CASE NO 145/88
/mb

**IN THE SUPREME COURT OF SOUTH ARICA**

**(APPELLATE DIVISION)**

In the matter between:

**JOSEPH SIPHO PHIRI** ..... APPELLANT

AND

**THE STATE** ..... RESPONDENT

**CORAM** : VAN HEERDEN, KUMLEBEN et EKSTEEN JJA

**HEARD** : 1 NOVEMBER 1988

**DELIVERED** : 11 NOVEMBER 1988

---

**J U D G M E N T**

**KUMLEBEN**, JA/...

KUMLEBEN, JA

The appellant was arraigned on three counts arising from what took place on the evening of 4 May 1980 at Paardeplaas in the district of Belfast, Transvaal. Count 1 alleged that he attempted to kill and murder the State witness William Mahlangu. On counts 2 and 3 he was charged with the murder of Thomas Mthimunye and Piet Mbokane respectively. He pleaded not guilty to all counts but was in each case found guilty as charged by Curlewis J, sitting with two assessors, in the East and South Eastern Circuit Local Division of the Transvaal Provincial Division. On count 1 a sentence of seven years' imprisonment was imposed. On the other two counts, having found no extenuating circumstances, the death sentence was passed. Leave to appeal against the convictions and sentences was refused in the court a quo. The petition for the grant of such leave addressed to the Chief Justice succeeded to the extent that leave was given

to appeal against the conviction on count 2 and against the sentences on all three counts, which in the case of counts 2 and 3 involved the finding that there was no extenuation.

At the trial the complainant Mahlangu, Simon Zulu and his mother, Dinah Zulu, testified on behalf of the State. Their evidence was accepted as reliable. The appellant also gave evidence in which he denied that he was in any way responsible for the assault upon the complainant or the death of either of the deceased. His evidence in this regard was rejected as false. These findings were rightly not challenged on appeal.

The State witnesses gave this account of the events that evening. Simon Zulu held a party at his home which was attended by a large number of people. The complainant arrived at about 5 p m and in due course was joined by Thomas Mthimunye and his brother Elijah Mthimunye. As they sat

drinking together the appellant, who was also at the party, approached Thomas Mthimunye and asked him for liquor. He refused to give him any, whereupon appellant, addressing the complainant, said "Mthimunye wil nie moet sy drank hê nie. Dit is beter ons moet vir hulle slaan." The complainant did not reply or react to this partially unintelligible statement. Apparently at this stage there was an altercation between Thomas's brother, Elijah, and the appellant. The complainant had to intervene and separate them. There was no further trouble between appellant and the Mthimunye brothers in the house. Whilst complainant was seated there, he saw the appellant go outside. After a while complainant left to catch a train. When he went out he noticed the appellant standing with another person a few paces from the doorway. Complainant asked them what they were doing. Without replying or saying a word, the appellant attacked him and stabbed him in the chest with a knife. The complainant ran back into the house and collapsed. Simon

Zulu, the host, saw him come in and asked him what had happened but he was incapable of speaking. With that the door opened and Thomas Mthimunye came in saying that he had been stabbed. This caused Simon Zulu to leave his house and go to his neighbour with a view to summoning the police. On his way there he saw the appellant running in the direction of his house. Appellant stopped at the entrance in a wall, which apparently surrounds his house, and appeared to be listening to what was going on inside. Simon Zulu heard him say "Ek wat Sipho Phiri is, is verbaas om te verneem dat daar mense in hierdie huis doodgemaak is." On Simon Zulu's return to his house he saw appellant leave his yard and stand under a nearby tree. As Simon Zulu walked towards his home, two persons approached him from the opposite direction. Just after they had passed him, he saw the appellant stand up, rush towards these two men and stab one of them. His victim was Piet Mbokane who instantly fell and died at that spot. The other person ran away with the appellant chasing after

him.

At the time when the two injured persons had entered the room and Simon Zulu had left to call the police, Dinah Zulu heard a noise outside and went to investigate. She saw the appellant when he was at the opening in this wall. She asked him why he was making such a noise and why it was that two injured persons had entered the house. He said, referring to them: "he must remark because these people are related to him" and "Kyk nou hierdie mense het nou 'n saak gemaak teen my." Her impression was that he was sorry that these two people had been stabbed. He then suddenly made off towards the tree where he hid himself. She too saw him, without any apparent reason, rush at Piet Mbokane, stab him and chase after the other person. The medical evidence proves that Thomas Mthimunye sustained two stab wounds, one penetrating his chest wall and the other his liver, the latter causing his death. In the case of Piet Mbokane a single stab wound in the chest proved fatal.

