59/88

In the matter between:

CHARLES ADRIAAN KOSZTUR — Appellant

and

THE STATE — Respondent

JUDGMENT: STEYN, JA.

CG

Case no: 401/87

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

CHARLES ADRIAAN KOSZTUR — Appellant

and

THE STATE — Respondent

CORAM: VAN HEERDEN, SMALBERGER et STEYN JJA.

HEARD: 5 MAY 1988

DELIVERED: 25 MAY 1988

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J U D G M E N T

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STEYN, JA.

This is an appeal against the death sentence im=

posed upon appellant by Harms, J. in the Witwatersrand Local Division on July 3 1987 for the murder of Grace Lephona (the deceased). The trial court found that there were no

extenuating .....

extenuating circumstances. The appeal is in essence directed against that finding.

Appellant stood trial on four charges, all related to events at his step-father's home during the morning of 16th September 1986. That home is at 57 Toby Street in the Jo= hannesburg suburb of Triomf, about 1 km from the Westdene dam and about 0,25 km from 1971 Martha Street in the Western Coloured Area of Johannesburg. It is common cause that the deceased was in the employ of appellant's step-father as house maid at his home on the 16th September and that she was then about 22 years of age.

Appellant was charged in count 1 with having murdered the deceased; in count 2 with having robbed her

under aggravating circumstances of 1 shotgun, about 38 rounds of ammunition, 15 bottles of liquor, 2 mens' suits, one Sanyo radio and tape combination and one pair of boots, the property of his step-father, Laszlo Bela Kosztur, and in the lawful possession of the deceased; and in counts 3 and 4 with being respectively in unlawful possession of the said shotgun and ammunition during the period 16 to 19 September 1986.

Appellant was defended at the trial by Mr Bennett and pleaded guilty on all four counts. A statement made by him in terms of s. 112(2) of the Criminal Procedure Act, No 51 of 1977 (the Act) was handed in by Mr Bennett as exhibit A. Each paragraph thereof was then read out by the

learned .....

learned judge and confirmed by appellant. Therein appellant admitted the contents of the medico-legal report of the post-mortem examination of the deceased. The paragraphs relating to the murder and robbery are also relevant to the question of extenuation. I quote them in full:

> "At the time of the offences I was jobless and living off friends in Hillbrow, Johannesburg. The night before the offences, I had smoked about 40 'buttons' of mandrax mixed with dagga, but at the time of the offences I was aware of what was going on although I could still feel the effects of the drugs. I decided to steal items from my step-father's house in order to sell them to obtain money.
>
> I did not initially intend to kill the deceased. I had tied her up with belts and covered her with a bedspread without her having the oppor= tunity to see me. I told her to stay like that until I told her I was leaving. She said 'yes'. I left her in the bedroom while

I gathered items from the house, and when I returned to the bedroom to look for a suitcase, the deceased was standing up trying to cut herself free with a letter opener. She looked at me and I realised she could identify me. I panicked and on the spur of the moment de= cided to kill her. I then intentionally stabbed her. Although I panicked, I was aware of what I was doing.

On the aforesaid date and at the aforesaid address, I unlawfully robbed the deceased of the items mentioned in the charge sheet, save that I only took one man's suit and not two. The deceased was the housemaid at the said address. After I tied her up with belts I gathered together from the house the said items. Thereafter the stabbing of the de= ceased took place in the circumstances set out above. I then left the house with the aforesaid items."

The State did not accept the plea of guilty on the murder charge and a plea of not guilty was then entered

thereon .....

thereon by the learned judge in terms of sec. 113 of the Act. The pleas of guilty on the other counts remained standing. The trial proceeded accordingly. At the commencement thereof three documentary exhibits were handed in by the prosecutor, namely, exhibit B - a list of formal admissions by appellant i.t.o. s. 220 of the Act relating i.a. to the identity of the deceased and the contents of the aforementioned medico-legal report; exhibit C - the report itself; and exhibit D - the record of the proceedings in the magistrate's court relating to the murder and robbery charges. Appellant had there also pleaded guilty to both charges. During the course of an interrogation by the magistrate i.t.o. s. 121 of the Act, he replied i.a. as follows (I quote the questions

and answers):

"Q. Do you admit that on 16/9/86 and at or near Toby Street, Triomf, Johannesburg you assaulted Grace Lephona?

A. Yes, by stabbing her, but I didn't know her name.

Q. Do you admit that you tied her up with belts?

A. Yes.

Q. What happened during this incident?

A. I entered the house of my stepfather at said address, grabbed the said black female and tied her arm behind her back. I took everything I wanted - all the items referred to in the charge sheet, apart from one mens suit. I only took one suit. It all belongs to my stepfather, Bela Kosztur. I got the shotgun from the bedroom, where the black female was. She was covered with a cloth. She struggled around and then saw me. I then stabbed her 5 (five) times with a bread knife, because she had seen me. I stabbed her in her kidneys, heart and

lungs. .....

lungs. I didn't intend to kill her ini= tially, but when I realised that she could identify me, I decided to kill her.

