29/1955.

G.P.-S.3844-1952-3-10,000. U.D.J. 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.

Johannes C. Wilson
Appellant.

versus

The Queen
Respondent.

(Death)

Appellant's Attorney D.T. Zeffertt *Respondent's Attorney* S. vd. Walt
Prokureur van Appellant *Prokureur van Respondent*

(special grant)

Appellant's Advocate D.T. Zeffertt *Respondent's Advocate*
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:— Thursday, 5th May, 1955.
Op die rol geplaas vir verhoor op:—

1, 3, 4. (9.45–12.10 — CAV.)

— Appeal dismissed. Conviction & sentence confirmed.

Centlivres, C.J., vd. Heever, & Hoexter, JJ.A. 24-5-55.

Registrar.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

JOHANNES NDHLOVU Appellant

&

R E G I N A Respondent

CORAM :- CENTLIVRES C.J. van den Heever et Hoexter JJ.A

Heard :- 5th May 1955. Delivered :- 24 = V = 55

J U D G M E N T

CENTLIVRES C.J. :- The appellant was convicted of murder by Dowling J. and two assessors and sentenced to death. The learned judge made the following order :

" THAT a special entry be, and is hereby, made in terms of Section 370 of Act 31 of 1917 on the ground that it was an irregularity for His Lordship Mr. Justice Dowling, to accede to the request of the accused that the accused be tried by a Judge and assessors after the accused had in terms of Section 165 of the said Act, demanded that he be tried by a Judge and Jury, and to have tried the accused with assessors, the terms of the said Section 165 being peremptory and the Court thus not being properly constituted. "

The record is silent as to what occurred immediately after the plea of not guilty was recorded but we were told by counsel for the appellant, who also appeared at the trial, that he had, on

behalf of the appellant, asked that the trial should take place without a jury and that counsel for the Crown had consented.

To get a clear view of the issue involved in this case it is necessary to refer to prior legislation. Before July 20th, 1914, when Act 27 of 1914 came into operation the only method of trial before a Superior Court was by means of a judge and jury. Under Sec. 18 of that Act the Governor-General was empowered in the circumstances therein stated to constitute a special criminal court consisting of two or three judges to try cases of high treason, sedition or public violence and contraventions of Chapter I and II of the Act. Act 31 of 1917 made a further inroad into the jury system. Section 216 provided that if an accused person gave notice within the time specified in the section that he desired to be tried without a jury, the presiding judge should try the accused without a jury. In Rex v Bapoo (1922 C.P.D. 508) it was held that when an accused had not given notice within the prescribed time that he desired to be tried without a jury, the Court had power, on good cause shown, to extend that time. A contrary view was taken in Rex v Mabena (1924 T.P.D. 286). In Rex v Mazwayo (1924 E.D.L. 385) the Court granted an application for a trial without a jury which was made when the jury had already been empanelled but not yet sworn. In Rex v Baki and Dogan (1930 T.P.D. 710) the cases of Rex v Bapoo (supra) and Rex v Mazwayo (supra) were followed

and it was stated that the learned judge who gave the decision in Rex v Mabena (supra) had said that he had not followed his own decision "in view of the established practice." In Rex v le Roux and Another (1934 N.P.D. 72) the accused who had given notices that they desired to be tried without a jury applied for leave to withdraw their notices, as they wished to be tried before a jury. Their application, which was opposed by the Attorney-General, was granted.

In 1935 Section 36 of Act 46 of that year substituted a new Sec. 216 in place of the old section in Act 31 of 1917. The new section contained a proviso to the effect that the presiding judge might, if he thought fit, act upon a notice demanding a trial without a jury, although the notice was not given within the time prescribed.

In 1954 the Legislature made a radical change. Sec. 1 of Act 21 of 1954 substitutes a new Sec. 165. The new section in so far as it is relevant reads as follows :-

" 165.(1) Any person who is committed for trial for any offence by a magistrate and who -

(a) verbally at the conclusion of the preparatory examination ; or

(b) by written notice to the magistrate of the district in which the preparatory examination was held, within three weeks from the date upon which he is committed for trial ; or

(c) if before the said period of three weeks has elapsed,

" notice is served upon him that he will be tried upon an indictment before a provincial or local division of the Supreme Court, by written notice to the said magistrate within seven days after the service of such notice,

demands to be tried by a judge and a jury, shall, if he is indicted for trial for any offence before a superior court, but subject to the provisions of sections two hundred and fifteen and two hundred and fifteen bis, be tried by a judge of the Supreme Court and a jury.

