CASE NO: 462/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

VALENTINE COTTON Appellant

and

THE STATE Respondent

CORAM: EM GROSSKOPF JA, HOWIE et HARMS AJJA

DATE HEARD: 5 MARCH 1992

DATE DELIVERED: 12 MARCH 1992

JUDGMENT

HOWIE AJA: Having been found guilty of murder without extenuating circumstances, and robbery with aggravating circumstances, appellant was sentenced to death for the former offence and imprisonment in respect of the latter. He appealed unsuccessfully to this Court against his convictions and against the finding as to extenuating circumstances. Thereafter the panel appointed in terms of Act 107 of 1990 reconsidered appellant's capital sentence and concluded that had the provisions of this legislation applied at the time of the trial the same sentence would probably have been imposed. By reason of that conclusion the matter of appellant's death sentence is now before us.

The deceased, a man in his sixties, was the manager of the Hilton Plaza Hotel in Hillbrow, Johannesburg. From November 1986 appellant, then 18 years of age, boarded in a room at the hotel with his pregnant mistress. When in due course he failed to pay his account, the deceased ordered them to vacate the

room at the beginning of February 1987 and they had to find accommodation elsewhere. On the evening of 13 February 1987 appellant, who had earlier in the day bought himself a hunting knife, proceeded to the deceased's flat on the top storey of the hotel accompanied by one Thring, aged 19, and one Khumalo, aged 23. The deceased had not yet returned after his evening's duties. Having gained entry to the flat, appellant instructed his companions to take up positions in hiding. He himself waited in the deceased's bedroom. When eventually the deceased came in after midnight he was set upon by appellant, who began by accusing the deceased of being responsible for evicting his mistress from the hotel. Almost immediately afterwards appellant attacked the deceased, inflicting multiple fatal knife wounds upon him. At appellant's insistence, Thring and Khumalo also stabbed the deceased but, on the evidence, the wounds they caused were minor. Not content with this assault, appellant gagged the deceased and bound him hand and foot. He then bundled him up in a counterpane and pushed him under a bed. Next, he opened the deceased's

Bible and wrote, on various blank pages in it, comments including "He who die shall always die with the exterminators are around. Signed exterminators" and "Die bastards". Having done all this, appellant telephoned the night porter and summoned him to the deceased's flat. He then took a bunch of keys which had been in the deceased's possession, including the key of the hotel safe, and proceeded to the ground floor. In the absence of the night porter he opened the safe and took R1000 from it.

So much for the murder and the events pertaining to it. At the trial appellant shed no light on his actions. He testified that he had not been in the hotel on the night in question and knew nothing of the killing. That evidence was rejected as false.

In relation to the question of extenuating circumstances, counsel who appeared for appellant at the trial called the evidence of Dr I W Berman, then senior psychiatrist at the Sterkfontein Hospital, who had been present throughout the hearing. He had been a member of a psychiatric panel appointed in terms of s 79 of the Criminal Procedure Act, 51 of 1977, to report

on appellant's mental fitness, referral for examination under that Act having been ordered during the remand stages of the case in the magistrate's court.

The essentials of Dr Berman's evidence were that appellant was a certifiable psychopath whose standard of intelligence was between dull and normal levels and whose criminal responsibility for the crimes laid to his charge had in no measure been reduced by his psychopathy. He had throughout had control over his actions and could at any stage of the events have desisted from his nefarious conduct. His leading and assertive role in the perpetration of the offences led Dr Berman to say that appellant was "handling his immaturity remarkably well". He agreed with the assessment by the trial Court (Vermooten AJ and assessors) that appellant was arrogant, overbearing and intolerant of any opposition. These characteristics, said the doctor, were typical of a psychopath. Opposition in particular could cause violent reaction. This was especially to be seen in the vindictive way appellant had, in the instant case, executed his attack on the deceased. Psychopaths had no feelings of

conscience and displayed callousness towards others. They were innately mendacious and tended to behave impulsively in their quest for immediate gratification, showing no remorse afterwards. Dr Berman expressed the view that there was a chance of appellant's rehabilitation but that it was less than even. The existence of that possibility, he said, arose from appellant's age and immaturity (the crimes in question were committed in the early hours of his 19th birthday). Asked if applicant's modest level of intelligence was a factor in his favour, Dr Berman answered that the planning and deliberation which had preceded and accompanied the crimes belied any possible suggestion that low intelligence served to mitigate them.

There are seriously aggravating factors in this case. That was common cause between counsel and requires no elaboration. The basic facts, set out above, reveal most of those factors clearly enough. I would only add that the intensity of the onslaught upon the deceased was such that of 10 penetrating stab wounds 8 were lethal and the gagging was potentially fatal quite by itself.

On behalf of appellant, Mr **Jansen** (who did not appear for him at the trial) argued that two factors militated against confirmation of the death sentence. These were appellant's youth and his psychopathy. In response, Mrs **Kilian**, for the State, contended that at the trial and in the earlier appeal to this Court it had been held that appellant's youth had played no role in the commission of the offences. She argued that he had acted out of inherent vice, free of influence by others and unaffected by the eviction from the hotel. In fact, said counsel, appellant had failed to make anything of the last-mentioned factor in his evidence. Against appellant were Dr Berman's comment that he was "handling his immaturity remarkably well" and the fact that in all respects appellant had been living an adult life at the relevant time. Concerning appellant's psychopathy, Mrs **Kilian** argued that it had not been shown to have had any connection with the crimes in question.