Q. With what did you stab her?

A. With a bread knife."

The cause of death according to the post mortem report was multiple injuries. Those injuries and the ex= ternal appearance of the body are described as follows in the report:

"A blue belt is firmly tied around the neck. The knot being anteriorly. The belt was re= moved from the neck by cutting it on the right hand side. It is also tied around both wrists and from the wrists the belt passes posteriorly to the back of the body. 2 belts have been used to secure the wrists behind the chest. There is a 1,5cm grooved abrasion encircling the neck underlying the belt. There is a 3cm x 2cm abrasion over the left cheek. The left cheek is contused. 1) There is a 4cm penetrating incised wound from the 11th to the 12th inter-costal space in the lateral clavicular line on the left side. Track of the wound passes medially to

enter .....

enter the abdominal cavity below the dia=
phragm and ends by penetrating the large
bowel. 2) There is a 2cm penetrating incised
wound, 14cm lateral to the 1st lumbar verte=
bra on the right side. Track of the wound
passes medially to enter the right chest ca=
vity and ends by penetrating the right lung.
3) There is a 2cm penetrating incised wound
just medial to the left scapula. The wound
does not enter the left chest cavity. 4)
There is a 1,5cm penetrating incised wound,
12cm lateral to the 1st lumbar vertebra on
the left side. The wound does not enter
the abdominal cavity. There are subconjunc=
tival haemorrhages in both eyes.

Neck structures: A bloodless dissection was
performed on the neck. There is extensive
haemorrhage into the subcutaneous tissues
underlying the belt ligature. There is also
extensive haemorrhage into the tissues below
the chin. There is haemorrhage into the strap
muscles of the neck bilaterally. There is
haemorrhage between the trachea and oesopha=
gus. There is haemorrhage into the pre=
cervical fascia. There is extensive contusion
of the pharynx and larynx. The hyoid bone and
thyroid cartilage are intact."

Two .....

Two State witnesses testified on the merits, det. sgt. Helgaardt Meyer of the South African Police, Newlands, and a specialist psychiatrist, dr. I W Berman, principal psychiatrist at Sterkfontein Hospital. The defence did not present any evidence on the merits and Mr Bennett intimated that he would abide the court's decision. Appellant was then convicted on all four counts as charged. Thereafter he testified on the question of extenuation and two social welfare reports concerning him were handed in with the State's consent by Mr Bennett. They are exhibit G, a report of 9 September 1983, pre= pared on behalf of Nicro by B van der Watt, and exhibit H, a report dated June 29 1987, by J Nel. Both of them are

social .....

social workers.

Although sgt. Meyer and dr. Berman testified before conviction their evidence is of particular significance in the present enquiry. Sgt. Meyer arrived at the scene at about 15h00 on the 16th September and found the house in disorder. Several cupboards had been ransacked and the deceased was found lying on her back in the main bedroom on the floor at the foot of the double bed with a pillow between her legs, a black beret covering her face and a long-bladed knife placed transversely across her breast. She was bound as described in the post-mortem report. The handle of a knife lay on the floor opposite her right shoulder and a second long-bladed knife also lay to her

right. Her dress was blood-smeared, with two large stains, on her stomach and right side respectively. A rumpled quilt lay on the bed. The blade of the broken knife was never found. In the kitchen the chairs were on the table and there were indications that the floor had been in the process of being washed. Meyer caused a series of photo= graphs (exhibits E1-12) to be taken of the scene as found by him. They reflect what is described above. On the 19th September appellant was arrested by Meyer at no 1971 Martha Street aforementioned.

On the 26th March 1987 appellant was referred i.t.o. sec. 78(2) of the Act for observation to the Krugers= dorp gaol for a period of 30 days. The enquiry was conducted

pursuant .....

pursuant to the provisions of s. 79 of the Act by dr. Berman and two private psychiatrists, dr's. Fine and Wolf. They prepared a joint report which was confirmed and handed in by dr. Berman as exhibit F. Appellant was found to be a psychopath but nevertheless fully triable. Dr. Berman testified, and the report reflects, that there was nothing found "to suggest that either his ability to appreciate the wrongfulness of the acts in question or his ability to act in accordance with an appreciation of such wrongfulness was affected by mental illness or defect at the time of the alleged commission" of the offences in question. Appel= lant was also found to have a focal brain disorder which may be the result of appellant's "psychopathic lifestyle",

which dr. Berman described as possibly including "drugging and violence and other practices of this sort". Dealing with the effect of such a disorder dr. Berman said "it may have no effect at all, it may cause a form of epilepsy, it can do a number of things". It was not a symptom or element of appellant's psychopathy but "some added thing which had occurred". It did not, however, affect his triability or responsibility for his actions and had no effect upon his ability to appreciate the wrongfulness of his actions or to act in accordance with such appreciation. Appellant had a better than average intelligence. In dr. Berman's words "it was bordering on superior". In amplification of the report dr. Berman, however, stated that appellant's

psychopathy .....

psychopathy was of a severe degree. He described a psycho=
path as "a person with a personality disorder which manifests
in the repeated perpetrating of anti-social acts and which
manifests before the age of 18 years". He added that there
is a strong hereditary element in psychopathy and that so=
cial factors, including upbringing, cannot be ignored.
Dealing with the characteristics of a psychopath dr. Berman
said that "the eminent American psychiatrist , Cleckley,
lists 16 features of psychopathy". (Dr. Berman was clearly
referring to Hervey Cleckley and his "seminal work" The
mask of insanity (1982) wherein those characteristics
(or "features") are listed. Vid."The Psychopath and Criminal
Justice, a Critical Review"by D.M. Davis in Vol 7 No 3 (1983) of

the .....

the South African Journal of Criminal Law and Criminology 259,

in note i.) The 16 features enumerated by dr. Berman are:

1. Superficial charm and good or apparently good intelligence.

2. Absence of delusions and other signs of irrational thinking.

3. Absence of nervousness or neurotic symptoms.

4. Unreliability.

5. Untruthfulness and insincerity.

6. Lack of remorse or shame.

7. Inadequately motivated antisocial behaviour.

8. Poor judgment and failure to learn by experience.

9. Pathological egocentricity and incapacity for love.

10. General poverty in major affective reactions.

11. Specific loss of insight.

12. .....

