IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SAMUEL LACKAY ..... Appellant

and

THE STATE ..... Respondent

CORAM: VILJOEN, JA, HOWARD et HEFER, AJJA

HEARD: 21 FEBRUARY 1984

DELIVERED: 26 MARCH 1984

J U D G M E N T

VILJOEN, JA

During March 1982 the appellant, (as accused 1) appeared with three others, Isak Prins

(accused /.....

(accused 2), Justice Lackay (accused 3) and Abraham Simons (accused 4) in the Graaff-Reinet Circuit Local Division before Solomon J and two assessors on a charge of murder. It was alleged that on or about 13 February 1981 they murdered one Stephen Smit (hereinafter referred to as the deceased) in or near Cradock. Accused 3, a younger brother of the appellant, was found not guilty and discharged but the appellant whose age is reflected on the charge sheet as 24 years, accused 2, a sixteen year old youth, and accused 4, nicknamed Habu, a youth of 14 years of age, were convicted. No extenuating circumstances having been found in the appellant's case,

he was sentenced to death. Accused 2 was sentenced to five years imprisonment, the whole of which term was suspended for five years on certain conditions. Accused 4 was sentenced to four years, the whole of which term was likewise suspended on similar conditions. On 10 September 1982 and at Grahamstown applications were made on behalf of the appellant before Solomon J, firstly, for leave to appeal against his conviction and sentence; secondly, to lead further evidence and, finally, for a special entry to be made in terms of s 317 of Act 51 of 1977. Solomon J refused all three applications. However, on 1 March 1983 this Court granted the appellant leave

to /.....

to appeal against the conviction of murder and the finding that there were no extenuating circumstances and referred the applications to lead further evidence and for a special entry to be made to this Court with a recommendation that the appeal and the two applications be heard simultaneously. On this basis the matter was argued before this Court.

The deceased met his death in the Coloured township of Michausdal, Cradock, on the night of 13 February 1981. The evidence presented by the State may be summarised as follows. The deceased and one Klaas Rondganger, both young men, had had a few drinks at a shebeen and were

proceeding homewards on foot along Charles Street which runs roughly from south to north. At a spot more or less opposite the house of the Solomons family, of which the State witness Eugene Solomons was a member, the appellant, who was driving a bakkie with a canopy on the back, drove this vehicle straight at the deceased and Rondganger where they were walking off the road. He stopped close to them and an argument ensued between the appellant and the deceased. After some verbal exchanges the appellant got into his vehicle and drove back the way he had come. He returned shortly thereafter with a number of passengers in his vehicle. He stopped the

vehicle near the deceased and Rondganger who had by that time proceeded as far as the corner of Charles and Hilary streets. The appellant and accused 3 alighted and started attacking the deceased, accused 3 with a spade and the appellant with a weapon which looked like an iron bar. The deceased was struck down twice but each time got up and tried to flee. At about the time he was struck down the second time a car came down Hilary street. The deceased fled up Hilary street with the appellant and accused 2 and 4 in hot pursuit. Accused 3 returned to the bakkie and drove it in the direction in which the others were running. When the deceased reached Eugene

street which runs parallel to Charles street he turned left and ran for a short distance before turning right into Aiken street. On the south-eastern corner of Eugene and Aiken streets, while being pursued by the appellant and accused 2 and 4 and shortly before accused 3 drove up Aiken street in the bakkie, the deceased scaled a fence, ran into a private yard and disappeared out of sight of his pursuers. Accused 3 drove the bakkie and the appellant and accused 2 and 4 ran up Aiken street to the corner of Lynley street where the bakkie stopped. When the appellant and accused 2 and 4 arrived all four accused stood discussing the disappearance of the

deceased. Accused 3 got into the bakkie once more, drove round the corner of Lynley street for a short distance, stopped again and waited, talking to the other accused who were walking up and down in that vicinity looking for the deceased who at that moment lay hidden underneath a motor vehicle parked in the driveway of private premises facing Lynley street. While the appellant and accused 2 and 4 were still searching the area the deceased suddenly emerged from his hiding place and decided to make a dash for safety across Lynley street to the east to an open stretch of ground between Lynley and Derick streets. He was, however, noticed by his

