

SOUTH AFRICA / JUDGMENT

S v Papiyana (479/85/av)

[1986] ZASCA 68 (29 May 1986)

[1986] ZASCA 68**COURT**

Supreme Court of Appeal

BEFORE

Jansen, Viljoen, Botha, Jacobs, Nestadt

CASE / FILE NUMBER

479/85/AV

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479/85/AV

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

ERNEST PAPIYANA Appellant

AND

THE STATE Respondent

CORAM: JANSEN, VILJOEN, BOTHA, JACOBS, JJA et NESTADT, AJA

HEARD: 7 May 1986

DELIVERED: 29 May 1986

JUDGMENT

NESTADT, AJA

The appellant was convicted of murder by LEVESON J, sitting with assessors in the Springs Circuit Court. No extenuating

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extenuating circumstances having been found, he was sentenced to death. He appeals now, with the necessary leave of this Court, against both conviction and sentence

The basis of the appeal against the conviction

is the complaint that certain irregularities occurred during the course of the proceedings in the court a quo. "What happened in this regard is not in dispute and is the following. When appellant, who was accused no. 2, emerged from the dock in which he had been seated and entered the witness box to give evidence in support of his plea of not guilty, the trial judge noticed, for the first time, that he was wearing clothes of a light olive colour and that, in addition, his feet were shackled in leg-irons. Having as a result.....

3result immediately formed the impression that appellant was a convicted prisoner, the learned judge, quite properly, mero motu, raised the matter with the prosecutor, referring to the prohibition contained in sec. 211 of the Criminal Procedure Act, 51 of 1977, and queried whether a trial de novo should not be directed. The section reads:

"Except where otherwise expressly provided by this Act or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he has been so convicted."

On.....

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On the completion of appellant's evidence and the closure of his case, the State and defence were required to and did present argument on whether, in the circumstances, the section had been contravened. The effect of the judgment, which then ensued, is to leave this question open. What was decided, however, was that appellant had, in any event, not been prejudiced by what had happened and, by implication, that the court had not been disqualified from continuing with the trial.

Before us, it was argued, on behalf of appellant, that the proceedings should not have been allowed to continue after his dress and the fact of being fettered had.....

5 had been observed by the court; they should immediately have been stopped and a new trial ordered. In addition, reliance was in this regard placed on the fact that there had earlier been evidence that an identification parade, of which appellant formed part, had been held in a prison; this, it was suggested, also showed that he had a conviction. Furthermore, when his appearance in court was, as already described, commented upon, the prosecutor had said: "My Lord, apparently this man is a high risk ... to the prison." All this had, so it was submitted, affected, adversely to appellant, the court's impartiality, resulting in him not having had a fair trial.

This is by no means the first time that an accused has

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has been brought to trial in this manner. There are a number of reported cases in which it has been complained of and commented upon. It must be said immediately that its continued occurrence is to be regretted. Prosecutors should take all possible steps to ensure its avoidance. It detracts from the dignity of the court. It must be humiliating to the accused. This is besides the legal consequences which may ; flow from it. It is to these that I turn. Broadly speaking, what is involved is the disclosure to the court of inadmissible information concerning the accused and more particularly that which shows or tends to show that he has a bad character and therefore a propensity to commit crimes. It is evidence which, as a general rule, is excluded on the ground.....

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ground that its relevance is too "tenuous to compensate for its prejudicial nature. Sec. 211 is obviously, insofar as previous convictions are concerned, statutory recognition of this. Where, usually inadvertently, they have nevertheless (prematurely) been revealed, the presiding officer, feeling disqualified to act, may, in a given case, recuse himself and order a re-trial. Examples of where this has happened are *S v Stevens* 1961 (3) SA 518 (C) and *SvPakies* 1985 (4) SA 592 (TKSC). It is for the individual court to decide whether this is the right and proper course to be followed (*S v Radebe* 1973 (1) SA 796 (A) at 812 H).