12. Unresponsiveness in general interpersonal relations.

13. Fantastic and uninviting behaviour with drink, and sometimes without.

14. Suicide often threatened but rarely carried out.

15. Sex life impersonal, trivial and poorly intergrated.

16. Failure to follow any life plan.

(That is also Cleckley's list. cf: SAJCC, supra, at 261.)

In further describing the psychopathic personality dr. Berman said that a severe psychopath does not have a moral feeling but is nevertheless capable of thinking clearly and knowing "that a thing is wrong" and that "there is a penalty and punishment if one commits a certain thing", even though he does not feel it morally. Dealing with a psychopath's ability to act in

accordance .....

accordance with his appreciation of the wrongfulness of a particular act dr. Berman said the following:

> "One of the features of psychopaths is that they have poorer control over impulses than non-psychopaths, so that if an act were com= mitted in an instantaneous way in seconds in response to some triggering factor, one could argue that there is perhaps a lesser ability to control himself. If an act is such that if requires summing up a situation and then with clear logic formulating a plan, there I would see a psychopath in the same light as any non-psychopath.
>
> Then there would be no difference? ... No, my Lord."

Dr. Berman found nine of the aforementioned features of psychopathy to be particularly evident in appellant. They are (in the order as given by him): lack of remorse and shame; intelligence; absence of delusion and other

irrational .....

irrational thinking; inadequately motivated antisocial behaviour; failure to learn by experience; general poverty in major affective reactions; unresponsiveness in general inter-personal relations and the taking of drugs; im= personal, trivial sex life; and the failure to follow any life plan. Dr. Berman excluded the possibility of appel= lant suffering from a personality disorder other than psychopathy. By virtue of appellant's high level of in= telligence he also saw some prospect of appellant's con= dition being improved by treatment. He was not, however, very sanguine about such prospect, saying "... this is a very difficult thing to answer. Can I answer it in a half negative way in saying that it is not impossible that it

might". .....

might".

Turning to his observation of an interview with appellant dr. Berman said that he gave him a clear, coherent version of what had happened. In his own words dr. Berman's conclusion was that "due to this version given me and the circumstances in it,I did not find that the factor of psychopathy in any way diminished responsibility". He ex= plained further as follows: "To mention specific detail, My Lord, the accused told me that he tied up the victim and stole whatever he needed to. He then came back into the room where the victim was, found her standing up and saw him and therefore recognised him, so he then went to the kitchen to fetch two knives, returned with these and

committed .....

committed the alleged offence. My Lord, this is thought, a thought-out act, the question of diminished impulse con= trol does not enter here ..." The difference between ap= pellant's conduct and a condition of diminished impulse control was explained by dr. Berman in the following passage of question and answer:

> "How would you expect a diminished impulse control to manifest itself, if there had been such a situation? --- My Lord, it should have been triggered ... with his response within seconds of seeing his predicament.
>
> If the accused had a knife already in his possession the moment he saw the deceased standing up and identifying him, what would you have expected from the accused if he had suffered from this diminished responsi= bility? --- There would have been the imme= diate, unthinking stabbing purely impulsively ... this possibility is eliminated by the

> going to the kitchen with an obvious inten=
> tion.
>
> Does that denote a thinking process to you or a non-thinking process, the going to the kitchen? --- My Lord, this is, it denotes to me clear, logical thinking.

This was said during evidence-in-chief. Dr. Berman's opinion was tested during cross-examination, inter alia by putting appellant's version to him. He denied the impulse element in that version and stood his ground, as is adequately de= monstrated by the following passages (question and answer quoted):

> "And when he went into the bedroom to fetch a suitcase to pack the items in he was confronted with the deceased who was now standing upright, trying to cut herself free with a letter opener and obviously identified him because

the bedspread had come off and this made him panic stricken and he started to stab her with that knife there and then? --- No, My Lord, I was not told this; I was told he then went to the kitchen. ... My Lord, had he had the knives on him and did the fatal stabbing there and then, one might have argued that there was diminished impulse control here, but he had the time ... to go to the kitchen and fetch the knives and the time to reflect. The longer between the stimulus and the act, the less is the poor impulse control, the more is the positive cognitive logical thinking element important. ... do you not accept that he panicked? --- No, My Lord, because he told me that he realised there and then that here was some= one who could identify him and I must remove the evidence; he told me this. This is thinking, My Lord, not impulse. These are his words."

Dr. Berman dismissed the suggestion during cross-examination that what appellant had told him was an ex post facto .....

facto reconstruction by him of what had happened. His dismissal thereof was in these terms:

> "My Lord, as a theoretical possibility I cannot dispute that that sort of thing could happen, but I do remember from the way, the dispassionate, calculating way, it was told me by the accused that this was not a fact here.
> ... So he may have acted in an uncontrollable, impulsive rage and what he is telling you is his later rationalisation of what went on? --- No, My Lord, because the facts are there, he summed up the situation, he went to the kitchen, he fetched two knives.
>
> Those facts are what he told you, is that not so? --- Yes.
>
> I put it to you that those facts could be his ex post facto rationalisation of why he did what he did? --- My Lord, he never gave me the impression of being the sort of person who would use this type of reasoning, that a thing would happen and he would later ration(alise), therefore imagine, that he

remembers things about it which in fact were not so; I have no reason for thinking this is so.

So you are not prepared to concede that the accused had weakened self-control at that point? --- No, My Lord, no."

