11/71

G.P.-S. J. 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

M. G. THOMPSON

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Goodrich & Franklin *Respondent's Attorney* Dep. A. G. (Jhb.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate I. Broude *Respondent's Advocate* M. E. Tucker
Advokaat van Appellant D. A. Bergman *Advokaat van Respondent*

Set down for hearing on 18 - 5 - 1971
Op die rol geplaas vir verhoor op

4.7.8.

(W.L.D.)

Coram: Holmes J.A. Rabie J.A. Muller J.A.

9.45 - 11am.
11.15 - 11.50am.
11.50am - 12.25am.
12.25 - 12.40am.

C.A.V.

27.5.71. Rabie A.R. - Appeal Dismissed.

REGISTRAR APPEAL COURT

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

MICHAEL GEORGE THOMPSON ..... APPELLANT.

AND

THE STATE ..... RESPONDENT.

CORAM: HOLMES, RABIE et MULLER, JJ.A.

HEARD: 18 May 1971. DELIVERED: 27 May 1971.

J U D G M E N T.

RABIE, J.A. :

The appellant, a married man 23 years old, appeared before Boshoff, J., sitting with two assessors, in the Witwatersrand Local Division on three counts, viz. murder, the allegation being that he murdered one Harry Mildenhall in Johannesburg on 17 January 1970 (Count 1); assault with intent to do grievous bodily harm, the allegation being that he assaulted one Lino Menesses Valadao in Johannesburg on 17 January 1970 (Count 2); and assault with intent to do grievous bodily harm, the allegation being that he assaulted one Benjamin Johannes de Bruyn in Johannes-

2/.....burg

burg on 11 April 1970 (Count 3). On Count 1 he was found guilty of culpable homicide, and on Count 2 of common assault. These two counts were taken together for the purpose of sentence, and appellant was sentenced to 5 years' imprisonment. On Count 3 he was found guilty as charged and sentenced to one year's imprisonment. The trial Judge granted the appellant leave to appeal to this Court in respect of Count 1.

The deceased, an old man of 81, died of a fractured skull and resultant brain damage. The trial Court found that he sustained these injuries when, as a result of a blow inflicted on him by appellant, he fell onto the cement pavement outside the Stadium Hotel, which was situated on Main Street in Rosettenville, Johannesburg.

17 January 1970 was a Saturday, and appellant did not have to go to work. At about 2 p.m. he accompanied three male friends to what he described as a "braaivleis" somewhere in the open veld in Oakdene, Johannesburg, and, according to his own evidence, he drank about a third of a bottle of brandy and a few beers while they were having the "braaivleis". At about 4.30 p.m. they went to the Rosettenville Hotel, where,

according to appellant's evidence, he had four or five tots of cane spirits and a few beers. He left this hotel with two friends, van der Westhuizen and Viljoen, shortly after 7 p.m., when the barman refused to serve them with any more liquor. The three of them then went in van der Westhuizen's car to the Stadium Hotel, which is situated about a mile from the Rosettenville Hotel. Van der Westhuizen parked his car around a corner about 100 yards from the hotel and they then proceeded to walk to the hotel. On the way they passed three men sitting on a bench at a bus stop, and, as they did so, they "brushed" these men, to quote the expression used by the State witness Sexton, who was one of the men on the bench. The other two were the deceased, who was a friend of Sexton's, and one Bolt. Appellant and his two friends thereafter entered the bar of the Stadium Hotel and sat down at a table. Inside the bar at that time, having drinks on their own, were two Portuguese-speaking men, Lino Menesses Valadao and his friend Pedro de Brito. After some time, as Valadao and de Brito were about to leave, appellant and his two friends approached them. Appellant put his arm around Valadao's shoulder and asked him to buy him (appellant) a drink. Valadao refused to do so, whereupon appellant struck him in the face

with his fist. Valadao fell to the ground and, as he got up, he was struck again. Appellant also tried to hit Valadao with a bar stool, but de Brito took it out of his hands before he could do so. This assault on Valadao was the subject matter of Count 2.

