

104/87

27/87

N v H

SIPHO MTHEMBU AND OTHERS v THE STATE

SMALBERGER, JA :-

27/87

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIPHO MTHEMBU

APPELLANT 1

MILTON MBUZENI ZUNGU

APPELLANT 2

MSHIYENI MIYA

APPELLANT 3

and

THE STATE

RESPONDENT

CORAM:

GROSSKOPF, SMALBERGER, JJA, et

STEYN, AJA

HEARD:

8 SEPTEMBER 1987

DELIVERED:

24 SEPTEMBER 1987

J U D G M E N T

SMALBERGER, JA :-

It is common cause that shortly after 6 a m on

25 May 1984 a group of Black men entered the MGM Butchery

situated /

situated on the corner of Market and Diagonal Streets,
Johannesburg, intent on robbing the owner thereof Joao De
Gouveia Faulha (the deceased). One of their number was
armed with a firearm, another with a knife. In the course
of the ensuing events the deceased was robbed of his firearm
and approximately R700-00, and fatally wounded. The cause
of his death was a gunshot wound of the chest, inflicted by
a single shot fired by one of his assailants.

Consequent upon the foregoing the three appellants
were arraigned in the Witwatersrand Local Division before
FLEMMING, J, and two assessors on counts of murder and rob-
bery with aggravating circumstances. They were in due
course convicted on both counts. On the murder count

extenuating /

extenuating circumstances were found to be present in the case of the first appellant (on account of his age), but not so in the case of the other two appellants. Mandatory death sentences were accordingly imposed on the latter, while the first appellant was sentenced to 18 years' imprisonment. On the robbery count each of the appellants was sentenced to 9 years imprisonment. Portions of the sentences imposed on the first appellant on each count were ordered to run concurrently with the sentence at present being served by him. Subsequently the three appellants were granted leave by the trial Judge to appeal to this Court against their convictions and sentences on both counts.

Very /

At a very much later date the first and third appellants applied to the trial Judge for the noting of a special entry on the record in terms of section 317 of Act 51 of 1977 (the Act) with regard to certain alleged irregularities which occurred at the trial, as well as for condonation for failing to make the application timeously. The trial Judge refused condonation and made no order on the application. In the course of his judgment the trial Judge opined that the alleged irregularities could be canvassed during the hearing of the appeal without the need for a special entry. I refrain from commenting on the correctness or otherwise of the procedure followed by the first and third appellants, or the decision thereanent. Suffice it to say that the

matters /

matters which formed the subject of the contemplated special entry were permitted to be fully canvassed on appeal.

Not one of the deceased's employees present at the butchery when the events referred to occurred was able to identify any of the perpetrators. The only evidence linking the three appellants with the crimes of which they were convicted, were statements in the form of confessions made by them to certain police officers (who ex officio are justices of the peace), together with, in the case of the first and third appellants, the subsequent pointing out of the locus where the crimes were committed. The admissibility of the statements made by the three appellants was contested in a trial within a trial, but after hearing evi-

dence /

dence and argument they were ruled admissible by the trial Court.

On appeal it was not contended on behalf of the first and second appellants that their statements had been wrongly admitted. Argument focussed on the alleged irregularities involving the first appellant, and the effect thereof, and the inferences concerning their guilt to be drawn from their respective statements. A more comprehensive argument was advanced on behalf of the third appellant involving an alleged irregularity and its effect, the admissibility of his statement, the correctness of the inferences drawn therefrom and, failing all else, the finding of an absence of extenuating circumstances on the murder count. I shall deal consecutively with the case of each appellant.

