 'n moord medebepalend kan wees vir die bestaan of andersins van versagtende omstandighede, bring egter nie mee dat beweerde versagting buite bevinding gestel kan word bloot deur die wreedaardigheid of snoodheid van die daad nie".

Rumpff JA stated his viewpoint as follows (at p 95 H):

> "Om vas te stel of daar versagtende omstandighede is of nie, spreek dit m.i. vanself dat die feite van die misdaad sowel as die moontlike omstandighede wat as versagting sou kon dien oorweeg moet word. Die erns of afskuwelikheid van die misdaad, as sodanig, kan nie die moontlikheid van versagtende omstandighede uitsluit nie. En ek dink nie iemand sou dit ooit wil beweer nie. Wat wel kan gebeur is dat wanneer die versagtende omstandighede oorweeg word in die lig van die feite van die misdaad, 'n Verhoorhof sou kon bevind dat die beweerde omstandighede in die besondere geval nie volgens sy mening as versagting kan geld nie".

/ Both.....

Both Judges considered that the dictum in Van der Berg's case was not inconsistent with these conclusions. (See further S v Bowers 1971 (4) SA 646 (A), at p 651 G - 652 C.)

The approach of Steyn CJ, as reflected in the above-quoted passage from his judgment, is susceptible of the interpretation that the facts relating to the nature of the crime and the manner of its commission are only relevant to the issue of extenuating circumstances in order to rebut factually, or to evaluate the influence of, an alleged extenuating circumstance, such as alleged drunkenness or provocation. In other words, that such facts would be relevant only to the first two enquiries listed in S v Ngoma, supra, at the passage quoted above, and not to the third. It is not clear to me, however, that Steyn CJ intended to lay down such a principle. It is true that he rejects the approach, as does Rumpff

/ JA, that.....

JA, that alleged extenuating circumstances can be eliminated or wiped out solely by reason of the brutality or heinousness of the crime, but there are indications in the judgments that the nature of the crimes and the manner of its commission are relevant in a more general sense to extenuating circumstances as being indicative of the accused's state of mind.

That this is a fair interpretation of Petrus's case seems to be confirmed by what was said by Rumpff CJ in S v Maarman 1976 (3) SA 510 (A), at p 512 H:

> "Hoewel die grusaamheid van 'n daad nie versagting uitsluit nie is dit 'n faktor wat oorweeg kan en behoort te word omdat van die grusaamheid van die daad 'n afleiding gemaak kan word oor die beskuldigde se geestestoestand gedurende die pleeg van die daad en sy morele skuld."
> (My emphasis.)

(And I might add that Petrus's case was referred to elsewhere in this judgment. See also S v Kavandara, supra.)

In S v Ndwalane, supra, the Court referred to the same passages in the judgments of Steyn CJ and Rumpff JA in

/ S v Petrus.....

S v Petrus, supra (in the case of the latter I have quoted merely portion of the same passage); and, in my opinion, the dictum from the judgment of Viljoen JA in Ndwalane's case relied upon by Mr Gordon and quoted above must be read in the light of what I have stated above.

In the recent case of S v Mzinyane and Others, supra, the trial Judge, when dealing with the question of extenuating circumstances, had referred to the facts surrounding the killing of the deceased and stated that it was a "most despicable crime"; premeditated and carried out in a careful and cowardly manner, with money as a motive. The Court concluded that the whole matter should "fill any right-thinking person with revulsion". It was argued on appeal, with reliance upon the above-quoted passage from the judgment in Van der Berg's case, that the trial Court had misdirected itself by testing the extenuating factors argued on behalf of the appellants

against the horrible circumstances under which the deceased met his death. It was held by this Court (per Jacobs JA, Corbett and Joubert JJA concurring) that there had been no misdirection. Having considered what was stated in Van der Berg's case, as explained in Petrus's case, Jacobs JA held that the trial Court had not found that the horrible circumstances under which the deceased met his death per se excluded any extenuating circumstances: the trial Court had paid due regard to the extenuating factors contended for, but when it came to the third part of the threefold enquiry outlined in S v Ngoma, supra, the Court, having to pass a moral judgment, had come to the conclusion that taking all the circumstances into consideration, it had not been shown that the moral blameworthiness of the appellants had been reduced. In so doing it had not misdirected itself.

/ I shall.....

