26/55

G.P.-S.384—1952-3-10.000.

U.D.T. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

D. Balla & Ors.

Appellant.

versus

The Queen

Respondent.

Murdoch

Appellant's Attorney ..... *Respondent's Attorney* .....
Prokureur van Appellant *Prokureur van Respondent*

A B Harcourt, Q.C.

Appellant's Advocate ..... *Respondent's Advocate* .....
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Tuesday 17th May, 1955.
Op die rol geplaas vir verhoor op:—

(2.15 p.m.) Before Hefer, Fagan & Steyn, JJA.
7.45 - 12.50 } C.A.V.
2.15 - 4.15 }

Appeals dismissed.

Registrar
16/5/55.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

DEVRAJ BALLA 1st. Appellant

MANNIE GOVENDER 2nd.Appellant

and PRYALAL RADHALAL 3rd.Appellant

and

R E G I N A Respondent

Coram: Schreiner, Fagan et Steyn, JJ.A.

Heard: 5th. May, 1955. Delivered: 16th May 1955

J U D G M E N T

STEYN J.A. :- Counsel for the appellants advanced a number of criticisms of the evidence for the prosecution. Some of these appear to me to be wellfounded. His first criticism concerns the evidence of George Govender and Percy Naidoo as to the manner in which the fatal wound was inflicted. The effect of the evidence of these two witnesses is that the first appellant, while sitting astride the deceased, either on his chest or on his stomach, facing the deceased who was on his back on the ground, raised his arm in inflicting the wound , holding the knife in the usual stabbing manner position, with the blade protruding below the little finger./.....

finger. The entrance of the wound is just below the armpit of the deceased, and its direction is forwards and upwards in the direction of the throat. It appears to be conceded that it would be very difficult indeed to cause such a wound in the manner stated, if the deceased were being held down in a stationary position. But also if he were moving his body about in a struggle to extricate himself from the grip of the first appellant, I have difficulty in conceiving how the wound would have been inflicted in the manner described, while the two contestants were facing one another. The deceased would have had to turn his body into quite a different position, not described by any of the witnesses, for such a wound to become at all probable, if caused in such a manner. In my view, this part of the evidence of these two witnesses, although it concerns the actual infliction of the wound, which one would expect to be clearly impressed upon their minds, cannot be relied upon as being correct.

It is likewise difficult to explain the conflicts in the evidence in regard to the use of one or more torches. It was a dark night, and one would not expect the continuous shining or intermittent flashing of a torch entirely to escape the attention of any person present at the scene, or to be completely forgotten, if, as described

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as by some witnesses, it was used on the immediate area of observation.

According to Johnny Murrigan, the first appellant struck the deceased a blow with his clenched fist while the latter was speaking to the driver of the van, Veerasamy, shortly after the van had stopped. He first said that the deceased fell as a result of the blow, but conceded later that he merely saw the blow and does not know whether the deceased was struck down or not. He was positive, however, that this blow was delivered. At that time a number of the other witnesses were pressing around the driver. Making due allowance for the prevailing excitement, I find it somewhat strange that none of them, including the driver Veerasamy, to whom the deceased was speaking at the time, noticed any such assault. It is true that it was dark at the time, but it was not so dark that the witnesses were prevented from observing at no close range, and at a time when there was cause for greater excitement, other details to which they have testified.

These features, and others such as the absence of bruises on the buttocks and lower limbs of the deceased, on which a number of kicks ~~were~~ are said to have been administered, the conflict of evidence, also on the part of

those/.....

those who were watching the struggle between the deceased and the appellants at the same time, as to the efforts made by bystanders to assist the deceased, and the senselessness, according to the evidence, of the murder (to which I shall return later) leave me with the impression that in regard to certain parts of the evidence, some of them of considerable importance, the witnesses cannot be described as reliable, and that it may well be that they are wrong also in regard to other details and that they have not given a full account of what transpired.

This, however, does not mean that the trial court erred in convicting the appellants. Apart from the impression which the witnesses made, there are strong indications that the evidence against the appellants is not a mere fabrication. Had it been, it is highly unlikely for instance, that they would have divided themselves, in such a confusing manner, into witnesses testifying as to the various stages of the assault, and that so many of them would have claimed to have seen and heard so little. Despite the fact that the witnesses seem to fall into different categories determined by the stages at which their observations of the actual assault commenced, there is a basic consistency

concerning/.....

concerning the position of the deceased, the positions of his assailants, their identity and the general pattern of their behaviour. There are further, as pointed out by my brother SCHREINER, other factors supporting the evidence of the eye-witnesses, which I need not repeat. Because of these considerations, and notwithstanding the unsatisfactory features to which I have referred, I do not find it possible to hold that the court a quo should have been left with a doubt as to whether the deceased was done to death by three assailants, or as to whether the appellants were the assailants. It was not seriously contended (except indirectly by suggesting that someone else may have inflicted the fatal wound in a general fight) that this is a case of mistaken identity. Such a contention could find little support in the evidence. The witnesses are unanimous in denying that there was a general fight. The assault took place close to the van, the witnesses had the opportunity of observing it at close quarters and of distinguishing the voices of the appellants, and the appellants have not given any explanation of the injuries sustained by the first appellant, of the blood found on the clothes of the second and third appellants or of the fact that the first appellant had removed his coat, all of which, in greater or lesser degree, point to the appellants as the

persons involved in the assault.