The question of appellant's alleged drug-taking and the possible effects thereof upon him at the time of the offences, were also dealt with by dr. Berman. Whilst testifying in chief he did so as follows (question and answer again being quoted):

"Returning lastly to the issue of drugs, would the accused's explanation to you of the events as he recalled them, have revealed any evidence that at the time of the commis= sion of the offence he was under the influence of the drugs? --- My Lord, even had I got a history of having taken drugs that particular

day, even had that been so, I am not saying that it is, the mental state at the time was such that, and the way the episode was nar= rated to me was such, that I would not have regarded it as relevant.

COURT: You use the word 'relevant', relevant for what purpose? --- My Lord, from my point of view of my having to assess ability to appreciate wrongfulness or act in accordance. Again, if I may point out, My Lord, where extenuation is concerned, I do not comment on that.

Yes, but in other words, what you are saying is that the drugs, as far as you were able to ascertain, had no influence upon what he did? --- That is correct, My Lord."

During cross-examination that issue was dealt with as follows'

"Now the question of drugs, the accused says that he had the night before smoked a mixture of dagga and mandrax, a fairly large quantity

and although he was aware of what he was doing he was, as he stated, in the coming-down stage of the drugs. Would you concede that? --- My Lord I do not know what the 'in the coming-down stage' means.

Well I would imagine it means that you were 'stoned' as they say, that sort of jargon and you are now coming down from your high, and this is the following day bear in mind? --- Even if this were so and I have no reason for assuming that it is so, his behaviour at the time of the alleged offence was entirely goal-directed and logical, so even if he were as you put it coming down from a high, it still does not mean that he could not appreciate wrongfulness or act in accordance. In fact My Lord it is a fact of, it is known that with alcohol and certain drugs that a person who does abuse them would be less mentally confused during that time than a person who never uses them and uses it for the first time. So if he is a person who has often been using it then all the more so My Lord, even had he been in what is termed, what you call a coming-down, this would not in any way deviate me

from my opinion that he knew entirely and clearly what he was doing."

During re-examination dr. Berman summed up in these terms:

"In regard to the suggestion concerning drugs, that the accused was in the process of coming-down, did you find that this so-called coming-down phase or did you find any evidence that this coming-down phase had weakened his self-control or weakened his responsibilities? --- My Lord, I am not even aware that there was a coming-down phase, there was nothing to suggest that it had weakened in any way his responsibility."

The two aforementioned social workers' reports and the effect of appellant's personal history and social background were also considered and dealt with by dr. Berman. He was not, however, examined at length thereon. During

examination- .....

examination-in-chief it consisted of the following:

"Now returning to the second of the factors which you mentioned in regard to psychopathy, the first being hereditary and the second being social factors, is it correct that a social worker's report was drawn up in re= gard to the accused? --- Yes My Lord that is true.

And it is correct that you have also had sight of another social worker's report furnished by the defence? --- I have My Lord.

Having read through the contents of these reports could you tell the Court whether in your opinion the accused's social background played any role in his condition, that is his anti-social disorder of psychopathy? --- My Lord it did not affect ability to appre= ciate wrongfulness or to act in accordance with such appreciation. Whether there is extenuation here because of the troubled past history, this is for His Lordship to

decide." .....

decide."

The cross-examination thereon proceeded thus:

"Now you had the opportunity of reading the social welfare report which I intend to hand in, which is provided by Nicro who had been dealing with the accused? --- My Lord I saw it for the first time this morning and looked at it briefly.

I will be handing it in in due course, but this report was compiled in 1983, in other words sometime before this particular offence and the final line to me is almost pathetic. It states, this is on the part of the diagnosis:

'Hy funksioneer verder op 'n impulsiewe wyse binne 'n krisissituasie wat sy on= volwassenheid en onvermoë tot sinvolle funksionering beklemtoon?' --- Yes My Lord.

COURT: Does that confirm with your findings? Is that in agreement with your findings? --- Well My Lord certainly one, there is immaturity here, yes.

MR BENNETT: And propensity towards impulsive

behaviour .....

behaviour in a crisis situation? --- Yes My Lord, this is a feature of psychopathy, yes."

But, as already set out, dr. Berman denied that appellant had acted upon impulse.

Appellant's previous convictions consisting of several of housebreaking, theft and allied offences and one of possession of dagga, during the period 7 May 1980 - 27 August 1985 were also put to dr. Berman during cross-examination. It was suggested that the murder and robbery committed by him were out of character for appellant as he had previously mainly been guilty of offences of an "economic nature". Dr. Berman replied as follows:

"My Lord, I noticed this in the ongoing history, this is indeed so; but then, if there

> is going to be a crime of violence there has got to be a first time anyway, and I had, from the accused himself, certain violent things that he did against animals, for in= stance, as a child. So the potential for violence was there."

The mental and psychiatric make-up of appellant, the condition of deceased's body and the state of the scene of the crime have now been extensively sketched. It is against that background that appellant's version must be dealt with and evaluated. Much of it has already been set out above when referring to the contents of exhibits A and D and the description given by appellant to dr. Berman. But his evidence amplifies and also departs from those versions in significant respects. It is as follows.