The /

The first appellant made two statements to a certain Capt Prinsloo, the first on 20 June 1984 and the second on 11 July 1984. The purpose of the second statement was to correct an inaccuracy in the earlier statement concerning the identity of the persons who accompanied the first appellant on the occasion in question. The relevant portion of the first statement reads as follows:

"Op so 'n week na hierdie dag, dit was 'n Saterdag, het ek, Richard en Ngoza by Fordsburg bymekaar gekom. Ons het toe weer gesels. Nadat ons gesels het is daar weer 'n week verby en ek, Shezi en Mqhino is toe na 'n slaghuis daar naby die Rank van die taxis, naby Diagonalstraat. Ons drie het binne die slaghuis in geloop. Ek het 'n klerie uitgehaal, Mqhino het 'n vuurwapen gehad en Shezi het 'n mes gehad. Ek het vleis gevat en is na die 'counter' om te betaal. Mqhino het die Blanke man met die vuurwapen gewys en Shezi het die Blanke man vasgegryp. Daar

het /.....

het toe h skoot afgegaan en ek het weggehardloop en Shezi en Mqhino het agter my uitgekom. Ons het nie geld gekry nie."

In the case of the second statement the relevant portion is to the following effect:-

"Ek wil nou praat van die Butcher. Ek het al h verklaring gemaak van die Butcher, maar daar het ek deurmekaar geraak met die name.

Ek wil maar net die regte name van die mense wie saam met my was, die mense was Zungu Mausela en Miya en ek. Ons was by die Butcher saam."

Despite the two statements being admitted in evidence the first appellant persisted in denying all knowledge of, or complicity in, the crimes charged. He raised the defence of an alibi, claiming that on 25 May 1984 he had gone to Bethal, having left very early in the morning, in order to enquire about the cost of repairs to a vehicle which

had /

had been damaged in a collision some two weeks previously on 12 May 1984. On that date, according to the first appellant, he had gone to Morgenzon in connection with a court case in which he was involved. He had borrowed a car from one Fika Mdakane for this purpose. On his return after his court appearance, when either entering or leaving Bethal (his evidence is contradictory in this respect) he was involved in a collision. This obliged him to leave the car in Bethal. Subsequently he returned to Bethal to ascertain the cost of repairs to the car, but was unable to contact the owner of the garage where the car had been left. When next he went to Bethal on 25 May 1984 it was for the same purpose. This time he managed to see the

owner /

owner of the garage, and was advised that the car would cost R3 000-00 to repair. The first appellant was adamant as to the correctness of the dates mentioned by him (12 and 25 May). The earlier date he coupled to his court appearance, but was unable to state with any degree of conviction why he recalled the latter date.

In the course of giving his evidence in chief the first appellant was asked certain questions by the trial Judge. One of the questions, relating to his recall that the collision was on 12 May, elicited the answer:

"I remember because I was from court for this case that I am serving."

This answer gave rise to the following cross-examination of the first appellant:

"MEJ /

"MEJ ZWIEGELAAR: Nou die saak wat u tans voor

'n vonnis uitdien, is dit 'n roofsaak? ---

Nee, dit is nie 'n roofsaak nie, ek was gearres=
teer vir 'n kar.

Kan u vir ons meer daarvan vertel? --- Ek was
gesê dat ek het mense 'n kar gegee en hulle het 'n
roof gaan pleeg.

Wat was die aanklag waarvan u aangekla is? ---

Hulle het gesê hulle kla my ook aan vir roof.

U is skuldig bevind? --- Ja, hulle het gesê
hulle vonnis my want ek het die ander mense die
kar gegee.

Is u skuldig bevind aan roof? --- Hulle het
gesê hulle vind my skuldig want ek het mense die
kar gegee en hulle het 'n roof gaan pleeg.

HOF: Die advokaat vra, sy het al tweekeer gevra,
is hy skuldig bevind aan roof? --- Ek het nie
gehoor of dit was roof want ek was deurmekaar.

MEJ ZWIEGELAAR: Weet u darem hoeveel jaar ge=
vangenisstraf u uitdien? --- Ek was deurme=
kaar gewees, ek het eers in die tronk gehoor dat
ek 5 jaar gekry het.