One of appellant's friends tore de Brito's shirt, but they desisted from any further assault on him when he threatened to use his pistol. De Brito thereupon took Valadao, who had suffered cuts on his lip and chin and who felt groggy, out of the bar to their car, which was parked alongside the pavement near the entrance to the bar.

De Brito's evidence on what took place after he had taken Valadao outside will be referred to presently. At this stage I point out that Sexton, fearing for the deceased's safety, had in the meantime told him to stand - and to remain - at a spot slightly to one side of the main entrance to the hotel while he (Sexton) went into the hotel to tell the manager of the "commotion" which was going on in the bar. Sexton could not find the manager, and, as he was on his way back to the front entrance, he looked through the glass portion of the doors and saw someone hit the deceased, who was then still standing at

the spot where he had told him to stand. Sexton stated that he did not see the assailant's face. His description of the assault is summed up in the following passage in his evidence:

> "So you saw the person move past the front of the deceased, and then come round to his left side and strike the deceased with his right hand on the nape of the neck? -- That is correct".

Sexton rejected the suggestion put to him in cross-examination that the deceased might have been accidentally pushed over by someone who was "rushing towards the hotel". There was a deliberate blow, he said.

I now turn to de Brito's evidence. He took Valadao to their car and helped him to get into the passenger's seat. Appellant and his friends followed him to the car, where appellant suggested that he be given the chance to hit de Brito, and that de Brito could thereafter use his pistol. De Brito refused, whereupon appellant turned round to follow the deceased, who walked by on the pavement at that moment. Appellant walked behind the deceased for a few paces and then struck him with the open hand on the left side of the neck, causing him to fall to the pavement.

This was, in brief, the version of the assault

on the deceased which de Brito gave in his evidence-in-chief. Later, in re-examination and in reply to questions by the Court, he made certain conflicting statements. He said, contradicting what he had said before, that he had not actually seen the deceased pass him, but thereafter he reverted to his earlier statement that he saw appellant walk behind the deceased. It appears, furthermore, that at the preparatory examination he at no stage said that he saw the deceased walking on the pavement. His evidence on that occasion was that the deceased stood at the entrance to the hotel. The trial Court found de Brito's evidence relating to the deceased's position immediately before and at the time of the assault unsatisfactory, but it seems clear - although there is no specific finding to this effect - that it accepted his evidence that he saw appellant assaulting the deceased.

The next State witness to whom reference must be made, is George Zodiades, the owner of a café two doors away from the main entrance to the Stadium Hotel. He testified that he saw the assault on the deceased, but it was not clear from the record whether he positively identified appellant as the

assailant. Throughout his evidence he referred to the "accused" as having attacked the deceased, but the following passage occurring near the end of his cross-examination creates uncertainty:

> "CROSS-EXAMINATION BY MR. BREGMAN CONTINUED: Now, you have said it was the accused who struck the blow? -- Yes.
>
> Did you recognize the person who struck the blow, or are you just assuming it was the accused who struck the blow because the accused is in the dock? -- No.
>
> THE COURT: No what? -- I don't recognize him in any case. If anybody is telling me it was the accused, I say 'I don't know'.
>
> You don't know who struck him? You can't say who the man is who struck the accused? -- I cannot say that".

I think the passage indicates that Zodiades could not say that appellant was the person whom he saw assaulting the deceased. The trial Judge makes no reference to this passage in his judgment and appears to have accepted that Zodiades did identify appellant. This was wrong, I think, but on the view I take of all the evidence in the case the error is not of any real consequence.

Zodiades' evidence was, very briefly, as follows. He saw the deceased, whom he knew, standing at a spot slightly to the south of the hotel's main entrance. He started walking towards him and then saw a man coming from the bar.

This man held a jacket in his left hand and with his right hand he hit at "everybody in front of him" (later in his evidence the witness said that appellant hit at two people, and that there were five or six people on the sidewalk). The man walked up to where the deceased was standing and, as he passed him, he struck him behind the neck. The deceased fell to the ground and the man ran away. In cross-examination it appeared that Zodiades was uncertain of the manner in which the assault took place, for, when the Court asked him "Is it possible that he could have walked past him in front, and went round him and struck him from the left-hand side?", his answer was "Yes". The suggested description of the assault was, of course, different from that given by him in his evidence-in-chief.

