IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JERRY MORTEN ..... Appellant

AND

THE STATE ..... Respondent

Coram: NESTADT, KUMLEBEN et EKSTEEN, JJ.A.

Heard: 1 March 1991

Delivered: 22 March 1991

J U D G M E N T

EKSTEEN, J.A. :

At about 6.30 a.m. on 12 January 1988 Mr. Thakordas Dajie the proprietor of Bops Radio and T.V. Shop in Kinross received a telephone call at his home. His early morning caller asked him whether he would come down to his shop at once, as the caller wanted to bring his television set in for repairs. Dajie agreed to meet him there at 7 o' clock. He drove down and as he approached the shop, he noticed a yellow van parked in front of the premises and two people standing near the door. He paid no particular attention to them but simply opened the door and walked in. The two men followed him, and

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one of them, who turned out to be Piccanini Mlinyane (to whom I shall refer as accused no. 2) asked whether Dajie had finished fixing his radio as he had come to fetch it. Dajie replied that if it was ready he could have it. He then switched on the lights in the shop and followed accused no. 2 who had preceded him into the workshop area. While they were in the workshop accused no. 2's companion, who is the appellant, and who was wearing a balaclava cap, also came in armed with "a reasonably big knife". He walked up to Dajie and said "Where is your revolver and where is your money?" Before Dajie could answer, accused no. 2 came from behind, put his arm round Dajie's neck and held him while the appellant stabbed him in the ribs. Dajie

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told them to take the money and to leave him alone. At the same time he grabbed at the balaclava cap and pulled it away so that he could see his assailant's face. He recognized the appellant who had done odd jobs for him in the past, and called him by his name, saying "Jerry what are you doing?" He again told them to take the money and leave him alone. Appellant however continued to stab him while accused no. 2 began hitting him with his fists until Dajie lost consciousness.

Appellant then took Dajie's keys, opened the safe and took R14,000 - R15,000 in cash, and a number of cheques which had not yet been banked. He also took the keys of Dajie's Datsun "bakkie", got into

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it, and drove off. Dajie says that a gold chain that he wore round his neck, a wristwatch, a suit jacket and a waistcoat were also taken.

Shortly after the two robbers had left Dr. Geyser - who was Dajie's personal physician - arrived on the scene. He says he found Dajie lying on a couch covered in blood. He appeared to be in a critical condition, with numerous stab wounds in his chest. He was breathing heavily and when he inhaled one could hear air being sucked into the lungs through the wounds in his chest. Similarly when he exhaled air was expelled through these wounds. His blood pressure was very low and his pulse hardly discernible. He was taken to hospital and when Dr. Geyser examined him

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there he found 17 stab wounds in his chest and 5 more to other parts of his body, as well as several scrathes, lacerations and bruises. He also found multiple rib fractures. The doctor says that when he first saw Dajie he did not expect him to live, and only the quick medical attention saved his life. In fact he has still not completely recovered from the incident, and says: "As a technician I have lost control of myself - even the usage of my expressions." He is unable to continue with his work as a technician. He cannot run his business any more and has had to sell it.

The appellant, in his evidence, conceded that he had gone to Dajie's shop on the day in question in

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the company of another man, but he says it wasn't accused no. 2. He also concedes that he caught hold of Dajie and assaulted him, but he says that he did no more than to slap him in the face with his hand. He concedes that he took Dajie's safe keys and that he stole the money and cheques from the safe. In fact he later took the police to the place where he had thrown the cheques away, and some of them were recovered in the long grass. Appellant also concedes that he took Dajie's "bakkie" and drove off with it. He later took the police to the place where he says he left the "bakkie", but it wasn't there any more. The "bakkie" was not recovered. Appellant could not explain how Dajie sustained the

multiple wounds and injuries, and suggested that his companion must have been responsible for it.

The appellant also made a confession to a magistrate admitting his complicity in the robbery, but again denying having stabbed Dajie. In his confession he says that accused no. 2 was the person who was with him, but at the trial he sought to substitute the name "Alfred" for "Piccanini" wherever it appeared in the confession.

Appellant was a bad witness. His evidence was properly rejected by the trial court, and he was convicted of robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, and of attempted murder. The learned Judge a quo sentenced

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him to 7 years' imprisonment for attempted murder, and imposed the death sentence for the robbery with aggravating circumstances. The present appeal is directed solely against this latter sentence.

Since the trial in this matter the approach of courts to the imposition of the death sentence has been changed by the provisions of the Criminal Law Amendment Act, 107 of 1990. Section 4 of this Act enjoins a court, before sentence of death may be imposed, to make a finding on the presence or absence of mitigating and aggravating factors. The trial Judge, having due regard to such finding, will then only impose the death sentence if he is satisfied that it is "the proper sentence" in all the circumstances.

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This phrase has been interpreted by this court to mean "the only proper sentence". (S. v. Nkwanyana and Others 1990 (4) SA 735 (A) at 745 A - G.) Moreover in considering an appeal against the imposition of a death sentence this court exercises an independent discretion in the sense that if it is of the opinion that it would not itself have imposed the death sentence it may impose "such punishment as it considers to be proper" (sec. 13(b) Act 107 of 1990). In considering an appeal such as the present one this court is therefore required, having due regard to the findings of the trial court, and to such mitigating and aggravating factors as may appear from those findings, to consider whether in its opinion the

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death sentence is the only proper sentence in all the circumstances.

