Case No.553/90

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THULANI SHELELA JOHANNES NICHOLAS DLAMINI Appellant

and

THE STATE Respondent

CORAM: HEFER, GOLDSTONE JJA et NICHOLAS AJA

HEARD: 2 September 1991

DELIVERED: 24 September 1991

J U D G M E N T

NICHOLAS, AJA...

NICHOLAS, AJA

In his lifetime Dr Abu Baker Asvat carried on a medical practice in Soweto. His rooms were in a converted house, being No 680 Rockville. The front door led from the porch into the waiting room. To the right was the so-called dispensary, in which Albertina Sisulu, the receptionist-nurse, worked. From this room the back door led to the yard. Between the dispensary and the waiting room was a grill door, through which one passed to the consulting-room. In it were the doctor's desk, an examination couch and other furniture. The grill door locked automatically when it was closed, and it could be opened electronically by pressing a button behind the desk.

On the afternoon of 27 January 1989 Dr Asvat was in his consulting room. There were seven or eight patients seated in the waiting room when a young man

presented himself to Albertina Sisulu. He said that he wished to see the doctor. She took particulars from him, which she entered on an admission card: "name - Mandla Nkwanyane; age - 21 years; address - J H Nancefield hostel; occupation - unemployed". At her request, he placed his right thumb-print on the card, which was then passed to Dr Asvat. He was directed to the waiting room.

Later in the afternoon the doctor called out the name Mandla. Patients who were waiting said that he had left. After he had seen all his other patients, Albertina Sisulu said, the doctor went out into the garden. She heard a voice say "yes", in answer to the doctor's question whether it was Mandla. From the dispensary she called out, "Where have you been, Mandla?" and got the reply, "I had gone to ask for money from my sister in Rockville." Shortly afterwards she heard the grill door

click, indicating that it had closed, but she did not see who went into the consulting room. A little later she heard a gunshot, followed by a scream. She ran out of the back door, screaming for help. On her way to a neighbour's house, she heard another shot. When she returned to the rooms she saw two black men running towards the gate. That was the last she saw of them that day.

Going into the consulting room, she found the doctor lying on the floor in a pool of blood. He was dead. The police were called. Dr Seedat, who was in partnership with the deceased's brother, was summoned to the scene. He found that the room was in disarray. The drawers of the desk had been pulled out and coins were scattered on the floor.

On post-mortem examination, Dr Kemp, a pathologist, formed the opinion that the cause of death was

two bullet wounds in the chest. One lay just below the left collarbone, and the bullet penetrated the left lung and the spleen and was found in the body. The other was under the right armpit: the bullet passed through the right and left lungs and the spine, and passed out of the body at the back. The two wounds caused considerable haemorrhage and death must have ensued within minutes.

On an evening in February 1989 Jacob Mazibuko returned from Boksburg to Merafe Hostel in Soweto where he lived. In his room were some cooking pots and blankets which did not belong to him. The following morning he found two men drinking tea in the kitchen. He knew them: he and they had grown up together in the Nongoma district of Natal. One he knew by the name of Nhlekisane, the other by the name of Shelela. They told him (it was Shelela who spoke) that they were looking for a temporary place to hide: they had killed a doctor in Rockville and the police

were looking for them - they had appeared on TV and in the newspapers. They said that they could not go home to Nongoma because they had there robbed a shop belonging to Mdlalose. They left that day but returned in the evening. During the night Mazibuko reported to the Protea police station what had happened. Early the following morning (it was established by a police witness that this was on 17 February 1989) a number of policemen went to room No 273 at Merafe hostel. Mazibuko pointed out the place where the men were sleeping. Three men were arrested: Wellington, whose room it was, and who was released shortly afterwards; and Nhlekisane and Shelela. On the following day, Mazibuko went to deposit some refuse in the dust-bin. He saw a piece of paper wrapped in plastic. It was Nhlekisane's identity document, which he handed to the police.

On 16 October 1989 two men were arraigned in the

Witwatersrand Local Division. The trial judge was SOLOMON AJ, who sat with two assessors. One of the accused was Nhlekisane, who was charged as accused No 1 under his full name of Zakhela Nhlekisana Cyril Mbatha. The other was Shelela, who was charged as accused No. 2 under his full name of Thulani Shelela Johannes Nicholas Dlamini. From now on, they will be referred to as Mbatha and Dlamini respectively. They faced seven charges, three of which are presently relevant:

> "1. Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977
>
> IN THAT upon or about 28 June 1988 and at or near Ekubuzeni Store in the district of Nongoma the accused did unlawfully and intentionally assault EPHRAIM MDLALOSE and with force and violence did take out of his possession R550,00 in cash, cigarettes and a wristwatch, his property or in his lawful possession, and did thereby rob him, aggravating circumstances as defined in section 1 of Act 51 of 1977 being present.

