BIBL 73/92

Case No 520/91
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JACQUES COETZEE — Appellant

and

THE STATE — Respondent

CORAM: E M Grosskopf, Milne JJA et Kriegler AJA

DATE OF HEARING: 8 May 1992

DATE OF JUDGMENT: 21 May 1992

J U D G M E N T

/MILNE JA.....

MILNE JA:

The appellant was convicted of the rape and murder of a 14 year old school girl. On the rape charge he was sentenced to 10 years' imprisonment. On the murder charge no extenuating circumstances were found and the death sentence was imposed. With leave of the trial court he appealed to this court against the rape conviction and against the finding that there were no extenuating circumstances and accordingly against the sentence of death. The appeal was dismissed on 25 May 1990. Thereafter, in terms of section 19 of the Criminal Law Amendment Act 107 of 1990, the case was considered by the panel appointed under that section and the panel found that the sentence of death would probably have been imposed by the trial court had section 277 of the Criminal Procedure Act as substituted by section 4 of the 1990 Act been in operation at the time sentence was passed.

The matter now comes before this court in terms of section 19(12)(a) of the 1990 Act.

The factual background is fully dealt with in the judgment of this court. It is not reported but was delivered on 25 May 1990 in Appeal Case No 533/89. I do not propose to repeat the facts but the relevant background may be briefly summarised as follows:- At the time he committed the offences in question the appellant was 20 years and 8 months old and the deceased was nearly 15 years old. The deceased was a virgin and a devoted young Christian. She and the appellant lived with their respective parents in Eshowe. Both mothers were members of the same church and the appellant's mother had visited the house of the mother of the deceased on several occasions before the date when these offences were committed. The deceased was in Std 7 and in order to travel to and from school she used a road which passed through the Dhlinza forest. She left the school at about

2.30 p.m. on 21 July 1988 and on her way home she was raped and murdered by the appellant. The relevant findings of the trial court as to the precise circumstances in which the deceased met her death were the following:

> "We are left with circumstantial evidence only as to the events in Dhlinza forest on the 21st of July 1988. The following circumstances are beyond dispute.
>
> The deceased's blazer was found neatly folded. Her shoes were found unbuckled. There is no evidence before us of signs of any struggle, either along the paths or in the vicinity of where these clothes were found. The deceased's bra (sic) had been removed without apparent damage to it. These circumstances, to our mind, show that there may have been some voluntary association with the accused on the part of the deceased. Although we find it to be unlikely in the circumstances we must consider the possibility that there was some petting between these two people prior to the intercourse and the death of the deceased and, on the basis only of it being reasonably possibly true, we give the benefit of the doubt in this regard to the accused.
>
> We also know, and this is a circumstance of some importance, that the deceased was a shy, inexperienced, Christian and obedient girl who was also menstruating at the time. These circumstances, to our mind, make it almost impossible to believe that she would have consented voluntarily to intercourse. If one takes, in addition to these circumstances, the conduct of the accused following upon the intercourse, the inference is to our mind

inevitable that there was no consent to intercourse. It is possible that the deceased was already unconscious at the time of intercourse. The blow to the back of the head could have caused a loss of consciousness. The injury to the vagina was caused shortly before death, but it is not possible to speculate further on that possibility. It is sufficient to find that the circumstances were such that we can infer nothing else than that there was no consent to intercourse.

The accused must, therefore, be found guilty on the first count.

As far as the second count is concerned we have the following undeniable circumstances. The deceased was found with a ligature tightly wound around her neck tightened with a stick. There was an injury to the back of her head which probably caused unconsciousness. She had been hidden under branches and leaves. There were no signs of manual strangulation. There were no finger-marks around the ligature which may have been expected if a deceased attempts to free herself of the strangulating ligature. This may be an indication that the deceased was already unconscious when the ligature was placed around her neck.