In support of the contention that there are extenuating circumstances, counsel contended that the appellants were under the influence of liquor, that they acted without premeditation in a state of intense excitement, that they are very young and that the first accused had received certain injuries before the fatal stabbing. In regard to the first two factors it is sufficient to say that the evidence does not disclose such a degree of intoxication or excitement that the trial court can possibly be said to have come to an arbitrary conclusion in rejecting them as extenuating circumstances which the court could take into account. Presumably the youth of the appellants was not urged upon the court below, as it does not deal with that aspect of the matter. The injuries to the first appellant are dealt with in the following passage from the judgment of CANEY J. :-

"As to the head injuries of the first accused, they were minor. The medical evidence in regard to that is clear. How they were obtained has not appeared in evidence. There is no evidence that the first accused received a blow on his head and there is no explanation of when or in what circumstances he obtained the injuries, whether at an early stage in the incident or at a later stage, no evidence from which one could say that the head injuries were obtained in circumstances which in some measure perhaps excused him in making thereafter a violent attack. "Although it/.....

Although these injuries were in fact of a minor nature, there was so much blood on the face and clothes of the first appellant, that others were led to believe that it was necessary to obtain medical ~~attention~~ assistance. The indications are that the first appellant was under the same impression.

It is correct, also, that there is no direct evidence that the first appellant received a blow on his head or as to the time when or in the circumstances in which he received it. But it seems clear, and it is not disputed, that he received these injuries between the time he left the van and the time he boarded it again and was taken away for medical attention, i.e. the period during which the assault took place. There is no evidence as to what transpired from the time when the deceased left the driver, up to the time when he was found on the ground, with the first appellant astride of him. In regard to this latter period, all the witnesses are silent. No witness, however, testifies to any incident after the first appellant was found astride the deceased, which could account for these injuries. It is a fair inference, I think, that they were probably sustained after the deceased turned away from the driver and before the first appellant

had/.....

had him down on the ground.

As to the circumstances in which they were received, it is relevant to consider what led up to the assault upon the deceased. The driver had stopped and dismounted from the van. The passengers, including the appellants, desired him to proceed, and a number of them pleaded with him to do so. All the witnesses who speak to this, except Stephen Frank, say that the deceased joined the others in doing so, that he was nat agressive in any way, that thereupon some sort of argument ensued between the deceased and the first appellant, and some say that one of those present took the deceased by the arm and led him away from the driver. That the first appellant should have found fault with the deceased merely because he joined in the common attempt to persuade the driver to do what everybody wanted him to do, and to carry the resulting quarrel to the point of murder, is difficult to accept. Looked at from that approach, the murder is completely senseless. The evidence of Stephen Frank in this regard is, in my opinion, more probably true. It stands alone, but because the evidence is not reliable in respect of all, details probabilities acquire greater weight than may otherwise

have/.....

have been the case. According to him the deceased said to the driver: "Look, you must be very careful how you are "driving because there are too many members in the van and "we are liable to lose our lives." It was as a result of this remark that the first appellant came up to the deceased and said : " Look, you should not have told the "driver that he must be very careful. By you telling him , "very careful, therefore he says he does not want to drive." The picture here is one of the deceased, the master of ceremonies of this band, obstructing, or conveying the impression that he was obstructing the achievement of the desire of all the other passengers, by giving vent to further censure of the way in which the van had been driven. It is much more likely that this may have led to the quarrel. The evidence that he was led away from the driver,supports this contention that he may have assumed an agressive attitude as a result of an altercation along these lines. Stephen Frank further says that shortly after this he heard a smashing of glass, that he then walked to the other side of the van, and found the deceased on the ground,with the first appellant sitting on him. A broken bottle was found on the scene. All this suggests that the deceased,before he was found on the ground, may have struck the first

appellant/.....

appellant with the bottle in the first stages of a fight arising out of a quarrel about the remark made by the deceased to the driver. But to the important question whether he delivered the first blow, the evidence provides no answer. Johnny Murrigan allocates the first blow to the first appellant. Others did not see it. If he is wrong, it is possible that the deceased struck the first blow or blows, causing the injuries to the first appellant. If he is right, the deceased may, after being led away, have commenced a fight to avenge the blow he had received. In either event, he would have given some provocation to the first appellant, although in all the circumstances, and having regard to the deliberate manner in which the deceased was stabbed, the provocation would not, in my opinion, avail to reduce the crime to culpable homicide. But that the deceased did give ~~such~~ some provocation is ~~merely~~ no more than a possibility. There is no evidence to substantiate it on a balance of probabilities. It is equally possible that he inflicted the injuries in self defence. While, therefore, I am unable to agree with everything CANEY J. said in this regard, I cannot, having regard to the principle of proof which he had to apply, find fault with the conclusion that it had not been

shown/.....

shown that the injuries in question had been sustained in circumstances which would provide some excuse for the attack upon the deceased. That conclusion cannot possibly be said to be arbitrary, and is not vitiated by any misdirection or irregularity.

I agree, therefore, that the appeals should be dismissed.

L. C. Steyn.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

DEVRAJ BALLA	1st.Appellant
MANNIE GOVENDER	2nd.Respondent
PRYALAL RADHALAL	3rd.Respondent

and

R E G I N A	Respondent

Coram: Schreiner, Fagan et Steyn, JJ.A.

Heard: 5th.May, 1955. Delivered: 16th. May. 1955

J U D G M E N T

SCHREINER J.A. :- The three appellants were convicted of murder by a court consisting of CANEY J. and assessors, sitting in the Natal Southern District Circuit Local Division. No extenuating circumstances being found, each was sentenced to death, but the learned Judge granted them leave to appeal to this Court.