4. Murder
IN THAT upon or about 27 January 1989 and at house 680 Rockville, Soweto in the district of Johannesburg the accused did unlawfully and intentionally kill ABU BAKER ASVAT.

5. Robbery with aggravating circumstances as defined in section 1of Act 51 of 1977
IN THAT upon or about 27 January 1989 and at house 680 Rockville, Soweto in the district of Johannesburg the accused did unlawfully and intentionally assault ABU BAKER ASVAT and with force and violence did take out of his possession R135,00".

The accused pleaded not guilty, but both were found guilty on these counts. On count 1 each was sentenced to imprisonment for eight years; and on count 5 a similar sentence was imposed, but it was ordered that four years of the sentence should run concurrently with that imposed on count 1. No extenuating circumstances having been found in respect of count 4, the accused were sentenced to death. Dlamini applied for leave to appeal

against the convictions on counts 1, 4 and 5, and against the sentence of death. The application was dismissed by the trial judge. On a petition to the Chief Justice, however, leave was granted to Dlamini to appeal against the convictions on counts 4 and 5, and against the finding that there were no extenuating circumstances and the sentence of death. Leave to appeal against the conviction on count 1 was refused.

At the trial evidence on the facts was given for the State by Jacob Mazibuko ; by two women who were in the house at the time of the shooting - Albertina Sisulu and Duma Similane; by Thandi Tshabalala, who lived in a house which backed onto Dr Asvat's; by Floyd Tshabalala, an ambulance attendant; and by Veronica Hlatswayo, who lived in a house in the same street as Dr Asvat's rooms. Other evidence was given by Dr Vernon Kemp, the pathologist who performed the **post mortem** examination, and by a number

of policemen who **inter alia** proved photographs and a sketch plan, and a statement made by Mbatha immediately after his arrest. The two accused gave evidence for the defence.

It will be convenient to deal at this early stage with the evidence of the two accused. It consisted of a denial generally of the State case. They were not at the scene; they were not the men who entered Dr Asvat's consulting room; and they did not make a statement to Mazibuko. The trial court found both accused to be extremely poor witnesses.

Quite apart from the evidence of the witnesses for the State, it is clear from statements which were proved to have been made on these occasions that Mbatha was guilty on counts 4 and 5: he pleaded guilty in the s.119 proceedings in the magistrate's court on the day of his arrest, and his answers to the magistrate's questions amounted to a full confession; he made a confession to

Lieut. Page of the South African Police; and on a visit to the scene with Capt. Basson, also of the South African Police, his pointing out of things and places was seriously incriminating. It was admittedly his thumb print on the admission card completed by Albertina Sisulu.

A perusal of the record shows that Dlamini was plainly a lying witness and that no weight can be attached to any of his evidence where it conflicts with that of the State witnesses.

The account given in the introductory paragraphs hereof has been extracted from the evidence of Albertina Sisulu and that of Mazibuko. It will be supplemented on some points of detail.

Albertina Sisulu did not at first in her evidence-in-chief identify either of the accused. She said she thought that Dlamini was the man whose particulars she took, but said, "I am not too sure really." Nor did

she see either of the accused go into the consulting room. When she observed two people running towards the street, she did not see their faces, and she did not recognize either of them, but she did notice their clothing. One was wearing a red skipper, and the other had on a cream and white striped top. As she ran towards the gate she saw an ambulance arrive. It had been summoned to take a patient, a Mrs Adams, to hospital. The ambulance was driven off in pursuit of the two men, but it returned without them. In cross-examination by Mr de Villiers on behalf of Dlamini, there was no challenge of Albertina Sisulu's evidence about the clothing the men were wearing. When recalled at a later stage of the trial for further cross-examination, she said that she recognized Dlamini because when she saw him for the first time "he had thin marks on his cheeks." She said that she pointed him out at an identification parade. (The State led no evidence

in this connection.) In further re-examination by the prosecutor, she was asked whether she was at all sure that she identified the right person and she replied, "I really don't know, because I even told the police I am not sure."