A feature which presents itself in the present case is the fact that much of what goes to constitute the offence of attempted murder is also relevant to the offence of robbery with aggravating circumstances. There is nothing wrong in taking the same facts into consideration when it comes to founding convictions on these two counts. (S. v. Moloto 1982 (1) SA 844 (A).) However when it comes to punishment a court is enjoined to guard against a duplication of punishment which would ensue if the same facts were to be taken into account in sentencing an accused for the two different offences. In

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R. v. Cain 1959 (3) SA 376 (A) an armed robbery was perpetrated and a person seeking to prevent the robbers from getting away was shot and wounded. The robbers were subsequently convicted of robbery with aggravating circumstances, and of assault with intent to commit murder in respect of the person shot. They were sentenced to death on the first of these counts and to 10 years' imprisonment on the second. In the course of his judgment on appeal Ogilvie Thompson J.A. remarked at p 383 D - E that -

> "Were a sentence other than death to be imposed for the robbery, it would, no doubt be appropriate, when assessing the sentence to be imposed for the separate charge of shooting, to pay regard to the fact that such shooting had already operated to make the sentence on the robbery charge more severe; but that would not affect

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the 'presence' of the shooting as an aggravating circumstance in robbery."

(See too S. v. Mathebula 1978 (2) SA 607 (A) at p 613 D - E; S. v. Witbooi 1982 (1) SA 30 (A) at p 35 B - F; S. v. Moloto (supra) at p 854 E - G.)

In the present case the learned trial Judge was fully aware of the circumstances. He clearly considered the robbery with aggravating circumstance the more serious of the two charges and deserving of the death sentence which he imposed. Many of the same facts relevant to the conviction of robbery were also relevant to the conviction of attempted murder. The sentence he imposed for the latter conviction does not, in my view, reflect the full seriousness of the

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injuries inflicted on the complainant, and there would not, on the face of it, appear to have been any duplication of punishment. In any event there is no appeal against the sentence for attempted murder, and no argument was advanced before us on the question of a possible duplication of punishment. I need therefore say no more about this.

The appellant is a man of 47 years of age. An aggravating factor in this case is his long list of previous convictions beginning as far back as 1957. They include five for housebreaking with intent to steal and theft, and a further six for theft. He was sentenced to various fairly lengthy periods of imprisonment in respect of these offences before, in 1975,

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being declared an habitual criminal. In the same year he was convicted of escaping from custody and of robbery and the indeterminate sentence was again imposed. Then in May 1980 he was convicted of escaping and of using a motor vehicle without the owner's permission. This time he received sentences amounting to 4 years' imprisonment. In August 1980 he was again convicted of escaping and sentenced to another 12 months' imprisonment. On 1 September 1986 he was released on parole and the offence before us was committed on 12 January 1988 - some 15 months after his release.

The robbery was obviously carefully planned. The evidence does not disclose who made the telephone call early that morning, but it was clearly part of the

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plan of appellant and his co-accused to lure Dajie to his shop before other customers were likely to turn up, so that they could take him by surprise in the workshop. This diabolical plan was relentlessly carried out with savage determination. The brutality and wanton excess of the assault on the unfortunate complainant needs no elaboration. He offered them no provocation or offence, and the appellant's motive seems to have been nothing more than personal avarice and a callous disregard for the lives and property of others. The stabbing, as has been pointed out commenced before the complainant revealed to the appellant that he had recognized him and was not merely a reaction to that disclosure. On Dr. Geyser's evidence the complainant is lucky to be alive. The quality of

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his life, however, has been shattered and he can no longer pursue his vocation.

The appellant has shown no remorse for his deed. In fact both in his confession to the magistrate and in his evidence he sought falsely to put the blame on somebody else - first on his co-accused, and then on an imaginary third person.

I have been unable to find any mitigating factors worthy of consideration nor were any suggested to us in argument. It does not follow, however, that for that reason the death sentence must stand. We are not called upon simply to weigh up aggravating factors against mitigating factors to see which weighs the heavier, but rather to consider whether, having due regard to whatever aggravating

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or mitigating factors there may be, the death sentence is the proper sentence in all the circumstances.

If one has regard to the appellant's long list of previous convictions stretching over more than 30 years it is apparent that even the fairly long periods of imprisonment he was compelled to undergo had no reformative effect on him. He is and remains one who is habitually inclined to criminal behaviour and, as the present offence merely serves to emphasize, he is a danger to a settled and orderly society. In the light of his propensity to escape from prison which is reflected in his list of previous convictions, even life imprisonment would not seem to be an adequate protection of society. Taking all the circumstances into account it seems to me that in this case it may well be said that

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the evil of the appellant's deed

> "is so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing"

(per Holmes J.A. in S. v. Matthee 1971 (3) SA 769 (A) at p 771 D - E). In the light of this conclusion it follows that in my view the death sentence was the only proper sentence to pass, and the appeal cannot succeed.

The appeal is dismissed.

J.P.G. EKSTEEN, J.A.

NESTADT, J.A.)
KUMLEBEN, J.A.) concur