The facts as they appear from the Crown evidence may be briefly summarised as follows. The deceased and the appellants were passengers, together with about fourteen other Indians, on a seven seater taxicab or van which

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was proceeding from Scottburgh to Umkomaas at about 9 p.m. on the 24th. July,1954. The occupants of the van, other than the appellants, were almost all members of a band of musicians who were to perform at what was referred to in the evidence as a Tamil Death Ceremony. At about two miles from Scottburgh and six miles from Umkomaas the van was brought to a stop on the left hand side of the road. It is not entirely clear why it was stopped; the driver, who was the van's reserve driver, the regular diver also being on it that night, stated that he stopped because of complaints about his driving voiced by one or more of the passengers. It was argued for the appellants that the evidence suggested that the deceased, who was the band's master of ceremonies, might have been one of those who criticised the driver's driving methods. This may be assumed to have been the position, although after the van had stopped he was apparently prominent in urging the driver to proceed. The first appellant demonstrated with the deceased and a quarrel arose which led to a physical struggle between them, but the evidence is limited and obscure as to the details of what happened at the initial stage. Apparently the quarrel began on the right of the van, near its front, but was continued to the fatal conclusion on the left of the van, towards its rear end. There the first appellant, who had

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removed his coat, had the deceased on the ground on his back, and was astride his body holding him by the throat. The second and third appellants were kicking him about the head, buttocks and legs. The deceased in struggling with the first appellant succeeded in raising himself to his knees and the second appellant then stabbed him more than once at the back of his neck. The deceased was then pressed back to the ground by the first appellant, who either asked the second appellant for ~~and received from him~~ or was offered it by him; a knife, with this knife he stabbed the deceased in the left side of his chest. The first appellant, who was bleeding from several small head injuries, then made his way to the van and was driven to a hospital at Scottburgh by the regular driver, the other driver and two others also being there in the van. The other two appellants went in the direction of Umkomaas in the company of one of the Crown witnesses. The deceased was removed in a taxicab to the Scottburgh hospital where he died soon after his arrival from shock and haemorrhage, the result of the stab wound in his chest. The medical evidence showed that, in addition, he had received two cut wounds in the back of his neck and another in the small of his back. He also had a number of bruises and abrasions on his head and

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face, but none were found on the lower part of his body.

The Crown called as witnesses all the surviving occupants of the van except the appellants and an old man who was throughout heavily under the influence of liquor. The appellants gave no evidence nor were any other witnesses called in their defence.

There were six of the passengers on the van whose evidence related directly to what happened at the left rear of the van before and at the time of the infliction of the fatal wound. Some of these witnesses did not profess to have seen more than part of what happened. Only one claimed to have seen the actual stabbing by the first appellant, though another said that he saw the latter's hand upraised apparently in the act of stabbing. There is no doubt that the evidence of these six witnesses, if accepted, establishes that the three appellants were together fighting or assaulting the deceased and that the first appellant stabbed him in the chest and so caused his death. The trial court accepted the evidence of the six witnesses, holding that they had tried honestly to convey to the court what they had seen. Inevitably, having regard to the darkness and the excitement, their accounts revealed discrepancies, but these the court found to be consistent with the

truthfulness/.....

truthfulness of the witnesses and with the correctness of their evidence in those respects that were crucial.

Before this Court counsel for the appellants did not indicate to us any important ground for criticism of the trial Judge's setting out of the evidence. But counsel did make a number of points from which he argued that it followed that the trial court had erred in convicting the appellants. He contended, for instance, that the direction of the fatal wound, as revealed by the medical evidence, was inconsistent with the accounts given by the several eyewitnesses, or at least made those accounts improbable. But this contention, in either of its forms, rests at least upon the assumption that the position of the chest of the deceased when he was stabbed can be fixed in relation to the stabber and the ground with a high degree of precision, an assumption which cannot be made. There was a tense struggle and there is no reason to suppose that, even after he had received the wounds on his neck and back and had been pressed again to the ground, the deceased made no movement at all. And even if it be accepted that the descriptions given by one or two of the eyewitnesses are rendered, in matters of detail, improbable by the medical evidence, this is a long way from creating a doubt

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as to whether the evidence of those eyewitnesses is in its material aspects trustworthy.

Another point on which reliance was placed by the appellants' counsel related to the presence of an electric torch at the scene, to which certain of the witnesses deposed. It is true that the evidence in that regard is not harmonious. Some witnesses saw no torch at all, or else saw one only immediately before the van left, others said that they saw the light of a torch intermittently while one said he saw it shining continuously. One stated that the third appellant used a torch, which was showing a light, to hit the deceased on the head. It may be that the disparity in the several accounts is greater than one would naturally expect, but in view of the excitement that doubtless prevailed a fair amount of disagreement was inevitable if the witnesses were honestly trying to recount their observations. There is little or nothing in this feature to support the view that the Crown witnesses were consciously untruthful or that they might have concocted their implication of the appellants.

The coat worn by the deceased was produced to this Court for inspection and the appellants' counsel submitted that the numerous cut marks which it

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revealed, when taken in conjunction with the fact that only three cuts or stabs were found on the deceased's neck and back, showed that those witnesses who had described the knife attack alleged to have been delivered by the second appellant were unreliable. The contention has, however, little or no force. The fact that there were many more cuts through the coat than wounds must have an explanation based probably on the rucking of the coat material, the movements of the deceased or the direction of the stabbings, or on a conjunction of these factors; but there is no sufficient reason for holding that the accounts given by the witnesses are inconsistent with an explanation on these lines.

We were referred also to gaps and contradictions in the evidence relating to the initial stage of the fight or assault and to the intervention or lack of intervention by the bystanders but the trial court was entitled to hold, as it did, that those features too were what might be expected in the honest accounts given by the witnesses in the circumstances in question.

The appellants' counsel relied upon portions of the evidence of the two van drivers as being inconsistent with that of the other witnesses. But the trial court found the evidence of the former to be

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markedly less satisfactory than that of the persons who said that they were at the left rear of the van and saw the actual fight or assault, and no good ground was advanced why this Court should depart from that finding.

