177/56

G.P.-S.117539—1954-5—5,000.

U.D.J. 445.

177/56

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

HENRY JOSEPH ANDERSON
Appellant.

versus/teen

THE QUEEN
Respondent.

Appellant's Attorney / *Prokureur van Appellant* — *Respondent's Attorney* / *Prokureur van Respondent*

Appellant's Advocate / *Advokaat van Appellant* — *Respondent's Advocate* / *Advokaat van Respondent*

Set down for hearing on: / *Op die rol geplaas vir verhoor op:* Friday, 21st Sept., 1956.

(TPD)
1, 2, 7, 9, 11

9.45 – 10.55 – C.A.V.

Appeal allowed on fact. – Conviction confirmed but sentence set aside. – Case referred back to trial judge to pass sentence afresh as if jury had found extenuating circs. (See order inside)

Registrar. 25/9/56.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter of :-

ANDERSON V. REGINA.

Coram:Centlivres, C.J., Schreiner, Reynolds, Brink et Beyers, JJ.A.

Heard: 21st September, 1956. Delivered: 25-9-1956

J U D G M E N T

SCHREINER J.A. :- At a circuit court trial presided over by WILLIAMSON J. the appellant was convicted by the jury of the murder of his wife and was sentenced to death. Thereafter an application was made on his behalf to the trial judge for the making of a special entry and for the preparation of a question of law. Both parts of the application were refused by the learned judge but were granted under the provisions of section 365(6)(iii) of Act 56 of 1955.

Both the special entry and the question of law related to what happened after conviction and before sentence. The relevant part of the record reads:-

"The Registrar: Are you agreed upon the verdict?

Foreman of the Jury: Yes.

Registrar: Is that unanimous ?

Foreman/.....

Foreman: Yes. Guilty, but the Jury would like mercy to be shown.

By the Court: You do not find extenuating circumstances?

Foreman: The gentlemen of the Jury wanted me to put it that way: The man is guilty, but just ask the Court to show mercy. They wanted me to put it that way. "

WILLIAMSON J. then addressed the appellant, saying that the jury had found him guilty and had made a recommendation to mercy. On that verdict he said that there was only one sentence which he could pass, but that the recommendation would be forwarded to the authorities who decide whether the sentence should be carried out or not. The learned judge then proceeded to pass sentence of death.

The special entry raises the question "Whether the learned judge after the jury had "returned the verdict failed to enquire or to enquire "with sufficient clarity from the jury what the verdict "was and/or whether in view of the ambiguous and inde- "cisive answer the learned judge failed to instruct the "jury to consider the matter in terms of sections 144 and "145 of Act 56 of 1955". The important part of the

two/.....

two sections referred to is that part of section 145(1) which provides that after the jury have given their verdict "the judge may ask them such questions as are "necessary to ascertain what their verdict is."

The question of law reserved reads, "Whether the learned judge was correct in inter- "preting the verdict of the jury as one of guilty with- "out extenuating circumstances and whether in consequence "thereof the learned judge erred in stating that the said "verdict left no discretion to impose a sentence other "than the death sentence."

The question of law thus advances the contention that the ~~jury's~~ verdict, properly interpreted, amounted to a finding of extenuating circumstances, while the special entry assumes that this is not so but makes the submission that the verdict was ambiguous and should have been cleared up by further questions from the learned judge, in which event, it is suggested, it would, or might well, have appeared that the jury had intended to bring in a finding of extenuating circumstances.

For the proper consideration of

these/.....

these points it is necessary to make some brief reference to the facts of the case and to the learned judge's summing up. The appellant met the deceased while he was in the army and stationed at Potchefstroom. After he had been discharged from the army as unfit for military service he obtained employment at Sasolburg. He became engaged to the deceased about July or August 1955, with her parents' consent. Not long afterwards they were married without her parents' consent and her father came from Potchefstroom to Van der Byl Park, where the appellant and the deceased were living, hit the former in the face and took the latter, still a minor, away with him. The appellant followed the deceased to Potchefstroom and for some days appears to have been in a state of considerable unsettlement. He gave evidence to the effect that he had heard stories of the deceased's unfaithfulness to him and even that she had herself admitted it to him. During the few days before the murder he moved back and forth between Potchefstroom and Van der Byl Park. According to him it was two or three days before the 11th November that he went to Vereeniging and bought a .25 pistol and ammunition. On the 11th November the deceased was doing some shopping in Potchefstroom with a friend,

Mrs./.....