Nou wanneer is hierdie misdryf gepleeg waarvan u
aangekla is, skuldig bevind is en gevonniss is? ---
Hulle het gesê maar ek onthou nie nou meer nie.

Onthou /

Onthou u nie eers die jaar nie? --- Nee,
dit is lank gelede.

Wanneer is u gevonniss? --- In 1985."

It was contended on behalf of the first appellant
that the above cross-examination was irregular, being in
conflict with the provisions of sections 197 and 211 of the
Act.

Section 197 provides that

"An accused who gives evidence at criminal
proceedings shall not be asked or required to
answer any question tending to show that he has
committed or has been convicted of or has been
charged with any offence other than the offence
with which he is charged, or that he is of bad
character, unless"

Thereafter four exceptions follow, none of which is appli=
cable in the present instance. Section 211 reads as
follows:

"Except /"

"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."

Having regard to the provisions of sections 197 and 211 of the Act, which are calculated to protect an accused person against unnecessary prejudice, the cross-examination of the first appellant in regard to his previous conviction would prima facie appear to constitute an irregularity. Counsel for the respondent, however, disputed that it amounted to such, on the basis, firstly, that the first appellant had chosen to reveal the fact of his previous conviction

while /

while giving evidence, thereby exposing himself to cross-examination thereon and, secondly, that the cross-examination was relevant insofar as it sought to probe the first appellant's alibi. With regard to the first contention, it is true that the reception in evidence of an accused's voluntary statement that he has a previous conviction does not per se constitute an irregularity (R v Bosch 1949 (1) SA 548 (A) at 553 - 5 - but subject to the caveat that "the use that could be made of such evidence might have to be defined" (at 553)), just as the introduction by an accused or his legal representative of otherwise inadmissible evidence by cross-examination or other means would not either (R v Morrison and Auret 1930 TPD 419 at 427). While it would therefore be irregular for the State to lead evidence of an accused's inadmissible confession or previous conviction (in the latter case, other than /

than in the circumstances permitted by section 197 of the Act, or in other instances where special provision is made therefor, as in sections 240 and 241 of the Act), the voluntary introduction of such evidence by an accused does not constitute an irregularity. (It is arguable that an unguarded response by an unsophisticated person in answer to a question by the presiding judge revealing a previous conviction cannot be equated to the voluntary introduction, in the accepted sense, of such evidence by an accused person, but for present purposes I shall regard the two situations as akin to each other). Non constat that where an accused voluntarily reveals in evidence that he has a previous conviction he exposes himself to unrestricted

cross- /

cross-examination thereon. If cross-examination in relation thereto is permissible at all (having regard to the provisions of sections 197 and 211 of the Act), it must be limited to the extent that any further details sought are relevant (in the legal sense) to an issue at the trial. In the present instance details concerning the exact nature of the first appellant's previous conviction and the sentence imposed in respect thereof have no relevance to any issue in dispute between the first appellant and the respondent. Even assuming that the fact of the first appellant's conviction was relevant to his alibi defence, the details thereof were not, for they were not strictly necessary to either test or disprove his alibi. This dis=

poses /

poses of the respondent's contentions. Apart from the above considerations the cross-examination elicited information highly prejudicial to the first appellant which the dictates of fairness and justice require should not have been revealed. In the present matter, therefore, cross-examination as to the details of the first appellant's previous conviction should not have been permitted, and the allowance of such cross-examination constituted an irregularity.

A further alleged irregularity was relied upon.

This related to the fact that the respondent was allowed to re-open its case to lead evidence in rebuttal of the first appellant's evidence concerning the dates of his court

appearances /

appearances at Morgenzon and the date of the collision.

These dates were relevant to the first appellant's alibi

insofar as they assisted him to fix 25 May as the date on

which he went to Bethal, and also because the alleged

collision on 12 May provided the reason for his going there.