The second witness who identified appellant as the deceased's assailant - de Brito being the other one - was Reginald Parker. His evidence was to the following effect. He was driving his car from south to north along Main Street at about 8 p.m. on the evening in question when he saw a "commotion" on the pavement outside the Stadium Hotel. He saw two men emerge from the bar and run up the street, and then he saw

appellant come out of the hotel's main entrance. Appellant, swinging both his arms, ran to the edge of the pavement. He stood there for a moment, pulling at his shirt, and then he ran back to the entrance to the hotel. As he passed the deceased, who was standing at the side of the entrance, he appeared to take a step in his direction, and then he hit him behind the neck. The deceased fell to the ground and thereafter appellant disappeared.

Parker stated that he knew appellant, who was a friend of his brother's, and that he recognized appellant as he emerged from the hotel's main entrance. He said, also, that although he was in a car on the far side of the street when he made his observations, he had a sufficiently good view, even if not a completely unobstructed one, so as not to be mistaken about what took place. Because of the fairly heavy traffic, he said, his car came to a stop opposite the main entrance to the hotel, and he could observe what was taking place on the pavement through a gap between two parked cars and over the bonnet of one of the cars. When he had to move forward again, he double-parked as soon as he could and then ran back to the hotel, where he helped to attend to the deceased. Later he took the deceased to hospital.

10/.....Alexander

Alexander Parker, the father of Reginald Parker, was in the passenger's seat of the car when they drove past the Stadium Hotel. He stated that his attention was drawn to what was taking place on the pavement when his son said "It is Michael" (i.e., appellant), and his intention then was, he said, that they should stop and "get him (i.e., appellant) away before any trouble took place". He saw someone on the pavement who was flinging his arms about, but he did not see his face. This person went up to the deceased and struck him on the left side of the neck. Thereafter he disappeared.

Pieter van der Merwe, the barman at the Stadium Hotel, stated that appellant had only one drink, a beer, at the hotel, and that in his view appellant was under the influence of liquor, but not drunk. He told the Court, amongst other things, that appellant ordered a drink from him and then refused to pay for it and, also, that when he told appellant to stop hitting Valadao, appellant struck him (van der Merwe) on the cheek. Three police officers, Scheepers, Bouwer and de Beer gave evidence as to appellant's condition later on the same night. Bouwer, who arrested appellant some time after 10 p.m., and de

Beer, who was with Bouwer when he made the arrest, both testified that appellant was not under the influence of liquor. Scheepers, who saw appellant at the Booysens police station at about 11 p.m., said that appellant appeared to be quite normal ("heeltemal normaal").

The appellant's evidence was that he could not remember anything about the alleged assault. He could recollect, he said in his evidence-in-chief, that he went to the Stadium Hotel with van der Westhuizen, that he had a drink there, and that he heard people arguing in the bar, but nothing more. The next thing he remembered was being awakened by the police. He was then in bed at home, but he could not remember how he got ~~xxxxx~~ home. In cross-examination he gave evidence which was in conflict with what he said in his evidence-in-chief. He then said that he could not remember having a drink at the Stadium Hotel, that he was not quite sure that he heard people arguing in the bar, and that he could not remember going to the hotel with van der Westhuizen.

Van der Westhuizen stated that when he left the hotel the appellant was still there. He waited at his car

for appellant to come, and, when appellant came after a short while, he took him home. Appellant, he said, was very drunk that night.

Victor Brand testified that he arrived at appellant's house at about 9.30 p.m., that appellant was then "lying sprawled over the bed", and that he was very drunk. He put appellant to bed.

The trial Court found that appellant was under the influence of liquor when he committed the assault, but not to such an extent that he did not know what he was doing. It rejected as false his evidence that he could not remember what happened from the time he entered the bar until the time when he was arrested.

