LL Case No 268/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ERIC TABETHE Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, MILNE et EKSTEEN JJA

HEARD: 14 NOVEMBER 1989

DELIVERED: 20 NOVEMBER 1989

JUDGMENT

VAN HEERDEN JA:

At approximately 10 p m on 13 November 1987 the body of the late Donald Steele ("the deceased") was found in Arundel Road, Durban. His right hand was grasping a plastic bag containing an item of merchandise and in his left hand was a crushed Chesterfield cigarette - a brand smoked by the deceased. One of his rear trouser pockets was turned inside out. The cause of his death was two incised wounds which had penetrated his heart and the upper lobe of his left lung.

Subsequently the appellant, an adult male, was arraigned in the Durban and Coast Local Division on charges of murdering and robbing the deceased. He was convicted on the first count and was found guilty of attempted robbery on the second count. The trial court found that there were no extenuating circumstances and the appellant was consequently sentenced to death on the first count. With the leave of the trial judge the present appeal is directed only against that sentence.

At the trial the appellant admitted that he inflicted the aforesaid wounds. He averred, however, that he acted in self-defence after the deceased had threatened him with a knife. This version was rejected by the trial court which found that the deceased was unarmed and that he was taken unawares by the appellant. The court also found that when stabbing the deceased in his chest, the appellant either deliberately intended to kill him or, with foresight of the likelihood of his death, was reckless as to whether or not that result ensued.

The appellant did not testify after being convicted. Nor was any other evidence led on extenuating circumstances. Nevertheless it was submitted at the trial that the combined effect of two factors constituted extenuation; viz, intoxication and the absence of premeditation.

According to the testimony of a witness for the State, one Mashiyana, a number of men, including

the appellant, were at some sort of shebeen in Malvern during the afternoon of 13 November 1987. The appellant left the shebeen at about 8 or 8.30 p m. The trial court accepted Mashiyana's evidence and found that the appellant was intoxicated at that stage. It was, however, not prepared to accept that his intoxication was of such a degree as to cloud his judgment at the time of the attack on the deceased.

In regard to the second factor the court found that having decided to rob the deceased, the appellant either followed him or lay in wait for him. In the court's view there was consequently not a true lack of premeditation.

On appeal counsel for the appellant advanced the same arguments as in the court a quo. They are without substance. It is true that according to Mashiyana the appellant had been drinking from noon on the day in question and that he was intoxicated when he left the shebeen. However, Mashiyana was not asked,

and therefore did not say, how much the appellant had to drink or to what extent he was intoxicated. The appellant had to walk some distance to reach Arundel Road and it does not appear from the evidence precisely when the deceased was attacked. All one knows is that the attack must have occurred some time after 8 p m and before 10 p m. Hence it is impossible to conclude that the appellant must still have been intoxicated when he stabbed the deceased. And on the assumption that there was some degree of inebriation, it does not appear as a probability that that condition had a significant bearing on the appellant's state of mind when he decided to rob the deceased.

As regards the submission that the trial court wrongly held that there had been no premeditation, I need say no more than this. One simply does not know how long before the attack the appellant formed the intention of robbing the deceased. Having decided to do so, he may well have followed the

deceased for a considerable distance before an opportunity for executing his design arrived. The appellant therefore failed to show that he acted impulsively in any sense of the word.

The appeal is dismissed.

H.J.O. VAN HEERDEN AR

MILNE JA

CONCUR

EKSTEEN JA