91/72

DEATH SENTENCE

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.**

KENNETH GEORGE WILSON

**Appellant.**

***versus/teen***

THE STATE

**Respondent.**

*Appellant's Attorney* Pro Deo *Respondent's Attorney* Dep. A.G.(Jhb.)
*Prokureur van Appellant* *Prokureur van Respondent*

*Appellant's Advocate* BERNARD NELSON *Respondent's Advocate* P JUTA SC VAN DER BIJL
*Advokaat van Appellant* *Advokaat van Respondent*

*Set down for hearing on* 6 - 9 - 72
*Op die rol geplaas vir verhoor op* 2.9.10.

( W.L.D.)

Coram: Van Blerk
Joubert
Rabie

B Nelson: 9.45 - 10.30
P Jukes SC: 10.30 - 11.05

CAV

29.9.72. Trollip J.A.:- appeal dismissed.

Van Wyk de Vries

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

KENNETH GEORGE WILSON ..... APPELLANT

AND

THE STATE ..... RESPONDENT

Coram: van Blerk, Trollip et Rabie, JJ.A.

Heard: 6 September 1972. Delivered: 29 September 1972.

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J U D G M E N T .

Trollip, J.A. :

On Friday, 2 July 1971, between 7 and 8 p.m., the body of a white man, George Marinacos, was found (at point A) on the east sidewalk of Height Street (which runs north and south), Doornfontein. The deceased, a widower, was about 50 years old and in sound health. He worked as a motor mechanic. That afternoon he was paid his weekly wages, which were included in an amount of R97,53 that the deceased was carrying on him at the time. According to the evidence of his brother, the deceased left him at about 7 p.m. to proceed

on .... /2

on foot from south to north along Height Street in order to visit a friend. He was wearing a wristlet watch. That he was sober at the time was established by the medical evidence. He would have reached the spot where his body was found within 15 to 20 minutes after leaving his brother. The money (R97,53) was found intact on his body in his trouser-pockets but his wristlet watch had been stolen.

The senior State pathologist, Dr. Scheepers, who conducted the post-mortem examination, testified that his death was due to two knife-stabwounds to the chest, one of which severed the left maxillary artery, causing extensive bleeding; that in addition there were two knife-stabwounds on his back, one of which was 8 cms. deep, and one on his left arm near the shoulder, also about 8 cms. deep, which must also have caused considerable haemorrhage, contributing towards and expediting his death; that his death must have ensued between 15 to 20 minutes; and that it appeared that all those wounds had been caused by the same knife.

Detective .... /3

Detective Sergeant Peach arrived on the scene at about 8 p.m., i.e., very shortly after the murder had been committed. In Height Street, near where the body was lying at point A, he found a large patch of blood (point B), and 39 paces to the south a smaller bloodmark (point C); and between B and C along Height Street there were small blood spots. The relevant part of the street is not well lighted, said Sergeant Peach, there being a street-light on the west side of Height Street opposite point A, but it was not a strong light.

The only eye-witnesses to the occurrence were a night-watchman and an employee of the Crystal Bakery, Joseph Selepe and Kaifas Mathebula. They were together in Height Street, just outside the Bakery, on the evening in question. Kaifas testified that he saw a man (who must have been the deceased) being attacked in Height Street by two persons, a fight ensued, the deceased fell, and the assailants then fled. Joseph, whilst agreeing that the two persons were present together there, maintained that only one of them

attacked .... /4

attacked the deceased but that both ran away together after the deceased had fallen down. Kaifas's version that both persons attacked the deceased is far more acceptable than Joseph's in the light of all the circumstances. Both Kaifas and Joseph were most unsatisfactory and unreliable witnesses, but Kaifas's testimony to the above limited effect can be accepted as true - indeed that part of it was really common cause.

That the motive for the attack on the deceased was robbery is beyond doubt. It is well-known in Johannesburg, as the Court a quo remarked, that Friday is pay-day for many employees, and the assailants must have contemplated that the deceased was carrying his weekly wages at the time, which indeed he was. That they only managed to rob him of his watch can be ascribed to their being precluded from going through his pockets by the arrival of a motor car, probably the one driven by Jonkers, which caused them to run away. Jonkers testified that about 7 p.m. that evening he turned into Height Street from the north and proceeded south and saw

the .... /5

the deceased's body lying at point A. That must have been just after the deceased had fallen down. It was Jonkers who reported the matter to the police.

