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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DONOVAN DIEDERICKS ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : VAN HEERDEN, KUMLEBEN et GOLDSTONE JJA

HEARD : 25 AUGUST 1992

DELIVERED : 3 SEPTEMBER 1992

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA:

At his trial in the Cape Provincial Division of the Supreme Court the appellant was charged with two others, accused nos 2 and 3, with murder and robbery with aggravating circumstances. On the first count the appellant alone was found guilty of murder (his co-accused of culpable homicide) and on the robbery count all were found guilty as charged. In the absence of proof on a balance of probabilities that there were extenuating circumstances, the appellant was sentenced to death on the murder charge. The court (Williamson J), however, granted leave to appeal against the death sentence, that is the finding that there were no extenuating circumstances. This conclusion and the decision to grant leave to appeal were based on the law as it stood at the time of conviction, that is, before the amendment of the Criminal Procedure Act No 51 of 1977 by the Criminal Law Amendment Act No 107 of

1990. This appeal is governed by the latter Act. We are to consider whether, taking all mitigating and aggravating circumstances into account, the death sentence is the only proper one. And in doing so any reasonable possibility of a mitigating factor is to be accredited to the appellant.

The relevant facts leading to the conviction appear from the evidence of the eye-witness, Ina Adams. On the night of 9 December 1988 she saw Paul Peterson, the deceased, walking in a road. Next she saw the three accused, all of whom were known to her, running towards him. As the appellant approached he ran with his one hand in his pocket. On reaching the deceased, the appellant stabbed him. He fell to the ground and the other two accused searched his pockets as he lay there. One of them placed something taken from the deceased's pocket in his pocket. She was unable to say what it was. The three of them then walked away. Her

evidence as regards the occurence was not contradicted by any evidence by or on behalf of the three accused. They disputed their involvement, each unsuccessfully relying on an alibi. The medical evidence established that one stab wound to the heart, with what must have been a large knife, was the cause of death.

On this evidence the purpose, common to all of them, was found to be robbery and hence their conviction on that charge. The fact that they came upon the deceased apparently coincidentally indicates that this decision to rob, as a reasonable possibility, was taken on the spur of the moment as opposed to a pre-planned attack on a person known to be in possession of sought after articles in his home or on his person. Evidence that the appellant spent time at a shebeen that night and, as the court a quo found, he had probably been drinking, lends some weight to this conclusion.

The violent act on his part that night would appear to have been out of character. He had one previous conviction involving violence. (The other three previous offences can in the present context be regarded as trivial.) In 1981 he was convicted of robbery of cash (R2,30) by threatening his victim with a weapon for which he was sentenced to strokes with a juvenile cane. In the light of these facts Mr Broeksma, who appeared for the State, conceded - quite correctly - that the appellant ought for purposes of sentence to be regarded as a first offender. It follows to my mind that the prospect of rehabilitation and reformation in the course of serving a long period of imprisonment cannot be ruled out.

The aggravating features of this case are self-evident. It was a lethal attack upon a defenceless person with, as I have said, robbery on the face of it the only motive. Nevertheless these

aggravating factors, serious though they are, in my view in the particular circumstances of this case, do not warrant the conclusion that the death sentence, and none other, is the proper one.

The appeal is allowed. The sentence of the appellant on the murder charge is set aside and replaced by one of 20 years imprisonment. The substituted sentence is antedated to 23 February 1990 and is to run concurrently with the sentence of 2 years imprisonment imposed on the robbery charge.

M E KUMLEBEN
JUDGE OF APPEAL

VAN HEERDEN JA)
GOLDSTONE JA) - concur