It is argued on behalf of the accused that the Court should accept his version, namely that he thought she was already dead, and that if a conviction of murder were to follow it should be on the basis of dolus eventualis in the sense that although he thought she was dead he recognised the possibility that she was alive and strangled her knowing of that possibility. I cannot accede to this argument. The version related by the accused is so bizarre as to defy credence. I cannot for a second believe that a person who believes that a person has been accidentally killed, would try to make an accident look like murder. It is

conceivable that a person would try to make murder look like an accident, not the other way round. The only inference to be drawn from the fact of this strangulation is that it was done with the intention to cause death. No other inference is open.

I have had some regard to the comparative youthfulness of the accused and his degree of development as I am enjoined to do in the **Mtsweni** case. I can find nothing in the accused's background, his degree of development, that would make the fact that he lied take a different complexion to the one that I have put on it. The only reason for his having lied, both in respect of the rape charge and of the murder charge, can only be to disguise or lessen his implication in these offences.

The unanimous finding of the Court is that the accused put the ligature around the deceased's neck with the direct intention to kill her. He is found guilty also on the second count as charged."

These findings were left undisturbed by the judgment of this court and on that basis it was submitted on the appellant's behalf that the following version was reasonably possibly true:

"(a) Die beskuldigde en die oorledene het mekaar geken;

(b) Die oorledene het vrywilliglik saam met die beskuldigde in Dhlinzabos ingegaan;

(c) Daar was, minstens op die basis van 'n redelike moontlikheid, liefkosinge tussen hulle;

(d) Die beskuldigde het onder die invloed van wellus die oorledene verkrag;

(e) Mediese getuienis en die appellant se getuienis dui daarop dat beide partye seksueel onervare was;

(f) Die oorledene was kort na die verkragting

bewusteloos geslaan [by the appellant] waarskynlik as gevolg van 'n hou tot die kop waarskynlik toegedien van agter af terwyl sy weggehardloop het om die verkragting te rapporteer;

(g) Die beskuldigde het die oorledene vermoor deur haar met haar skooluniform gordel te verwurg deur 'n stok te gebruik om die gordel op te wen soos 'n tourniquet, terwyl die oorledene bewusteloos was;

(h) Die verwurging het waarskynlik 'n aanvang geneem baie kort na die verkragting, 4 tot 5 minute op die meeste;

(i) Die beskuldigde was ongewapen en die moord was nie voorbedag nie in die sin dat daar geen voorafbeplanning was nie;

(j) Die beskuldigde het die oorledene vermoor om haar te verhoed om die verkragting aan te meld."

I agree that this version is, on the evidence, reasonably possible and the question of sentence must accordingly be approached on that basis.

It follows from (a), (b), (c) and (d) above that it has not been excluded as a reasonable possibility that it was only in the course of the "liefkosinge" that the appellant formed the intention of raping the deceased. It also follows from (h), (i) and (j) that it

was only in the last few minutes before her death that the appellant formed the intention of killing the deceased. It is necessary to amplify (j) slightly. The appellant said in evidence that after he had had intercourse with the deceased she said that she would tell her mother what had been done to her. He, in effect, attempted to dissuade her but when his pleas fell on deaf ears he became angry and eventually, after he had struck her and she had slapped him twice, he started to strangle her manually, she fell and hit her head against a pipe whereupon he strangled her in the manner described in (g) above. The trial court decided "... that the evidence of the accused must be rejected as being false and unreliable", but it is apparent that this rejection relates, in the main, to his evidence that the deceased had consented to intercourse and that she had struck her head against a pipe. It was accepted in the judgment of this court that only a few minutes had elapsed between the completion of the rape and the strangling of the

deceased and that his intention to kill her was formed only when she made it clear that she would not be dissuaded from reporting what had happened to her mother. Steyn JA who delivered the judgment of this court said the following in this regard:

> "Die feit dat sake na die verkragting vinnig verloop het en binne ongeveer vyf minute afgespeel het, regverdig nie die gevolgtrekking dat appellant toe impulsief opgetree het nie. Hy het inteendeel vinnig 'n aantal berekende alternatiewe opsies oorweeg en toegepas oor hoe om die skielike krisis te hanteer wat vir hom ontstaan het toe die oorledene sê dat sy haar moeder gaan vertel wat hy aan haar gedoen het. Hy het aanvanklik met haar geredeneer en probeer oortuig om dit nie te doen nie. Eers daarna, toe sy op die vlug geslaan het om van hom weg te kom en die onmiddellike gevaar hom in die gesig gestaar het dat sy tog aan haar moeder gaan rapporteer, het hy haar te lyf gegaan en doodgemaak om daardie gevaar te vermy."