pursuers who immediately gave chase. Accused 2 was the first to catch up with him and started hitting him with what appeared to the State witnesses to be an iron bar. The appellant and accused 4 who were not far behind pelted him with stones. Under this onslaught the deceased collapsed in a shallow foundation trench where his pursuers proceeded to assault him severely, accused 2 hitting him repeatedly with the iron bar mostly over his head, and the appellant and accused 4 stoning him. Eventually accused 2, who had at some stage in the course of the events sustained a severe cut to his left arm, desisted and turned away. Accused 4

also /.....

also stopped, and it was the appellant who delivered the coup de grace by picking up a large stone and hurling it with force at the deceased's head. When the stone landed the witnesses heard a cracking sound. The appellant was thereafter heard to say:- "Nou is ek tevrede die vark is vrek." The bakkie, driven by accused 3, arrived on the scene at that moment and all four accused left the scene in the bakkie and drove to the Lackays' shop. Thereafter appellant and accused 2 and 4 drove to the hospital where the wound to the second accused's arm was attended to and sutured. While they were still at the casualty section of the hospital Sergeant Erasmus arrived to arrest them. When questioned

as to what weapon they had used upon the deceased a kierie, the knob of which was covered with blood, was produced from the van and pointed out to Erasmus as the weapon used.

Sergeant Mongie who arrived on the scene soon after the assault picked up a knife close to the dead body of the deceased. This, inferentially, was the knife with which the deceased caused the injury to the second accused's arm. Dr Schoeman who conducted the post mortem examination on the accused testified that there were numerous injuries to the head. Death was caused by cerebral haemorrhage and a fracture of the skull, he said. The doctor found no fewer than eleven lacerations

on the head and a depressed fracture of the occipital region of the skull. The skull fracture was consistent with a large stone having been dropped onto the head from a considerable height or hurled at it with brute force, he said. The kierie which, according the accused, was used on the deceased was shown to the doctor when he was cross-examined by counsel for accused 2. The following questions and answers were recorded:-

> "Sou dit moontlik wees om die fraktuur soos u aangedui het wat die skedel ingeduik het, sou dit moontlik die gevolg kon wees van 'n aanval met 'n kierie so dun soos hierdie, of sou u verwag dat dit 'n groter en swaarder instrument sou wees? --- Ek sou regtig verwag dat dit 'n groter en swaarder voorwerp moes gewees het.

Sou dit moontlik wees ... (tussenbei) ... --- Dit is moontlik om 'n skedelfraktuur te bewerkstellig met 'n kierie van daardie aard, maar weens die grootte van die fraktuur sou ek persoonlik verwag dat dit 'n groter voorwerp ... (tussenbei) .. --- Dit is nie onmoontlik nie, maar ek sou sê dit is onwaarskynlik.

Onwaarskynlik dat 'n skedelfraktuur soos hierdie met 'n kierie .. (tussenbei) .. --- Dit is korrek.

Sou dit eerder strook met die toedien van 'n klip wat gegooi word van 'n staande posisie op die hoof van die slagoffer wat op die grond lê? --- 'n Redelike groot klip, ja."

The appellant's evidence was that he and accused 2 and 4 were on their way to deliver groceries at a certain address in the neighbourhood when they came upon one person who was walking in Charles street blocking

the way of the bakkie. He hooted and stopped because he feared that if he drove past the pedestrian, who later turned out to be the deceased, the latter might get injured by getting in the way of the vehicle. He and accused 2 alighted from the bakkie — he to remonstrate with the deceased and accused 2 as an interested onlooker. While the two of them were standing next to the bakkie the deceased took one step backwards and suddenly advanced lunging at him with a knife in his hand. The appellant jumped out of the way but accused 2 was not quick enough and got stabbed in the arm by the deceased. Accused 2 took a kierie from the bakkie and, followed by accused 4,

chased after the deceased who had taken to his heels. After having driven the bakkie off the road the appellant followed on foot, his main concern being the safety and welfare of accused 2 who had been badly injured. He denied that he threw stones at the deceased and denied that he picked up and dropped a large stone on the deceased's head. All he did was to grab hold of the arm of accused 2 and enquire about the injury to his arm.