Where, however, the trial has been allowed to proceed, then, on appeal, the accused having been found guilty, the issue of....

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of whether an irregularity took place may arise. The test to be applied, in order to determine this, is the possibility of bias on the part of the court resulting from the improper divulgence of the previous convictions (or other damaging matter). Where it exists, or appears to exist, the judicial officer will be held to have been bound not to have heard the case, and, having done so, the accused would not have received a fair trial. In this event, an irregularity would have been committed. But this need not necessarily be the case. Ex hypothesi, one is dealing with a case where.....

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where the detrimental information does not comprise admissible evi-

dence of the accused's actual commission of the crime for which he is charged; moreover, it has not been admitted. but, on the contrary, was, in effect, rejected and purportedly disregarded by the trial court. It is assumed that a judge or magistrate, as well as assessors, will not, in view of their training, normally be influenced thereby but will give an objective decision on the merits. Accordingly, the improper disclosure of an accused's previous convictions does not, per se constitute an irregularity (*R v Mgwenya* 1931 AD 3; *Khan v Koch* N 0 1970(2) SA 403 (R)) and the contrary opinion of Lansdown and Campbell, *South African Criminal Law and Procedure*, Vol 5 ,pp. 809-810, cannot be subscribed to.

Sec....

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Sec. 211 contains no such sanction or consequence. It is a question of fact in each case whether this has occurred, In *R v Dominic* 1913 TPD 532 it was held that it had, but the circumstances were special in the sense that the accused bore the onus of proof. (See too *R v Owen* 1957(1) SA 458 (A) and *S v Dozereli* 1983(3) SA 259 (C), being examples of cases in which it was held that an irregularity had taken place). Other relevant considerations would, of course, include the nature of the convictions and, in particular, their connection with the charge the accused is facing. The manner in which the evidence is elicited or adduced is also of importance (*R v Mitchell* 1929 TPD 727; *R v Mkabile* 1935 TPD 107; *S v Dozereli* (supra)). Even where an irregularity in the sense outlined

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outlined has been committed, that is not an end to the matter. For the appeal to succeed, a second inquiry has to be embarked upon, viz., whether a failure of justice within the meaning of the proviso to sec. 322(1) of Act 51 of 1977 resulted. This normally involves deciding whether the accused was prejudiced. He would not have been if it can be

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said that, unaffected by the irregularity, there is proof of guilt. (S v Tuqe 1966(4) SA 565(A).) In an exceptional case, however, it might be held that the improper disclosure amounted to a failure of justice per se. In this event, the proceedings are vitiated irrespective of how strong the evidence against the accused is (as in S v Dozereli (supra). Against the background of these principles (as also

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also the concession, correctly made in my view, that in casu there was no question of a failure of justice per se)

I revert to the facts in order to determine whether an irregularity took place and, if it did, whether appellant was thereby prejudiced. It is to be doubted whether any of the matters referred to constituted notice that appellant had previous convictions or whether they were not as consistent with him being 'merely an awaiting trial prisoner. No positive finding was made in favour of the former, It was held that there was substance in the State's proposition that appellant's clothing could have been ordinary civilian apparel. One might add that, even if it was identifiable as prison garb, this might have been because appellant.....

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pellant had no clothing of his own. The use of leg-irons, so it was also recognised, could have been due to the fear, as the prosecutor sought to indicate, that he might attempt

to escape during his appearance in court. The fact that the identification parade was held in prison was not regarded as indicative of appellant having been convicted, This is not surprising. It is well known that such a venue is often used simply because the suspect is in custody there pending his trial. In the result, therefore, it is by no means clear that the learned trial judge's initial impression that appellant was a convicted prisoner was his lasting one. In fact, though he had previous convictions (three for assault with intent to do grievous bodily harm and one for.....