Counsel for the appellants also criticised the trial court's reliance upon several other factors as supporting the evidence of the eyewitnesses. There was, for instance, the fact, admitted by his counsel at the trial, that the first appellant did remonstrate with the deceased when he was speaking to the driver, and that, following, it was said, upon a blow by the deceased, there was a scuffle between them. This was confirmed by the injuries sustained by the first appellant. His jacket, too, was afterwards found in the van by the police. Human blood was seen on the clothing of the second and third appellants after the fight, though not, it seems, on their trousers where some might have been expected in view of the evidence as to their having kicked the deceased on the head as well as on the legs and buttocks. The court also referred to what it called the conflicting attitude of the first appellant in his account given to the police; at one stage he said that he did not know how the injury to himself occurred while at another he said that he was struck by a bottle. Counsel's criticism of the use made

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by the trial court of these factors is not well-founded; they were elements of some importance and there is nothing to suggest that undue weight was attached to them.

A broken bottle was found at the scene and it is not impossible that at some stage which does not appear from the evidence it was used against the first appellant. But since he gave no evidence it would be mere speculation to hold that there might have been some trace of self defence or retaliation in his conduct towards the deceased.

The trial court accepted the direct evidence which taken at its face value established that the three appellants brought about the death of the deceased by a concerted attack in which lethal weapons were used. It found that the Crown witnesses were honest and that despite the darkness they could not, in view of their proximity to the persons involved, have erred in regard to the identity of the deceased's assailants.

The appellants' failure to furnish by evidence any denial or explanation of the Crown evidence was in the circumstances of the case a factor of importance, and no good reason has been advanced for holding that the

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trial court was wrong in the view it took.

Counsel for the appellant expressly disclaimed before this Court, and also it seems at the trial, any suggestion that a distinction should be drawn between the degrees of responsibility of the three appellants, and, despite the different parts played by them, this disclaimer accords with the evidence. The appeals on the merits must accordingly be dismissed.

Counsel also argued that the trial court should have found the existence of extenuating circumstances, but in the absence of misdirection or other irregularity this argument could not be entertained, unless, it may be assumed, no reasonable court could have come to any other conclusion than that, in the language of section 206(2) of Act 31 of 1917, " there are extenuating circum- "stances. " (cf. Rex v. Taylor, 1949 (4) S.A. 702 at pages 716 et seq. and Regina v. Mkize, 1953 (2) S.A. 324 at pages 335 and 336). The lastmentioned case was exceptional; although there was clearly material which would have strongly supported an argument that there should be a finding of extenuating circumstances, counsel, though invited by the presiding judge to address the trial court on the subject,

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had refrained from doing so. It should not, however, be supposed that in practice the members of this Court express such views as that extenuating circumstances might well, or apparently should, have been found by the trial court. On the contrary, there are many cases in which some or all of the members of this Court hearing an appeal do hold such views but give no expression to them because, in general, it is not our function, as it is that of the trial judge, to advise the Executive on the exercise of the prerogative of mercy. It should be emphasised that this is the Court's practice, in fairness to unsuccessful appellants who have been sentenced to death and the carrying out of whose sentences depends on the decision of the Executive, after reconsideration of the record and such other material as may be before it. It would be extremely unfortunate if any assumption were countenanced that the absence of any comment from this Court favourable to the existence of extenuating circumstances indicated in the slightest degree that in the view of its members there were no features in the case in question pointing away from the execution of the death penalty.

In the present case there was, in the light of the above cases, no basis for the intervention

of this Court, whatever view may be taken when the matter comes to be considered by the Governor-General-in-Council on the whole of the materials then available.

Counsel for the appellants also argued that since the decision in Regina v. Malopi (1954 (1) S.A. 390) the rule laid down in Rex v. Lembete (1947 (2) S.A. 603) that the onus lies upon the accused to prove extenuating circumstances must be taken to have been modified. I can find no support for this argument in Malopi's case.

The appeals are dismissed.

FAGAN J.A.) Concurs.
[redacted])

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The 25th February 1955.

Trial resumed.

JUDGMENT

CANEY J: The learned Assessors and I are agreed on our verdict in this case, and I proceed to read our judgment.

During the evening of 24th July 1954, Paul Naidoo, an Indian male (to whom we shall refer as the deceased) died at the G.J.Crookes Hospital in the presence of the medical officer of the hospital, Dr. J.F.Schoebers. The cause of his death, as given in evidence by the District Surgeon Dr. J.G.Kee (who carried out a post-mortem examination on 27th July) was haemorrhage from a wound in the left lung, with shock and cerebral trauma as secondary causes. This wound originated from an incised wound on the left side, running upwards and inwards and slightly forwards, caused by a sharp instrument which cut through and completely divided the fourth rib and entered the lung. In addition, the deceased had two small incised wounds on the back of the neck, and another incised wound almost in the middle of the back. He had nine small abrasions on the cheeks and forehead, also one below the right eye and another outside the left eye. There was extensive bruising in the scalp, over the left temple and into the left temporalis muscle, and several small bruises in the scalp on the top of the head. The brain was congested over the whole cerebral cortex and there was a haemorrhage under the covering of the brain in the right parietal region; and there was bleeding on the surface of the cerebellum. All bones at the base of the nose were completely fractured, and the deceased had a cut between the 4th and 5th fingers of the left hand.

The question is whether the accused, or any of them, are responsible in any degree for the death of the deceased.

It is common cause that on the evening in question

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the deceased and the three accused were, with other Indians numbering about fourteen, passengers in a seven seater motor van proceeding from Scottburgh to Umkomaas, where they were to attend a ceremony described as "a Tamil death ceremony". The van had been engaged from one Manicum Gengan to carry a band of musicians to the ceremony, and travelling with the musicians were others, termed in the evidence their supporters. The leader or organiser of the musicians was one Johnny Murugan, and the deceased was its master of ceremonies or announcer. None of the accused was a member of the band, but the First Accused was sometimes a vocalist at its performances. The van was being driven by one Manicum Veerasamy, and Manicum Gengan was seated beside him. The journey lay along the South Coast national main road, which carries a considerable amount of traffic. During the course of this journey, Manicum Veerasamy brought the van to a stop near the left edge of the road in an uninhabited locality. In evidence he gave as the reason the fact that one or more of his passengers had expressed themselves in critical terms concerning his manner of driving; he was not disposed to continue, but preferred to surrender the control to another. The evidence of a number of the passengers, though varying in detail, was to much the same effect. Save one, an old man who was under the influence of liquor, all alighted from the van after the driver had done so, some immediately and others later, and some of them urged him, somewhat persistently, to resume driving; but he was adamant. Considering that Manicum Gengun, who was the usual driver of the van,was present, it is difficult to appreciate why there should have been the persistent pressure on Manicum Veerasamy of which the witnesses have spoken.