Accused 2 in some respects corroborated the evidence of the appellant and in other respects that of the State witnesses. The evidence of accused 4 was

substantially /.....

substantially consistent with the evidence of the appellant but he also corroborated the evidence of the State witnesses in a few minor respects.

The Court a quo had considerable hesitation in accepting the evidence of Rondganger but did accept, since it was confirmed, that there was some altercation between the deceased and some or other of the accused at the corner of Charles and Hilary streets and that a chase followed. The Court appears not to have accepted Rondganger's evidence that the deceased was attacked with a spade by accused 3 and also appears to have been sceptical about his evidence that the deceased's assailants numbered

eight to ten persons. He accepted the evidence of three young women, Elizabeth Holster, Rochelle van Dyk and Catherine Grobbelaar, with regard to the final stage of the events. Elizabeth Holster was the witness who told the Court that she saw the deceased hiding underneath the car while all the accused were looking for him in the area; she also saw him, she told the Court, leave his hiding place to make a dash for safety. Rochelle van Dyk and Catherine Grobbelaar told the Court that they were close to the scene of the killing, witnessed the assault by all three (the appellant and accused 2 and 4) upon the deceased and the dropping of the big stone,

the size of which they described as that of a rugby ball, onto the head of the deceased by the appellant. Both of them said they heard a cracking sound when the stone came into contact with the head of the deceased. The learned Judge remarked that all three of these young women impressed the Court as being absolutely honest. The evidence of Rochelle, who is a young girl, was corroborated in all material respects by that of Catherine Grobbelaar and the evidence of both of them was entirely consistent with what was found at the scene of the crime, and to a considerable degree with the evidence of the accused themselves, the Court held. The minor dis-

crepancies between the evidence of Rochelle van Dyk and Catherine Grobbelaar were, in the Court's view, not significant. Catherine Grobbelaar was described by the learned Judge as one of the most impressive witnesses to have appeared before him in years. Wendy Basson was the witness who told the Court that she was a passenger in the car which came down Hilary street. She recognised the appellant both visually and by his voice when he ran past the car in pursuit of the deceased. The learned Judge said that this was important because the appellant denied that he saw that car and also denied that he was running with the group of persons.

The presence of the appellant in Hilary street as one of those chasing the deceased was subsequently confirmed by accused 2 and 4, the Judge said. It seemed to the Court to be immaterial whether the weapon which was used by accused 2 upon the deceased was the kierie handed to the police or some other weapon. The learned Judge analysed the evidence of the appellant and said that the Court found that none of it was convincing or acceptable. The Court found the appellant to be an unconvincing witness and where there was a conflict between his evidence and that of the young women, the learned Judge said, it had no hesitation in rejecting his evidence in favour

of theirs. The Court held accused 2 to be an unprepossessing and unconvincing witness and accepted the young womens' evidence rather than his where it conflicted with their evidence. By the time accused 4 had concluded his evidence the Court had come to the conclusion that he was a consummate liar.