On the question of impulsiveness it must be borne in mind that calculated conduct may follow an impulsive decision. Furthermore, as pointed out by Professor Edwards and Dr Dunn, there may still be an element of impulsiveness in apparently calculated

conduct. They both took the view that there was such an element in this case. This view derives some support from the fact that the whole course of "berekende" conduct lasted only a few minutes. In considering the question of impulsiveness it is also necessary to bear in mind the particular person that one is concerned with.

This brings me to the personal circumstances of the appellant. He was chronologically a minor at the time he committed these offences (he was 20 years and 8 months old). It is however clear from the evidence of Dr Dunn, a psychiatrist, and Professor Edwards, a professor of psychology and a registered clinical psychologist, who both gave evidence at the trial, that the appellant was "significantly" emotionally and intellectually immature. They estimated that his intellectual development was equivalent to that of a 16 year old. Furthermore, his level of intelligence was bordering on that of a person with mild mental retardation. It is also clear from the

evidence of the appellant himself and a social worker's report that, from the age of 14, until the age he was when he committed the offences in question in this case, the appellant was either in prison or in similar institutions as a result of having committed criminal offences involving dishonesty - but none involving violence. In my judgment the appellant's counsel was right in submitting that the appellant's family background was of such a nature that there was no role model to serve as an example for him and that normal and healthy moral values were never instilled in him in his family life. It is also clear from the evidence of Dr Dunn and Professor Edwards that the appellant suffered from an anti-social personality disorder or, in other words, a serious degree of psychopathy. Their evidence was to the effect that a psychopath possesses the following characteristics:

> "emotional immaturity, callousness, inability to learn by experience, weak impulse control and lack of insight with accompanying impulsiveness of conduct without regard to the consequences."

These facts were also considered by the trial court and by this court but it was found that they played no role in the commission of the murder. Counsel for the State, rightly in my view, conceded however that, having regard to the changes effected by section 277 of the Criminal Procedure Act as substituted by section 4 of Act No 107 of 1990 particularly in regard to the onus, a different approach is now called for. There is now no longer an onus on an accused person to prove that his mental and emotional maturity were a factor in the commission of the crime before such factors can be taken into account in considering the appropriateness of a death sentence. His immaturity, low level of intelligence, poor family background and lack of judgment are now circumstances to be taken into account when considering whether the death sentence is the only proper sentence unless the State is able to prove that they did not play any role in the commission of the offence. The test to be applied by this court is therefore different

from that which had to be applied and was applied when the matter was previously dealt with by the Appellate Division. Steyn JA, referring to the remarks of Rumpff CJ in **S v Lehnberg en 'n Ander** 1975(4) SA 553 (A) at 561G-H, said:

> "As twintigjarige het die bewyslas op hom [appellant] gerus om op 'n oorwig van waarskynlikheid te bewys dat sy graad van onvolwassenheid regtens 'n versagtende omstandigheid was."

The immaturity, intellectual poverty and psychopathy of the appellant having been properly raised in the evidence of the appellant and the expert witnesses already referred to, it was for the State to establish that they did not play a significant role. On the basis already mentioned that it must be accepted that:

(a) Having indulged in some love-making that was not objected to by the deceased the appellant was carried away by his passions and raped her.

(b) His decision to murder the deceased was formed and

carried out within a few minutes after the rape.

(c) The reasonable possibility has not been excluded that his emotional immaturity, "border-line" intelligence and the absence of any kind of normal background which would give him a proper sense of values, all played a substantial part in his decision.

To this group of factors it must be added, for what it is worth, the evidence of Professor Edwards that as a result of the appellant's psychopathic condition he was less able than the normal person to reject murder as an instantaneous solution for his dilemma. I say "for what it is worth" not as any reflection on Professor Edwards or his evidence, but because the matters that bothered me in considering the whole concept of psychopathy and its effect as a mitigating circumstance in **S v Phillips & Another** 1985(2) SA 727 (N) at 739B - 724C, still bother me. At the least, however, it seems that psychopaths tend to have a diminished ability to control themselves.

