

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

JOHN MTHEMBU Appellant

AND

THE STATE Respondent

Coram: SMALBERGER, KUMLEBEN et EKSTEEN, JJ.A.

Heard: 23 November 1989

Delivered: 23 November 1989

REASONS FOR JUDGMENT

EKSTEEN, J.A. :

The appellant was convicted of murder in the
Circuit Local Division for the Zululand District. No

extenuating circumstances were found and he was sentenced to death. Leave was subsequently granted to him by the trial Judge to appeal to this Court "against sentence".

I take it that this means that the appeal is against the trial Court's finding that no extenuating circumstances existed. After hearing Mr. Jeffreys for the appellant, the Court dismissed the appeal, and indicated that its reasons would be handed in later. These are the reasons.

The State case was that an uncle of the appellant had hired the appellant and one Siboniso Nxele to kill the deceased, and that they had carried out this mandate by forcing their way into the hut of the deceased on the night of 4 August 1988 and stabbing him to death. The uncle of the appellant, Velaphi Mbonambi, was charged

together with Nxele and the appellant with the murder of the deceased. There was so little evidence against him however that he was discharged at the end of the State case. Nxele and the appellant were both convicted of murder, but extenuating circumstances were found in the case of Nxele and he was sentenced to 15 years' imprisonment.

There is no appeal against the conviction, nor could there have been. The wife of the deceased described graphically how two men, pretending to be policemen, had forced their way into the hut and stabbed the deceased with a long knife. The district surgeon found 49 stab wounds to the chest, body and upper arms of the deceased. Three of these wounds had

penetrated the heart and caused the death of the deceased. Both the appellant and Nxele made confessions to a magistrate in which they confessed to having been the assailants of the deceased. They both confessed to having been hired by the appellant's uncle to kill the deceased, and to having carried out their mandate. The death of the deceased as a result of the stabwounds sustained was clearly proved aliunde, and there was also ample evidence to confirm the allegations in the confessions.

In their evidence at the trial both Nxele and the appellant denied all complicity in the murder. The appellant who had initially alleged that he had been forced to make his confession and schooled as to what

to say, subsequently denied making the confession at all.

Both of them were such bad witnesses that their evidence was rejected in toto, and this finding has not been challenged before us on appeal.

Mr. Jeffreys, who argued the matter before us on behalf of the appellant, submitted that extenuating circumstances ought to have been found in the youth of the appellant at the time of the commission of the offence, taken together with the influence which his uncle, an inveterate enemy of the deceased, must have had over him. Then he also referred to an allegation in Nxele's confession to the effect that appellant had told Nxele that the deceased was pestering his uncle and bewitching "their mother and children".

As regards the youth of the appellant it appears to be common cause that he was 23 years and 10 months old at the time of the commission of the offence. He passed Standard VII at school in 1984, and had been employed at a factory for two years. He then worked for a veterinary surgeon for a few months before resorting to coaching soccer teams. A clinical psychologist, who examined him at the request of his Counsel, found that he had an average range of intelligence, was socially skilled, and well able to function as a leader. He was also of the view that the appellant was "possessed of sufficient intellect and powers of reasoning to have made a balanced and reasoned decision to execute the contract" he had entered into with his uncle. Youthfulness can therefore hardly

be said to have constituted an extenuating circumstance in the present case.

As regards the other two features referred to by Mr. Jeffreys viz. the alleged influence of the appellant's uncle over him, and his alleged belief in witchcraft, there does not seem to be any evidence to support these allegations. The appellant has made no such allegations. On the contrary he has denied all complicity in the killing of the deceased. The only reference to witchcraft on all the evidence is to be found in Nxele's confession. Such a confession is clearly inadmissible as evidence against the appellant (sec. 219 of Act 51 of 1977). Nor would it seem to be admissible in his favour (Wigmore, Chadbourn revision para. 1076, Phipson

(13 th Ed.) para. 22-17; Rex v Jaspan and Another 1940

A.D. 9 at p 16). But quite apart from that, Nxele in his evidence at the trial also denied all complicity in the killing and denied making the confession attributed to him. On this evidence, therefore, it can hardly be said that the appellant has discharged the onus of showing that these submissions could be taken into account in considering the existence of extenuating circumstances.

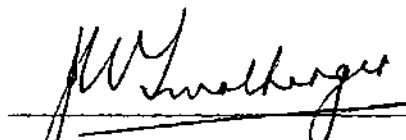
Finally Mr. Jeffreys submitted that the trial Court ought to have considered the fact that the appellant had no previous convictions in extenuation. That the existence or non-existence of previous convictions should be disclosed to the trial Court at all prior to its judgment on the issue of extenuating circumstances

seems to me to pose certain problems. However, I am in respectful agreement with Colman J. in S v Khumalo 1968 (4) SA 284 (T) at 284-5 that the absence of previous convictions in itself cannot be an extenuating circumstance, but at best a factor which could be borne in mind as part of the accused's general background. In the present case, in the light of the brutality of the killing of the deceased, this feature cannot assist the appellant in any way to discharge the onus which rests upon him. The appeal was therefore bound to fail.

I concur

I concur


J.P.G. EKSTEEN, J.A.


J.W. SMALBERGER, J.A.


M.E. KUMLEBEN, J.A.