The deceased was one of those who urged Manicum Veerasamy to continue with the driving of the van, and the

evidence

evidence is that the First Accused intervened by remonstrating with the deceased. The case for the Crown is that he did so in an aggressive manner, and that this was followed by physical conflict between the two of them, ending in the death of the deceased. What happened at the start of the trouble is somewhat obscure. There is some evidence that when, on the right hand side of the van and towards its front, the deceased and others were endeavouring to prevail upon Manicum Veerasamy to resume the journey, and when the First Accused had intervened, remonstrating with the deceased for doing so, he, the First Accused, then removed his jacket and struck the deceased a blow with the fist or with the open hand, which felled him to the ground; this occurred, according to Johnny Murugan, on the left hand side of the van, on the edge of the road. Although the witness did not say so in so many words, it seems fair to infer that he meant that the deceased and the First Accused had moved to that situation from the right hand side of the van after the latter's intervention. George Govender corroborated Johnny Murugan in regard, not only to the First Accused's intervention (as did other witnesses, although all did not coincide in their evidence as to what was said by the First Accused), but also as to the First Accused removing his jacket and adopting a belligerent attitude towards the deceased. No one save Johnny Murugan spoke of the blow which felled the deceased to the ground. Up to that point the matter might have been no more than a minor assault. There is no evidence as to whether the deceased rose again or not. There is a hiatus in the story from the time of the blow with the fist or open hand (and indeed, save for Johnny Murugan's evidence of that ~~incept~~ incident, from the time of the First Accused's remonstrating with the deceased) until a stage at which witnesses claim to have seen the deceased on his back/and on the ground the First Accused astride

astride him - which must have been a very short interval of time. It is from then that the evidence was directed towards showing that the First Accused, with the aid of the Second and Third Accused, killed the deceased by stabbing him in the side with a knife or dagger or similar sharp instrument.

The main elements of the scene as reconstructed by the Crown are as follows : the deceased was on his back on the ground, the First Accused sitting astride him on his chest and holding him by the throat with both hands. They struggled. The Second Accused was near the deceased's legs, with a knife in his hand, and jumping about and kicking the deceased. The Third Accused was also kicking the deceased. The deceased succeeded in getting to his knees, and he and the First Accused, also partially risen, wrestled for control. Whilst they were in this posture the Second Accused delivered two or more blows, in quick succession, with a knife, stabbing the deceased in the back of the neck and in the middle of the back. The deceased was forced again on to his back; the Second and the Third Accused resumed kicking him, and the First Accused delivered the fatal stabbing blow on the left side, and then punched the deceased in the face. They then all three kicked him and went off. The kicks here and earlier mentioned were directed at the head, the buttocks and the legs.

The witnesses upon whom the Crown relies to support this were Johnny Murugan, George Govender, Percy Naidoo, Perumal Charles, Jack Kisten and Stephen Frank. They did not all claim to have seen the whole incident from beginning to end; only one of them, George Govender, claimed to have seen the stab in the side. But if their evidence be accepted, it would justify the reconstruction of the scene which the Crown has advanced.

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It will be convenient now to summarise the evidence of these six witnesses on this aspect of the case. Johnny Murugan said that having "pleaded" unsuccessfully with the driver to resume the journey, he went towards the back of the van and saw the First Accused in a kneeling position astride the deceased, who was on his back on the ground, and holding him by the throat; he saw that the Second Accused had a knife in his hand; the First Accused and the deceased were struggling; the deceased was trying to wrench himself free whilst the Third Accused was kicking him with his booted foot, on the buttocks and lower portion of his body. He, the witness, pleaded with the Second Accused to release the deceased and the Second Accused used an abusive term to him, meaning that he was to get away "before I knife you". The Second Accused had a knife in his hand and said to the First Accused "Fatty give him a knife". The witness left the scene, apparently in fear as the consequence of the Second Accused's threat towards him - in cross-examination he said that when he intervened the Second Accused lifted his hand (with the knife in it) and held it in a stabbing position. The witness did not see anyone stab the deceased, nor did he see the Second Accused kick or assault the deceased at all.

George Govender said that he saw the deceased on the ground with the First Accused sitting on his chest and holding his throat; the Second and the Third Accused were kicking the deceased. He pleaded with them not to do anything to the deceased, and the Second Accused threatened to stab him if he came to the deceased's aid. The deceased struggled to rise and when he was on his knees the Second Accused took a knife and stabbed him on the back of the neck. He stabbed so fast the witness was unable to say how many stabs there were. The deceased fell again and the First Accused held him by the throat. The First Accused said to

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the Second Accused "Manie give me a knife", and the Second Accused took a knife from the inside pocket of a coat he had on his arm and gave it to the First Accused. The First Accused took the knife and stabbed the deceased on the left side about the position of the outer breast pocket; then the three of them started kicking the deceased. When the First Accused was about to stab the deceased, the witness pleaded with him not to do it, and the Second Accused said he would stab the witness if he helped the deceased. The last he saw was the First Accused jumping into the van and he pleaded with the driver not to drive off but to take the deceased to hospital, not the driver who had been driving but another. The witness also said that he did not hear the Second Accused say "Fatty give him the knife", and it would not be true to say that that was said; he did hear the Second Accused threaten to stab Johnny Murugan.

