G.J.A. &. 448.

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

(_____ DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

_____
Appellant.

versus/teen

_____
Respondent.

Appellant's Attorney _____ *Respondent's Attorney* _____
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate _____ *Respondent's Advocate* _____
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on _____
Op die rol geplaas vir verhoor op

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

THEMBA NENE ..... Appellant

versus

THE STATE ..... Respondent.

Coram: Rumpff, C.J., Trollip, J.A., et Van Winsen, A.J.A.

Date of Hearing: 17 August 1976.

Date of Judgment: 2-9-1976

J U D G M E N T

VAN WINSEN, A.J.A.:

Appellant appeals against his conviction for murder and the imposition upon him of the death sentence by HEFER, J., and two assessors sitting in the Natal Provincial Division.

The/.....

The relevant facts appearing from the evidence adduced in the Court below may be briefly summarised as follows.

On 6 September 1975, sometime after sunset, a number of Bantu were walking along a street in the Imbali Township and amongst their number was the deceased, the person in respect of whose death appellant was convicted. One Caiphas Mazibuko was walking ahead, closely followed by Daphne Zondi and Phillip Mnyandu walking side by side. To their rear came Jackson Dhlomo and the deceased, Henry Mnyandu, walking together. The street lights were burning at the time. While so walking a person, whom Daphne Zondi identified as appellant, proceeding in the opposite direction, approached these persons. He passed Caiphas as well as Zondi and her companion and according to Jackson came up to the deceased, who was walking next to him (Jackson), and struck the deceased a blow on the upper part of the chest. The deceased said "You are stabbing me". [redacted] The appellant, says Jackson, wished to attack the deceased again but he, Jackson, by means of his jacket held in his hand, warded off further blows directed

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by appellant at the deceased. The deceased ran away and appellant also made off, taking with him Jackson's jacket. The medical evidence disclosed that the deceased died from a single stabwound in the neck.

Appellant did not contradict the State case beyond denying that he was the person who stabbed the deceased. He stated that on the evening of the stabbing he had come from work by bus to Imbali and that he went to his uncle's house at about 8 o'clock. This house is situated in the same area but not the same street as that in which the stabbing took place. From there he proceeded at about 9.30 p.m. to his home. He claims that on the way he was set upon by three young men, one of whom struck him with an umbrella. Another attacked him with a knife which, when it fell from the attacker's hand, he picked up and stabbed at his attackers, injuring one of them. His attackers made off and he ran home. The effect of appellant's evidence was to convey that the incident in which he had been involved bore no relation to the attack on the deceased. In the result,

therefore, the only disputed issue in the case was the identity of the deceased's murderer. The State called only two witnesses, Jackson and Zondi, on this issue. Only the latter, to whom the appellant was well-known, could identify him as the deceased's attacker. The Court a quo was aware of the fact that to entitle it to convict on the strength of a single witness as to identity such evidence had to be clear and satisfactory in all material respects. The learned Judge stated in his judgment that Zondi favourably impressed all members of the Court and that the Court rejected the possibility that she was deliberately lying. The Court also considered the possibility that she might have been honestly mistaken as to the identity of the appellant. It held, however, that Zondi knew the appellant well (a fact that he himself admitted), that she had had an adequate opportunity to see him and that the somewhat indifferent light afforded by the street lamps was not such that proper identification could not be made. It found appellant to be an utterly

unreliable witness and rejected his evidence as false. The Court a quo accordingly, relying on Zondi's evidence as corroborated by Jackson in certain respects, convicted accused of the murder of the deceased. Thereafter, at the request of accused's counsel, the Court below embarked upon an inquiry as to the presence or otherwise of extenuating circumstances. The appellant again entered the witness-box and, as his counsel put it to him, he expressed the wish "to make a clean breast of the whole affair". He then stated that he had stabbed the deceased and entered upon a rambling statement - described by the trial Judge as "an absolutely confused jumble" - as to how this had come about. He stated that the deceased had owed him money and that when he demanded to be repaid, the deceased refused to pay and threatened to set a gang upon him. When next he approached the deceased for repayment of the loan, the gang was in fact set upon him and he lost two teeth in the ensuing fight. Subsequently on the night in question he again met the deceased in company with others and a fight ensued when he

asked for the money owing to him. The fight was between himself and the deceased, both of whom, according to appellant, were armed with knives. In the course of the fight the deceased was stabbed by him.