As regards the conviction on count 2, Mr Jordaan, who appeared for the appellant before us and in the court a quo, submitted that, inasmuch as there is no direct evidence indicating who stabbed Thomas Mthimunye, it is reasonably possible that it was not the appellant. The evidence on record controverts this. Simon Zulu makes it clear, in the evidence to which I have referred, that within a very short space of time the two injured men entered his home. There is no suggestion that at the relevant time other persons were quarelling or fighting at that party. According to the evidence appellant was the only assailant at the scene. He stabbed the complainant just before, and Piet Mbokane soon after, the deceased was stabbed. The medical evidence indicates as a probability that the same weapon was used. In the circumstances, since the evidence of appellant in rebuttal was rejected as false, the inescapable inference is that he was the assailant on each of the three occasions.

In his heads of argument counsel for the appellant submitted that, even if appellant had stabbed Piet Mbokane, in the absence of evidence as to how this took place, it is reasonably possible that appellant acted lawfully in self-defence, or was no more than negligent. However, before us counsel did not pursue this line of argument with any enthusiasm. Without any evidence from appellant raising these contentions, they are wholly speculative and the State was therefore not called upon to adduce more evidence to prove that the appellant acted unlawfully and intentionally. This is to be inferred in the circumstances unless the basis for some other conclusion is laid. There can be no doubt that appellant was correctly convicted on count 2.

The correctness of the sentence of seven years' imprisonment on count 1 was not seriously challenged in argument before us. The potentially lethal attack and serious nature of the injury sustained, constrained counsel

to concede that the court had exercised a proper judicial discretion in imposing such punishment.

On the question of extenuation counsel for appellant relied on the influence of liquor (as evidenced primarily by appellant's irrational behaviour) and on his youthfulness.

His conduct was certainly abnormal and inconsequential. I have referred to his senseless outbursts and remarks. Simon Zulu said that when he went out of the house and saw the appellant, he was talking unintelligibly as though bereft of his senses ("soos 'n mal mens"). His actions were equally bizarre. He was a stranger in that community and did not know the complainant or the two deceased. On the face of it he had no possible motive for attacking the complainant with murderous intent. The fact that Thomas Mthimunye had refused to give him a drink may

conceivably be the reason for his stabbing him. But having done so, he stood outside the house. He must have seen both injured men return to the house and must have expected - had he been reacting normally - a hostile response from its occupants. Yet he remained there and did not run away. It is at this stage, according to Dinah Zulu, that he seemed contrite and remorseful. However, he next concealed himself at the tree and attacked two strangers, again without any discernible motive.

The evidence on the amount of liquor the appellant consumed before and at the party, and its effect upon him, is sketchy. According to the complainant, when he arrived there the appellant was not all that intoxicated and was still in command of his faculties ("Met my aankoms daar was hy nie so baie gedrink nie, ek meen hy was nog by sy positiewe.") The appellant explained that he was an itinerant vendor of clothing and had come from Johannesburg to sell his wares.

Whilst doing so, he had been drinking at various places before he arrived at the party. When there, he cannot say how much he had to drink but he does remember buying two bottles of beer, for which he paid R3. Though, as I have said, his evidence denying his unlawful conduct was rejected, this evidence relating to drinking was not. There appears to be no reason why it should not be accepted.

The most probable inference to be drawn from the evidence is that the liquor he consumed accounts for his irrational behaviour. The precise reason or reasons for such conduct are however largely by the way. What is important is that, whatever may have been the cause or causes, the appellant behaved abnormally. Though in law accountable for his actions, this fact must make his conduct less morally reprehensible than that of a person whose faculties are unimpaired.

The appellant said that he was 26 years old at the time of the trial, that is, on 6 November 1987. This would make him 19 years old at the time the offences were committed. Both State and defence accepted this to be the case. That youth, prima facie and in the absence of special circumstances, operates as an extenuating circumstance has been acknowledged in a number of decisions of this Court. For instance, in S v Lehnberg 1975(4) S.A. 553 (A) 561 Rumpff CJ said:

> "Wat die probleem van versagting betref, behoort na my mening tienderjariges in die algemeen as onvolwasse beskou te word, en derhalwe geregtig op versagting, tensy die omstandighede van die saak van so 'n aard is dat 'n Hof homself genoop voel om die doodvonnis op te lê. Vanselfsprekend is daar grade van volwassenheid by tienderjariges, maar uiteraard het geen tienderjarige die rypheid van 'n volwassene nie. Jeugdigheid is onvolwassenheid, gebrek aan lewenservaring, onbesonnenheid, en veral 'n geestestoestand van vatbaarheid vir beïnvloeding, veral deur volwassenes. En 'n persoon van 18 of 19 jaar is, volgens my mening, onvolwasse of hy nog op skool of universiteit is, en of hy reeds 'n jaar of wat gewerk het. Om jeugdiges, sonder meer, met die dood te straf, is om die jeugdige met die maat te meet waarmee 'n rype volwassene gemeet word. En

ek dink ook nie dat die regspleging van 'n beskaafde Staat begerig is om, behalwe in buitengewone omstandighede, tienderjariges te laat ophang nie."