The dates and their significance emerged for the first time

when the first appellant gave evidence after the close of the

State case. The respondent was therefore unable to lead

evidence in regard to these aspects before it closed its

case, which in all probability it would have done, and would

have been entitled to do, had the details of the first appel-

lant's case come to light earlier. In the circumstances I

am unpersuaded that in permitting the respondent to re-open its

case /

case to lead evidence to clarify the position concerning the relevant dates and when the car in question was damaged the trial Judge did not exercise his discretion properly and correctly. The claim that an irregularity occurred in this respect I conceive to be without substance.

I turn to consider the effect of the irregularity arising from the improper cross-examination of the first appellant. Counsel for the first appellant, rightly in my view, did not contend that the irregularity fell within the category of exceptional cases referred to in S v Moodie 1961 (4) SA 752 (A) at 758 G, viz., that it constituted such a gross departure from established rules of procedure for it to be said that the first appellant was not

properly /

properly tried and there was thus per se a failure of justice. Nor can it be equated with the situation which arose in S v Mavuso 1987 (3) SA 499 (A). Not only do the circumstances giving rise to the irregularity in the present matter (insofar as the first appellant is concerned) differ from those in Mavuso's case, but this is not an instance where the trial Court's judgment can be said to be "deursuur met die invloed wat die vorige veroordeling en die appellant se antwoorde op die ontoelaatbare vrae op hom gehad het" (at 505 I). While reference is made thereto in the trial Court's judgment, no great reliance was placed on the previous conviction, or what emerged from the cross-examination in respect thereof, when rejecting the first appellant's alibi. In any event it could not have

influenced /

influenced the trial Court's thinking on the cardinal issue at the trial, the admissibility of the first appellant's statements, for the irregularity only occurred after the trial Court's ruling that the statements were admissible. Mavuso's case clearly did not intend to convey that in every case where a previous conviction was irregularly introduced into the evidence, or irregularly cross-examined on, a failure of justice per se results irrespective of the effect or the likely effect of the irregularity. Insofar as the decision in S v Dozereli 1983 (3) SA 259 (C) suggests this to be the case it is incorrect. (The reference to Dozereli's case in Mavuso's case cannot be construed as an unequivocal acceptance of

any /

any such principle laid down in Dozereli's case).

Each case must be considered in relation to its own special facts and circumstances in order to determine whether the irregularity and its consequences, or probable consequences, were so gross as to have resulted in a failure of justice per se.

The test that therefore falls to be applied is that laid down in S v Tuge 1966 (4) SA 565 (A) at 568 G, viz., whether this Court on the evidence unaffected by the irregularity considers that there is proof of guilt beyond reasonable doubt. As I have pointed out, the irregularity in casu occurred after the trial Court had ruled on the admissibility of the first appellant's statements, and the

irregularity /

irregularity could not have influenced its decision in that regard. These statements are the cornerstone of the respondent's case against the first appellant.

Nor can it be said, on a proper consideration of the trial Court's reasons for rejecting the first appellant's alibi, that the irregularity had a material bearing on its decision. It is beyond question that his alibi falls to be rejected.

The first appellant's guilt or otherwise accordingly falls to be determined with regard to the two statements made by him, and the pointing out of the MGM butchery to Major Earle on 3 July 1984. The pointing out, together with certain statements made by the first appellant in conjunction therewith, establishes that the events to

which /

which he refers in his two statements are those which gave rise to the robbing and killing of the deceased.

From these statements it is apparent that the robbery was planned and that, to the knowledge of the first

appellant, one of his co-perpetrators was armed with a firearm. He clearly associated himself with the events

which occurred in the butchery. The only reasonable

inference to be drawn from his conduct is that he subjectively foresaw the possibility of the firearm being used

to fatally injure the deceased in the course of the robbery, and continued to participate in the robbery regardless of

the consequences. In the result he was correctly convicted of both murder and robbery (cf. S v Mbatha en Andere 1987 (2)

SA 272 (A)). No argument was advanced on his behalf in

respect /

respect of the sentences imposed on him, and there is nothing which would justify an amelioration of his position in this regard. It follows that the appeal of the first appellant must fail.