In support of the application to lead further evidence the appellant submitted to this Court, as he did to the Court a quo, a number of affidavits including one made by Catherine Jacobs, another by Julie Plaatjies and a third by Felicity Pieters. Catherine Jacobs, 27 years of age, who lives in Michausdal, Cradock, deposed in her affidavit that about 2 weeks prior to the

hearing of the matter in Graaff-Reinet she was at the house of Julie Plaatjies in 17 Derick Street, conversing with Julie in her kitchen, when Rochelle van Dyk came there and told them that she was extremely worried because her train ticket to Graaff-Reinet, where she was due to give evidence for the State against the appellant and the other accused, had arrived. She told them that she was reluctant to testify but that the investigating officer, sergeant Van Jaarsveld (nicknamed Tarra) had forced her to do so and that he had gone so far as to threaten that he would lock her up if she refused to testify that the appellant

was present at the scene of the death of the deceased. Julie asked Rochelle whether the appellant really had anything to do with the death of the deceased. Rochelle in reply gave Julie the assurance that the appellant was not involved at all. She told them that Sakkie (accused 2) hit the deceased with a kierie. Tarra however told her that she should testify that Sakkie attacked the deceased with a piece of iron and that the appellant threw a big stone at his head. Rochelle emphasised that that was not what really happened. The discussion was at that stage terminated by Julie's sister-in-law who called them.

After /.....

After the hearing she met Rochelle in the library one Monday and confronted her with the fact that she had not testified in accordance with what she had told them. Rochelle's response was to look away and to say:- "Kom ons los daardie dinge." Julie Plaatjies, in her affidavit, corroborated the statement of Catherine Jacobs as to the incident at her house. Felicity Pieters deposed in her affidavit that late on Friday afternoon, the day of the death of the deceased, she assisted in the Lackays' shop making up parcels which had to be delivered that night at 17 and 19 Eugene street. She went off duty at 19h00 leaving two other girls Sonnet and

Bennonita on duty at the shop. The appellant took her home.

Eugene Llewellyn Moss, an attorney's clerk, referred in an affidavit made by him to a previous case heard in Graaff-Reinet during December 1981 in which the appellant and his father Sam Curry stood trial on a charge of murder of one Albert Holster. According to Moss Holster had met his death in an attempt to avenge the death of the deceased Stephen Smith. It became clear in that case, he deposed, that a personal vendetta was being waged by detective sergeant Van Jaarsveld, the investigating officer in that as well as the present case, against the

Lackays. Moss suggested in his affidavit that, if the application to lead further evidence was granted, Van Jaarsveld be called to give evidence and to explain his conduct in the previous case in the light of what Eksteen J said in his judgment in that case.

Another affidavit in support of the application to call further evidence and for a special entry was one made by Katie Violet Simons, the mother of accused 4. She stated that on Sunday 15 February 1981 she and her late husband took their child, accused 4, to the police station as they were told to do by Van Jaarsveld (Tarra). In their presence Van Jaarsveld questioned accused 4 and

asked him what had happened on Friday night, 13 February. Accused 4 told Van Jaarsveld that Isak Prins (accused 2) had chased the deceased, and that he had followed; , that at the scene of the killing Isak had hit the deceased with a knob kierie while the latter lay on the ground; and that when he, accused 4, came on the scene he tried to stop accused 2 from further assaulting the deceased but only succeeded in doing so when the appellant came to his assistance. Van Jaarsveld did not accept what accused 4 told him; in fact, he told him in foul language not to talk nonsense and offered to make him a state witness if he was prepared to testify that the appellant

and accused 3 had killed the deceased. When she, the deponent, tried to intervene, Van Jaarsveld abused them and locked her son, accused 4, up. He was only released in her care the next day. She deposed further that she attended the trial at Graaff-Reinet. While sitting in court she noticed that while the State witnesses were being cross-examined, Van Jaarsveld repeatedly left the court room.

Opposing affidavits were filed. Van Jaarsveld denied the veiled allegations against him of waging a vendetta against the Lackays, and denied having done anything irregular in the course of the

two trials. Brenda Lottering made an affidavit dealing with the occasion when Rochelle van Dyk went to the house of Julie Plaatjies to deliver a skirt to Brenda who was also staying at that house. She stated that she heard Rochelle van Dyk talking in the kitchen to Julie Plaatjies, but she could not make out what they were saying. Julie Plaatjies never told her, however, she deposed, that Rochelle van Dyk told her that Van Jaarsveld had coerced her to give false evidence against the appellant. Rochelle van Dyk herself made an affidavit, denying the allegations made by Julie