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for theft) what sentences had been imposed had long before his trial been served. A second consideration relevant to the issue of whether an irregularity was committed is the following. It is only on an extended meaning of "evidence" in sec. 211 that what happened in facie curiae could have amounted to a contravention thereof. On its normal connotation of viva voce testimony, it would not. Perhaps significant in this regard is the different wording of the original Criminal Procedure and Evidence Act, 31 of 1917. Section 76(5) thereof (being the only provision dealing with the point) referred to due care having to be taken by every officer that "no information relative to any alleged previous conviction of the accused" is disclosed. Thirdly, it.....

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it must be borne in mind that what the section enjoins

is that evidence shall not be "admissible". As my Brother BOTHA pointed out during argument, no such evidence was in fact admitted. Insofar as what occurred might be construed as the tendering of evidence of previous convictions, it was, in effect, rejected.

It is, however, unnecessary to pursue the points raised or indeed to express any firm opinion on them. This is because I shall assume, in favour of appellant, that, whether on the basis that he had previous convictions or was a dangerous awaiting trial prisoner, there was an improper disclosure to the trial court of detrimental information concerning him. Even so, in my opinion, no irregularity.....

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irregularity can be inferred therefrom. It is implicit in the

judgment

of the court a quo that the learned judge himself was not in any way (consciously) influenced thereby. The same applies to the assessors. Their state of mind is explained in the judgment thus

"I am, of course, not able to say what effect what has happened in this court has had on the minds of the assessors. I have been assured by them that their attitude to this case is based entirely on the merits, that is on the evidence before us, that has been led through the witnesses. They are not in any way influenced by what we have seen.

I am strengthened in the view which I take by the fact that both the assessors are legally trained persons in the profession. One, a senior magistrate has presided in courts for many years, the other, an advocate of the Johannesburg bar, both with considerable experience

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perience of criminal trials. I am satisfied that they are not influenced by what they have seen."

There can be no reason to doubt this.. The nature of the previous convictions was never revealed. The disclosure (including the intimation that appellant was dangerous) was therefore a vague one. It can hardly be described as damning. Far more prejudicial indications of an accused's guilt are frequently excluded by the courts from consideration. As I have said, it was the judge himself who raised the impropriety of appellant's appearance. His (then) counsel did not 'object to the continuation of the trial or even raise the point when leave to appeal was sought. I am, in the circumstances, prima facie satisfied that no fault

can

18 can be found with the decision to continue with the trial. This is not an end to the matter. What has been said does not take account of the further argument, presented on behalf of appellant, that an inference of bias is to be drawn from what was termed the trial court's selective treatment of the two accused, i.e., accused no. 1's acquittal and appellant's conviction. It was submitted that, on the facts, the guilt of appellant had, similarly, also not been proved.

This brings one, naturally, to the merits of the

conviction. The deceased was a certain Anderson Dzingwa, aged 38. He met his death at about 7 p.m. on 26 February 1984 after having been assaulted by two persons as he walked across an open piece of ground in the township

of

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of Wattville, Benoni. He was stabbed three times; in the lower jaw, the left shoulder blade and the chest. The latter wound resulted in the heart being pierced and was the cause of death. The immediately preceding events are not clear. There was evidence that when confronted, appellant took off his jacket and handed it to a child who was following in his wake and came onto the scene just then. This suggests that he may have been preparing to engage in a fight with them. Nevertheless, it is plain that deceased was murdered; this was not contested. What was in issue was the identity of his assailants. It was the State case that they were accused no. 1 and appellant. They each denied this; they raised what amount to an alibi

The evidence against them was, in summary, the following.....

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lowing. According to Patricia Dzingwa, the eldest sister of deceased, at about 6 p.m. on the evening in question appellant arrived at her house in Wattville. He said he had come there to warn deceased not to interfere with accused no. 1.. She knew accused no. 1; he was her neighbour Appellant added the threat that he was going to kill deceased (in a manner which he described). He then left in the company of a young boy who had apparently come to call him. A little while later she proceeded to the nearby shops. On her way there she received a report concerning the death of deceased. In an open piece of ground about 20 metres from where she later found his body she came across accused no. 1 and appellant standing next to a car which was parked.....