Thandi Tshabalala said she lived in a house backing onto Dr Asvat's surgery. On 27 January 1989 she was at a water tap in the backyard washing some meat. She heard a shot and people screaming. She looked and saw a person holding the burglar-proofing at the window of Dr Asvat's surgery, apparently trying to get out. She was standing about 20 paces away from the window. The man was wearing a skipper, which was cream and white in colour. In court, she identified this person (from his facial expression only) as accused No 2 (Dlamini). She said she pointed him out at an identification parade at Lenasia, but the State led no evidence in this regard. Under cross-examination she said for the first time that this man had

a fire-arm in one hand. Her evidence as to what the man was wearing was not challenged in cross-examination.

Duma Similane said that on 27 January 1989, she went to Dr Asvat's in the company of an older woman, Mrs Adams. They sat in the waiting room. She heard the name Mandla called, but he was not there. Later, while she and Mrs Adams were waiting for an ambulance which was to take the older lady to the hospital, a black man arrived. Dr Asvat spoke to him, asking where he had been. The reply was that he had been to ask for money from his sister. A second black man followed the first one into the doctor's room. The grill door closed behind them. She heard two shots and screaming. The two men came out, one leaving the building by the front door, the other (whom she identified as Dlamini) by the back door. She recognised him from the scars on his face. She said it was Dlamini from whom particulars were taken, and he was

the first to go into the consulting room. They ran away together as the ambulance arrived. She ran to the ambulance and got in, and it was driven off after the two men, but they did not catch them.

Dlamini's counsel, Mr de Villiers, made a number of criticisms of the evidence of Albertina Sisulu, Duma Similane and Thandi Tshabalala. On some points his criticisms were well-founded. There were discrepancies and inconsistencies in the evidence of each and between them inter se and they committed obvious errors. Their evidence identifying Dlamini as one of the assailants was either non-existent or weak, and I do not think that it would be safe to place any reliance on it. But on points on which they were not cross-examined -e.g. the events of the afternoon in their main outline and the description of the clothing of the two men - I think that their evidence can safely be accepted. Although they were confused on

some points (and on some clearly wrong), I do not think that any of them was dishonest. Mr de Villiers urged -

> ".....dat daar 'n sameswering, saamspanning, ooreenkoms of blote napratery tussen mevv Sisulu, Duma Similane, Tandi Tshabalala & Floyd Tshabalala [sc. the ambulance attendant] moes gewees het om die appellant valslik by the moord te betrek."

There is no basis for such a submission. It is unsupported by evidence. It was not put to any of the witnesses in cross-examination. No motive could be suggested why these people, who apparently had no connection with each other except through the fortuitous circumstance that they were all at or near Dr Asvat's rooms on the afternoon of 27 January 1989, should conspire together to involve in a murder a man who was not known to any of them. The discrepancies and inconsistencies in their respective accounts points away from, not towards, a conspiracy. So does the fact that none of them identified Mbatha, who was arrested at the same time and place as

Dlamini.

Floyd Tshabalala, a medical orderly employed at Jabulani Fire Station, was the attendant in the ambulance which came to fetch Mrs Adams. As it drew up outside No 680 Rockville, he heard a shot and after some seconds another shot, and voices screaming from inside Dr Asvat's rooms. A woman came out, screaming and shouting that the doctor had been shot. Shortly afterwards a man who had on a red T-shirt came out, and ran along the driveway towards the ambulance. Into the front of his trousers he was busy pushing an object that looked like a firearm. Tshabalala called this man "the tall person." When he passed Tshabalala, he turned round and asked him whether there was anything he wanted to do or say. The object was now in his hand. A second man (called "the short person") came out of the back door of the premises. He

also had in his hand an object which Floyd Tshabala could not distinguish. He was wearing a windbreaker jacket, which was off-white in colour. He had traditional marks on his face. He ran, "following the tall one." The ambulance was driven after the two men in pursuit, but they disappeared.

At a duly conducted identification parade held at Lenasia police station on 21 February 1989, Tshabalala identified Dlamini as "the short person", the man who was the second to leave the place. Asked by what he identified him he said:-

> "In the first place the traditional marks on his face. Further his being short. I cannot forget the shape of his head and his hair was short at the time .....The shape of his head is not the same as other people, it is quite different....."

He did not identify "the tall person". Mr de Villiers submitted that:-

"Die vraag aan Floyd waarom hy en verskeie van die ander getuies dan net vir u Appellant kon uitwys en nie No 1 nie, was in my submissie 'n geldige een en die agbare Hof **a quo** het dit nie toegelaat nie."

