



in the company of a friend, Victor Da Costa. As he was early he whiled away some time at the bar with some girls. Eventually he spotted Ramash on the terrace and having told the girls that he would meet them later at the nearby Yen Saan Hotel, he walked over to Ramash. The tablets were, he said, in the top pocket of his leather jacket and in his pants pockets and when he made as if to produce them Ramash said they should go to a more discreet place. They left the terrace and at the reception desk Ramash telephoned Ahmed and when Ahmed joined them the four men, including Victor, went out to the car park where they got into

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Ahmed's hired car.

I should mention here that according to the accused Ramash had taken quite a fancy to a girl called Angle while they had been waiting at or near the reception and had wanted her to join them. However, although she agreed to do so and gave Ramash a kiss and a hug she left saying she was going to fetch her handbag but failed to return. To continue with the evidence of the accused, he said that Ramash's interest in obtaining a woman for the evening did not end with Angie. He said that shortly after driving off the hotel complex Ramash enquired where they could find some ladies, and he, the accused, suggested the Mantenga Falls Hotel which is a fairly short drive down the Ezulwini road and then three kilometres along a gravel road. They therefore set off for the Mantenga falls Hotel. It would seem that by this time Ramash's interest in the mandrax had evaporated completely because even though they stopped on the gravel road to relieve themselves no further mention was made by either party of the tablets and the E10,000 transaction. At this point the accused said he replaced Ahmed as driver because he knew the place better even though the hotel was only another couple of kilometres down the road.

The journey continued with the accused at the wheel and, according to the accused, the conversation remained focussed on women rather than the mandrax transaction. It was agreed says the accused that such women as there might be at the Mantenga Falls Hotel would in all probability be asleep by that hour of the night and Ahmed and Ramash fell in with Victor's suggestion that they should drive on the thirty kilometres or so to Manzini where he knew another hotel where they would find some women.

So, trusting to Victor's instincts about the availability of women in Manzini, and leaving behind them the Yen Saan where,

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according to the accused, he had arranged to meet some lady friends, they set off on the journey to Manzini. However, because of the low level of fuel in the car instead of keeping to the main road they took the shorter road which passes Lozitha Palace and while on this less frequented road Romash suddenly produced a gun, pointed it at the accused and ordered him to stop and hand over the mandrax tablets.

The accused said he stopped the car and was able to persuade Romash to allow him to get out by saying that the tablets were in the back pocket of his trousers. He walked around the back of the car where he took out his own pistol which he had earlier placed in the inside pocket of his jacket as a precaution. He operated the loading mechanism and as he came round the back of the car he fired a shot at Ramash's gun hand, Ramash also having alighted by this time. Ramash, he said, was stooped forward when the shot was fired and his gun went flying and he fell to the ground. Victor also got out of the car, picked up Ramash's gun and also took possession of the accused's gun. Victor then took charge. Ahmed tried to run off but Victor pulled him back in the car. At Victor's instance the accused also got back into the car and they drove off without even troubling to ascertain what injury had been inflicted on Ramash.

After driving some five hundred yards the accused was told by Victor to stop, which he did, and Victor then pushed Ahmed out of the car. The two walked a short distance and the accused says he heard a bang and a scream. Victor returned alone with the gun which he placed under the seat and they drove back to the Yen Saan Hotel, Victor rejecting the accused's suggestion that they report what had happened to the police.

At the Yen Saan Victor spend a couple of hours dancing but the accused, who claims to have been in a complete state of shock, simply sat on the terrace by himself. They then left for Manzini still using Ahmed's car and later in the night the accused managed to get

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a lift to his home at Matsapha. It is, perhaps worthy of mention that the journey to Manzini took them past Matsapha but the accused did not get out there. He gave two reasons: one was that he did not want to go to his home in the car and the second was that there was little petrol left. The car, however, was later discovered burnt out in Matsapha. To complete the accused's account he says that the following day he fled to Durban taking his gun with him."