I shall now endeavour to sum up the present state of the law on this aspect of extenuating circumstances. The nature of the murder (and here I would include the identity of the deceased and the relationship, if any, between the accused and the deceased) and the manner of its commission are factors which, while they cannot be regarded as per se excluding extenuation, are nevertheless relevant to the general enquiry as to extenuation. They may be relevant to the factual enquiry as to whether an alleged extenuating circumstance in truth existed or as to whether it actually influenced the accused; or they may be relevant as part of the web of circumstances associated with the crime which must be considered by the court when it passes its moral judgment and decides whether there exist circumstances which in the minds of reasonable men diminish the accused's moral blameworthiness.

I now proceed to consider the argument by Mr

Gordon that the majority of the trial Court in the present case misdirected themselves by having regard to the nature of the crime committed by the appellant, viz "the explosion of an enormous bomb in the environment where it could cause massive injury to a large number of people", which they characterized as a "gross, callous and atrocious act". It is clear to me that the majority weighed this factor, together with the various grounds of extenuation mentioned in this judgment, in passing a moral verdict upon the conduct of the accused. In doing so, they acted in accordance with the legal position as I conceive it to be and committed no misdirection. Counsel's first ground for interference with the decision of the majority can accordingly not succeed. The same goes for the related submission that the majority of the Court misdirected themselves by weighing the extenuating features against the aggravating factors and finding that the latter out-

/weighed.....

weighed the former. If by this is meant (as I understand it to mean) that the majority of the Court had regard to the nature of the crime and the manner of its commission in passing moral judgment, then as I have shown, they were guilty of no misdirection.

It was further argued by Mr Gordon that the majority of the trial Court misdirected themselves by having regard to the identity of the victims. This submission runs directly counter to the decisions of this Court in, eg, R v Myeni, supra, S v Modisadife, supra, and, as I have shown, is not well-founded in law. It is no ground of misdirection.

In the alternative, Mr Gordon argued that the finding of no extenuating circumstances was one to which no reasonable court could have come. In this regard he stressed (i) the appellant's "psychological make-up", (ii) his politicization, (iii) the influence of his father,

/(iv)

(iv) the social conditions at Wentworth where he had grown up, (v) his position as a Coloured person, (vi) the impact upon his state of mind of the declaration of the state of emergency and (vii) the change of target under the influence of Lecordier. In this judgment I have referred at some length to the first five of these factors. They undoubtedly explain why the appellant joined the ANC and participated in its acts of terrorism, aimed mostly at inanimate targets, the "rescue" of Gordon Webster and so on. It must be accepted too that the declaration of the state of emergency and the police action and detentions which accompanied it further exacerbated appellant's feelings and induced in him an urge to "hit back". At the same time there must be taken into account the enormity of what he did, namely the placing of a bomb of great explosive power in a place which was deliberately chosen for its potential to kill and injure

innocent persons. According to appellant such action was contrary to ANC policy. There must be borne in mind too that the appellant had ample opportunity to reflect upon what he was proposing to do during the whole of that fateful Saturday while he was purchasing the Cortina motor car, collecting the explosives, making the bomb and waiting for nightfall to carry out his design. It is true that the original plan of placing the bomb in West Street, if carried out, would probably not have been as destructive of life and limb as the plan which was eventually executed, but appellant must have realized that even in West Street there was a real risk of the bomb killing or maiming persons who happened to be in the vicinity. The change of plan was in order to achieve "White destruction". Admittedly this change of plan was instigated by Lecordier, but appellant decided to adopt the change after debating the matter and, even after having so decided, the appellant had the

/ opportunity.....

opportunity to reflect. Judging from all the coming and going and manoeuvring of vehicles, at least twenty minutes to half an hour must have elapsed between the decision to change the plan and the placing of the car-bomb outside the Parade Hotel.

Mr Gordon contended that this Court has recognized that a killing in pursuance of a political objective may in appropriate circumstances be viewed in "an extenuating light" and he referred in this connection to the case of S v Mkaba and Others 1965 (1) SA 215 (A). But, as pointed out in that case, it all depends upon the particular circumstances of the matter and in fact in Mkaba's case this Court refused to interfere with the decision of the trial Court that the "political motive" did not serve to extenuate the crime. (Cf. also S v Harris 1965 (2) SA 340 (A).)

/ As .....

As I have emphasized, it is not for this Court to pass its own judgment on extenuation. In the absence of misdirection or irregularity, of which there was none, the question which this Court must consider is: was the majority decision of the Court a quo one to which no reasonable court could have come? After careful consideration I am of the view that this question must be answered negatively. There is accordingly no ground for interference with the majority decision of the Court a quo on the issue of extenuating circumstances.

The appeal is dismissed.

M M CORBETT.

VILJOEN JA)
HEFER JA)
GROSSKOPF JA) CONCUR
VIVIER JA)