Having drifted around Hillbrow the previous night

smoking .....

smoking the mixture of mandrax and dagga as described in exhibit A, appellant spent the rest of the night in a waiting room at the Johannesburg railway station. He was unemployed and had nowhere else to go. The next morning he made his way on foot towards the aforementioned Coloured area. He was wont to sleep there quite often. Whilst so on his way he reached the Westdene dam between 09h00 and 10h00. He then decided to burgle his step-father's house. He in= tended buying drugs in the Coloured area with the proceeds of the stolen goods. He went there, proceeding cautiously and making sure before going onto his step-father's property, that the street was empty. He was known in the area and wanted to make certain that he was not recognised. On

arrival he entered the gate and stood in the front yard play=
ing with the dog, intending thereby to create the im=
pression that he was still staying there. He noticed that
there were no cars in the drive-way and realised that no=
body was at home. But he knew that the domestic servant
might be there. He had seen her when he was there on a
previous occasion. It crossed his mind that she might recog=
nise him if she saw him and report him to the police. He
intended entering the house, stealing, and then leaving
without her knowledge. He intended finding out where she
was by checking through the windows. If she was in the lounge
he could enter through the kitchen. She would then not know
he was in the house unless she walked into him. But when

he .....

he passed the kitchen window he saw the kitchen chairs on the table and realised she was already busy cleaning the kitchen. He then had to change his plans. He knew he could catch her by surprise "for the reason that the maids that worked there before all did the job in the same way; they started at one end of the kitchen and they worked to the door and then they came out on their knees, coming out at the door". He did not want her to know he was there. When asked why, he replied "well, the less people that know what I am doing, I will not get caught, that is how I was thinking". He then decided to wait for her at the outside door of the kitchen on the back "stoep" and pounce upon her from behind when she opened it. she would then not be able

to .....

to see who it was. On his way to the back stoep/he happened upon a Philips screwdriver standing on the toilet step. It was a sharp-pointed, cross-end screwdriver, 20-30cm long. He took it. He intended threatening her with it if necessary, in order to dissuade her from trying to escape. He also contemplated subduing her by throttling and so prevent her screaming should she catch sight of him. Screwdriver in hand he went and stood by the kitchen door. Within a few seconds the maid opened it. It opened outwards and towards him, so concealing him from her sight. He moved towards her, bumping against the door with his arm. She heard him, but before she could look round he was over her where she was kneeling, still in the process of cleaning the floor.

He .....

He grabbed hold of her from behind, pulled her to her feet with her back to him, put his left arm around her throat and his right hand, still holding the screwdriver, on her right shoulder. He pulled the kitchen door to with his foot and took her thus held to the main bedroom. He took her there because he could not leave her behind in the kitchen. She would then have escaped and raised the alarm. She "was only an obstruction" as far as appellant was concerned. Whilst still approaching the house, appel= lant had already planned to tie her up if necessary. He said:"I had full intentions of tying her up and putting her in the room from the beginning". Appellant also knew that the firearms were kept in the main bedroom. The deceased

did not resist, said nothing and made no sound. (She must have been terrified.) On arrival in the bedroom, appellant maintained his grip upon her and told her to open a certain cupboard and take out two belts. She did so. Appellant then put the screwdriver in his pocket, made her lie down face downwards on the bed and tied her with the belts as described above. Whilst he was doing this she moved her head from side to side a few times in an obvious effort to catch a glimpse of her assailant. Appellant thwarted her efforts each time by moving his body sidewards out of her line of vision and by holding her down. Having tied her appellant made her shift higher up on the bed and then covered her with the quilt, thereby in effect blindfolding

her. .....

her. He then told her to stay there and behave herself, saying that nothing would then happen to her, meaning to scare her with the implied threat, and that he would let her know when he was leaving. The deceased replied in the affirmative and lay in silence without moving. Appellant then went to the cupboard, removed a pair of gloves (ap= parently to wear so as not to leave fingerprints), and put the screwdriver in the cupboard, leaving it there. He then removed "the guns", put them on the dressing table chair in the main bedroom and went to the kitchen to lock the door "so that nobody could come in". He did so. Then he decided to take "the most vicious looking knives" he could find. He took three long-bladed knives, choosing

them from amongst a number of different types of knives in the drawer. He intended using them "for a threatening pu= pose"; should anyone come and attempt to arrest him, he intended scaring them off with the knives and then running away. He said he did not then intend using the knives on the deceased. Because three knives were too many to carry around he put two of them on the telephone table in the hallway in case he had to use them. The third knife he kept in his right hand and proceeded to ransack the house. Then he looked for a suitcase in which to remove his spoils. He found one in another bedroom and returned with it to the main bedroom, put it down, and left again. The deceased was still on the

bed .....

bed under the quilt. He proceeded to the lounge, took the liquor out, left it there and went out to the garage to see if there was anything there worth taking. He found nothing, re-entered the house and went to the main bedroom for the suitcase. He found deceased standing "next to him", grabbed her behind the neck and threw her down on the bed. Then he noticed that she had the paper-knife in her hand. He tried to take it from her but she held it so tightly that it bent in the struggle. She started shouting and screaming. He managed to wrench it from her hand and threw it away, either on the floor or on the bed. She continued screaming. He told her to "shut up" but she persisted. Then he stabbed her three times with the knife he had on him. He stabbed

her first in, then under, the ribs, and the third time in the spine. The blade broke off and remained in her body. She was still alive and "still making sounds and carrying on and moving around, most probably in pain". Appellant then fetched the other two knives in the hallway. He returned. She was still alive. He knew that he had already wounded her mortally. He nevertheless stabbed her again, twice, with one of the two knives. He then gathered his spoils and left. He stabbed her to stop her screaming, not because she could identify him. Appellant said that he was "not really worried about her seeing him" because she had already seen his face in the mirror, when they first came into the room. Appellant had great difficulty explaining

why he had covered her with the quilt. The following answers he gave to questions by the court during cross-examination will be sufficient to demonstrate his predicament.

> "COURT: Why did you then place the, the bedding over her face? --- So that she would not hear what I was doing. I did not expect, I did not really intend to come back and tell her look I am leaving, I intended leaving without her knowing.
>
> So you covered her up so that she should not see that you were stealing? --- No, that she could not see when I left, when I left.
>
> Oh I see? --- Because she, she knew that I had put the guns on the dressing ...
>
> So you did not cover her, you covered her, you did not cover her up so that she could not identify you because she already saw you? --- Well I did it for that as well because she had not seen me yet.