(See too S v Mohlobane 1969(1) S.A. 561 (A) 565; S v Mapatsi 1976(4) S.A. 72(A); S v Ceaser 1977(2) S.A. 348(A) and State v Disten 1988(1) P.H. H 8.)In the instant case there are no special reasons for not regarding the appellant's youthfulness as an extenuating factor. The evidence, far from showing that he is an exception to the general rule, strongly suggests that, if he cannot be described as a callow youth, he was certainly not mature beyond his years. I refer to the evidence of the complainant, who, when asked why he thought the appellant had assaulted him, gave these replies:

"Nou watter rede kon hy gehad het om jou met 'n mes te steek? Kan jy aan enige rede dink? -- Ons het nie 'n uitval gehad nie, ek weet nie watse rede het hy gehad nie, maar hy het vir my beseer.

Presies. U het in u getuienis - ek verstaan nie u taal heeltemal nie, maar u het na hom verwys op 'n stadium as 'umfaan', is dit korrek? 'Umfaan'? Die beskuldigde? -- (hof kom tussenbei).

HOF: Ja, hy sou daar jonk gewees het nê?
MNR JORDAAN: Ja, dit is die punt wat ek wil maak. -- Ja, hy was nog 'n jong seuntjie, hy het nog hierdie seilskoene gedra. Hy het nog seilskoene gedra.

Dit is reg. Nou hoekom sal so 'n jong klonkie jou sommer met 'n mes aanval vir geen rede nie? -- Seuntjies is gewoonlik stout, gewoonlik doen hulle dinge sonder rede."

Finally, it is necessary to quote the short judgment on extenuation in full. It reads as follows:

"CURLEWIS, J: Counsel has addressed us on the question of extenuation. The law is perfectly clear. The onus is upon the accused to establish on a balance of probabilities that there are facts which reduce his moral blameworthiness. No evidence was led by him or on his behalf. It hardly needs to be said or authority quoted that we can look though of course at all the evidence, in particular in this case that of the state, to see whether there are extenuating circumstances.

He was nineteen years old; there was some drink there and he consumed some. It is stated by Mr Jordaan also that he was speaking irrationally. I think that he has misconceived or misconstrued what both Mr Zulu and Mrs Zulu meant. However that may be it is argued by Mr Jordaan that if one takes this what is apparently unmotivated attack with his age and the drink, it clearly shows that something was operating upon him, something went wrong with him, which would make him

morally less blameworthy. He has said that we cannot accept that he deliberately laid in wait to stab Mr Mbokane on the third count; that he might, says Mr Jordaan, have gone underneath that tree to hide away thinking that these people were coming to catch him. I do not see how that improves the matter. He concealed himself from someone whom then he stabbed, he went out from the place of concealment and deliberately killed. If he had really just wanted to get away then he could have fled into the darkness. So I do not think that it helps to say that he wanted to get away and then he decided to kill these people because he thought they might arrest him. Even looking at it that way and taking all the facts I do not see how that - my assessors and I indeed do not really understand. Here is a man who has deliberately killed two innocent people. They were not at fault. They were enjoying themselves at a party.

In our view it is unanimous there are no extenuating circumstances."

This judgment is open to criticism in a number of respects:

(i) It is acknowledged that appellant was a nineteen year old youth but no reasons are given why this should not be regarded as an extenuating factor in the light of the clear authority of this court, to which I have referred.

(ii) Though it is found as a fact that there was liquor at the party, and it would seem that the court

also accepted that appellant partook of it, the evidence in this regard is not examined or assessed nor is there any finding on whether the liquor he had consumed was likely to have affected him.

(iii) The words spoken to Mr and Mrs Zulu by the appellant were clearly irrational. There is no room for any misconception of their evidence in this regard.

(iv) As I have indicated his irrational conduct is more telling than anything he might have said. This evidence - the most significant as regards extenuation - is not dealt with, or even referred to, in the judgment.

(v) The submission of counsel that the facts show "that something was operating upon him, something went wrong with him, which would make him morally less blameworthy" was, as I read the judgment, rejected solely on the ground that the appellant had "deliberately killed two innocent persons." It hardly needs saying that the fact that innocent people are murdered (which is more often than not the case), is no ground for ruling out the presence of extenuating circumstances.

The material misdirections and omissions in this judgment leave one with the ineradicable impression that the vital question of extenuation on a capital charge did not receive the careful attention it plainly deserves.

The appeal succeeds in part. The sentences on counts 2 and 3 are set aside and in each case one of 15 years' imprisonment is substituted. The conviction on count 2 and the sentence on count 1 are confirmed. The sentences on counts 1 and 3 are to run concurrently with that imposed on count 2.

M E KUMLEBEN
JUDGE OF APPEAL

VAN HEERDEN) JA
EKSTEEN ) JA - Concur