Plaatjies and Catherine Jacobs. She went to the library one day about a month before the court case, she deposed, when Catherine Grobbelaar told her that Julie Plaatjies wanted to talk to her. She did go to Julie Plaatjies's house one night to deliver a skirt to Brenda. Julie Plaatjies told her that accused 3 wanted to talk to her about the murder case. He wanted to know what she had told the police about his own involvement in the case. Julie suggested that a meeting at her house be arranged between Rochelle and accused 3. She (Julie) never spoke about the appellant. Rochelle stated that she was reluctant to speak to accused 3 because she feared that the

Lackays might assault her. What she testified to in court was the truth, she deposed. She did meet Catherine at the library thereafter, on which occasion Catherine asked her why she had lied in court. She told Catherine she had spoken the truth.

Counsel for the appellant submitted that the Court a quo should have allowed further evidence to be led because the contents of the affidavits of Catherine Jacobs, Julie Plaatjies and Felicity Pieters satisfy the requirements of s 316(3) (a)-(c) of Act 51 of 1977 which provides:-

> "When in any application under subsection (1) for leave to appeal it is shown by affidavit -

(a) that further evidence which would presumably be accepted as true, is available;

(b) that if accepted the evidence could reasonably lead to a different verdict or sentence; and

(c) save in exceptional cases, that there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial,

the court hearing the application may receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court."

The application cannot succeed. In my view no reasonably acceptable explanation has been offered for the failure to produce this evidence at the trial. Moss might have been unaware thereof but it is hardly likely that, if there

was any truth in the averments made by Catherine Jacobs and Julie Plaatjies, the Lackays and particularly the appellant and accused 3, his brother, would not have been aware thereof before the trial. There is no allegation that for some reason or other Catherine Jacobs and Julie Plaatjies refrained from telling the Lackays about Rochelle van Dyk's perfidy.

It does not seem to me, furthermore, that the evidence tendered would presumably be accepted as true. The depositions of Catherine Jacobs and Julie Plaatjies are disputed by Rochelle van Dyk and the Court a quo found her to be a good and honest witness. Felicity Pieters is allegedly the girl friend of the appellant.

In /.....

In any event, I fail to see that what she said in her affidavit could, whether standing by itself or read with the contents of any other affidavit, lead to a different verdict. The Court a quo treated the evidence of Klaas Rondganger with caution, but Rondganger's evidence that the appellant left the scene of the first altercation to return shortly thereafter with a number of henchmen was corroborated by the young Eugene Solomons. It was never put to either Rondganger or Solomons that that was not the truth. The appellant, therefore, returned with the intent, clearly, of doing the deceased physical harm and his evidence that he was driving along peace-

fully on his way to deliver groceries is unacceptable. The proposed evidence of Felicity Pieters cannot, in my view, affect the case of the appellant at all.

The same applies to the proposed evidence of Catherine Jacobs and July Plaatjies. Even if Rochelle van Dyk's evidence is ignored as to what happened in the final stages of this drama, there would still remain the evidence of Catherine Grobbelaar who was described by the learned Judge a quo as an excellent witness. True, she would then be a single witness on the final assault upon the deceased, but there is an abundance of evidence from other witnesses that the appellant was not

the innocent also-ran that his evidence suggests, who was intent only upon ensuring that accused 2 did not, in the seriously wounded condition in which he was, exert himself unduly.

The application for a special entry relates to Van Jaarsveld's alleged interference with State witnesses while they were giving evidence, for which counsel claims to find some confirmation in Van Jaarsveld's conduct at the previous trial at Graaff-Reinet. In the course of the later trial counsel for appellant and accused 1 and 3 brought to the attention of the Court a quo certain irregularities allegedly committed by

Van Jaarsveld about which he and counsel appearing for accused 2 were concerned. What happened is recorded as follows :-

"MR QUINN ADDRESSES COURT

I would just very much like at this stage My Lord, to make objection to your Lordship, I speak also on behalf of my learned friend. We are rather concerned that the investigating officer in this case, Sergeant Van Jaarsveld, who is sitting alongside my learned friend, has been moving in and out of the court during the course of yesterday and during the lunch adjournment. My learned friend and I had to restrain him when he was talking to the witness who was yet to be cross-examined. When your Lordship adjourned for lunch he and the witness got together at the back of the court alone and I had to ask him to please desist from doing that.