In the case of the second appellant the only point in issue on appeal is whether the statement made by him on 14 July 1984 to Capt Saaïman justifies an inference of guilt.

The second appellant's statement reads as follows:-

"Ek bly by Nancefield Hostel. My ander vriende bly by Jabulani Hostel. My vriende waarvan ek praat is Twana en Miya en Mayisela. Op n Dinsdag, dit is lank voor ek gearresteer was na omtrent een of twee maande voor dit het Twana en Miya na my kamer te Nancefield Hostel gekom.

Twana /

Twana het aan my gesê dat daar is 'n slaghuis in die dorp wat ons moet gaan kry. Twana het my gesê dat ek die volgende Vrydag na Jabulani moes gaan na waarvandaan die taxi ry en vir hulle daar wag.

Ek het vertrek vanaf my hostel om 05h30 na die plek waar ek vir Twana en Miya sou kry op die Vrydag. Twana, Miya en Mayisela het om 05h45 daar aangekom. Ons het 'n taxi dorp toe geneem. In Johannesburg het ons uit die taxi geklim en ek en Twana het met die een straat en Miya en Mayisele aan die anderkant van die straat geloop. Ek weet nie watter straat dit was nie. Toe ons by die slaghuis aankom het Twana vir my die slaghuis gewys waar ons die geld moes kry.

Twana en Mayisela het eerste in die slaghuis ingegaan en ek en Miya het hulle gevolg. Ek het twee appels in die slaghuis gevat, hulle verkoop appels en ander vrugte ook by die slaghuis, en het na die toonbank gegaan om die appels te betaal. Twana was toe langs my gewees. Twana het toe 'n vuurwapen uitgehaal en dit op die witman agter die toonbank gerig. Mayisela het die witman gegryp. Miya het ook Mayisela gehelp om die witman vas te gryp. Die twee van hulle het die witman getrek tot by 'n plek wat lyk soos 'n kelder.

Ek het /

Ek het gesoek vir die geld maar kon dit nie kry nie. Mayisela het toe uit die kelder gehardloop gekom en my gesê dat Twana die witman geskiet het. Ek het ook net voordat Mayisela uitgekom het 'n skoot gehoor. Ek en Mayisela het toe weggehardloop, Twana en Miya het ons later gevolg. Ons het tot by Westgate gehardloop waar ek en Mayisela die bus na Soweto gehaal het. Toe ons binne-in die bus was het ek gesien dat Mayisela 'n vuurwapen by hom het. Mayisela het aan my gesê dat dit die witman se vuurwapen is. Ek het by Mlanalankunzi van die bus geklim en kamer toe gegaan waar ek geëet het en te Jabulanie gegaan om te sien of Twana en Miya al teruggekom het. Ek het hulle te Jabulanie gekry. Twana het my toe gevra waarom het ek en Mayisela weggehardloop. Ek het hom gesê dat Mayisela my gesê het dat hy (Twana) die witman geskiet het. Ek het teruggegaan na my plek toe. Dit was die laaste dag dat ek hulle gesien het totdat hulle my uitgewys het aan die polisie. Toe ek saam met die ander drie na die slaghuis gegaan het, het ek gedink dat hulle hulle geld gaan haal en ek was nie bewus daarvan dat hulle die witman sou beroof en skiet nie."