Percy Naidoo said he "got fed up" with pleading with the driver and went to the left side of the van where he saw the First Accused and the deceased struggling on the ground towards the rear of the vehicle; the deceased was on his knees trying to balance himself on the First Accused; they were moving about, and he demonstrated that they were in a wrestling posture, the First Accused on the left side, the deceased close to him, chest to chest, and the First Accused's arms round the back of the deceased's neck, trying to push him to the ground; each was leaning on his left and right arm respectively and they were struggling. Then, the witness said, the Second Accused pulled out a knife and stabbed the deceased on the back of the neck. The First Accused, who had hold of the deceased's neck whilst the Second and the Third Accused kicked him on his back, pushed him back to the ground, and sat on him and started punching his face whilst the other two continued kicking him. In a little

while

while the First Accused shouted "Mannie give me the knife", whereupon the Second Accused handed a knife to the First Accused, taking it from a leather sheath from inside the pocket of the coat he was wearing. The First Accused raised his arm to stab the deceased, and as he brought the knife towards the deceased's left side the witness shouted for mercy. He said he was so excited at that moment that he turned away, and when he turned back he saw the First Accused punching the deceased in the face; then get up and kick him in the face, and the three of them kicked him and then ran towards the van. In cross-examination the witness said that when the Second Accused stabbed the deceased he stabbed him once only on the back of the neck, and not on the back - he saw him stab once only.

Perumal Charles said that before he reached the driver he heard a noise at the back of the van, and heard someone call "leave me, leave me", and he ran to the place; there he saw the First Accused on top of the deceased. He tried to pull the First Accused off and felt something sharp like a knife hurt his arm; his arm bled, and he exhibited a cut in the upper portion of the right sleeve of his jacket. He did not know at the time who had stabbed him, he said. He heard the deceased say "leave me, I give up", and he himself, in the hopes of frightening the assailants shouted that a police van was coming. The Second and the Third Accused were engaged in kicking and hitting the deceased, and when he, the witness, received a stab in the arm he ran away a little distance; he looked back and he heard the Second Accused say that he would "poke" anyone who came near.

Jack Kisten said that when with a number of the others on the right hand side of the van with the driver, he heard a cry "Oh, Mother", indicating that somebody was in trouble; he went to the left side of the van to find

out

out what was happening and saw the deceased lying on his back on the ground with the First Accused "choking him by the throat"; the Third Accused was kicking him; the First Accused was kneeling and had the deceased by the throat. The deceased's jacket and body were covered with blood. He did not see the Second Accused do anything. He himself was frightened and walked away after a short time.

Stephen Frank said that he heard a smashing of glass from the left hand side of the van, walked around there and saw the deceased on the ground; he was groaning and the First Accused was sitting on his stomach and holding him by the chest. The Second Accused was standing with a knife in his right hand. The witness went up to the Second Accused and told him to "forget it", whereupon the Second Accused pointed the knife at him and told him that if he came near he would "poke" him. He was frightened by this threat and stepped back. He then saw the Third Accused kicking the deceased on the head. He could see the deceased's face was covered with blood and became very frightened and walked away. In a short time he saw the van move towards Umkomaas. In cross-examination the witness said that he did not see the First Accused hold the deceased by the throat; he sat astride him, not kneeling on his knees, and they were not struggling at that time. He did not see anyone try to pull him off the deceased, but his attention was directed to the Second Accused, not the First Accused.

The evidence of these witnesses, if acceptable, makes it clear that at the time any of them first came on the scene the First Accused was in the ascendant; he was astride the deceased, probably sitting on his chest, and holding his throat. George Govender spoke of this, and Perumal Charles' evidence appears to relate to the same time. Then the deceased succeeded in freeing himself to some extent

and

nd in rising to his knees; he and the First Accused wrestled, face to face. It was then that the Second Accused stabbed the deceased. George Govender spoke of this phase, and so did Percy Naidoo. The First Accused then forced the deceased to the ground again and, kneeling astride him, stabbed him. It seems that it was this phase, or part of it that was witnessed by Johnny Murugan and Jack Kisten, and George Govender spoke of it in full; Percy Naidoo also spoke of this phase up to the point of the First Accused raising his arm to stab. At what stage Stephen Frank came on the scene does not clearly appear.

In addition to the eye witnesses mentioned above, others of the van's passengers gave evidence. Bobby Naidoo said that he heard a noise from the other side of the van like the voices of people quarrelling, and went to see what was happening, but there was such a crowd that he did not see anything save two figures rolling on the ground. He crossed to the other side of the road where he sat to rest himself; he was feeling miserable - he had said earlier that he had been drinking before setting off on the journey and he was unaccustomed to liquor. He saw the van move off towards Umkomaas, ran and shouted for it to stop but it did not. Then the Second and Third Accused came up from behind him, and the three of them commenced to walk towards Umkomaas. They slept the night in a car and in the morning he noticed blood on the clothes of both of the others. The Second Accused's jacket and the Third Accused's shirt had blood on them. This was admitted by the defence to have been human blood.

Harry Maharaj said he was drunk and did not remember if the van stopped on the journey; he knew nothing about the incident in question.

Ganas Pillay said he did not alight from the van

with

with the others when it stopped, but followed them later. He heard the deceased's voice "calling for his mother" from behind the van on the left side; he ran to the van to get his torch and saw the deceased lying on the ground - there were eight of them there and the van left as soon as he took his torch; he did not see how the deceased came by his injuries. He added in his evidence that when he first saw the First Accused he was coming towards the van, as he himself came from it with his torch.