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parked there. She accused the former of having killed deceased. He did not reply. She noticed that both of them got into the car which was then driven away to accused no. 1's house. The actual circumstances in which deceased was killed were described by two other State witnesses. One was 16 year old Petunia Ntsele, the niece of Patricia (with whom she stayed). Deceased was her uncle. She had been to the shops. At about 7 p.m. she was walking home when she saw, ahead of her, deceased in the company of three other children walking along a foot-path which passed through the

open piece of veld. He was accosted by accused no. 1 and appellant. Both of them were armed with knives. Appellant stabbed at deceased. She did not however see that he was actually.....

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actually struck. When she saw what was happening she took fright and ran away. The other eye-witness was a standard two scholar, 8 year old Andile Dzinga, the son of Patricia. He was one of the children accompanying deceased. Despite his youth he was more bold than Petunia. He was not over-awed by the incident he then witnessed". He testified that, as they were walking away from the shops, appellant approached, A brief altercation took place between him and deceased. By this time accused no. 1 was also on the scene. Both he and appellant then stabbed deceased, the former in the back and the latter on the one cheek and in the chest. They then ran to a car in the vicinity. There he saw his mother talking to them whereafter they drove away to accused no. 1's house.....

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house, A certain John Jan gave evidence that at about 10 p.m. that night, appellant told him: "Man, ek het iemand gesteek". Finally for the State, Detective Officer Maxatasi, the investigating officer, deposed to the fact of appellant having on 14 March 1984 at his, appellant's, house pointed out and handed over a knife which, according to Andile, was the one used by appellant to stab deceased.

Both accused no. 1 and appellant gave evidence in

their defence. That of accused no. 1 was to the effect that on the afternoon of 26 February 1984 appellant was at his house; they had previously during the day been drinking together;' at between 3 and 4 p.m. appellant left; he never saw him again that day; at about 7 p.m. he and his brother-in-law.....

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in-law, Petrus Skosana, who was also visiting him, went and sat in a car outside his house; following upon a report he received, he alighted and walked to a nearby open piece of ground (a distance of about 60 metres from his house) where he saw deceased lying; there was blood on his chest; he did not know how deceased came to be injured; he did not see appellant there; having returned to the car he and Skosana immediately went to the Police Station where he reported the matter; he did not see or speak to Patricia that evening at or near the scene. Appellant, in his evidence, admitted having gone to Patricia's house to see deceased; his visit there was, however, in the morning and its purpose was to speak to deceased about certain construction.....

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tion work which he had in mind they would do together; all he told her, in deceased's absence, was ,that she should tell him that he had been looking for him; during the next few hours he and accused no. 1 drank at various places; at about 2 p.m. he left accused no. 1's house (to which they had earlier returned) and went home; he never told John Jan that he had

stabbed someone; at his request his wife had produced a knife but it was not his; it belonged to his parents-in-law.

Nothing arises, in my view, from the pointing out and production by appellant of the knife. I say this if only for the reason that it is impossible to be satisfied that it was indeed the murder weapon. Accordingly the.....

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the trial court was right in ignoring it. Less understandable is the failure to take into account or deal with the confession which appellant allegedly made to John Jan. However, in the absence of any credibility finding in this regard, it is not possible, as the State would now have, for reliance to be placed on it in its favour

The fate of the appeal (as far as the conviction is concerned) accordingly turns on the correctness or otherwise of the trial court's acceptance of the evidence identifying the appellant as one of the persons who stabbed deceased. It is not without blemish. Petunia's and particularly Andile's youth detracts from their reliability. What happened must have shocked them. Appellant.....

pellant was unknown to them. The incident took place when it was already dark. It happened quickly. None of the witnesses can be regarded as impartial; they were all related to deceased. Petunia contradicted herself in that she initially stated that she saw appellant actually

stab deceased but then conceded that it was only a stabbing motion that was observed. The general fallability of evidence of identification based on a witness's observations and the potential unreliability thereof need hardly be stressed, These considerations notwithstanding, I am of the opinion that the trial court was fully justified in rejecting appellant's denial that he participated in the attack on deceased. To begin with it is important to note that.....