The following is the relevant passage from the record:

MR DE VILLIERS: Now you say No 1 you did not see him on the parade, is that correct?---- I did not identify him.
Is that now because he did not have traditional lines in his face?----- No.
You see what I cannot understand, not only you but quite a few witnesses now, nearly all of them were able to identify No 2 but not one can point out No 1?

COURT: Well, what do you expect the witness to say to that, Mr de Villiers?

MR DE VILLIERS: My lord, I am going to put it to him that there is something common amongst them why they could only point out the one and they all saw both.

COURT: Do you suggest that there was a conspiracy between them?

MR DE VILLIERS: I don't know, something like that, my lord, but perhaps he can explain it.

COURT: Well, you can put it to him that you suggest that there was a conspiracy amongst all

the witnesses and see what he says."

It is apparent that the trial judge did not restrict cross-examination on the point. In any case, the submission is illogical, as is the argument that -

> "Floyd se uitkennings ook heeltemal van buite voorgesê is en dat hy vir No 1 beskuldigde beter te sien gekry het as vir u Appellant en dat die feit dat hy vir u Appellant kon uitwys maar nie vir No 1 nie h bewys is dat hy bloot by die merke aan die gesig wat hy op die uitkenningsparade opgemerk het nadat hy daarvan gehoor het, u Appellant uitgeken het."

Floyd Tshabalala was also criticised because one of his reasons for identifying Dlamini was the traditional marks on his face. Other witnesses (Albertina Sisulu, Duma Similane and, later, Veronica Hlatswayo) also referred to these marks, and the question of their visibility received the close attention of the trial court. In the judgment SOLOMON AJ said:

> "I may say that at this stage, and before dealing with the other facts of the case, I wish to mention the so-called tribal marks on the face of

accused No 2. Much was made by defence counsel of these tribal marks, and although it was never put so bluntly, we gained the impression that it should be inferred that there had been some discussion between the witnesses relating to these tribal marks.

We as a court examined the face of accused no 2 in court, but could not positively identify the marks on his face. But almost without exception the witnesses, who were of the Zulu nation, identified these marks on the face of the accused. Dr Kemp, the district surgeon, who specifically examined accused No 2 saw such marks, but said that they were very faint.

I am dealing with this issue because almost without exception everyone of the persons who had to deal with accused No 2 made reference to these marks. We feel, however, the defence counsel made more of them than was justified, in criticising the identification by the witnesses of accused No 2. The marks were only one of a number of factors by which the accused were identified. Other factors, for example, the shape of the accused's face ...., were also mentioned, and these characteristics were indeed observed by the court."

I do not think that Floyd Tshabalala's reference to these marks throws any doubt on his identification of "the short one" as Dlamini, nor does it point to a

conspiracy between the witnesses. That Dlamini had these marks he himself admitted in his evidence, saying "I was very young when these marks were brought on my face."

Mr de Villiers put in through Floyd Tshabalala newspaper cuttings from the Sowetan, The Star and Citizen newspapers published between 8 and 12 February 1989. That from the Sowetan contained Identikits of two men ("Shelela Alphas Nyawusa" and "Zakhele Hlekisana Mbatha") who, it was stated, "are suspected of killing Dr Abu Asvat in his Rockville surgery on January 27." The Identikit of Shelela clearly shows marks on the left side of his face.

There was no evidence as to which of the witnesses assisted the police in drawing up the Identikit, but it must have been Floyd Tshabalala or one or more of the women called as witnesses at the trial.

The last of the women was Veronica Hlatswayo who lived in a house in Rockville which was situated in the

same street as Dr Asvat's surgery, and not far from it. Some time after 4 pm on 27 January 1989 she left her house to visit a friend, Thandi (not the Thandi Tshabalala who gave evidence). She saw Shelela, sitting outside Thandi's house. She knew him because he had visited her house and she identified him as accused No 2, Dlamini. He was seated on the grass next to the gate, "with another boy" whom she did not know. Dlamini was wearing a cream-white windbreaker jacket; the other boy wore a red skipper. On Dlamini's face there are "traditional lines" which she pointed out to the trial court. Shelela threw some spectacles in her direction and told her to keep them for him. She had seen him passing by in the same street in Rockville on two or three occasions during the previous week. She returned home, and finished writing a letter, and then went out to take the letter to some people who were to deliver it at her homeland in Natal. On the way

back, she saw people standing inside and outside Dr Asvat's premises, and also an ambulance there. People were saying the doctor had been shot.

