

SOUTH AFRICA / JUDGMENT

S v M (11/1988) [1988] ZASCA 11; [1988] 4 All SA 456 (AD) (11 March 1988)

[1988] ZASCA 11**COURT**

Supreme Court of Appeal

BEFORE

Hoexter, Hefer, Nicholas

CASE / FILE NUMBER

11/1988

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IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

B.R.M. APPELLANT

and

THE STATE RESPONDENT

CORAM

: HOEXTER, HEFER, JJA et NICHOLAS AJA.

HEARD : 19 FEBRUARY 1988.

DELIVERED : 11 MARCH 1988.

JUDGMENT**HEFER JA :**

Subsec

(1) (a) of sec 277 of the Criminal Pro-cedure Act No 51 of 1977 provides that sentence of death shall 2

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shall, subject to the provisions of subsec (2), be imposed upon a person convicted of murder. Subsec (2) reads as follows :

"(2) Where a woman is convicted of the murder of her newly born child or where a person under the age of eighteen years is convicted of murder or where the court, on convicting a person of murder, is of the opinion that there are ex-tenuating circumstances, the court may impose any sentence other than the death sentence." (My emphasis)

In S v Ngoma 1984(3) 666 (A D) at p 671 CORBETT JA

said :

" where it appears that the age of the accused is near the critical borderline of 18 years, the correct determination of his age becomes a matter of the utmost importance. From the accused's point of view it may be a matter of life or death."

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In the present case it was indeed a matter of life and death. The appellant and a co-accused were convicted of murder. In appellant's case no extenuating circumstances were found. In sentencing him to death the learned judge in the court a quo said that he was compelled by law to do so "because he (the appellant) was not under the age of 18 and extenuating circumstances were not proved". Why there was this specific reference to appellant's age will presently emerge.

After the appellant had been convicted, his counsel addressed the court on the question of extenuating circumstances and argued that his youthfulness was such a circumstance. She informed the court of his date of birth,

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according to which he was 18 years and about 4 months old at the time of the murder. Counsel had obtained her information from the appellant himself and there was no confirmation of the date eg by the production of his birth certificate or by a witness who could reliably speak of it. The appellant is, moreover, an unsophisticated and apparently uneducated person. Not without reason, therefore, the learned judge was sceptical about the reliability of the date furnished. The case was then postponed. Enquiries were set afoot and the appellant was examined radiologically in order to determine his age. But it was all to no avail because, when the trial eventually proceeded, the learned judge was informed that the appellant's birth certificate

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could not be produced, that none of his relatives could be traced; and that the radiological examination revealed no more than that he was 19 years or more at that stage (which was little more than a year after the murder had been committed). The court was thus in no better position than it had been before the postponement; apart from his counsel's statement it had no information of the appellant's age. But there was a real possibility that he could have been under the age of 18 at the time of the murder and the question of his age could therefore not be left unresolved. Counsel for the State suggested that sec 337 of the Criminal Procedure Act (which provides for the assessment by the court of an accused's age by his appearance or from any available ...6

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able information) be invoked. The learned judge refused to assess his age in this manner. He expressed himself as follows in the judgment :

"If this court was forced to make an assessment, I think I might be inclined to say that (he is) more than 18 at this stage. I do not know what a young man looked like a year ago. Young people change quickly in those years. I find myself unable to make an estimation which can firmly put the answer of the age of the accused the one way or the other."

The following situation thus emerges : the appellant's appearance was such, and the information given to the court regarding the outcome of the radiological examination revealed, that he might well have been under the age of 18 years at the time of the murder; this being the case, it

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was vitally important with a view to a proper sentence to determine his age; but every effort to do so with any measure of certainty had failed and there did not seem to be any likelihood that further efforts would meet with greater success. How then did the learned judge eventually come to say that the appellant was not under the age of 18?