All the above evidence proves directly or inferentially that the two assailants had the common purpose of robbing the deceased, that they consequently attacked him to carry out that purpose whilst he was walking alone along this badly lighted street, that, being in good health and sober, he put up a vigorous resistance, that at about point C one of the assailants stabbed him with a knife, that the pursuit of or the attack on the deceased then continued north along Height Street for about 39 paces to point B where he was again stabbed with the same knife (and hence by the same assailant), that the deceased then collapsed and died at point A, that his wristlet watch was removed, but that the assailants fled before robbing him of his money.

The appellant, a white man aged 24 years, and Zacharias Makinitha (herein referred to as "accused no. 2"), a Bantu aged about 21 years, were subsequently arrested as

being .... /6

being the alleged assailants. They were tried before Boshoff, J., and assessors in the Witwatersrand Local Division for murder and robbery with aggravating circumstances. The Court a quo unanimously found accused no. 2 guilty of both charges and he was sentenced to death. He has not appealed. By a majority decision the Court a quo also found the appellant guilty on both charges. The minority considered that he ought to be acquitted of murder on count one and convicted only on count two. No extenuating circumstances having been found in his case either, the appellant was also sentenced to death for the murder, no sentence being passed on count two. With the leave of the learned trial Judge the appellant has appealed against his convictions to this Court.

The evidence identifying the appellant as the other assailant of the deceased was irrefutable. He had been unemployed since 18 May, and he was short of money at the time. Kaifas, who knew him by sight, identified him as one of the assailants. Jim Baloyi, a foreman employed at a hotel in Johannesburg, testified that on the following

Monday .... /7

Monday or Tuesday (5 or 6 July) the appellant approached him at the hotel, wearing a wristlet watch, which he offered to sell him for R4; Baloyi said he had only R3; the appellant, after calling accused no. 2 from round the corner, where he was waiting, and consulting with him, agreed to take R3; Baloyi thereupon paid the appellant and acquired the watch. The Court a quo correctly accepted Baloyi's testimony. The police found the watch in Baloyi's possession on Wednesday 7 July. It was the one that had been stolen from the deceased on the Friday evening, 2 July. In addition, the appellant made a confession to a magistrate on 8 July. The learned trial Judge, sitting without the assessors, overruled the objection to its admissibility and admitted it. The correctness of that decision has not been challenged before us on appeal. The confession read as follows:

> "Well, sir, we were on the corner of Beit and Buxton Streets by the café. It was myself and the African, Biza (i.e. accused no. 2). We saw this bloke walking up Height Street. We followed him. When we got

nearly .... /8

nearly to the top of Height Street, I grabbed him from behind. Biza then came from the front. This bloke struggled and he broke loose from us and shouted. When he shouted, I ran across the road onto the pavement. Then Biza stabbed him from the front and he fell onto the pavement where he walked to after he was stabbed by Biza. Biza then took his watch off and we ran through the veld back to the café. I do not know where Biza went after that, but I went to bioscope. That is all, sir."

At the trial the appellant, in testifying in his defence before the Judge and assessors, denied the truth of that confession. He again maintained that he had made it because of police assaults and undue questioning of him. He then gave a different version of what had happened on the evening in question, which, he professed, was the real truth. He met accused no. 2, he said, just after 7 p.m. When they turned into Height Street to the north of point A, they saw a fight in progress between two persons. A motor car arrived and stopped and another motor car drove past. One of the

persons .... /9

persons involved in the fight then ran away; the other walked to the pavement and fell down (that was the deceased). The appellant went to the west side of Height Street where the light was and stood there. But accused no. 2 went up to the deceased and removed his watch, despite his (appellant's) repeated exhortations to him not to go anywhere near the deceased. That was all accused no. 2 did to the deceased, i.e., he did not stab him. Accused no. 2 then rejoined him and they walked off together to a café in the vicinity. En route there accused no. 2 showed him the watch.