In regard to the evidence given by Dlamini about this encounter, SOLOMON AJ said in the judgment of the trial court:

> "Accused No 2 admitted meeting Veronica Hlatshwayo that day but denied her evidence as to where and how he met her. He described his meeting with her. He said that it was in the tarred road which runs parallel with that in which the doctor's surgery is situated; that he was going from Baragwanath to White City. Thereafter his story became very confused. It was not clear to us at the end of his evidence whether he was going to White City to see his girlfriend; whether he was going there to fetch her to take to a doctor in White City; whether he was going there to fetch her and take her and her baby to a doctor in some other suburb. His evidence can only be described as totally unconvincing. It was an unconvincing story which he changed several times in the course of telling it, and we disbelieve it. We disbelieve that he saw Miss Hlatshwayo where he says he did, or in the circumstances he claimed, and we believe her evidence, not only as to where she saw him and his companion, but also what they

were wearing."

There is no fault to be found with those findings.

These witnesses established the following: Before the violence erupted in Dr Asvat's consulting room Dlamini had been sitting with another man in the street not far from it. He was wearing a cream-white windbreaker jacket, and the other man was wearing a red skipper (Veronica Hlatshwayo). After the two shots had been fired, two men ran out of the house towards the street. One was wearing a cream-white or off-white top (Albertina Sisulu, Thandi Tshabalala); the other was wearing a red top. (Duma Similane, Albertina Sisulu). They emerged from the Asvat property and passed the ambulance which was standing in the street. The one, who was wearing an off-white windbreaker, was Dlamini; the other, who was wearing a red skipper, was not identified (Floyd Tshabalala). After the ambulance had arrived and people

had collected at Dr Asvat's property, Dlamini and his companion were no longer in the street (Veronica Hlatshwayo). There is only one possible inference from this evidence: Dlamini was a participant in the fatal attack on Dr Asvat.

Mr de Villiers submitted that the statement made to Mazibuko was inadmissible, and that a trial within a trial should have been held. There is no substance in the submission. There cannot be a trial without an issue to be tried. No issue as to the admissibility of the statement was raised: nor could it have been, because Dlamini and Mbatha both denied that it was made.

Then it was argued that it was extremely improbable that Dlamini would have inculpated himself in the murder. I do not agree. If, as would appear from the statement, he was on the run, he had to explain to Mazibuko, who had grown up with thim in the Nongoma

district, why they wanted a temporary refuge until more permanent arrangements could be made. And it is indisputable that Mazibuko did go to the police during the night of 16/17 February 1989, and gave them information which led to the arrest of Mbatha and Dlamini at Merafe Hostel in the early morning of the 17th.

The trial court found Mazibuko to be a persuasive witness. In the light of all the evidence in the case, it had no reason to doubt the truth of Mazibuko's evidence, and it accepted it. If it had stood alone it would have had to be regarded as the evidence of a single witness and would have had to be viewed with great caution. It was, however, confirmed by conclusive evidence **aliunde.** That was provided by the evidence of Floyd Tshabala and that of the women. Confirmation was also provided by evidence which showed that the contents of the statement were true.

I agree. Mazibuko's evidence is confirmed by the

finding, based on the evidence of Floyd Tshabalala and the women, that Dlamini was a participant in the robbery of Dr Asvat.

That it was true that Dlamini and Mbatha told Mazibuko that they could not go home to Natal because they had robbed a shop in Nongoma, was shown by their conviction on count 1, the facts relating to which were accurately summarized in the

"**SUMMARY OF SUBSTANTIAL FACTS**

1. During the morning of 28 June 1988 the two accused and two other persons approached Ekubuzeni Store, the shop of EPHRAIM MDLALOSE in Kwaminya area, Nongoma, Natal. Each of the accused was armed with a firearm.

2. On entering the abovementioned shop, the weapons were produced and money was demanded. EPHRAIM MDLALOSE was assaulted and R550,00 in cash was removed from the till. Cigarettes to the value of approximately R600,00 were taken from a shelf and EPHRAIM MDLALOSE's wristwatch was removed from his arm. Thereafter the four men fled out of the shop. A shot was fired

when they left the shop."

That they had good reason to seek a temporary refuge with Mazibuko is shown by the fact that, as they said, they had appeared on television (this was something which Mr de Villiers put to Albertina Sisulu) and that they had been in the newspapers (this appeared from the newspaper cuttings which Mr de Villiers put in.)