Mrs. Botha. At about 1 p.m. they crossed the street to get into Mrs. Botha's car, from the right-hand side. The deceased got in first and moved along the seat past the steering wheel; Mrs Botha followed her into the driver's seat. At the same moment the appellant got into the car from the left-hand side and sat down next to the deceased. He had the pistol in his hand and threatened to shoot Mrs. Botha if she did not drive the car away. She did not, however, do so and, after parleying with the appellant, called to two acquaintances across the street and jumped out of the car. As she did so the appellant fired four shots in rapid succession. He fired the first three into the deceased's chest causing fatal injuries, and the fourth into his own left temple. That he had planned to kill the deceased and himself appears clearly from the fact that in the pocket of a jacket found in a room that he was occupying on the morning of the murder was found a letter written by him and addressed to the deceased's parents, in which he charged them with being the cause of the deceased's death and his own.

At the trial medical evidence was called on behalf of the appellant with the object of

showing/.....

showing that at the time he committed the murder he was of unsound mind. The evidence was to the effect that he was suffering from a form of hysteria but was not certifiable under the Mental Disorders Act. The summing up was concerned in the main with this defence.

In relation to extenuating circumstances the learned judge, in mentioning the possible verdicts at the commencement of his summing up, said, "then you may find this, that he did commit the act, that "he is not proved to you on a balance of probabilities "to have been insane, but you find that there are cir- "cumstances surrounding this shooting and leading up to "this shooting, which indicate to you that he may, while "not insane, have nevertheless been moved by, disturbed "by unfortunate things that had happened and generally not "have been so blameworthy as an individual who deliberate- "ly shoots for no reason. You could then find him guilty "of the crime but find that there are extenuating circum- "stances. That verdict would be then, 'guilty, but we "find extenuating circumstances'. If you find that, you "must tell me why you found that - on what you found "that there were extenuating circumstances, or to use

"tho/.....

"the Afrikaans term, 'versagtende omstandighede.' "

After dealing with the facts of the case and the evidence of insanity the learned judge mentioned the position of a verdict of guilty of murder were returned. "Then," he said, "in that event arises "the further consideration. I have told you that you "can bring in a verdict that in this case, although the "man is guilty of murder, it is a case where there are "extenuating circumstances which may so have affected "him that his guilt, his blameworthiness, is in some way "diminished because of the disturbed state of mind, "because of jealousy, because of rumours which he had "heard or stories that had been put in his ear, perhaps "poisonous or untrue stories, but nevertheless stories "which he may have believed, because of what he thought "was a possibility of his losing this girl through the "father having the marriage annulled, because of that "then in some sort of haste or some sort of temper "arising out of some sort of jealousy, or having been in "a disturbed state of mind (not sufficient to show that "he was insane) but sufficient to show that his conduct "was not as blameworthy as it might have been, then in

"those/.....

"those circumstances you can say that there are extenuating/g
"circumstances. The result of what you find of course
"does not concern you - that concerns me."

The learned judge concluded his summing up by repeating the possible verdicts and, apropos of extenuating circumstances, said, "Then I would like "the foreman of the jury to tell me why there are ex- "tenuating circumstances . I have indicated to you the "sort of circumstances you can consider; anything can be "considered which can show that his conduct was not as "blameworthy as it might be/ordinarily. The fact that he "was subject to those emotions, the fact that he might "have believed these stories, or that they might have "been true, are circumstances."

I have set out in full what the learned judge told the jury on the subject of extenuating circumstances because, in the first place, it shows that the jury were fully instructed as to the sort of considerations they might take into account in deciding whether to find extenuating circumstances. On this aspect of the matter no objection to the summing up was or could have been advanced.