> She saw you in the mirror? --- But that was not the real reason why, the reason why I really wanted to cover her so she could not hear when I came and took the guns quietly and left quietly."

His performance was equally poor in attempting to explain his previous statements that he had killed her because she had caught sight of him and could identify him. It is not necessary to deal with those attempts. They are clearly without foundation.

Appellant's personal history as described by him in evidence and as set out in the two reports, exhibits G and H, and reflected in his previous convictions,is that of a problem child evincing antisocial conduct from an early age. When he was but 5 he stole milk from milk bottels and ice

cream from a cafe,and he started sucking "thinners" when he was 8 or 9 years old. Later he drank "thinners" and petrol. At the age of 11 he started abusing alcohol. On several occasions he was sent to rehabilitation centres be= cause of those problems. His school record was poor. He succeeded in passing the practical standard 8 but left school in his standard 9 year. His mother and step-father were married when he was still very young but divorced during 1977. He always had a poor personal relationship with his step-father. When he was 16 his mother was murdered. Appellant testified that after her death he had "nothirg to look forward to in life" and "did not bother what happened". The cogency of the said two reports is, however, weakened

because .....

because the information the appellant gave to the two social workers differs in material respects. It is not necessary to deal therewith at this stage.

Appellant repeated the allegation made in his s. 112 (2) statement, exhibit A, that he had smoked about 40 "buttons" of Mandrax mixed with dagga the previous night, but added that at that time each such "button" cost R8,00-R9,00 and that he did not pay for all he smoked because, being unem= ployed, he did not have sufficient money to do so. He also repeated his further allegation that at the time of the offences he "could still feel the effects of those drugs" although he was then "aware of what was going on". He ela= borated as follows when asked in chief how he felt that

morning. .....

morning. "Well, not only personal experience but of people that has been smoking with me and so on, I can prove that when you are on the coming-down stages of the drug, after you have been smoking it, you are aggressive in all ways, you are aggressive in your attitude, you have got that aggra thing about you".

It is clear, to my mind, that appellant did not tell dr. Berman about having been in a "coming-down stage". As will be recalled, dr. Berman said that he was "not even aware that there was a coming-down phase". The trial court doubted the truth of appellant's evidence concerning the amount of Mandrax and dagga he had smoked the previous night, but clearly accepted that he had indeed smoked a certain

amount .....

amount thereof. In view of appellant's admitted psychopathic life-style, that acceptance was correct. The question to be decided is not, however, whether he took drugs but whether the fact that he did so influenced his conduct at the time of the commission of the offences, and, if so, whether such influence reduced his moral blameworthiness in such measure as to amount to an extenuating circumstance.

The principle governing the approach by this Court to a finding by a trial court that there were no extenuating circumstances, is well settled. In S v MASUKU AND OTHERS 1985 (3) 908 (A) Nicholas AJA restated it thus at 912D:

> "The principle is well settled that the ques= tion as to the existence or otherwise of ex= tenuating circumstances is essentially one for decision by the trial Court; and that,

in .....

in the absence of misdirection or irregularity, this Court will not interfere with a finding that no extenuating circumstances were pre= sent, unless it is one to which the trial Court could not reasonably have come."

A psychopathic condition is not by itself an ex= tenuating circumstance. S v MNYANDA 1976 (2) SA 751 (A) at 766 H; S v PIETERSE 1982 (3) 678 (A) at 683 E. Whether it is or not may be a difficult matter to decide and must in each such case be carefully considered. This is so be= cause of the variable effect of the condition. In certain instances it may affect the moral blameworthiness of a psycho= pathic accused, in others not at all. In S v LEHNBERG EN n

ANDER .....

ANDER 1975 (4) SA 553 (A) Rumpff CJ expressed that necessity for caution and the reason therefor. At 559 G-H he said:

> "Wel is dit nodig om op te merk dat die vraag=stuk van psigopatie as versagtende omstandig=heid met groot omsigtigheid behandel behoort te word omdat dit anders maklik sou wees om daardeur die leerstuk van determinisme by die agterdeur in ons strafreg in te bring. 'n Volwaardige psigopaat mag miskien 'n aangebore of verworwe swakheid hê maar hy sal nie 'n vrou in die publiek probeer verkrag nie. In dié opsig verskil hy nie van 'n persoon met sterk seksdrange, wat geen psigopaat is nie, en wat ook nie 'n vrou in die publiek sal probeer verkrag nie. Aan die ander kant is dit moont=lik dat 'n psigopaat in sekere gevalle nie in staat is om dieselfde weerstand te bied as wat volkome normale persone sou kon bied nie en dan sou in sulke gevalle die swakheid tereg as 'n versagtende omstandigheid in aanmerking geneem kon word. So is dit bv. in R v HUGO, 1940 WLD 285, gestel:
>
> > 'In this case the evidence satisfies us that the accused was a psychopathic person to a degree amounting to sub=stantial abnormality. ... We are satisfied that .....

that he suffered from a mental defect and that in consequence of this defect he was subject to abnormal obsessions and was unable to show the powers of resistance, the courage in the face of trouble, that normal persons habitually display.'

Verder dien opgemerk te word dat die getuie= nis omtrent psigopatie ook met omsigtigheid benader moet word."