Tommy Ramjuthan said that he did not get out of the van immediately but did so later, spoke to the driver and re-entered the van and was in it when it moved off, the other occupants being the two drivers, Benjamin Samuel, an old man whose name he did not give, and the First Accused who had a lump on his forehead and blood flowing from his forehead, and on the front of his jersey. He gave no evidence as to how the deceased came by his injuries.

Benjamin Samuel said he alighted from the van after a time and spoke to one of the drivers, Manicum Gengan. He said "I never went on to the left side of the vehicle and I saw no fighting taking place". He re-entered the van, the First Accused, Tommy Ramjuthan and an old man were in it and Manicum Gengan drove off to Umkomaas. The First Accused was ~~bleeding~~ bleeding from his head.

All three accused elected not to give evidence, and they called no witnesses. Their Counsel, in addition to criticising the evidence of the eye-witnesses above-mentioned and asking us to reject it as not worthy of credence or at any rate as unreliable and unsafe to be acted upon, placed considerable reliance on the evidence of Manicum Veerasamy and Manicum Gengan. The former said that he stopped the van because the passengers said he was taking the whole road, but he was unable to say who it was who had said this; all

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the passengers got out and held him and started pulling him back to the van; there was a great noise, some asking him to continue driving the van and some pulling him; he had to hold on to the door handle because they were rough with him, he added in cross-examination, with the consequence that he became afraid. After a little while some of the passengers went to the front of the van and to its left, whilst others remained with him. He went on that after a little while he heard a scream inside the van and he was asked to rush the First Accused to hospital; he saw blood on his face; Manicum Gengan came and drove the van. He also said that he had no argument with the deceased that evening, and that the deceased was not aggressive towards him at any time; nor did he see or hear anything suggesting that the deceased was in a fighting mood, or see anyone attack the deceased. Further, he saw no sign of nor did he take part in a general fight and he saw no one in possession of a knife. The latter (Manicum Gengan) said that when the driver stopped the van and got out some of the passengers tried to force him (the driver) back; they wanted him to get into the van, but he could not do so because they were holding him. He himself caught the driver's wrist in order to assist him. He went on that after a short while he heard a noise from another direction and someone said that another's skull had been broken, and then he saw the First Accused sitting in the van with blood on his face. He himself then immediately drove the van to Umkomaas waiting for no one.

Counsel contended that the evidence of these two witnesses showed that there was a general disturbance and chaos around the driver Manicum Veerasamy on the right hand side of the van, such a disturbance that he became afraid; that in the course of this disturbance, which became a general fight, some one or more person or persons must or might

might have mortally wounded the deceased; and that it is more probable that this would have been done by members of the band of musicians than by anyone else, because they were losing their evening's remuneration in consequence of the deceased's interference with the driver. The evidence of these two witnesses does not, however, go so far on this subject as Counsel would have it; indeed Manicum Veerasamy said he saw no sign of a general fight. It is, moreover, clear that the deceased received his mortal injuries on the grass verge on the left hand side of the road and to the left of the van, not on its right, where the driver was the centre of interest. The Police found unmistakable signs of this on the grass on the following morning. That the three accused were in the vicinity is undisputed, and we understood Counsel to concede that the First Accused "exchanged words with the deceased" as he put it; and indeed the cross-examination also indicated this. There was no suggestion that any member of the band was as assertive as was the First Accused over the deceased's attitude to the driver; and, according to the evidence, he removed his coat at the outset of the trouble. On that evening and at the place where the van drew up the First Accused received minor head injuries, the origin of which is unexplained; with Head Constable de Klerk he at first remained silent on the subject of his injuries, later the same evening at the hospital he said he did not know how he had received them; subsequently he told the Head Constable he had been struck on the head with a bottle. No one else, save Perumal Charles, was injured in the slightest degree. It should be mentioned that on the next morning the neck of a broken bottle was found on the scene, as well as fragments of glass of a broken bottle. There is no evidence otherwise concerning this. The theory of a general fight does not impress us.

Nor

Nor were we impressed with the evidence as such of Manicum Veerasamy and Manicum Gengan. Their evidence omitted all mention of any untoward incident in which the deceased was concerned; the first indication in their evidence of hurt to anyone was the call to take the First Accused in the van for medical aid. It appeared to us that these two witnesses were disposed to glibness and were not frank, and their demeanour suggested to us that they were untruthful.

The six witnesses to whom we have referred as being eye witnesses impressed us as being truthful; they appeared to us to be trying to tell the truth in regard to what happened on the evening in question, as they saw it. Their evidence was criticised by Counsel for the Accused on account of inconsistencies, and because they were unable to describe the actions of various of the spectators of the incident; and because they differed concerning the question whether or not a torch was used, and if so, how. We consider, however, that the situation was such that variations are to be expected in the evidence of what each witness saw and heard. No one of them claims to have seen the whole incident from beginning to end; they came on the scene at varying times, and were situated in varying positions, and it is reasonable to suppose that those who were present simultaneously had their attention focussed on one or more of the contestants, rather than upon the spectators. There must have been a state of intense excitement, and some, if not all, of the witnesses, must have endured some degree of nervous strain and anxiety; and it was dark. Under the best conditions it can be expected that several persons viewing the same incident or hearing the same conversation will in all truthfulness give differing versions of the incident or the conversation respectively; the conditions prevailing on this

this occasion were particularly conducive to this. But unless the witnesses in question were deliberately lying, their evidence makes it clear that the Second Accused struck the deceased with a knife or other sharp instrument, from behind, that the Third Accused kicked him unmercifully, and that the First Accused stabbed him in the side; and that they then all kicked him. As we have said, the witnesses impressed us as trying to tell the truth; they impressed us as being truthful witnesses and the demeanour of each of them we considered to be good. We should add that experience teaches that this type of Indian witness, even with the aid of interpretation, is not facile in expressing himself, and that one can expect the use of words or phrases which are not likely to be used by Europeans as the appropriate words or phrases. In so far as they may be criticised in respect of variations from the evidence they gave at the preparatory examination, we think it important to observe that there was a considerable time-lag; the deceased was killed on 24th July 1954 and the trial in this Court commenced on 10th February 1955. In addition we think it is important to observe that the evidence at the preparatory examination, although no doubt obtained by way of question and answer, was recorded in narrative form, with the consequence that the recorded evidence can very easily appear to contain a shade of meaning slightly different from what was intended to be given up by the witness, sometimes through an interpreter.