A feature of the summing up to which attention should be drawn appears in the passages

which I have quoted. On two occasions the learned judge told the jury that if extenuating circumstances were found they would have to furnish reasons for the finding. That was not in accordance with section 141(2) of Act 56 of 1955, which provides that if the jury state that in their opinion there are extenuating circumstances, the judge may require them to specify those circumstances. The provision does not contemplate that the judge should tell them in advance that if they find extenuating circumstances he will require them to specify those circumstances, let alone the reasons for their finding, which were what the learned judge said he would ask for. It may well be that the legislature did not want the jury to be deterred from finding extenuating circumstances by the knowledge that the judge would require them to specify those circumstances. Such deterrence was doubtless far from the mind of the learned judge but the risk of its happening will be avoided if the sequence provided in the subsection is adhered to. If the jury find extenuating circumstances and are unable to specify the circumstances in such a way as to convince the judge that the finding was justified he always has the power to give effect to his own view of the matter (Regina v. von Zell, 1953(4) S.A. 552).

But/.....

But of more direct importance in the decision of the present appeal is the fact that the learned judge did not explain to the jury that if they found extenuating circumstances this would empower him to impose a sentence other than death, while if they did not make such a finding he would have no option but to impose the death penalty. Indeed, from one of the passages quoted above it appears that the learned judge told the jury that they were not concerned with the result of their finding, if they found extenuating circumstances. Counsel for the Crown supported this remark of the learned judge and contended that it was undesirable that the jury should be told what the effect is of a finding of extenuating circumstances, because it might lead them, weakly, to find extenuating circumstances on insufficient grounds, in order to shirk the burden of making a decision that would render the death sentence inevitable. But unless the jury understands what the effect of a finding of extenuating circumstances is, the possibility arises that they may not appreciate the importance of the duty which the law imposes upon them in this regard. One has to consider the question whether in the present case the

jury/.....

jury may not have failed to use the expression "extenuating circumstances" for the very reason that they did not realise what important consequences a finding of extenuating circumstances may have.

The question of law reserved and the special entry may conveniently be dealt with together. It is important to realise, what is clear from the portion of the record quoted at the beginning of this judgment, that the jury were asking the learned judge to show mercy in imposing the sentence; they were not asking him to merely convey a recommendation to the Executive. It seems to follow that either they had no appreciation of the fact that the judge was obliged to impose the death sentence unless they expressed the opinion that there were extenuating circumstances, or else, despite the language used by the foreman on their instructions, they must have intended to convey thereby the same meaning as a finding of extenuating circumstances. Counsel for the appellant disavowed any intention of contending that in every case in which a recommendation to mercy is attached by the jury to their finding of guilty in a murder case, the recommendation should be construed as an expression of opinion that there are

extenuating/.....

extenuating circumstances. In this counsel was quite correct, for in some cases such a recommendation would clearly be intended as a message which the jury wished the judge to convey to the Executive. But where, as here, the jury ~~clearly~~ asks the judge himself to show mercy in imposing the sentence, the request can only have a sensible meaning if it amounts to a finding of extenuating circumstances - unless, indeed, the possibility mentioned above exists, that the jury were unaware of the purpose and effect of a finding of extenuating circumstances. I am disposed to the view that the proper interpretation of the jury's verdict in this case is that they meant to find, and so, in reality, did find, extenuating circumstances. But, if that was not their meaning, there must have been a misunderstanding on their part as to what they were being asked by the learned judge to do; they could not have understood that there might be, or might be held to be, a serious difference between a finding of extenuating circumstances and a request to the judge to show mercy in imposing the sentence. If there was/ this misunderstanding it must have arisen because the learned judge did not explain

what/.....

what the result of a finding of extenuating circumstances is, but actually told them that they were not concerned with what the result might be. Especially in view of that remark the learned judge should not have been content to put the question "You do not find extenuating cir-"cumstances ? ", but should have made quite sure that they understood the difference between a finding of extenuating circumstances and an expression amounting to no more than a recommendation that mercy should be shown by the Executive.