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that before us Mr. Meyer, on behalf of appellant, (wisely) did not seek to impugn their honesty. His attack was confined to their reliability. It must fail. There could have been no mistake on the part of Patricia that it was appellant who came to her house. He did not dispute that he did (save that he puts the time of the visit much earlier in the day) If, as I have indicated, her veracity be accepted, the trial court was entitled to find, as it did, that appellant threatened deceased as deposed to by Patricia. I must say that it has the ring of truth. Her version, in this regard, is moreover supported, in some degree, by accused no. 1's admission that, about a month earlier, deceased had accused him of having had an illicit relationship with his (deceased's) wife.....

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wife and that this had annoyed him (though he goes on to deny that he told appellant about it). Of course, if appellant made the alleged threat against deceased, it fur-

nishes a motive for the attack on him and, as such, is corroborative of the evidence of Petunia and Andile. They each identified appellant at a duly held identification parade. I do not think that the fact that it only took place on 27 July 1984, though the delay is unfortunate, seriously diminishes its value. Both had ample opportunity to observe deceased's assailants. They were within two metres of them. Petunia specifically said she saw appellant "quite clearly". The lighting at the scene was probably not good but it appears to have been adequate to enable.....

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enable this to take place. Accused no. 1 himself, who it will be remembered, on his own version, saw where deceased was lying, described it as sufficient to see people's faces there well.' Its source was school, shop and street lights in the vicinity. One of the features relied upon by Petunia was that appellant's head was clean shaven. The evidence establishes that on the night in question he had this physical characteristic. Andile impressed the trial court. His description of how deceased was stabbed is consistent with the medical evidence. His evidence also corroborates Patricia's that appellant and accused no. 1 were standing next to a stationary car in the vicinity of where deceased's body was found to be lying and that the two of.....

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of them then drove away in it. Andile must have seen such

car because it was he (or his sister acting on information which he must have given her) who later pointed it out to the police who were thus enabled, as I understand the position, to arrest accused no. 1 in it (as he admits). Patricia was not cross-examined on her failure to accuse appellant (rather than just accused no. 1 when she spoke to them at the car) of having killed deceased; it therefore cannot be held against her. Appellant's involvement in the crime is given credence by "a witness called by accused no. 1, viz., Thonoki, his young nephew. Though exculpatory of accused no. 1, he materially incriminates appellant. . He stated that as he was walking across the veld he saw appellant.....

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lant, whom he had earlier that day met for the first time drinking at accused no. 1's house, "struggling" with deceased. He ran home and told accused no. 1, who at this stage was sitting in a car outside the house, what he had seen. He too recognized appellant by his clean shaven head. It was, of course, common cause that appellant was at accused no. 1's house as he alleged. Indeed, appellant admitted seeing Thonoki there. Significantly, he also states that it was not so dark that "you could not see people". Whilst his partiality "to accused no. 1 is obvious (and hence his support of the latter's alibi suspect), and certainly his evidence that only one other person was fighting with deceased untruthful, there would appear to be no reason why he.....

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he should have falsely or incorrectly implicated appellant. His admission that he did not notice whether appellant had a knife is some indication that he does not exaggerate the case against him. The trial court's approach to certain of the evidence requires special treatment. "It was suggested that in some respects it misdirected itself. Reference was made to the passage in the judgment that Thonoki "testified to the fact that he had gone to deceased that day and summoned" appellant. What he actually said, after initially denying that he went to Patricia's house, was:

"Dit is moontlik ek het vergeet ... Ek het vergeet ja ... Ja, dit is ter-wyl ek met vriende gespeel het dat ek

daarheen

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daarheen gegaan net maar ek het toe vergeet".