As we have indicated, we accept the evidence of the six witnesses in question that the three Accused inflicted on the deceased the injuries which were disclosed by the medical evidence. The witnesses spoke, not of a general fight in which it might be difficult to say who used a lethal weapon, but of a scene apart in itself, in which there were

four

four actors, with a number of spectators standing by. It is to be observed that, not only the situation of the fatal stab, but also the other injuries found in the post mortem examination lend support to the evidence of these witnesses concerning the details of the attacks by the Accused upon the deceased, in particular the injuries to the head and the face. There is no suggestion by the defence that the witnesses were mistaken as to the identity of the participants in this scene they have described. If that, and not a general fight, occurred, the suggestion is that the witnesses were or might be lying to shield one or more of their number. We are satisfied they were not lying.

Upon the medical evidence Counsel for the Accused based a contention that the deceased could not have come by his fatal stab wound in the manner indicated by the Crown witnesses. The point of his contention was that, if the First Accused was sitting astride the deceased's chest he could not have stabbed the deceased on the left side in the manner spoken of by these witnesses, firstly because the direction of the wound indicated, as the District Surgeon said in evidence, that the blow was delivered not with the raised arm in the traditional stabbing posture, the blade of the knife protruding from the little finger side of the hand, but that it must have been delivered by an upward swing of the arm, the blade of the knife protruding from the thumb side of the hand; and in any event the First Accused would have stabbed his own thigh if in the position indicated. We consider, however, that this contention loses sight of the fact that the two contestants were not stationary, the one about to stab, the other awaiting the stab. All the indications are that they struggled, and it is difficult to escape the conclusion that the deceased would have been endeavouring to free himself. Even if the knife

was

was protruding from the thumb side of the hand, it appears to us that the arm would be swung back and raised preparatory to delivery of the blow. Further, the evidence does not indicate that at this stage of the affair the First Accused was sitting astride the deceased's chest. This was so at the earlier stage spoken of by the witnesses, at the time before the deceased succeeded in rising partially from the ground to a position in which he and the First Accused were each on one knee and in a wrestling posture, the position in which he was when the Second Accused stabbed him from behind. Thereafter, however, the deceased was pushed or fell back to the ground, and it appears to us unlikely, and the evidence does not establish, that the First Accused resumed a sitting position astride the deceased. There is evidence that he kneeled over the deceased, and so far as appears, at the time when the witnesses say he delivered the fatal stabbing blow, he was kneeling astride or beside the deceased. Further, the medical evidence in regard to this aspect of the matter can be expressed only as an opinion of what would have happened if the contestants had been in a particular more or less fixed situation; variations from the hypothesis must have effect to vary the opinion in greater or lesser degree. The evidence of the eye witnesses, the one who saw the fatal blow delivered, and another who saw it about to be delivered, convinces us that the First Accused did stab the deceased in his left side.

Counsel for the accused also laid considerable emphasis upon the fact that the deceased's jacket contained a number of cuts, many of which were not only in the outer material but also in the lining of the jacket. This multiplicity of cuts, caused no doubt by a knife or similar instrument, Counsel contended, indicated that someone must

have

have stabbed at the deceased on many more occasions than represented by the wounds actually disclosed on his body, and this in turn suggested that he was injured in a general fight, because there was no evidence that any of the Accused struck so many blows as are represented by the number of cuts in the garment. This argument, however, appears to us to lose sight of the fact that the deceased's jacket will in all probability have been rucked up and become so placed that any one particular stabbing action could have caused several cuts in the garment, or a cut that would not injure the skin.

There is some measure of extraneous support for the evidence of the eye witnesses from the fact of the First Accused having admittedly had words with the deceased over his attitude to the driver, from the fact that the First Accused's jacket was found later by the police in the van (supporting the evidence that he had removed it preparatory to attacking the deceased), and from the fact of his conflicting attitude to the Head Constable about his head injuries and their being unexplained in evidence. In addition, the Second and the Third Accused must have obtained the blood on their clothes from contact with the deceased or with the First Accused, in which latter event they must have been in close company with him when or after he had obtained his head injuries; there is no suggestion of any other source of this blood. They did not assist the First Accused to the van; he made his way there on his own and boarded the van. Nor did they leave with the First Accused in the van, and they have not explained how the blood came on their clothes before he left.

Counsel for the Accused concedes that if they did inflict upon the deceased the injuries in question, there is no distinction between them in their measure of guilt and they are all of them guilty of murder, being bound by the

doctrine

doctrine of common purpose. Having found, as we do, that they did so inflict the injuries, we find the three Accused guilty of murder.

MR JACOBS: At this stage I wish to apply for an adjournment of this case, firstly to consider the judgment as a whole. Then the question of whether extenuating circumstances may or may not be argued was reserved by your lordship.

CANEY J: For further consideration, yes.

MR JACOBS: The position is that my learned leader is available only tomorrow (Saturday) if your lordship is prepared to sit in this matter.

CANEY J: I do not think tomorrow will suit Mr Rees.

MR REES: No, my lord, I have to be in Johannesburg tomorrow morning.

MR JACOBS: My learned leader, as he informed the Court, has to be in Bloemfontein on Monday, but he could return to Durban by Tuesday the 1st March at 11 a.m.

CANEY J: Very well, the hearing will be resumed on Tuesday, 1st March 1955.

The Court adjourned.