I would just like to place this on record. It is, it will be part of the defence case that there is a grudge between the investigating

officer and the Lackay family. And for that reason it is of considerable significance. I would submit with respect.

And, I would ask your Lordship to direct the investigating officer to desist of this practice of moving in and out of the court.

COURT:

I can't tell the investigating officer not to walk in and out of the court, Mr Quinn. This is part of his job.

MR QUINN

Well my Lord, the witnesses for the State will gather on that side of the building and my learned friend and I are concerned. There was one incident yesterday My Lord, when your Lordship may recall when we were discussing the size of the stone that was thrown on the deceased's head, your Lordship suggested to the witness that the stone was as big as a rugby ball.

The next witness who was called, volunteered of

her own account that the stone was the size of the rugby ball. Now this may be coincidence. But these are the kind of features that had given my learned friend and I cause for concern. And that is for that reason that I mention this to your Lordship.

MR KINGSLEY IN REPLY ADDRESSES COURT

This was brought to my attention by both my Learned friends for the defence. I have taken the matter up with the investigating officer. He informs me that he did not at any stage discuss with the witnesses what had been said in court. Yesterday's situation at lunch time. I had informed the witness who was still in the witnessbox at that stage not to speak to anybody about what she had said and I have the assurance from the investigating officer thereto. That he did not speak about the case with her. She was on her own in the Court at that stage when he went to sit with her.

As far as the rugby ball is concerned My Lord, it would may have been of any assistance, this in fact was stated in consultation by both the witnesses long before either of the

two witnesses went into the witnessbox. And this was individually given to me as an approximation of the size.

COURT

I just want to say this that if it should come to my attention that there has been any interference with the witness, whether adversely or beneficially by any person whether he be an official or not, I will take the strongest action against him."

S 317(1) of Act 51 of 1977 provides that if an accused thinks that any of the proceedings in connection with or during his trial before a superior court are irregular, he may apply for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular. Such special entry shall,

upon such application be made unless the court to whom the application is made is of the opinion that the application is not bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

The learned Judge a quo found that the application was indeed frivolous. He dealt with the alleged conduct of Van Jaarsveld in the previous case in the context of the application to lead further evidence and remarked that he had read the judgment delivered by Eksteen J in that case and that he could find no reference whatever to any stricture made by the Judge about the

conduct /.....

conduct of Van Jaarsveld. Certain passages were read to us in this Court, but in none of those was any mention made by the learned Judge of any irregularity committed by Van Jaarsveld. The passages read to us contain remarks made by Eksteen J about the language used by the State witnesses to describe certain events in suspiciously similar language. There is no indication whatsoever that Van Jaarsveld had primed these witnesses. The description by Catherine Grobbelaar and Rochelle van Dyk of the rock used by the appellant as being as big as a rugby ball was dealt with by the learned Judge a quo as follows:-

"It /.....

"It appears from the record that I suggested to the witness Van Dyk, who had demonstrated the size of the stone that it was 'so groot soos 'n rugbybal'.
Grobbelaar in giving evidence said 'Samuel het 'n groot klip soos 'n rugbybal opgetel en op die oorledene se kop gegooi'. That is the extent of the evidence."