The Court a quo found that the appellant had failed to establish any extenuating circumstances. It thereafter acceded to an application for leave to appeal to this Court. Counsel for appellant filed heads of argument in this Court which proceeded upon the startling premise that this Court, in adjudicating on the correctness of the finding of the Court a quo that appellant was guilty of murder, was precluded from relying on the evidence given by appellant in relation to extenuating circumstances. At the outset of the hearing in this Court the fallacy of this premise was pointed out to counsel but, nothing daunted, he proceeded to develop a labyrinthine argument on the assumption that this premise was indeed sound.

The fallacy of this assumption stems from the fact that counsel took the view that the Court a quo had delivered

two verdicts, one in relation to murder and another in relation to the presence or absence of mitigating circumstances. In fact, while there were two issues before the Court a quo, there was but a single inquiry directed to the determination of whether appellant was guilty of murder with or without extenuating circumstances, and the result of this inquiry is contained in a single verdict. This Court in S v Shabalala, 1966 (2) SA 297 (AD) took the view that it would be in the interests of justice if these two issues were separately tried, more particularly since the onus lay with the State in regard to the proof of an accused's guilt whereas it lay with the latter in regard to the presence of extenuating circumstances. Accordingly the procedure followed in this case of trying the two issues separately was correct and the result was a verdict of murder without extenuating circumstances. Shabalala's case (supra) was applied in S v Sparks and Another, 1972 (3) SA 396 (AD) at p 404 D-E. It follows, therefore, that when this verdict

is challenged in this Court all the evidence led on both issues falls to be had regard to, both in reference to the issue of appellant's guilt as well as to the issue of extenuation.

Dealing for the moment with the first of these two issues I consider that the criticism directed against the veracity and reliability of Zondi as a witness is unfounded. Her evidence as to identity rests upon the firm foundation of her acquaintanceship over the period of a year with appellant. Indeed, according to him it was a far more intimate relationship. Her opportunity of observing him was adequate though brief. The light from a street lamp, though not bright, was sufficient to enable her to observe appellant when he passed some 12 yards from her. It afforded her sufficient opportunity to notice several of the articles of clothing worn by him and in regard to certain of these her description is confirmed by the witness Jackson. The latter furthermore states that the light at the scene of the attack on the deceased was sufficient to enable the identification of a

person known to the identifier. Jackson was unable to identify appellant as the latter was unknown to him. The Court found Zondi to be an honest and impressive witness and a reading of the record amply confirms this impression. It is a profitless exercise to conduct, as appellant's counsel did, a microscopic examination of Zondi's evidence and then having discovered minor discrepancies in the evidence - which as a general rule are to be found in most cases - to magnify them in support of a contention that no reliance can be placed upon the honesty or reliability of the witness. It is to the broad totality of the evidence that regard must be had in determining whether guilt is proved beyond reasonable doubt (cf. State v Snyman, 1968 (2) SA 582 (AD)). Taking all the evidence tendered by the State together with the fact that the Court a quo found that appellant's evidence on the question of his guilt could not reasonably be true, I consider that Court to have been justified in convicting appellant. What was a well-founded case for the State, however, became a conclusive one once appellant

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went into the witness-box on the issue of mitigation and admitted having stabbed the deceased. Nothing additionally stated by appellant in the course of such evidence casts doubt upon the correctness of the finding as to his guilt.

This appeal, however, is also directed at the finding of the Court below that no mitigating circumstances were present in the case. It was argued in this Court that there was no evidence of premeditation and that dolus directus was absent. In addition reliance was placed upon appellant's youth and that he was on the night in question affected by intoxicating liquor.

This Court's powers to interfere with the finding of the Court a quo as to the absence of mitigating circumstances fall within prescribed limits. It can only interfere with the trial Court's finding if it is vitiated by misdirection or irregularity or is one to which no reasonable Court could have come: S v Malinga, 1963 (1) SA 692 (AD) at p 695 (D - E). In my view no such grounds exist

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for interference in this case. The Court a quo rightly approached the matter on the basis that the onus lay with the appellant to prove, on a balance of probabilities, that extenuating circumstances existed. Appellant's was the only evidence led in an attempt to discharge this onus and the rejection of his evidence as "an absolutely confused jumble" is not open to criticism under any of the headings on which this Court's interference is justified. It may well be that a dispute over money was the motivation for the attack and had there been evidence that may reasonably have been true to the effect that the money was owing and that the deceased refused to pay, this circumstance may well have operated to some extent in extenuation of appellant's conduct. At this stage an investigation into such a possibility lies outside the ambit of this Court's jurisdiction.

The appeal is accordingly dismissed.

RUMPFF, C.J.)
TROLLIP, J.A.) Concur.