One of appellant's witnesses, James Collins, told the Court that he drove down Main Street on the evening in question and that, because of the heavy traffic, his car came to a stop at a point slightly beyond the bar entrance of the Stadium Hotel. He then saw appellant fighting on the pavement with a foreign-looking man whose shirt had been torn, and a few paces away from them he saw three other men who were also engaged in

a fight. As he drove on again, he looked back and saw that the fighting was still going on. He also saw a number of people rushing out from inside the hotel, and in this rush, he said, an "elderly gentleman" was knocked over.

Collins' version of what took place was not put to any of the State witnesses, and it was in conflict with that of all the other witnesses. The trial Court found Collins to be an untruthful witness and rejected his evidence in toto. This finding has not been challenged on appeal.

The argument addressed to us on behalf of appellant is summed up in the following submission in counsel's heads of argument, viz. that the Court a quo "should have entertained a reasonable doubt regarding the identity of the person who struck the deceased. This doubt should have emanated from the fact that the witnesses contradicted each other on material aspects of the case, and that no one witness can be termed reliable". In developing this submission counsel directed our attention to differences in the versions of the State witnesses as to what happened on the pavement. The main points mentioned by him in this regard were as follows: de Brito's evidence that

he spoke to appellant at the car, as well as his evidence that the deceased walked on the pavement immediately before he was assaulted, was not supported by anyone else; according to Zodiades the deceased was hit as his assailant walked past him, whereas Sexton said that the deceased was hit by someone who went around him and then struck him from behind; according to Zodiades the deceased's assailant had a jacket in one hand, whereas Reginald Parker stated that appellant had both hands free; and, finally, Reginald Parker was the only witness who stated that appellant ran to the edge of the pavement, and his evidence as to the manner of the assault was not consistent with that of de Brito or Zodiades. Counsel also contended that none of the State witnesses could be termed reliable, and he referred us to what he submitted were unsatisfactory features in their evidence.

As to the first part of counsel's argument, viz. that which relates to the witnesses' differing versions of the manner of the assault, it cannot be disputed that the differences to which we were referred do in fact exist. It is clear at the same time, however, that the trial Court was aware of contradictions in the evidence of the witnesses, as appears

from the following passages in the judgment:

> "There are many contradictions and discrepancies in the evidence, and the Court must, in weighing up and evaluating the evidence of the witnesses, not overlook the nature of events to which they testified, their interest and complicity, if any, in the events, and the circumstances in which they made their observations."

And:

> "The witnesses contradicted each other on several aspects of the case. The contradictions are largely due to the fact that they made their observations in some cases under different circumstances, from different angles and in a brief period of time with the scene changing rapidly. What emerges clearly, however, is that the accused, Viljoen and van der Westhuizen were involved in the trouble, and that the accused in each case was the aggressor. The fact that the witnesses contradicted each other as to the side from which the accused approached the deceased and the manner in which he struck him, seems to me, in the circumstances of this case, to be immaterial".

The learned Judge's positive statement that the contradictions "are" largely due to the factors mentioned by him may perhaps be questioned, but at the same time experience does teach, I think, that differing observations of the kind mentioned may not unreasonably be expected to occur in the evidence of persons who witness a rapidly changing scene and, with that, an assault which takes place in only a moment or two. Due regard must,

of course, at all times be had to all ~~circumstances~~ contradictions in the evidence of witnesses who purport to identify an accused person, for such contradictions may be sufficiently material to render their identification unreliable. Every case must, however, be decided in the light of its own circumstances, and the ultimate inquiry in each case is whether there is sufficient proof on all the evidence, taken together, to establish guilt. In the present case, despite the contradictions to which we were referred, and despite the criticism which was levelled at the witnesses individually, I am not persuaded that the Court a quo erred in finding the appellant's guilt proved. I say this on the strength of what is set out in paragraphs (1) to (4) below, in which I also deal briefly with counsel's criticism (in the second part of his argument) of the individual witnesses concerned.

(1) Appellant is the only person who was seen to assault anyone on the pavement during the period before the deceased was assaulted. The evidence of Collins, who stated that he saw two fights on the sidewalk, was rejected as untrue by the trial Court, and no reliance is placed thereon by appellant's counsel. Sexton alleged that four or five people were hitting "this way

and that", and that he was also struck on the back of the head by someone whom he could not identify, but this was alleged to have happened after the assault on the deceased. It was contended on appellant's behalf that this evidence of Sexton was not supported by any other evidence and that it was unreliable, but it is unnecessary to inquire into the matter since the evidence relates to something which allegedly took place after the deceased had been assaulted.