The learned Chief Justice, in the light of evidence of two other witnesses (Phindile, a crown witness and Angelina, a defence witness) rejected Ramash's evidence that he and Ahmed were marched out of the Casino at gun point. The Chief Justice, correctly in my view, regarded it a reasonable possibility that the two Indian men were keen to obtain female companionship and were negotiating for the acquisition of mandrax. Despite this, however, he accepted the evidence of Ramash in regard to the shooting.

The appeal is based on two main grounds namely: Firstly, that the court erred in accepting the second portion of Ramash's evidence, and secondly, that the court erred in holding that the appellant and Victor acted in common purpose. This last mentioned finding is, of course, essential to sustain a conviction against the appellant in the light of the fact that there is no evidence as to who fired the shot which caused the death of Ahmed Yakoob.

The learned Chief Justice gave several reasons for accepting a portion of Ramash's evidence although he was untruthful and had lied in regard to part of the events of the Saturday night. Those reasons included the following. Firstly, the learned Chief Justice said that an adverse finding regarding the credibility of a witness in regard to a portion of his evidence does not necessarily call for a rejection of all his evidence. He said that careful consideration of his testimony might warrant a finding that another portion of his evidence may be accepted. There is support for such an approach in the law

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reports.

Secondly, the Chief Justice found that there was every reason for Ramash to lie about his desire to have female companionship: His wife was in the public gallery when he testified and he would naturally be inclined to deny his unfaithfulness. Furthermore there would be a reluctance to admit to illegal drug trafficking. "Seen in this light", remarked the learned Chief Justice, "Ramash's lack of candour, while certainly no recommendation of him as a witness, does not necessarily permeate the entirety of his evidence and in particular that part which deals with the shooting and the alleged robbery."

The third reason was that Ramash's account of the shooting and preceding events in the car, carried strong conviction both in content and manner of delivery. The learned Chief Justice said:

"So far as content is concerned the account bears all the hallmarks of a couple of tourists being lured away from their hotel having been identified as doing well at the gaming tables robbed and then ruthlessly killed to avoid risk of detection. The detail also has a strong ring of truth about it. A concoction would much more likely have ascribed to the accused and Victor the usual open threats associated with a robbery than the rather menacing silence described by Ramash and the almost gratuitous handing over of money and valuables."

A fourth reason was that the evidence of Ramash that he was robbed of money, a watch and a ring was described by the Chief Justice as being convincing. He said "It seems to me most improbable that the witness would have rid himself of money and valuables while staggering injured through the bush having

at that stage decided upon a false story of robbery. I might add at this point, that when

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first asked whether Ramash had handed over his money and valuables the accused gave a very curious answer, 'I do not remember him doing that' although a little later he did in fact deny that this had happened."

The above reasons are in my view sound reasons which demonstrate careful and conscientious consideration of the testimony adduced at the trial. But the learned Chief Justice went further and considered, as he had to, whether the appellant's version might reasonably possibly be true. He concluded, again in my view on substantial grounds, that it was false and could not reasonably possibly be true. He stated the view that the appellant's version is riddled with improbabilities. The reasons for coming to this conclusion included the following:

Firstly, that the 2000 mandrax tablets could hardly have been stuffed in the pockets without huge bulges. Later in order to meet the problem the appellant claimed to have had more pockets than the original two described. A second reason was that the hotel terrace was an improbable place to conclude negotiations of the type described.

The third reason was that, once in the car, everyone seemed to have forgotten about the mandrax and a search for women was suddenly on.

The court a quo disbelieved the appellant that he had mandrax and rejected his explanation that he shot Ramash because Ramash wanted to rob him of the tablets. At page 16 of the judgment the Chief Justice said -

"Assuming that these two tourists, and all the evidence points to them being just that, had fortuitously found a supplier of drugs and had agreed to buy a large quantity, is it likely that they would have set about removing them from the supplier by force? I think not.