There can be no doubt that Dlamini was a participant in the crimes charged on counts 4 and 5 . He entered the consulting room with Mbatha, and left it with Mbatha, and was together with Mbatha two weeks later looking for a place to hide.

It was accepted on both sides that it was Mbatha who fired the two shots. It is known that they entered the consulting room together, and that they ran away at about the same time. Apart from that, there is no evidence, admissible against Dlamini, as to what took place

in the consulting room and how it was that the doctor came to be shot. Nor is there acceptable evidence that Dlamini was in possession of a firearm.

What is clear beyond doubt is that Mbatha and Dlamini had a common purpose to rob Dr Asvat. Veronica Hlatshwayo said that during the previous week she saw Dlamini two or three times, always in the street where Dr Asvat had his consulting rooms. Dlamini had no reason to be in Rockville on those occasions, and the inference is that he was probably there on reconnaissance. He and a man who was unknown to Veronica were sitting together in the street before the attack took place: the probable inference is that they were waiting for the doctor to finish his list of patients before they struck. The two men ran away together, and they were still together when they spoke to Mazibuko at Merafe Hostel.

The question then is whether it was shown that

Dlamini had the requisite intention to kill. Mazibuko's evidence was that "they (sc. Dlamini and Mbatha) told me that they have killed a doctor in Rockville." Dlamini was the spokesman and this was an admission that he was an active participant in the killing.

Dlamini must have known that Dr Asvat might offer resistance, and that such resistance might have to be overcome, if necessary by inflicting serious injury upon him which might cause his death. So he must have foreseen that Dr Asvat might be killed in the course of the operation and he accepted that risk. It is true that there was no evidence that he knew that Mbatha was armed, but he must have foreseen this at least as a possibility, because only seven months previously he had been one of a party of four, including Mbatha, which carried out a robbery at Mdlalose's store at Nongoma, and both Mbatha and Dlamini had carried firearms on that occasion.

That Dlamini had the intention to kill, at any rate in the form of **dolus eventualis**, was clearly proved,

The conclusion is that Dlamini was rightly convicted of murdering Dr Asvat in terms of count 4. It was proved that after the robbery, some R145 was missing from the middle drawer of Dr Asvat's desk, this sum being his calculated takings from patients on 27 January. It follows that the conviction on count 5 (robbery with aggravating circumstances) was also correct.

SENTENCE

The trial court found that Dlamini had not established any extenuating circumstances. As he was obliged to do under s.277 of the Criminal Procedure Act, 1977 ("the Act") as it then read (3 November 1989) the trial judge sentenced him to death.

By the amendment of that Act by the **Criminal Procedure Amendment Act**, 1990, ("the amending Act") fundamental changes were made in regard to the imposition of the sentence of death. The new provisions were set out and discussed in **S v Masina and Others** 1990(4) SA 709(A). The compulsory imposition of the death sentence where extenuating circumstances are not found, has been abolished and the trial judge is directed to impose the sentence of death only if he is satisfied, having due regard to the findings made by the trial court on the presence or absence of any aggravating or mitigating factors, that the sentence of death is "the proper sentence".

The expression "extenuating circumstances" has disappeared from the Criminal Procedure Act. Although the expression "mitigating factors" comprehends such circumstances as were under the previous dispensation "extenuating", it has a wider ambit. For the purpose

of the amending Act, the words "aggravating factors" must be given their ordinary meaning, and include any factor which, objectively speaking, "makes the crime worse." (See **S v Masina** at 714 A-D). Generally speaking, mitigating and aggravating factors include all factors which can properly be taken into account by a court in regard to diminution or augmentation of sentence (See **S v Senonohi** 1990 (4) SA 727(A) at 732 G-H).

In terms of ss.(2A) of s.322 of the Act which was added by the amending Act, upon an appeal against the sentence of death, the Appellate Division may, (a) confirm the sentence of death, or (b) if it is of the opinion that it would not itself have imposed that sentence, set it aside and impose such punishment as it considers to be proper. (See **S v Masina** at 713 G-H). The present appeal falls within the ambit of s.20(1)(a)of the Amending Act, so that it is now for this court to make a finding as to

mitigating and aggravating circumstances and then in the light of such finding consider the question of the proper sentence.