(2) It is highly unlikely, I think, that de Brito would have made a mistake in his identification of appellant as the deceased's assailant. He knew appellant by sight, and he must have had a good view of him in the bar that evening. He also saw appellant on the pavement, when appellant came to his car, and in these circumstances it cannot successfully be contended that his identification should not have been accepted. It is true, of course, that his evidence about where the deceased was immediately before the assault was found to be unsatisfactory by the trial Court, but it may be pointed out that at the preparatory examination, when his memory of events must have been better than at the time of the trial, he said that the deceased was standing

when he first saw him and when he was assaulted. But be this as it may, I do not think that this unsatisfactory feature of his evidence is sufficient to cast doubt on his evidence that he saw appellant assault the deceased. I may add that the evidence shows that the lighting on the pavement was very good, there being neon lights above both the bar entrance and the main entrance to the hotel.

(3) It is also highly unlikely, in my view, that Reginald Parker would have made a mistake in his identification of appellant. He knew appellant, and there can be no doubt that he spotted appellant on the pavement as he drove down Main Street. The evidence of Alexander Parker would seem to show that the Parkers' intention was to go and get appellant out of trouble, and, if this is so, it is most unlikely that Reginald Parker would have given the evidence he did if he had any doubt in his mind about his identification of appellant.

It was contended that Parker's identification was unreliable on a number of grounds. It was submitted, firstly, that on his own admission he looked at the scene only casually, and that he might, therefore, have made faulty observations.

This submission is based on the following passage in his re-examination:

> "Yes, but you can assist us by saying whether you paid attention to the traffic and the driving and made these observations just casually, or whether you concentrated on these incidents on the pavement and gave it all your attention? --- No, I just took the scene in casually, as it was happening. I never made particular notes of every specific detail that went on. But it had all your attention while you were looking? --- Yes".

I do not think the submission is sound. Apart from agreeing to the suggestion that the scene had all his attention, the witness, when using the word "casually", merely meant that he did not take particular note of "every specific detail" of what happened. This was no admission that he did not carefully observe the main details of what was taking place, and it certainly was no admission that he could not have seen what he testified to having seen.

It was also argued that, on his own admission, the witness did not have an unobstructed view of the pavement inasmuch as he had to look through a gap between two cars and over the bonnet of one car. This is so, but it does not show that the witness did not see, or that he could not have seen, what he

stated that he did see.

It was contended, also, that the witness' evidence that he saw appellant emerge from the main entrance - and not the bar entrance - of the hotel was in conflict with that of the other witnesses. This is so, but, as I have said, there can be no doubt that the witness did see appellant on the pavement, and a mistaken observation in this connection cannot, in my view, cast doubt on his identification of appellant as the person who assaulted the deceased.

It was submitted, finally, that the witness' eyesight was defective. This submission is based on the following portion of his evidence:

> "CROSS-EXAMINATION BY MR. BREGMAN CONTINUED: With your glasses do you have hundred percent vision? --- One hundred percent, yes.
>
> Were you wearing your glasses that night? --- I never had glasses at the time.
>
> When did you start wearing glasses? --- In May.
>
> And does it improve your vision? --- It improves it.
>
> Quite a bit? --- No, they are not very strong, but it helps.
>
> There was something affecting your vision which made you decide to see a specialist or doctor, who prescribed glasses for you? --- There was.
>
> And if your vision is a hundred percent with glasses, what would you say it is without glasses? Sixty percent, seventy percent? Can you give an

> estimate? Do you know? --- I would say eighty-five percent.
>
> But it is certainly not as good as with glasses? --- No.
>
> Now, taking all these factors into account, Mr. Parker, the fact that you were not wearing glasses at the time, the fact that it was night, the fact that there was a form of light, neon lights, street lights, and so on, and the fact that there was a commotion, isn't it possible that you are making a mistake as to the identification when you say it is definitely the accused? --- No.
>
> I put it to you, Mr. Parker, that there is a possibility that you are making such a mistake? --- I don't think so".