In S v PIETERSE, supra, at 683H-684C the learned Chief Justice dealt i.a. with the proper approach by a trial court to psychopathy as a possible extenuating circumstance. He said:

"Wat die psigopaat betref, kan 'n Hof bevind dat ten opsigte van 'n bepaalde misdaad die psigopaat minder verwytbaar is as wat 'n nie-psigopaat sou wees, en sou 'n Hof dus kon ver= sagtende omstandighede bevind in geval van 'n moord en 'n vonnis anders as die doodstraf oplê.

Ek .....

Ek dink dit spreek vanself dat in elke geval die Hof veral sal let op die graad van psigo= patie wat aanwesig is, die aard van die mis= daad wat gepleeg is en die omstandighede waarin die misdaad gepleeg is. Beklemtoon moet word dat dit die Verhoorhof se taak is om te beslis of 'n beskuldigde minder toerekenbaar is of nie en of die verminderde toerekenbaarheid wel as versagtende omstandigheid sal geld, en nie die taak van mediese deskundiges nie. Natuur= lik sal die Verhoorregter die menings van psigiaters of kliniese sielkundiges aangaande die betrokke geestesafwyking van 'n beskuldigde deeglik in aanmerking neem, veral indien die feite waarop daardie mening gebaseer is, die opinies van die mediese deskundiges steun.

Die feit dat die psigopaat gevoelloos teen= oor ander is, onderskei die psigopaat strafreg= telik nie juis van ander mense nie maar, indien hy sterk drange het wat weens sy besondere geestestoestand minder beheerbaar is as dié van 'n gewone mens, sou 'n Hof, afhangende van omstandighede, dit as 'n versagtende omstandigheid kon bevind. Geen formule kan deur hierdie Hof

> of enige hof uitgedink word nie waarvolgens ver= minderde verwytbaarheid bevind kan word. Dit kom omdat so 'n bevinding sal afhang van die feite van elke geval."

Where, as here, an accused convicted of murder and facing a possible death sentence, suffers from a severe degree of psychopathy,a trial court must be careful in its assessment of the effect of that condition upon the moral blameworthiness of the accused. When, in such a case, a finding by the trial court that despite such a condition there are no extenuating circumstances, is taken on appeal, this Court should likewise scrutinize the evidence and the finding of the trial court with great care. If there is furthermore a possibility, as is the case here, that such an accused was also under the influence of drugs when he

committed.....

committed the offences in question, then a fortiori there should be careful scrutiny. For that reason the evidence has been dealt with at greater length and in finer detail than would have been done in a case not similarly complicated.

Dr. Berman's evidence is clearly to the effect that appellant did not impulsively kill the deceased, that he acted rationally throughout, in the execution of a pre-conceived plan, as a normal person would have done, that he killed her because she had recognised him, that he gave a clear, detailed and rational account of what he had done and that neither his personal background nor his psychopathic condition nor any drugs he may previously have taken, had played any role in the commission of the offences.

Appellant was 23 years of age at the time. He was already a young adult, and there is no indication that any residual immaturity that may still have been present affected his conduct in any way. His whole purpose, as described by himself in his evidence and in his preceding statements in exhibits A and D and to dr. Berman, was to burgle his step-father's house for own gain and not to be detected whilst doing so. To achieve that end he set about the approach to and entry into the house with great circum= spection. But he was aware of the danger posed by the presence of the deceased in the house and that he might have to use force upon her in order to effect his purpose. When he realised she was already busy in the kitchen he clearly

knew .....

knew that he could not enter the house without forcibly neutralising her as a source of detection. That is why he armed himself with the screwdriver, ambushed her at the kitchen door and kept her back to him whilst taking her to the main bedroom, and tied and covered her as aforemen= tioned. That he used considerable force on her is evidenced by the ligature mark around her neck and its serious under= lying injuries. It is equally clear from the aforementioned statements that he killed her when he realised that despite his efforts to prevent deceased identifying him, she had nevertheless succeeded in doing so. His conduct so revealed is clearly indicative of an operation proceeding according to a pre-conceived plan, and not of an impulsive, unthinking

reaction to a triggering stimulus suddenly presented. And it matters not whether he went for the knives only after having been recognised by the deceased or whether he had previously armed himself with one knife and kept the other two in readily available reserve, fetching them when the first knife broke before he had succeeded in despatching the deceased. On either of those two alternative versions his conduct was rational, in conformity with the execution of a plan already conceived, and not in the least impulsive or irrational. Dr. Berman said that that is how many a normal non-psychopathic miscreant would act. Numerous cases have indeed come before this Court of non-psychopathic burglars, robbers and other miscreants killing to avoid

detection. .....

detection. Such killing clearly cannot, without more, reduce the moral blameworthiness of an offender who was in the process of committing an offence for own gain. cf: S v MCHUNU : AD March 18, 1988.

Appellant's descriptions in his statement i.t.o. sec. 112(2) of the Act (exhibit A) and to dr. Berman, are of particular importance. They were both made during consultations obviously conducted in private, when appellant would have been in a position to weigh his words carefully. At no time prior to testifying did he suggest any other reason for killing the deceased. His attempts to do so whilst testifying were quite clearly the result of after= thought and were quite unconvincing. They were rightly

rejected .....

rejected by the trial court.