What actually happened, was that the learned judge ruled that there was an onus on the appellant to prove that he was under the age of 18 when he committed the murder and that he had not discharged the onus. This appears from the following passage in the court's

judgment:

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"It has not been finally decided whether the State or the accused should prove that the accused is under the age of 18. Whereas the accused must prove the extenuating circumstances it seems to me that similar considerations apply to the question of age. Frequently the accused is in a position to give information about age which the State does not have He claims to have been born on 17 November 1967. Even on his own claim he does not suggest that he was under the age of 18 when the

crime was committed As far as the fin-

dings of fact is concerned he does not even suggest that he was under the age of 18, or in any other way indirectly to create a degree of factual basis for thinking that he was under the age of 18. This court would be speculating totally if this court were to say that he was under the age of 18."

Having thus overcome the problem of the appellant's age and having found that there were no extenuating circumstances, the learned judge sentenced him to death but granted

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him leave to appeal against his sentence.

Two questions were argued in this court. The first is whether the learned judge in the court a quo correctly ruled that it was for the appellant to prove his age, and the second, whether the finding that there were no extenuating

circumstances is correct. Both these matters arise from the provisions of sec 277(2) and, in order to distinguish between them,

I shall refer to the provision relating to persons under the age of 18 years as the second provision (the first being the one relating to a woman convicted of murdering her newly born child) and to the one relating to extenuating circumstances as the third provision. In the discussion

which follows any reference to the appel-

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lant's or an accused's age should be construed, unless the context indicates otherwise, as a reference to his age at the time when the offence was committed; it is his age at that time and not at the time of his conviction that is relevant (R v Rainers 1961 (1) SA 460 (A)).

Counsel for the State supported the court a quo's view that the second provision can only be invoked if the accused proves that he was under 18 years of age when the murder was committed. He based his argument on the analogy which he sought to draw between the second and third provisions. The onus to prove extenuating circumstances rests, of course, on the accused (*R v Lembete* 1947 (2) SA 603 (A); *S v Theron* [1984] ZASCA 1; 1984 (2) SA 868 (A)), It was accordingly argued 11

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argued, that likewise it is for the accused to prove that he was under the age of 18 if he relies upon the second provision. In my view the two cases are not analogous. Save that they both operate in favour of the accused to the extent that a sentence other than the death sentence may in either case be imposed, the second and third provisions really have nothing in common. Counsel for the State pointed out that the youthfulness of the accused is often relied upon in the context of extenuating circumstances. This is so; but a moment's reflection reveals that the similarity between a case where youthfulness is relied upon in the context of extenuation, and a case 12

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case to which the second provision is applicable, is more apparent than real. It must be realized at the outset that the second and third provisions create separate and independent grounds for the court's discretion to impose a sentence other than the death sentence. The position is accurately stated in Hunt's South African Criminal Law and Procedure (2nd ed) at p 376 :

"Where 'a person under the age of 18 years is convicted of murder', the age of the convicted person per se confers upon the court a discretion to impose a sentence other than death. In such a case it is thus not necessary for the court to enquire whether extenuating circumstances exist, since such an enquiry would do no more than confer a discretion which already exists by virtue of the accused person's age."

This is in accordance with the decision in Ngoma's case

(supra)....13

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(supra) where it was said (at p 670) that

"(w)here a person convicted of murder was under the age of 18 years at the time when the crime was committed, the Court has a discretion as to whether to impose the death sentence or not. On the other hand, if the person concerned was not under the age of 18 years, ie was 18 years old or more, at the time of the commission of the murder, then, unless there were extenuating circumstances, the death sentence is obligatory. (See s 277(2) of Act 51 of 1977.) Thus only where the accused was not under the age of 18 years at the time when the offence was committed is it necessary for the Court to decide whether extenuating circumstances, in the technical sense,

were present (although naturally such circumstances would be relevant on the question of sentence where the accused was under the age of 18 years at the relevant time). "

(See also *S v Harman* 1978(3) S A 767 (A) at p 770.)