(2) The magistrate who commits any person for trial shall upon conclusion of the preparatory examination inform the person committed for trial that if he is indicted for trial before a superior court he shall have the right, subject to the provisions of sections two hundred and fifteen and two hundred and fifteen bis, to be tried by a judge and jury, provided he demands to be tried by a judge and jury in accordance with and within the periods prescribed by sub-section (1), and shall record upon the record of the preparatory examination the fact that he has so informed the person committed for trial and any such record shall be conclusive proof that the person was so informed. "

Section 14 of Act 21 of 1954 substituted a new Sec. 216, sub-section (1) of which provides that "in any criminal case "pending before a superior court in which..... the accused "has not in terms of section one hundred and sixty-five, in "accordance with the provisions of that section, demanded to "be tried by a judge and a jury, the trial of the accused "shall..... be before a judge of the Supreme Court "without a jury." The new section 216 does not contain

any proviso similar to the proviso to be found in the section which ~~with~~ it replaced nor does Sec. 165 contain such a proviso.

From June 9th, 1954, when Act 21 of 1954 came into operation there was, as appears from the terms of that Act, a complete change in regard to what was the usual or ordinary method of trial before a superior court. Prior to that date the normal procedure was trial by a judge and jury and subsequent to that date the normal procedure was trial without a jury. If an accused person wishes to be

tried by a judge and jury he must now demand such a trial within the time prescribed by Sec. 165 ; if he does not make such a demand he must, in terms of Sec. 216, be tried by a judge without a jury. It is not necessary to consider in this case whether the Court has the power on good cause shewn to extend a time limit of this nature imposed by a statutory provision. In Rex v Bapoo (supra) and the cases which followed that decision it was held that the Court has that power but there are decisions to the contrary. The point has not yet been decided by this Court. See Rex v Hendrikz (1940 A.D. 246) and Rex v Noorbhai (1945 A.D. 58 at pp. 64 and 65).

It is clear therefore that under the law which is now in force the usual or ordinary method of trial before a superior court is by a judge without a jury. Section 165 allows a departure from that method in favour of the accused if he complies with the requirements of that section. He may "demand" to be tried by a judge and jury. The reason why the section prescribes a time limit within which such a demand must be made is obviously because it is essential for the authorities to know timeously whether it is necessary to summon a jury to attend the court. As long as such a demand stands the provisions of Sec. 165 must be carried out and in this sense

the section is peremptory. I can see no reason why the accused is not free to withdraw his demand at any time before a jury is empanelled and sworn. In Regina v Williams (1954(4) S.A. 637 at pp. 638 and 639) the Court said that Sec. 165 appeared to be prima facie peremptory and added "But it does not follow that "an accused person" (who had demanded to be tried by a judge and jury) "would not have the right to apply for a reversion "to what had (has ?) now become the ordinary method of trial. "Whether any such application should be granted would have to be "determined on the facts of each case, for the accused would "not have the right automatically to bring about any alteration."

I am unable to agree with the above view. It amounts to this : an accused who has made a demand in terms of Sec. 165 must be tried by a judge and jury unless he applies to the Court for the ordinary method of trial and the Court grants the application. I do not think that this could have been the intention of the Legislature. The Legislature could not have intended that if, for instance, an accused verbally demanded a trial by judge and jury at the conclusion of the preparatory examination he could not change his mind and withdraw his demand within the period prescribed by paragraphs (b) and (c) of sub-sec. (1) of Sec. 165. No order of court would be required in such a case

and I do not think that an order of Court is required if the demand is withdrawn at any later stage provided that a jury has not already been empanelled and sworn, for the section gives the accused the privilege of demanding a trial by a tribunal which is different from the ordinary and usual tribunal and there is no reason why he should not waive that privilege at any time before a jury is seised of the case. This is a different case from Regina v Price (1955(1) S.A. 219) where it was held that that although an accused had consented to be tried by a court which was not properly constituted this Court should set aside his conviction and sentence. In the present case the Court which tried the appellant was a competent court.