Aggravating circumstances there are. The crime was a heinous one. The accused shot and killed a man who was peacefully practising the healing art in his consulting room in Soweto. The robbery in the course of which it was done was impudently committed in broad daylight. His assailants gained access to the consulting room on the fraudulent pretext that Mbatha required medical treatment. Received as a patient, he turned out to be a ruthless assassin, and Dlamini was an active party to the deed. Moreover, Dlamini was not a callow youth. He had, three years before, already embarked on a criminal career. He was convicted on 23 December 1985 of car theft and was sentenced to four years imprisonment of which two years were conditionally suspended. On 23 August 1986, only 8

months after the sentence, he was released on parole until 7 November 1986. On 28 June 1988, he participated together with Mbatha and two others in the armed robbery at Nongoma in Natal which was the subject matter of count 1, and seven months later he committed the crimes charged in counts 4 and 5.

The only mitigation that was suggested was the fact that Dlamini was a young man. Counsel told the court that he was born in June 1969, so that he was under twenty when the crime was committed on 27 January 1989. SOLOMON AJ said in the judgment on sentence:-

> "Neither of the accused is a callow youth. Each lived his own life; each ran their own businesses, if their evidence is to be believed. Youthfulness, in order to be a persuasive factor, must have influenced the accused in some way. The accused have chosen not to go into the box and we have been told nothing about the influences which may have been brought to bear on the accused to cause them to act in this way, or to influence their moral blameworthiness. The evidence in the case has shown that on a previous occasion both accused committed the same type of

> offence, that, as in this case, that offence was deliberately committed. This was not a case where either of the accused acted on the spur of the moment."

In **S v Lehnberg and Another** 1975(4) SA 553(A) RUMPFF JA at said at 561 G-H that a teenager is to be regarded **prima facie** as immature and on that ground extenuating circumstances could be found, unless it appears that the viciousness of his deed rules out immaturity. In particular, the youth of a teenager would be extenuating if other factors influenced his personality by reason of his youth. This would mean also that a person of 20 years or more can show, by acceptable evidence, that he was immature to such an extent that his immaturity can serve as extenuation. By reason of the amendment of s.277, the incidence of the onus has changed. It is now for the State to negative the existence of mitigating factors as well as to prove aggravating factors (see **S v Nkwanyane** 1990(4) SA 735(A) at 744). Dlamini was at the time of the

murder still in his teens. His history, and the nature of the crime, however, showed that he was not an immature youth, but a man already seasoned in crime.

Nevertheless, it does not follow from the fact that there are only aggravating factors and no mitigating factors that the sentence of death is "the proper sentence" (**S v Nkwanyana** at 745G).

RUMPFF JA said in **S v Zinn** 1969(2) SA 537 (A) at 540 G that what has to be considered in determining sentence is the triad consisting of the crime, the offender and the interests of society. In **S v Du Toit** 1979(3) SA 846(A) RUMPFF CJ as he had become said at 857H-858A -

> "Wanneer die aard van die misdaad en die belang van die gemeenskap oorweeg word, is die beskuldigde eintlik nog op die agtergrond, maar wanneer hy as strafwaardige mens vir oorweging aan die beurt kom, moet die volle soeklig op sy persoon as geheel, met al sy fasette, gewerp word. Sy ouderdom, sy geslag, sy agtergrond, sy

> geestestoestand toe hy die misdaad gepleeg het, sy motief, sy vatbaarheid vir beïnvloeding en alle relevante faktore moet ondersoek en geweeg word."

This is a counsel of perfection which is not always, or even frequently, followed in the court room. The reason is that in our practice the sentencing judge or magistrate depends for the most part on information placed before him by the State (generally very little) or by the defence (frequently through his legal representative and not by way of evidence from the accused himself, who ordinarily, even after conviction, continues to protest his innocence.) As a result it is not always possible for the court to investigate the various matters referred to in **Du Toit's** case.

It has been observed that whereas criminal trials in both England and South Africa, are conducted up to the stage of conviction, with scrupulous, time-consuming care, the procedure at the sentencing stage is almost

perfunctory. Writing in the first (1967) edition of **Suid-Afrikaanse Strafproses,** Mr Justice HIEMSTRA said at 407:

> "Aan die vraag van skuld of onskuld word die mees noulettende aandag gewy; geen talent, tyd of kragte word gespaar in die proses nie en 'n ingewikkelde stel reëls van bewyslewering is daaromheen opgebou. Wanneer die beskuldigde eers skuldig bevind is, kom die strafoplegging meestal binne enkele minute. Die pleitbesorger vir die beskuldigde wys op enkele omstandighede; die pleitbesorger vir die Staat sê niks. Sommige beskou dit selfs as verkeerd om hom iets te laat sê."