Then follows:

"Na Busisiwe (Petunia) se ma se huis? -- Ja, daar en ek kan nie meer onthou waar nog nie. Het u met iemand in Andile se ma se

huis gepraat? Ek het met niemand

daar gepraat nie. Ek kan nie meer onthou of ek met iemand daar gepraat het nie"

Implicit in this, as I read it, is an admission that he was at Patricia's house. Accordingly, although the learned trial judge put the position marginally too positively, it can hardly be described as a misdirection. In any event, it is of no consequence. It is clear on the evidence (of Patricia and Andile) that Thonoki went to the house to summon appellant. Another was said to be the finding that:

"At

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"At the identification parade which was held subsequently Andile identified accused no. 2 as the person who had done the stabbing. One of the distinguishing features in his mind was the fact that accused no. 2 has a slight scar on the left side of his face and neck. Andile says that on the night of the stabbing he noticed the scar."

Insofar as this gives the impression that Andile noticed the

scar (which appellant admittedly had) when he saw appellant stabbing deceased, it is not correct. Whilst his initial evidence gave this impression, under cross-examination he conceded that this occurred earlier that day, when, being at home, he saw appellant arrive there seeking deceased and threatening him as deposed to by Patricia. It is to be noted, however, that the learned judge uses the words "on

the

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the night of the stabbing". On Patricia's evidence that appellant came to the house at about 6 p.m., this is not really a misstatement. I shall however accept that the cogency of Andile's identification is detracted from by the fact that he was not able, at the relevant time, to recognize deceased's assailant by this feature and that the court a quo was not mindful of this or the danger that he is, in reality, identifying the appellant not as one of the deceased's assailants, but simply as the person whom he saw earlier that evening. Nevertheless, so it seems to me, reliance on his evidence was justified. What he is, in substance, saying is that by means of the scar he identifies appellant as the person who was at his house and that it was.....

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was that person whom he later saw stabbing deceased. A third misdirection which was postulated arises from the statement in the judgment that Patricia had, at the identification parade which she attended (on 14 March 1984) , pointed out appellant "as one of the persons who had been . present at the time or after deceased was stabbed", whereas her evidence was that she had pointed out "die persoon ..

wat op 26 Februarie by my huis gekom net". . The learned judge's understanding of the evidence was therefore inaccurate but here, too, I do not believe it to be of moment, It admits of no doubt that she avers that it was such person whom she subsequently saw near the scene standing next to the car with accused no. 1

In.....

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In the result, therefore, there were, in my view, no misdirections of any consequence on the part of the trial court. Even, however, if there were, so that a reassessment of the matter purely on the record is required, I am satisfied, in the light of what has already been said, that the State proved the falsity of appellant's version. To sum up in this regard, two eye-witnesses (Petunia and Andile) identify him as having stabbed deceased; another (Patricia) places him on the scene shortly after the crime and, in addition, establishes a threat made by appellant to kill deceased; and a defence witness (Thonoki) also identifies appellant as having been engaged in a fight with him. The cumulative effect of this evidence established the guilt of appellant

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appellant

It is in the light of these findings that I return to the argument based on the acquittal of accused no. 1. The trial court's reasons for so doing were that, despite the positive identification of him by Petunia and Andile,

as also Patricia's evidence that he was at the car, it was reasonably possible that he went to the scene only after deceased had been killed (as he and Thonoki alleged). The fact that he had reported the matter to the police, or at least called at the police station, was an improbability in the State version that he was one of deceased's assailants. The trial court no doubt also had in mind (though it is not mentioned) that his version is supported by Skosana (who.....

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(who was called by accused no.1).

Now, normally the acquittal of one co-accused would not affect the conviction of the other at least where the evidence against them was different. Here, however, it cannot be gainsaid that, in material respects, it was the same. The court a quo recognized this. Thus LEVESON J stated:

"In the light of the fact that we have discharged accused no. 1, it might be

asked whether the identification with respect to accused no. 2 is not suspect. The essential point, however, is this -accused no. 1 in his own version puts himself on the scene of the crime. He was present within minutes, perhaps even seconds of the events taking place. In discharging accused no. 1 we fear the possibility of a mistaken identification

in..... 41 in the light of the fact that his version might reasonably possibly be true. It could be possibly true because a face seen at the scene of the crime could be mistaken for another seen at the same scene. Accused no. 2, however, denies that he was present at the scene of the crime or came there subsequently."