It follows that either the question of law must be answered in favour of the appellant, or it must be held that the failure to clarify the verdict was, in view of the terms of the summing up, an irregularity. On either view the course should be followed that was followed in Regina v. von Zell (1953(3) S.A. 302). A fair idea of the circumstances which it must be presumed that the jury would have specified can be gathered from the passages in the judgment which I have quoted.

The appeal is allowed in part. The conviction is confirmed but the sentence is set aside. The case is sent back to the trial judge to pass sentence afresh as if the jury had found extenuating cir-

cumstances and had specified them as being

(1) the appellant's mental unbalance and hysteria; and

(2) his disturbed state of mind arising from his fear that his marriage might ~~have~~ be annulled and from his suspicion that the deceased had been unfaithful to him.

Centlivres, C.J.
Reynolds, J.A.
Brink, J.A.
Beyers, J.A.
} Concur

24.9.56

JUDGMENT REFUSING LEAVE TO APPEAL

IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG, the 3rd day of July, 1956.

Before the Hon. Mr. Justice WILLIAMSON.

In the matter between:

HENRY JOSEPH ANDERSON Applicant

and

R E G I N A

JUDGMENT

FAURE-WILLIAMSON, J.: In this matter the accused, the applicant, was convicted in the Circuit Court at Potchefstroom of the crime of murder. The conviction was as a result of a verdict of a Jury; the Jury, after retiring, found the accused guilty. When asked whether this verdict was unanimous, the jury said it was but that it would like mercy to be shown. The Court then asked the Jury: "You do not find extenuating circumstances?", and the reply was "The gentlemen of the jury wanted me to put it that way: The man is guilty, but just ask the Court to show mercy. They wanted me to put it that way."

The first basis of this application is that I should grant an application under sec. 364(1) of Act 56 of 1955 for a special entry on this question: "Whether the learned Judge after the Jury had returned the verdict failed to enquire or to enquire with sufficient clarity from the Jury what the verdict was and/or whether in view of the ambiguous and indecisive answer the learned Judge failed to instruct the Jury to consider the matter in

terms of sections 144 and 145 of Act 55 of 1956." The second basis of the application is in terms of section 366 of Act 56 of 1956, for the reservation of the undermentioned question of law for the consideration of the Appellate Division

> "Whether the learned Judge was correct in interpreting the verdict of the Jury as one of guilty without extenuating circumstances and whether in consequence thereof the learned Judge erred in stating that the said verdict left no discretion to impose a sentence other than the death sentence."

In my view neither of these points are sound in law if the facts on which they are based are adequately set out. I did ask the Jury specifically when they returned their verdict whether they did not find extenuating circumstances, and the answer from the Jury could only have meant that they did not find extenuating circumstances, because I put it specifically to them. The point is not made that they were not instructed on it fully; and I think a perusal of my summing-up to the jury will show that I put it very clearly and directed their minds to that question specifically.

In my view the application for a special entry on the record and for a reservation of a point of law on these grounds cannot be granted.

The second basis of the application for the reservation of a point of law is that, in any event, the jury should have decided that there were extenuating circumstances. The matter of course is put in the proper form that no reasonable person could have arrived at the opposite decision. In my view that cannot be said on the

facts of this case. Whatever my personal view may have been, my summing-up to the jury indicates both points of view as to whether or not there were extenuating circumstances and the difficulty of finding extenuating circumstances. The jury had the facts adequately before them, and in my view there were facts which might have induced a reasonable person to find the accused guilty without extenuating circumstances. In the circumstances I feel that the application for the making of a special entry or reservation of a point of law should not be granted.

Johannesburg.
3. 7. 1956.

(Sgd) A.F.W.
JUDGE OF THE SUPREME COURT.

REGISTRAR'S CERTIFICATE

I certify the foregoing to be a true copy of the Original filed of record in this Office.

(Sgd) E. I. WHITE
REGISTRAR OF THE SUPREME COURT
TRANSVAAL PROVINCIAL DIVISION