The grounds for the discretion in terms of the second provision. are, moreover, not only independent of, but also

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entirely different from those giving rise to the discretion in terms of the third provision. The approach of the courts to the question of extenuating circumstances is trite. It emerges from decisions like those in *S v Babada* 1964 (1) SA 26 (A) at p 27-9, *S v Letsolo* 1970 (3) SA 476 (A) at p 476 and *Ngoma's case* (supra at p 673) that the enquiry as to their existence involves not merely the proof of facts or circumstances which could have influenced the accused's state of mind or mental faculties in the commission of the crime, but also the further question whether they probably did influence him, and whether the influence was of such a nature that his moral blameworthiness is reduced. The first two legs of the enquiry involve pure matters

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of fact and the third one a moral judgment on the court's part. In the case of a murder committed by a youthful accused, although his age is obviously relevant (see *Ngoma's*

case at p 674), it is not his age or his youthfulness as such, but the immaturity flowing therefrom, which may, in a proper case and with due regard to other factors, afford grounds for a finding of extenuating cases. As appears from the judgment in *S v Rooi en andere* 1976 (2) SA 580 (A) at p 585 the real question in such cases is

"of die beskuldigde as gevolg van onvolwassenheid, gebrek aan lewenservaring, onbesonnenheid, of vatbaarheid vir beïnvloeding met minder laakbaarheid bejeën behoort te word al dan nie."

If all this is taken into consideration and compared

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with the position in terms of the second provision, the distinction is plain. In the case of an accused under the age of 18 years all that is relevant is his age; no fact or no circumstance need be shown which could have influenced or did influence his state of mind or mental faculties; it matters not whether his youthfulness or immaturity played any part in the commission of the crime; and, perhaps most importantly,

he need not cross the barrier of the court's moral judgment in order to invest the presiding judge with a discretion to impose a sentence other than death.

The suggested analogy of extenuating circumstances can thus not be used to decide the question of the onus of

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proof for purposes of the second provision. How then is that question to be decided?

In the Lembete case (supra at p 609) it was said that the incidence of the onus "depends of course on the interpretation to be given to the language of the section, and light may be thrown on the question by the application of the general principles in regard to the incidence of the onus". This is the approach which I propose to adopt in deciding where the onus lies in cases such as the present one.

There is little in the wording of sec 277(2) from which the legislature's intention may be inferred. The words "where a person under the age of eighteen years is convicted of murder" provide no reliable clue. Nor can

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anything be made of the fact that the mandatory death sentence was introduced in subsec (1)(a) of sec 277 "subject to the provision of subsection (2)"; it cannot be said that exceptions to a general injunction were hereby created which may be proved by some one who invokes one of the exceptions. For two reasons I am, nevertheless, of the opinion that the legislature did not intend to cast an onus on the accused. The first one flows from a remark in Ngoma's case (supra at p 671) where CORBETT JA said :

"it would be palpably contrary to public

policy and to the intention of the Legislature if persons actually under the age of 18 years were dealt with, in terms of s 277(2), on the factual basis that they were 18 years or older."

I respectfully agree. And this is precisely what may happen

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if the onus were to be cast on the accused. Bearing in mind that the incidence of the onus becomes relevant and decisive only where there is uncertainty arising from the lack of evidence relating to the fact in issue, it is clear that, if the accused were to bear the onus, the second provision cannot be applied whenever there is no or insufficient evidence of his age. He will then be treated as if he were 18 years or older although (as in the present case) he may well have been

younger. Taking into account the legislature's avowed intention of treating persons under the age of 18 differently from others, such a result could, in my view, not have been intended. Nor does it accord with public policy.

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The second reason is that sec 337 of the Criminal Procedure Act deals expressly with the situation where there is no or insufficient

evidence of an accused's age. As mentioned earlier it permits the court to assess his age in such a case by his appearance or from any available in-formation. This is the answer which the legislature has provided to the problem which would otherwise be solved by the incidence of the burden of proof and it is hardly like-ly that the Act would have contained such a provision had it been the intention to cast the onus of proving his age on the accused (or on the State, for that matter) for pur-poses of the application of the second provision of sec 277(2). I am not unmindful of the shortcomings of sec 337.