More than a hundred years ago, Mr Justice STEPHEN said that while it is commonly thought that England's countless Acts of Parliament, judges of first-rate ability, elaborate systems of procedure and careful rules of evidence are concerned essentially with the punishment of the offender, "there is no part of the whole matter to which so little attention is paid by those principally concerned with it." He regretted the fact that judges paid so little and such superficial attention to sentencing. Yet, he argued,

sentencing was the gist of the criminal trial. "It is", he said, "to the trial what the bullet is to the powder." And more recently, in **The Machinery of Justice in England,** Jackson wrote:

> "An English criminal trial, properly conducted, is one of the best products of our law, provided you walk out of the court before the sentence is given. If you stay to the end you may find that it takes far less time and enquiry to settle a man's prospects in life than it took to find out whether he took a suitcase out of a parked motorcar."

There is no legal reason why a judge should, in considering sentence, be restricted to the material placed before him by the parties. In terms of s.274(1) of the Criminal Code -

> "A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."

In the case of juveniles the court frequently calls for the report of a probation officer, and there would seem to be no reason why the practice should not be extended in

appropriate cases to convicted persons of more mature years. Where a judge is considering the imposition of the sentence of death under s.277(2) of the Code, he may well feel that he cannot be satisfied that the death sentence is the proper sentence without more information about the person of the accused than the impression of him formed by the judge during the trial, or gained from statements by his counsel. Much greater use could be made in such cases of pre-sentencing reports, confirmed if required under oath, by persons such as social welfare officers, clinical psychologists, criminologists and the like, who may be able to garner information from the accused which the court itself could not do. Most of those convicted of murder in South Africa have themselves neither the resources nor the facilities to obtain such reports and witnesses. In order to implement this suggestion, administrative arrangements would no doubt have to be

made, but this should not prove to be an obstacle.

In the present case, no pre-sentencing report was called for, presumably because it would have served no purpose as the law then stood. I do not think that in the circumstances of the case this court, acting in terms of s.20(3) of the amending Act, should remit the matter to the trial court for such a report to be obtained. The reason is that I do not consider that the sentence of death is the proper sentence in this case. Although Dlamini's age is not a mitigating factor, it is, I think, relevant to the propriety of the death sentence. RUMPFF CJ said in **S v Lehnberg** at 561 B:-

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

The same reluctance would, I believe, extend to cases where the accused, though no longer a teenager, is standing on the threshold of manhood.

In **S v Letsolo** 1970(3) SA 476(A) at 476H - 477A, HOLMES JA said:

> "....the trial judge has a discretion, to be exercised judicially on a consideration of all relevant facts including the criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme step of ordering him to forfeit his life; or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence. The possibility of such an alternative should be considered by the trial Judge, in view of the words "the court may impose any sentence other than the death sentence" in the proviso to sec.330(1) of the Code. And it should be weighed with the most anxious deliberation, for it is, literally, a matter of life and death. Every relevant consideration should receive the most scrupulous care and reasoned attention."

Dlamini was born in June 1969. According to his aunt, Regina Mbata, who was called as a State witness, he stayed with her from 1974 until he came to work on the Reef in 1980, when he would have been 11 years old. He

himself said in evidence that he started staying in Johannesburg in 1983. Mr de Villiers said he attended school until standard 2, although Regina Mbata said that he passed standard 4. However that may be, he appears to have led a shiftless existence, unsupervised and undisciplined. The prognosis is not a favourable one, but I do not think that it is so poor that the possibility of rehabilitation can be excluded, or that the opportunity for reform should be denied him.

The fact that the sentence imposed on him in 1985 for car theft did not deter him from committing the crimes of which he has now been convicted, does not in itself show that he is incorrigible. Indeed, his early release on parole only eight months after the 1985 conviction may well have done him a disservice, by suggesting to him that a court's bark was worse than the bite which followed, thus making a scarecrow of the law.

In my view a sentence of imprisonment for a long time would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence.

The appeal against the convictions on counts 4 and 5 is dismissed. The appeal against the sentence on count 4 is upheld. The sentence of death on count 4 is set aside, and there is substituted therefor a sentence of 20 years' imprisonment. It is directed that the sentences in respect of counts 1, 4 and 5 shall run concurrently to the extent that the total effective sentence is one of imprisonment for 25 years.

H C NICHOLAS AJA

HEFER JA)
GOLDSTONE JA) Concur