The MGM butchery was never at any stage pointed out by the second appellant to anyone. The question thus arises whether the events referred to in the second appellant's statement can be connected with the incident giving rise to the death of the deceased. The trial Court held that it could, in my view rightly so. The events to which the second appellant's statement relates took place in a butchery in Johannesburg. They correspond in large measure to what actually occurred in the deceased's butchery on the day of the robbery. The butchery referred to in his statement was one where apples and other fruit were sold - on the face of it a somewhat unusual feature. The evidence establishes that fruit, including apples, was sold at the deceased's butchery. Finally, the second appellant named

his /

his companions as Twana, Miya and Mayisela. The first appellant is known by the name of Twana (Tswana), and Miya is the third appellant. The incident referred to in his statement was therefore one involving the three appellants.

Leaving aside for the moment the last sentence thereof, it emerges clearly from the second appellant's statement that he and his companions embarked upon a pre-planned robbery at a butchery in mid-Johannesburg.

Bearing in mind the obvious dangers inherent in such a venture, and the need to overcome any resistance offered, one is entitled in my view to assume, as a matter of general probability, that one or more of the participants in the robbery venture would, to the knowledge of all, be appropriately armed, and furthermore each of the participants

would /

would foresee the use of a weapon or weapons in the course of the robbery. But even if the second appellant was initially unaware that any of his companions were armed he became aware of the fact when Twana produced a firearm and pointed it at the deceased. Had he previously been unaware of the firearm, and wished to disassociate himself from its possible use, one would have expected him to cease further participation in the robbery. Instead, according to his statement, he continued with his search for money. In the context of his statement as a whole he manifestly associated himself with the events that took place and the conduct of his co-perpetrators. In the absence of any evidence on his part suggesting the contrary, in his case too the only

reasonable /

reasonable inference that can be drawn is that he subjectively foresaw the possibility of the deceased's death but was reckless as to the consequence of it occurring. The last sentence of the second appellant's statement, which is of an exculpatory nature, must be viewed in the context of the statement as a whole. So viewed it falls to be rejected as it is entirely inconsistent with the preceding detail in the statement. (S v Felix and Another 1980 (4) SA 604 (A) at 610/11).

In the result the second appellant was correctly convicted on both counts. Neither the trial Court's finding that there were no extenuating circumstances, which inevitably led to the imposition of the death penalty, nor the sentence imposed on the robbery count was challenged

on appeal. No basis for interference exists. In respect of the murder conviction the second appellant clearly failed to discharge the onus of establishing the existence of extenuating circumstances. In the result the second appellant's appeal must fail.

This brings me to the appeal of the third appellant, on whose behalf a more vigorous attack on the findings of the trial Court was launched.

While testifying during the trial within a trial as to the admissibility of his statement the third appellant was questioned as follows by counsel for the respondent:-

"Nou /

"Nou is ek reg as ek sê dat u na u arrestasie
 Westonaria toe geneem is? --- Ja.
 U was daar betrokke by 'n saak en dit is ook
 die saak wat u nou 'n vonnis uitdien? ---
 Ja."

It was contended that the latter answer could
 have left the trial Judge and his assessors in no doubt
 that the third appellant had previously been convicted of
 an offence, and that the probability that it was of a
 serious nature could be inferred from certain other aspects
 of the evidence. Consequently it was argued by the third
 appellant's counsel that the provisions of section 211 of
 the Act had been disregarded, and that an irregularity had
 occurred. While conceding that the irregularity was not
 of the kind which would have resulted in a failure of

justice /

justice per se, counsel contended that the effect of the irregularity was to preclude this Court from holding that there was sufficient evidence unaffected by the irregularity to establish the guilt of the third appellant beyond all reasonable doubt. This contention proceeded on the premise that the evidence of the third appellant's previous conviction was likely to have prejudiced the minds of the trial Judge and his assessors (although to what exact extent is not clear); that but for this the third appellant might have succeeded in raising a doubt in the mind of the trial Court regarding the admissibility of his statement resulting in its exclusion from evidence; and that in that event there would have been insufficient evidence on which to base a conviction/

conviction of the third appellant as the admission of his statement in evidence was essential to ensure his conviction.