The Court a quo (i.e. the learned Judge and assessors) rejected the appellant's version of police misbehaviour towards him and decided that he had made the confession freely and voluntarily. It consequently found that his subsequent inconsistent and exculpatory testimony at the trial was false and rejected it. The correctness of those findings was not challenged on appeal - in my opinion rightly so. It can, however, be noted that in his evidence the appellant said three significant things. Firstly, that

the .... /10

the struggle commenced at or near point C in Height Street and continued up to where the deceased fell down, i.e., for 39 paces to point A; and, secondly, that it was one or other of the motor cars that arrived at the scene that caused the assailant to run away. That tends to confirm those inferences to substantially the same effect drawn from the State evidence and mentioned above. Thirdly, that he and accused no. 2 departed from the scene <u>together</u>. Whether they <u>ran</u> (according to his confession) or <u>walked</u> away together (according to his evidence) is not of much moment. The evidence of Kaifas and Joseph and the probabilities support the conclusion that they <u>ran</u> away. But be that as it may, the important point is that they left <u>together</u>.

The appellant admitted that he sold the deceased's watch to Baloyi for R3. But, he said, he was not wearing the watch at the time (contrary to Baloyi's evidence), the sale was merely on behalf of accused no. 2, who was present and to whom he immediately paid the money (again contrary to Baloyi's evidence), and he received R1,20 for his services in

effecting .... /11

effecting the sale. Where the appellant's evidence conflicted with Baloyi's on this aspect, the latter's was more acceptable and was indeed accepted by the Court a quo. It proves that the sale of the watch was on behalf of both the appellant and accused no. 2.

The appellant also testified, as part of and conformably with his exculpatory version, that when he reached the café he reported to the owner, Spinola, whom he knew, that there was a man lying in the street, but the latter merely replied that it was no concern of his, so he (the appellant) took the matter no further and went to the cinema. Now as appellant was such a non-credible witness, that piece of testimony could not be regarded as reliable in any way unless it was supported. Significantly, the appellant, made no mention of this report in his confession, although he did say there that he called at a café before going to the bioscope. But Spinola was called by the defence to corroborate the report. He said that he did hear in his café that evening, from someone he could not identify, that a

person .... /12

person had been found killed in Height Street. He was, however, very vague about the details. There were many people in his café at the time, he said, since it was during intermission of the nearby cinema. He equivocated about whether someone had reported the incident to him or whether he had merely overheard it as talk amongst those present. The latter is a distinct possibility for the police were quickly on the scene and would have made inquiries in the vicinity. The appellant himself might have heard such talk while he was in the café. In any event it is, on Spinola's evidence, most unlikely that the appellant did report it to him. For Spinola knew the appellant by sight, and he would probably have remembered that it was the appellant who had reported it to him; moreover, Spinola said that, if it had been reported to him for the purpose of something being done about it (which is the impression the appellant wanted to convey by his evidence), he would not have reacted (as the appellant maintained) by saying it was no concern of his; either he would have used the café telephone to inform the police, or if he was too busy, he

would .... /13

would have asked the person reporting it to do so. Consequently, Spinola's evidence does not support the appellant's version on this aspect, which, with the rest of his testimony, must be rejected. That was in effect the view taken by the Court a quo, and I agree with it.

To sum up so far, therefore: it was proved that the appellant and accused no. 2 combined to attack and rob the deceased; but the evidence showed that it was accused no. 2 who inflicted all the stabwounds, and it was not proved that the appellant was himself armed in any way. Consequently, it was contended on appellant's behalf, and this was the main if not the only contention advanced on appeal, that the appellant's guilt for the murder had not been satisfactorily established by means of the principles of common purpose, since it was not proved that he beforehand knew or approved of accused no. 2's possession of the knife and his intention to use it on the deceased in order to effect the robbery.