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They would still have had to remove the drugs from the country and the aggrieved supplier would have had every reason anonymously to alert the authorities of what was going on and Ramash and Ahmed must have realised this."

I find it impossible to conclude that the Chief Justice was wrong in accepting Ramash's evidence in regard to the attack on him. The Chief Justice, after all, was the trier of fact. He analysed the evidence with great care and as I have endeavoured to demonstrate there are no compelling reasons to interfere with his findings and to accord recognition thereto having regard to the very great advantages the trier of fact enjoys in assessing the factual situation such as this. I pass now to the issue of common purpose. The Chief Justice held as follows:

"While it may be that the prospect of obtaining mandrax tablets was used as a lure to get the two tourists in the car I have no doubt that the intention of the accused and his companion was to rob them and that Ramash was deliberately shot with the intention of killing him so as to avoid detection. I am satisfied that they were acting with a common purpose throughout, and while there is no evidence as to which of them fired the shot which killed Ahmed the only reasonable inference to be drawn from the evidence of Ramash, which I accept, is that that act was done in furtherance of that common purpose."

Here too, I find it quite impossible to disagree with the finding of the Chief Justice. The evidence reveals that the appellant and Victor acted in close association with each other; that they co-operated; that after the gruesome events they together went to the Yen Saan Hotel without any outward signs of disagreement between

them being evident. This being so I find it difficult to resist the conclusion that they acted in furtherance of a common purpose agreed upon earlier. Mr. Flynn, in the course of a careful argument, submitted to us that the learned Chief Justice disregarded an important piece of evidence given by the appellant to the effect that he (the appellant) requested Victor not to act violently towards Ahmed. That evidence is to be found at page 44 of the record and reads as follows:

"I shouted back to Victor and said Victor don't do anything harmful towards him nomore violence and he did not reply me."

I do not consider accused's evidence can be taken seriously since these two men acted in close unison throughout. I am of the view therefore that the conviction cannot be disturbed.

In regard to sentence I will deal first with count one. The appeal is directed against the finding that there were no extenuating circumstances. In the course of his judgment on sentence this is what the Chief Justice said:

"In an eloquent plea your counsel has submitted that extenuating circumstances can be found in your relative youthfulness and the uncertainty as to whether it was you who actually shot Ahmed Yakoob. I have dealt with the latter point. As for age you were a few months short of twenty two years when you committed these despicable crimes. Youth can constitute an extenuating circumstance but all depends on the effect which youth has on the mind of the individual offender at the material time. You received an education to Standard VII and obtained what is known as Junior Certificate and then went

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to train for a trade. You were in employment as a fitter and turner and from what I have seen of you during the course of this trial, admittedly some eighteen months after the event, it is clear to me that you are nobody's fool. I am satisfied that you knew perfectly well what you were doing on the night in question, that you acted with a ruthless determination and with a complete disregard for the sanctity of human life. I have given careful consideration to Mr. Flynn's very able plea but I do not consider that your age had any real bearing on the crimes you committed. I therefore am unable to find any extenuating circumstances."

The question of youth is not materially supplemented by any other circumstance of importance and in the absence of any suggestion of a misdirection or the application of any wrong principle by the trial judge I find no basis for interfering with the finding that extenuating circumstances do not exist. Therefore there is no escape from the compulsory sentence of death which was imposed on count one.

I pass now to counts two and three. I am of the view that an adjustment of sentence is called for in this regard. In respect of count two the conviction is one of attempted murder. In my view the imposition of a sentence of life imprisonment in this regard is excessive. In my view a period of fifteen years imprisonment is sufficient and reasonable.

In respect of the last count of robbery the period of fifteen years imprisonment is excessive and in my view should be reduced to ten years imprisonment.

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I would suggest that the sentences of fifteen and ten years respectively run concurrently.

(Signed) KOTZE J.A.

I agree.

(Signed) MELAMET J.P.

I agree.

(Signed) WELSH J.A.