I do not think the evidence establishes the submission made.

(4) Appellant gave no evidence to meet that of the witnesses who testified that they saw him assault the deceased. His evidence was, as I have said, that he could not remember what happened that evening. It was contended that he could only have assisted himself by giving evidence regarding the assaults (Counts 1 and 2), and that his failure to do so was almost certainly due to his inability to recollect these incidents. This argument cannot be sustained in the light of the trial Court's rejection of appellant's evidence that he could not remember what happened from the time when he entered the bar until the time when he was arrested, and I am not persuaded that

the Court's finding was wrong. The position therefore is, on the basis of the trial Court's finding, that appellant could have given evidence, if he had so wished, to meet the allegations made against him, but he failed to do so, and in my opinion this is a point which counts against him.

It is my view, therefore, that the appeal against the conviction cannot succeed.

I now turn to the appeal against the sentence. Four submissions, dealt with in paragraphs (a) to (d) immediately below, call for consideration.

(a) It was argued that the Court wrongly held that the assault on the deceased was a serious one. The result was serious, it was said, but the assault was of "a comparatively minor nature". It was not argued, I should point out, that the deceased's age could in any way be relied on as an extenuating factor. In answer to this submission I find it sufficient to say that the deceased was struck a blow behind the neck which felled him and, in the result, caused his death. It was a completely irresponsible assault on an innocent man, and in my view the offence was rightly regarded in a serious light.

23/.....(b)

(b) It was submitted that the trial Court misdirected itself with regard to sentence on Counts 1 and 2 by allowing itself to be influenced by appellant's subsequent assault on de Bruyn (Count 3), and counsel relied on the following passage in the Court's judgment on sentence:

> "The nature of the assault on de Bruyn really reflects the viciousness of the deceased (this is an error for 'the accused'). It appears from the evidence that the bar fights are very prevalent, particularly in the bar in the Stadium Hotel. According to the barman, Van der Merwe, there are fights in the bar practically every weekend. At one stage the Broadway mob operated in the southern suburbs and always fought in the bar of the Stadium Hotel".

The evidence relating to Count 3, I should point out, shows that appellant hit de Bruyn with a bottle and that, when the bottle broke, he thrust its jagged end into de Bruyn's face.

The judgment on sentence, read as a whole, does not, in my view, justify the submission made. I may point out, also, that the sentence "The nature of the assault on de Bruyn really reflects the viciousness of the deceased (accused)" follows immediately on a passage relating to Count 3, and I am not convinced that one is entitled to draw the conclusion that what is said in this sentence played a part in the determination

of sentence on Counts 1 and 2. I would add, in any event, that the Court had sufficient evidence before it to justify its taking a serious view of appellant's conduct. He assaulted Valadao; he struck van der Merwe when he tried to stop the assault on Valadao; his suggestion that de Brito should allow himself to be hit and that he could thereafter use his pistol could hardly have been anything less than an implied threat that de Brito would be knocked out so that he would not be able to shoot; and then, of course, there was the assault on the deceased.

(c) It was also contended that the Court erred in not holding that appellant was strongly under the influence of liquor at the time he assaulted the deceased. I am not persuaded, however, that the Court's finding as to appellant's condition was wrong; and would point out in this connection that counsel did not argue that reliance could be placed on appellant's witnesses.

(d) The final submission is that the sentence is startingly inappropriate and that it induces a sense of shock. The sentence is, no doubt, a heavy one, and it was intended to be such by the learned Judge, who concluded his judgment by saying:

"Bar thuggery and violence of the kind of which the accused has been found guilty, are to be deprecated

25/.....and

and should be discouraged with salutary sentences. It is hoped that the sentence I am about to pass will adequately serve the stated ends of criminal justice".

This was a valid consideration, and, on all the facts of the case, I am not persuaded that this Court should interfere with the sentence which was imposed.

The appeal is dismissed.

HOLMES, J.A.
MULLER, J.A. } CONCUR.

P. J. Rabie