The starting point in considering that contention is the fundamentally important fact that not only were

the .... /14

the appellant and accused no. 2 friendly and used to go about in Doornfontein together, but this particular evening they had agreed to attack and rob a victim like the deceased. That immediately distinguishes S. v. Ngobozi 1972 (3) S.A. 476 (A.D.) heavily relied upon by Mr. Nelson for the appellant. For there no common purpose at all was shown to have existed between the appellant and his companion, who quite independently of the appellant stabbed the deceased. Indeed, it appears that the appellant and accused no. 2 did not even intend that there should be any preliminary threats of violence to induce the victim to peacefully hand over his money: violence was to be applied immediately. That follows from the appellant's confession where he said they saw the deceased walking up Height Street, they followed him, the appellant then grabbed him from behind, and accused no. 2 "came from the front" of him, i.e., grabbed him from the front. They must also have contemplated that the victim might resist and call out for help, which might be forthcoming. After all, it was not late and they must have appreciated the possibility of motor

cars .... /15

cars still travelling in Height Street. (Joseph, the Bakery's night-watchman, said "cars were busy coming into the premises".) Hence the appellant and accused no. 2 must have discussed and agreed upon some kind of effective violence to be used in the event of the victim resisting vigorously and calling out for help, violence that would expeditiously and effectively silence him and facilitate their robbing him. (cf. S. v. Melinda 1971 (1) S.A. 798 (A.D.) at pp. 801 H to 802 G; and S. v. Dhlamini and Another 1971 (1) S.A. 807 (A.D.) at pp. 816/7.) And the nature of that violence agreed upon or contemplated can, I think, be easily inferred from what actually happened: the deceased was silenced and his resistance was overcome by accused no. 2 knifing him.

It is true, as pointed out in argument, that the appellant's knowledge of accused no. 2's possession of the knife was not canvassed with him when he testified. But the exculpatory version he proferred in his defence rendered such questioning of him pointless. In any event, the important features are that neither in his confession nor in

his .... /16

his testimony did he maintain that he had no prior knowledge of accused no. 2's possession of a knife, that he obviously saw the latter use it on the deceased during the attack and robbery (see his confession), that he did not at any relevant time disassociate himself from accused no. 2's action, but, on the contrary, he continued the association with the latter by leaving the scene with him and subsequently taking the leading part in disposing of the deceased's watch. Those features prove that the use of the knife by accused no. 2 must have accorded with their original plan or contemplation about how their common purpose of robbing the deceased might have to be achieved. That the appellant's conduct after he saw the stabbing can be so used to reach inferentially the above conclusion is clear from such cases as R. v. Mtembu 1950 (1) S.A. 670 (A.D.) at pp. 689/690, 694/5 and S. v. Kramer 1972 (3) S.A. 331 (A.D.) at p. 334 F to H. Consequently the only reasonable inference is that the appellant must have foreseen the possibility that accused no. 2 might use the

knife .... /17

knife and cause the deceased's death in carrying out their common purpose but he persisted in assisting in its execution reckless whether or not such a fatal consequence might occur. According to the decisions of this Court he was therefore also guilty of the murder of the deceased.

In coming to that conclusion I am not unmindful of the exculpatory passage in the appellant's confession that he broke off his attack on the deceased when the latter shouted ("When he shouted, I ran across the road onto the pavement"), thereby implying that he did not associate himself with the stabbing. That passage must, of course, be taken into account, but its probative value depends upon all the circumstances(R. v. Vather 1961 (1) S.A. 350 (A.D.) at pp. 353 H to 355 A). In that regard the circumstance that the appellant did not, at the trial, confirm his confession when he testified - he threw it overboard - weakens that exculpation. Apart from that it is highly improbable that the appellant, desperately short of money and intent, with accused no. 2's assistance, on robbing the deceased of his money, would simply have withdrawn

from .... /18

from that common purpose merely because the deceased then resisted and shouted. Moreover, the appellant's subsequent conduct, already mentioned, shows that he did not dissociate himself from the commission of the murder and robbery. In all the circumstances, therefore, the abovementioned passage is, in my view, of no probative value at all.

For those reasons I think that the majority decision of the Court a quo that, on the principles of common purpose, the appellant was guilty of murder and robbery with aggravating circumstances was correct.

The appellant testified in mitigation that he was the product of a broken home and had had an unfortunate history. There was also his evidence that he had been drinking and smoking dagga on the day in question. The Court a quo dealt fully with all those circumstances and concluded that the appellant had not discharged the onus of proving that they were extenuating circumstances, i.e., that they reduced the appellant's moral blameworthiness for committing these crimes. That conclusion was correct in

law .... /19

law, but no doubt this aspect will now be given further, administrative attention by the proper authorities.

The appeal is therefore dismissed.

W. G. Trollip, J.A.

van Blerk, J.A. )
Rabie, J.A. ) concur