The learned Judge a quo expressed the view that the submission that Catherine Grobbelaar used the precise vernacular used by him during the testimony of Rochelle van Dyk seemed somewhat to overstate the position. The further submission that Van Jaarsveld had during the course of the hearing continually departed and entered the court room in circumstances

suggesting /.....

suggesting a possible improper communication of information to State witnesses waiting to give evidence was, in the learned Judge's view, a reckless allegation wholly unsupported by any evidence whatsoever. The learned Judge considered that the application was, in the absence of any factual foundation for the allegations and in the face of the specific reply given by the prosecutor in court, frivolous. There is not the slightest acceptable evidence, said the learned Judge, of any attempt on the part of Van Jaarsveld to influence any of the witnesses who gave evidence for the State. The accusations are purely inferential or hearsay and the

inferences, though not beyond the bounds of possibility, are highly improbable, he said. He pointed out that the only specific allegation with regard to the evidence given by the State witnesses is that relating to the description of the rugby ball used by Catherine Grobbelaar when she gave evidence after Rochelle van Dyk, but it is significant, he said, that no suggestion is made that Catherine Grobbelaar was approached by Van Jaarsveld, much less that her evidence was influenced by him. He stressed that she gave her evidence after Rochelle van Dyk.

I fully agree with the learned Judge's reasoning. I have consequently not been persuaded that

the learned Judge a quo erred in refusing to make the special entry. The application for a special entry cannot succeed.

The argument advanced on the appeal itself has substantially been dealt with by me in my consideration of the applications to lead further evidence and for a special entry to be made. Largely the same ground was covered. It remains to deal with two submissions. One which counsel for the appellant made with seeming confidence is that Rochelle van Dyk's and Catherine Grobbelaar's evidence about the throwing of the big stone at the deceased's head cannot be accepted because the deceased

was, according to the evidence, lying on his back when the stone was allegedly dropped on his head. That, submitted counsel, is not consistent with the medical evidence that it was the occipital region of the skull which sustained the fracture. There is no merit in this submission. Even on the assumption that the deceased was lying on his back, his head might have been turned to such an extent when the stone landed as to cause a fracture of the occipital part of the head. For the proposition that the fracture was caused when the head was turned some support is to be found in the evidence of Catherine Grobbelaar who said that in trying to make the deceased more comfortable she

turned his head straight to face upwards after the appellant and the other accused had left. Another submission made was that Mongie's evidence is inconsistent with a large stone having been used. The reliance by counsel for the appellant on the evidence of Mongie that when he found the knife he found no large stones lying about, is equally untenable. Mongie did not look for large stones. When he was recalled he did produce large stones which he had picked up at the scene of the killing. I cannot, therefore, accede to this submission. The appellant's appeal against the conviction cannot succeed.

In support of the appeal against the finding that there were no extenuating circumstances, counsel for

the appellant submitted that the Court a quo erred in finding that the appellant was the driving force behind the attack upon the deceased and that it also erred in finding that the attempt to stab the appellant did not amount to provocation. That the appellant was the driving force behind the attack on the deceased is clear from the evidence. What his motive was for attacking the deceased, who was not a regular inhabitant of Michausdal but who only went there occasionally to visit his people, is not clear. It seems unlikely that the mere fact that the deceased was walking in the street blocking the passage of the bakkie so incensed the appellant that he went back

to /.....

to return shortly thereafter with thugs to help him deal with the deceased. However, whatever the cause of the friction between the appellant and the deceased might have been, it must be accepted that he went back to return with the other accused. That he did not do so was never put to Rondganger or Eugene Solomons when they gave evidence. If the evidence of the State witnesses was correctly accepted, as, in my view, it was, it is clear that he was the instigator of the assault upon the deceased. As far as the provocation is concerned, he can hardly rely on the fact that he was stabbed at (as the learned Judge appeared to have found)

at the scene of the second altercation. If the deceased did stab at him there the deceased was obviously defending himself against the attack upon him by the appellant and others. The argument based on provocation cannot prevail. It has not, in my view, been shown that the Court a quo erred in not finding extenuating circumstances.

In the result the appeal of the appellant is dismissed and the applications for a special entry to be made and to lead further evidence are refused.

JUDGE OF APPEAL

HOWARD, AJA - CONCUR
HEFER, AJA