Counsel for the respondent denied that any irregularity had occurred. In any event it was pointed out that the third appellant had appeared in court in prison garb and it must therefore have been obvious to the presiding Judge and his assessors that the third appellant had a previous conviction and was serving a prison sentence. I propose to comment on this at a later stage.

From the trial Judge's judgment on the application for a special entry it appears that after the question and answer complained of were asked and given an objection was made to their admissibility which led to the line of

questioning /

questioning not being pursued further. (This does not appear from the record itself.) The objection is noted on the record, but the events which transpired immediately thereafter are merely recorded as "inaudible". Counsel confirmed that the official recording at that point was inaudible for a while, and did not challenge the trial Judge's recollection of the events. While no specific ruling was given the trial Judge is adamant that the question and answer were not ruled admissible - in fact their inadmissibility seems to have been implied. However regrettable, it is not an infrequent occurrence at a trial that prejudicial evidence, subsequently ruled inadmissible, comes to light. This does not per se constitute an irregularity. Nor could it found the argument advanced on behalf of the third appellant. I appreciate that one cannot always gauge the

extent /

extent of the influence which inadmissible evidence or prejudicial information which comes to light during a trial may have on the subconscious mind of a presiding judicial officer (and/or, where appropriate, his assessors), particularly where issues of credibility are being dealt with. (See in this regard R v Dominic 1913 TPD 582 at 584; Khan v Koch NO 1970(2) SA 403 (R) at 404 H, as well as R v Chondi and Another 1933 OPD 267 at 270/1, although the latter dictum is given to some overstatement). It is for this very reason that the need exists to guard against anything irregular or untoward happening at a trial which has the potential for prejudicing an accused person.

In the result I am not persuaded that an irregularity

occurred /

occurred. To the extent that the question asked (and answered) was potentially prejudicial it may be assumed, in keeping with what would normally be the position, that the presiding Judge and his assessors would, by virtue of their experience and training, have been able successfully to disabuse their minds of the prejudicial information gleaned therefrom and to give an objective decision on the merits. (S v Papiyana 1986 (2) PH H 115 (A).) Despite having said this, the need to avoid potential prejudice remains. For this reason it once again becomes necessary to pass stricture on the practice of allowing an accused person to appear in court in prison garb. The practice is undesirable and is to be deprecated. I trust that the

responsible /

responsible authorities will heed this and similar comments that have been made in the past, and act accordingly.

The only instance where the appearance of an accused in prison garb may be justified is where his trial involves an offence committed in prison, or one related to his imprisonment e g escaping from custody.

I turn to consider the next argument advanced.

This was that the third appellant's statement was wrongly admitted in evidence. This argument proceeded on the premise that the third appellant's evidence on this issue could reasonably possibly have been true, and that the State had accordingly failed to prove the prerequisites for its admissibility. It is common cause that the statement

having /

having been made to a police officer, the State bore the onus in this regard. The third appellant's case was that

prior to being taken to make a statement he was assaulted by members of the Brixton Murder and Robbery Unit.

The reason for the assault is not clear, for the third appellant claims that he was neither told to go and make a

statement nor what to say (it being his case throughout

that he knew nothing of the events surrounding the robbing and killing of the deceased.) Thereafter he was taken

to Capt Prinsloo at Randburg. The third appellant denied

having made any statement to Capt Prinsloo. According to

him, the policeman who accompanied him to Capt Prinsloo

handed the latter a handwritten document. Capt Prinsloo

copied /

copied the contents thereof onto a document purporting to be the third appellant's statement. Thereafter the third appellant was virtually forced to put his thumbprint on this document. It is this document which was admitted in evidence as being his statement. (Exhibit J).