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21.To assess an accused's age with any measure of accuracy by his appearance is neither easy nor satisfactory; in cases like the present one where he appears to be near the prescribed age, it may indeed be impossible to say whether he is under or above it. It is for reasons like these that it has been said (e g in *S v Seleke en Andere* 1976 (1) SA 675 (T) at p

688) that sec 337 should only be used as a last resort. Naturally, the impossible cannot be expected and if the accused's age cannot be assessed with the required degree of accuracy, nothing further can be done. But the uncertainty which then exists, must enure for his benefit and not against him. He should not be dealt with as if he had already reached the prescribed age at the time of the

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murder.

The problem which arose in the present case is by no means a novel one. The law reports abound with decisions in cases where the accused's age was relevant fÃ³r purposes of sentence e g in terms of secs 334 ter and quat and sec 335 of Act 56 of 1955 or in terms of sec 4(1) of the Dangerous Weapons Act 71 of 1968. In all these cases it was held to be the duty of the presiding officer to satisfy him-self as to the accused's age. (See e g *R v Hadebe and Another* 1960

(1) SA 488 (7); *R v Hlongwane* 1960(1) SA 309 (T); *S v Seleke en Andere* (supra) ; *S v Swato* 1977 (3) SA 992 (0); cf *R v Matipa and Others* 1959 (2) SA 396 (T); *S v Manyololo* 1969 (4) SA 356 (E); *R v Malevu* 1961 (1) SA 284 (N) 23

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284 (N)). And in *S v Danjana and Another* (judgment delivered on 25 May 1973 and reported only in 1973(2) P H H(5) 81) this court adopted the same attitude in a case similar to the present one.

Although it is th^a court's task to assess the ac-cused's age, the State and the accused both have an interest in ensuring as accurate an assessment as possible. Both par-ties should, therefore, assist the court to the best oftheir ability to obtain all relevant information. It should not be left to the concluding stages of the trial (as so often happens) before proper enquiries are set afoot.' It has be-come pratice for the accused's age to be mention^d in the indictment and it appears that investigating officers do

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take the trouble to make some sort of enquiry before a charge is preferred. But the courts have had occasion to remark on the unreliability of this type of information because its source is seldom known or, where it is known, it is usually of such a nature that it cannot be relied upon. If proper enquiry is made timeously by the State and by defence counsel, both parties, or at least one of them, should be in a position to present the court with positive evidence (thus rendering recourse to sec 337 un-necessary,) or at least with sufficiently reliable informa-tion to make a fairly accurate assessment possible. The court's burden will be appreciably alleviated if all those charged with the investigation

and presentation of the

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case bears this in mind.

The remaining question is what this court should now do to dispose of the case. It is clear that the ruling relating to the onus led the learned judge to the erroneous belief that the second provision of sec 277(2) did not ap-ply and that he had no discretion

to pass a sentence other than the death sentence unless extenuating circumstances were proved. Amidst the irresoluble uncertainty

regarding the appellant's age and in view of the fact that there was a real possibility that he could have been under the age of 18 years at the time of the murder, he should not have been dealt with as if he had already reached that age. There was thus no need for the court to enquire into the existence

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of extenuating circumstances nor is it necessary for this court to do so now. The learned judge has not exercised the discretion which he had to impose a lighter sentence but counsel were agreed that this court is in as good a position as the learned judge to pass a proper sentence and requested us to do so. Seeing that all the relevant information is before us, we will accede to the request. In all the circumstances of the case I consider a sentence of 12 years imprisonment appropriate.

The appeal succeeds to the extent that the death sentence imposed on the appellant is set aside. Substituted therefor is a sentence of imprisonment for 12 years.

J J F HEFER JA

HOEXTER JA.)

CONCUR.

NICHOLAS AJA.)

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