I am bound to say that I do not find this convincing. On the State evidence, accused no. 1 was not on the scene as an innocent ex post facto bystander. There is no room for mistake as to what he was doing there. Yet the trial court accepted as a possibility that this was so. It may therefore be said that, in relation to the identification of accused no. 1, it had a doubt concerning the reliability of the evidence of Patricia, Petunia and Andile. And the question that arises is whether if this be so it

should

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should not, inevitably, have affected appellant's position; whether he too should not have had the benefit thereof; perhaps all the more so because, unlike appellant, the witnesses previously knew accused no.

1. In my view not. The paradox is more apparent than real. Had the trial court's approach been that the identification of the State witnesses was suspect, it would have been a grave misdirection to have relied on it to convict appellant. This was, however, not its finding. Thus in the passage following the one I have quoted, it is said:

"In the light of the positive identification of the three witnesses and. our acceptance of the content of the conversation which took place between accused no. 2 and the witness Patricia, we.....

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we cannot conclude that the version of accused no. 2 might reasonably possibly be true."

Earlier, the following appears:

"Patricia identified accused no. 2 as being present alongside the motor-car when she arrived on the scene. The witness Busisiwe (Petunia) and the witness Andile both positively identified accused no. 2 at the identification parade attended by them."

According to the judgment on the application for leave to appeal:

"(T)hree witnesses positively identified the accused as being present at the scene of the crime. In the evidence led before us we were particularly impressed with the testimony of the witness Andile and are convinced that he gave an accurate

account

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account of the events and a sound identification of accused no. 2".

It appears to me, therefore, that the true basis for acquitting accused no. 1 was not an adverse finding regarding the reliability of the State witnesses but what amounted to an over-cautious assessment of the case against him. What weighed, incorrectly I think, with the court was accused no. 1 having placed himself on the scene of the crime plus the fact, as already indicated, that he subsequently went to the police station. Not only did these considerations not enter into the picture as far as appellant is concerned, but Patricia's evidence, which is expressly found to be reliable, of the threat he made, provided an additional safeguard for convicting appellant.

The

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The conclusion which I have, in the result, come

to is that no inference of bias on the part of the court a
mo can be drawn from accused no. 1's acquittal and that
the submission to this effect is without substance. The
consequence of this is that even if an irregularity was com-
mitted, no failure of justice resulted therefrom. It fol-
lows, further, that the argument that, in any event, the
acquittal of accused no. 1 should, on the merits, have car-
ried with it that of appellant, must also be and is rejected,
The appeal against the conviction cannot succeed.
It remains to deal with the appeal against sen-
tence. There is no warrant for disturbing the finding
that extenuating circumstances were not proved by appellant.
Indeed.....

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Indeed, the contrary was not argued before us. The attack
on deceased appears to have been premeditated. The only
ground relied on in the court a quo was that appellant had
consumed alcohol. However, it was held that though this
was so, he had not discharged the onus of proving that
"his faculties were so disturbed, his control over his ac-
tions so unrestrained that there is present in the matter
diminished responsibility". I am not sure that this does
not perhaps place the criterion for proving extenuation too
highly. Even so, it cannot, be found that liquor played any
meaningful role in reducing appellant's moral blameworthiness
It is true that accused no. 1 stated that appellant "was ge-
drink gewees" but he goes on to say "hy het normaal opgetree"
Skosana's.....

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Skosana's opinion was that "hy was ... normaal". Ap-
pellant, himself, conceded that "there was nothing wrong with
me. I had been drinking but I was not affected"

The appeal is dismissed

H H NESTADT, AJAJANSEN, JA VILJOEN, JA BOTHA, JA JACOBS, JA J

Concur

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