As to the question of psychopathy, it is indeed consistent with Dr Berman's depiction of a psychopath that appellant acted as callously, viciously

and vindictively as he did. What does not tally with that profile, however, is the lack of impulsiveness on appellant's part. There seems little doubt that he was strongly motivated by distress at the defendant's eviction of himself and his mistress. The fact that he immediately confronted the deceased with that grievance on the fatal night bears this out. So do the crude inscriptions he made in the deceased's Bible and the very extent of the physical assault. These features are not really consistent with a primary intention to commit robbery. However, given the fact that the eviction was about a fortnight before the killing, it is clear that appellant's aggrieved feelings (they may have been quite unjustified seeing that he had failed to pay his account) had had a protracted period in which to fester. When finally they erupted there was even then no sign of impulsiveness. On the contrary, the purchase of the knife, the choice of the moment to strike, the deployment of his accomplices in hiding and even the subsequent ruse to distract the night porter and to facilitate the theft, all bear witness to cunning deliberation and a devious presence of mind.

In the circumstances the State went a long way towards excluding a link between appellant's psychopathy and the crimes concerned. However, in the view I take of the case it is unnecessary to pursue that aspect further. I am satisfied, despite the submissions of counsel for the State, that appellant's youth and associated immaturity constitute, cumulatively, a substantial mitigating factor.

The negative findings made against him in this regard by the trial Court, and by this Court in the first appeal, are explicable on the basis that appellant was held not to have discharged the onus then upon him to prove extenuating circumstances. Now the onus is the other way and in my view the grounds relied upon on behalf of the State did not serve to discharge that burden.

If by inherent vice State counsel intended to submit that there was no reason for appellant to act the way he did other than that he had a predeliction for wrongdoing, there is sufficient on record to show that, rightly or wrongly, he thought that the deceased had been unfair in causing him and his mistress to

leave the hotel and seek other lodgings. This resentment was, in my opinion, the reason for the attack on the deceased. It was not argued for appellant that the deceased's conduct constituted a mitigating factor but it did provide a reason other than that suggested on behalf of the State. And it is not significant that appellant did not rely on this aspect in his evidence. His defence was a denial and he sought to distance himself as far as possible from any motive of revenge.

As to his submission that appellant was leading an adult life, it is so that he earned his own living (as a security guard) and was cohabiting with a young woman whom he referred to as his wife and of whose expected child he would be the father, but outward features of adulthood really do not provide a reliable test. As already stated, the killing took place on appellant's 19th birthday. **Prima facie** someone of that age has not yet reached emotional and intellectual maturity. This factual inference was not disturbed by the evidence in this case. It is not consistent with mature adult behaviour, for example,

that he reacted as extremely as he did to the eviction. If anything, this suggests an inability on his part to cope with the situation in which he and his mistress found themselves. His inscriptions in the deceased's Bible are indicative, I think, of a distinctly immature mind. So is the evidence - not yet mentioned - that he was wont to impersonate a policeman, complete with boots, whistle, false appointment certificate and imitation firearm. The fact that he played the leading and assertive role referred to by Dr Berman does not amount to much. On the evidence his companions were weak and shiftless personalities, the reason for whose presence is hard to explain save, possibly, that appellant felt hesitant to do by himself that which he could just as effectively have done alone. Whatever significance all the aforegoing features have in the context of appellant's psychopathy they support the basic inference of immaturity arising from appellant's age at the relevant time. Accordingly, in my view, the State failed to disprove that youthful immaturity caused or materially contributed to the appellant's offences.

There is a further feature that is relevant

and that is that appellant has no history of violent crime. He has only two prior convictions. At the age of 13 he was placed under the supervision of a probation officer after being convicted of housebreaking with intent to steal and theft of groceries worth R12,75. When he was 14 he received cuts for possessing a dangerous weapon. This record does not stamp appellant as "seasoned in crime" (S v **Dlamini** 1992 (1) SA 18 (A) at 30C) and that is to be borne in mind in conjunction with the evidence of Dr Berman that there is a possibility of appellant's rehabilitation, albeit a small one.

Considering the horrific violence for which appellant was responsible in this case the retributive and deterrent purposes of punishment undoubtedly render the death sentence appropriate. That would probably have been the only appropriate sentence had it not been for appellant's age.

In **Dlamini**'s case, where the appellant was 19 years and 7 months old at the time of the offence, his age, although not considered a mitigating factor, was nonetheless regarded as a reason, together with some

slight prospect of rehabiliation, why the death sentence was not the only appropriate sentence.

The case of **S v Bosman** 1992 (1) SACR 115 (A) bears some resemblance to the present matter. There, the appellant was 18 years and 10 months old at the time of his offence and was also a psychopath. Psychiatric evidence was led to the effect that there was little hope of his reform. As in the instant case, there was neither evidence nor argument to the effect that the appellant would not be liable to adequate control in gaol or that he would pose a danger to the prison community.

In all the circumstances I have come to the conclusion that because of appellant's age and the possibility, such as it is, of his reform, the death sentence is not the only appropriate sentence. I think that all the objectives of punishment would be achieved by a sentence of life imprisonment. As in the **Bosman** case I propose that the relevant authorities should be apprised of this judgment and the psychiatric evidence led at the trial.

The following order is made:

1. The appeal is allowed.

2. The sentence of death upon appellant is set aside and replaced by a sentence of life imprisonment.

3. The registrar is directed to transmit a copy of this judgment and a copy of the evidence of Dr I W Berman to the Department of Correctional Services.

HOWIE AJA

EM GROSSKOPF JA)
) CONCUR
HARMS AJA)