It is now necessary to consider the aggravating factors. There are certainly aggravating factors of a very serious nature. The first is that the murder was committed with direct intent, the second is that it was committed in order to avoid the detection of the appellant's previous rape - in other words it was his own previous conduct that put him in the dilemma and the third is the pathetic circumstances of the deceased. The murder of a 14 year old girl of the kind the deceased was, is an offence likely to arouse feelings of the utmost repulsion in the community. The community however must be taken to have expressed its will through the legislature and the legislature has made it plain that persons under the age of 18 are not to be sentenced to death. As pointed out by the appellant's counsel it seems probable that the rationale behind this approach is that persons under 18 are considered not to have sufficient mental and emotional maturity to deserve the ultimate penalty. Another approach is to say, as did

Rumpff CJ in **Lehnberg**'s case **supra** at 561B:

> "... ek dink ook nie dat die regspleging van 'n beskaafde staat begerig is, behalwe in buitengewone omstandighede, om tienderjariges te laat ophang nie."

See also **S v Dlamini** 1991(2) SACR 665 (A) at 667i-668a. Whichever approach one adopts, it would seem logical that when the evidence establishes that an accused person over the age of 18 is by reason of his paucity of intelligence and his emotional immaturity, in effect, a sixteen-year old he should also not be liable to be sentenced to death. It is, however, unnecessary to decide whether this process of reasoning is a valid one: at the very least the appellant's immaturity is a material factor in considering sentence.

Two further factors must be mentioned. Strangulation is for the reasons mentioned by Malan JA in **R v Lewis** 1958(3) SA 107 (A) at 109E-F usually a particularly deliberate and abhorrent kind of murder.

This aspect is probably not quite so prominent where, as here, the trial court accepts that it is reasonably possible that the deceased was already unconscious when the appellant applied the ligature to the throat of the deceased. The other factor to be considered is the question of the rehabilitation of the appellant. The prospects are not bright. During the period February 1981 to December 1987 the appellant was convicted on three occasions of theft, on two occasions of housebreaking with intent to steal and theft, and on one occasion of removing a motor vehicle without the consent of the owner. He was also convicted of escaping from custody. For these offences he received a variety of sentences including eventually a sentence of imprisonment for 3 years. After he committed the offences involved in this case he escaped from custody and once again committed a housebreaking with intent to steal and theft. For these offences he was sentenced to 3 years and 6 years imprisonment respectively. In these

circumstances it is difficult to quarrel with the view of the trial judge that it is improbable that further imprisonment will be of any value to the appellant. There is the further circumstance that the prospects of rehabilitation of a psychopath are apparently poor - though they are somewhat better according to Prof Edwards in the case of an introverted psychopath, as is the appellant, than in the case of an extroverted psychopath. Both the expert witnesses also agreed that certain aspects of psychopathy tended to burn out after the age of forty. The prospect of some improvement in the appellant if he is kept in prison until some time in his forties cannot therefore be ruled out.

Weighing up the mitigating factors and the aggravating factors and giving due consideration to the objects of punishment I am satisfied that the death sentence is not the only appropriate sentence in this case. I was disposed to think that a sentence of

imprisonment for life is the appropriate sentence, but I have been persuaded that that would be excessive in all the circumstances, and in particular the fact that the appellant was only twenty years old when he committed the offence. I propose therefore to pass a sentence which, if it is not interfered with, will ensure that the appellant is incarcerated for a sufficiently long period to diminish the risk of his committing further serious offences.

The appeal is upheld against the death sentence, and a sentence of 25 years' imprisonment is substituted in its place, such sentence to be ante-dated to 9 August 1989 in terms of section 282 of Act 51 of 1977 and to run concurrently with the sentence imposed on the rape charge.

A J MILNE
Judge of Appeal

E M Grosskopf]
] CONCUR
Kriegler AJA]