The whole corpus of evidence was carefully con=sidered by the trial court. It accepted the evidence of dr. Berman, rightly so to my mind. The facts testified to by him were not challenged in any material respect. He stated them fully and fairly. He supported his evidence with authority (Cleckley); his analysis of the facts was fair and thorough and his opinions were cogent - they were clearly stated, well reasoned and related to the facts. His examination of appellant was thorough and his evidence as to what appellant had told him was not disputed. The court also accepted Meyer's evidence, which was likewise not ques=tioned in any material respect by the defence. It is cogently

borne out by the photographs, exhibits E1-12. The knife on deceased's breast and the beret on her face are indicative of a purposeful albeit grisly action and not in the least of a hasty departure from the scene of an impulsive killing. Appellant clearly intended initially to create the impres= sion that the latter was the case. This is clear from the following passage in his evidence-in-chief when he was ques= tioned about the disposal of the third, unused, knife:

> "... I left the other knife there, I did not use it, the third knife.
>
> Did you place it on her body? --- I just threw it down, I do not remember where I put it. And I grabbed the bag with the, with the gun in it and I went to the lounge and put the other stuff in the bag and then I left."

During cross-examination he however conceded that he had

"probably" .....

"probably" placed the knife on her body and admitted that he had placed her beret on her face.

Dr. Berman pertinently refrained from expressing any opinion as to whether appellant's psychopathic condition and the other relevant factors amounted, or could amount, to extenuating circumstances and expressly left that de= cision in the hands of the court.

At the trial the onus was upon the appellant to prove the existence of extenuating circumstances on a pre= ponderance of probabilities. In deciding whether he had succeeded in doing so the trial court had to consider the evidence as a whole in the manner set out in S v LETSOLO 1970 (3) SA 476 (A) and subsequent decisions of this Court.

The trial court did so. It scrutinized the evidence thoroughly and with great care. Its conclusion that there were no ex= tenuating circumstances, and the grounds for that finding were summarised with equal care and precision by the learned judge as follows:

> "What is also of some significance is the fact that the information given by the accused to the social welfare worker as contained in EXHIBIT G differs in material respects from the facts given to the welfare worker as related in EXHIBIT H. I therefore have grave doubts as to the correctness of many of his allegations.
>
> Having regard to the analysis of the crime and the undisputed evidence of Dr Berman we conclude that although the accused could have acted impulsively in a crisis situation his acts in the present case were not impulsive acts in a crisis situation. He entered the

house knowing full well that there is a real possibility or probability that he had to kill the maid and if he then creates his own crisis situation he could hardly rely upon an impulse under those circumstances.

As related above the accused alleges that the night prior to the murder he did use mandrax and drugs to the extent described. The ques= tion is however what the effect of this abuse was when the crime was committed. The accused testified today that he was in a so-called coming down stage, that means that the drugs had some residual effect which made him more aggressive than otherwise. Dr Berman testi= fied that drug abuse over a long period has a diminishing effect. He testified that drugs break down inhibition but the accused had little, if any, inhibitions. The accused was always potentially violent. He could find no evidence of any residual effect, having regard to the accused's relation of what had occurred.

The planning and commissioning of the house= breaking and the murder, as well as the clear

recollection of the accused are not consistent with any tangible remaining effect upon him by these drugs and we have come to the con= clusion that his use of the mandrax and drugs did not contribute to the commissioning of the crime.

That brings me to the accused's social back= ground. The social background is set out in EXHIBIT H. As far as the accused is aware his father died when he was 3 years old. Whether he had any contact with his biological father is not clear, he did not testify and it does not appear from the report. His mother married his stepfather, the complainant in charge 2. His mother and his stepfather were divorced during 1977. His stepfather was obliged during 1978 to take the accused with him because of problems caused by unstable relations in which his mother was living at that stage. His stepfather is apparently a person with some temper and who is presently having a relationship with the accused's mother's sister. The problems in the accused's life began at an age of 5 years when he started

stealing money. Presumably as a result thereof he started living between greatparents and was shifted from school to school. He started his school life when 7 years of age, but was not keen on attending school. Ac= cording to him he started abusing alcohol at 11 years age. In 1980 he was apprehended for house-breaking and theft, was referred to the Constantia School on a charge of dri= ving a vehicle without the owner's consent. During the same year he apparently stole pills. He also began sniffing for instance petrol. He did not accept authority, he apparently assaulted the head of his school. He completed his standard 8 education. I should point out that the accused will turn 24 years of age within 10 days.

He was not acceptable to do military service. He has no history of any proper job-keeping. He says that at this stage he does not use alcohol to any extent. He sees himself as a great dagga smoker, who will do anything to obtain dagga and he apparently needs it to calm him because he has a quick temper. He

apparently sniffed thinners since his early childhood and he drank thinners at a later stage. He apparently had used herion, cocaine, and, as his evidence indicates, mandrax. Many attempts were made to rehabilitate him.

There is no psychiatric history of any impor= tance. His relationship with his stepfather is poor and his relationship with his step= sisters slightly better. All this indicates that the accused had an unstable background, but it is difficult to pin it on external circumstances. I find little in this report or the evidence that really can explain his chosen life since his 5th year.

Having considered these facts and having summed them up we have to consider whether they had a bearing on the accused's state of mind when he killed the deceased. We are unable to find any such causal connection. A tragic youth on its own cannot be an extenuating circumstance. It is necessary for the accused to show that it had at least some influence upon the crime as committed. No other facts

were referred to during argument or in the evidence relating to extenuation. We were unable to think of any others. Having regard to the cumulative effect of these factors relied upon we have come unanimously to the conclusion that they probably had no bearing on the accused's state of mind when he killed the deceased and that accordingly there is nothing to abate the moral blame= worthiness of the accused."

Except in certain minor and unimportant aspects I can find no fault with the trial court's findings of fact, approach and reasoning, nor with its conclusion. Appellant has consequently failed to satisfy me that there are any grounds for interfering with the finding that there were no extenuating circumstances.

The appeal is dismissed.

M T STEYN, JA.

VAN HEERDEN, JA )
SMALBERGER, JA ) CONCUR