Apart from the inherent improbabilities therein (especially when regard is had to the contents of the statement) the third appellant's evidence is contradicted by numerous police witnesses. The trial Court, after carefully weighing up the probabilities and the credibility of the witnesses who testified, rejected the third appellant's evidence and accepted that of the State witnesses, holding that the third appellant had made the statement, Exhibit J, and /

and had done so freely and voluntarily. In doing so it approached the evidence with the necessary caution which the circumstances demanded, and it has not been shown to have misdirected itself in a material respect. There is no substance in the contention advanced that, judging from certain passages in its judgment, the trial Court at times failed to appreciate where the onus lay. Even if certain passages in the judgment are equivocal, on a conspectus of the judgment as a whole it is clear that the trial Court appreciated throughout where the onus lay, and did not misplace it. In the result no ground exists for disturbing the trial court's finding that the third appellant's statement was admissible.

The /

The relevant portion of the third appellant's statement reads:-

"Ek is so gevang, ek, Maisela Zungu en Twana is van Soweto. Ons het gegaan na die dorp, by Johannesburg ons het geloop met die taxi. Ons het by Market Street afgeklim, ons het vir 'n Blanke man gewag van die Butcher by Market Street.

Ek dink dit was Woensdag so ongeveer 06h30. Die Blanke man het gekom, hy het die deur oopgemaak, die Swartes wat daar werk het ingegaan. Zungu Maisela en Twana en ek het toe binne by die slaghuis gegaan. Zungu het 'n pakkie van die bene op die counter gesit, toe het Twana die pistool uitgehaal en na die Blanke man gewys, Maisela het van agter gekom en binne by die deur waggehou. Maisela, Zungu en Twana het die Blanke man naby by die vrieskas gevat. Ek het die slaghuis se laaie deursoek en ook onder by die counter, maar ek het nie geld gekry nie. Toe ek nog binne by die slaghuis was het 'n skoot geklap, daar waar Zungu met die Blanke man was. Ek het toe gesien Twana het die vuurwapen by sy hand. Maisela het na my kant toe gekom, hy het

gehardloop /

gehardloop. Zungu het ook na my kant toe gekom en Twana was heel agter. Toe die ander uit is het ek en Twana saam geloop. Ons het toe hierna 'n taxi gevat. Maisela het net weggehardloop en ek en Twana en Zungu is na Soweto.

By Soweto het ek vir Zungu en Twana gevra hoekom het julle geskiet, Twana het gesê hy het 'n vuurwapen gesien by die Blanke man en het toe die Blanke geskiet. Ek het by Zungu gehoor dat Maisela die Blanke se vuurwapen gevat het."

For basically the same reasons that apply to the second appellant's statement, with which I have already dealt, the only reasonable inference to be drawn from the third appellant's statement is that he and his companions set out to rob the deceased, that he subjectively foresaw the possibility of death resulting from the use of a firearm during the escapade, but persisted in associating himself

with /

with the events that occurred regardless of the consequences.

In view of the fact that he pointed out the MGM butchery to Major Eager there can be no doubt that the events he refers to in his statement are those which occurred at the deceased's butchery. In the result the third appellant was correctly convicted on both counts.

The final contention advanced on the third appellant's behalf was that the trial Court should have found in his favour that there were extenuating circumstances present. For this contention reliance was placed on the fact that the deceased's death had not been pre-planned, there was no evidence that the third appellant had personally possessed a dangerous weapon or inflicted

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the fatal wound, and his mens rea was that of dolus

eventualis. In holding that the third appellant had not

discharged the onus of establishing extenuating circum=

stances the trial Court was alive to these considerations.

In my view there is nothing in the evidence, or in the

third appellant's statement, which is indicative of reduced

moral blameworthiness on his part. In any event, the trial

Court's finding is not vitiated by misdirection or irregu=

larity, nor is it one to which no reasonable court could

have come. Accordingly no basis exists for interfering

therewith.

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The appeals of the three appellants against
their convictions and sentences are dismissed.

J W SMALBERGER
JUDGE OF APPEAL

GROSSKOPF, JA)
STEYN, AJA) CONCUR