Counsel for the appellant relied strongly on the case of Regina v Kotze (1955(1) S.A. 510). In that case it was held that where an accused who on committal for trial had elected to be tried by a judge without a jury was bound by that election and that an application made by him at his trial to be tried by a judge and jury should be dismissed. As regards that case I wish to say at the outset that, assuming that the Court has power to extend the time prescribed by Sec. 165 within which a demand for trial by jury must be made - a matter with which I dealt earlier in this judgment - the accused would have to show

good cause for such an extension. It does not appear from the report of that case that good cause was shown and in the absence of good cause the Court correctly dismissed the application. In its judgment the Court proceeded on the view that Sec. 216 was peremptory in the sense that where an accused desires for the first time after the periods prescribed by Sec. 165 have elapsed, to be tried by a judge and jury he is not entitled to such a trial. With this conclusion I have no quarrel if the Court has ~~xxx~~ no power on good cause shown to extend the prescribed periods. But I am with ~~regret~~ respect unable, for the reasons given above, to agree with the judgment in Kotze's case (supra) in so far as it may be taken to have decided that Sec. 165 is peremptory in the sense that when an accused has demanded to be tried by a judge and jury he cannot subsequently withdraw that demand. For the same reasons Regina v Adami (1955(2) S.A. 175) must be overruled.

Counsel for the appellant relied upon the fact that the proviso to Sec. 216(1) as enacted by Sec. 36 of Act 46 of 1935 was not reproduced in the substituted section as enacted by Act 21 of 1954. I do not think that this fact is of any assistance to the appellant. That proviso enabled the Court to extend the period within which an accused could demand to be tried by what was then an unusual tribunal viz: a judge without

a jury. Today such a tribunal is the usual and ordinary tribunal and a judge and jury is an unusual tribunal. A proviso corresponding to the proviso in the old Sec. 216 would be a proviso in the new Sec. 165 empowering the presiding judge, if he thinks fit, to act upon a notice demanding a trial by a judge with a jury, although the notice was not given within the prescribed time. The fact that the Legislature has not seen fit to insert a proviso is explicable on the basis that the Legislature realized that, if such a power were given to a presiding judge, great inconvenience and delay might occur in the assembling of a jury. For this reason it seems to me that a proviso similar to the proviso in Sec. 216 as enacted by Sec. 36 of Act 46 of 1935 was not inserted in Sec. 165 as enacted by Sec. 1 of Act 21 of 1954.

In sub-sec. (2) of Sec. 165 the Legislature insists on a magistrate informing an accused of his right to demand a trial by a judge and jury and further provided that the magistrate concerned must record upon the record of the preparatory examination the fact that he has so informed the accused and that any such record shall be conclusive proof that the accused was so informed. The object of this proviso is to prevent any dispute arising whether the accused knew of his right to be tried by a judge and jury.

Sub-Sec.(2) of Sec. 165 affords a strong indication on the part of the Legislature of an intention that, if an accused does not demand the right to be tried by a judge and jury within the periods prescribed by sub-sec. (1), he should lose that right. A proviso similar to the proviso in the previously existing Sec. 216 would be inconsistent with this intention.

For the reasons which I have already given there was no need for the Legislature to insert in Sec. 165 or Sec. 216 a proviso empowering the presiding judge to allow an accused to withdraw a notice demanding a trial by a judge with a jury.

For all these reasons I am of opinion that the appellant was properly tried by Dowling J. and assessors. The appeal is dismissed and the conviction and sentence confirmed.

[signature]

van den Heever J.A.
Hoexter J.A. } concur.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

SILENCE PIET NHLAPO Appellant

&

R E G I N A Respondent

CORAM :- Centlivres C.J.,Hoexter et Steyn JJ.A.

Heard :- 18th May 1955. Delivered :- 24-5-55

J U D G M E N T

CENTLIVRES C.J. :- The appellant was convicted before Ramsbottom J. and a jury in the Witwatersrand Local Division of attempted murder. At the conclusion of the trial the following special entry was made :-

" At the conclusion of the preparatory examination, as appears from the magistrate's record, the accused elected to be tried by a Judge and jury after the provisions of Sec. 165(1)" (of Act 31 of 1917, as amended by Sec. 1 of Act 21 of 1954)" had been explained. At the trial the accused then stated that he wanted to be tried without a jury. In reply to questions by the presiding Judge the accused admitted that he had elected to be tried by a Judge and jury, and that the record correctly states that he had done so after the provisions of Sec. 165(1) had been explained to him. He stated that the functions of a jury were not explained to him before he exercised his election.

" The presiding Judge then ruled that the case was to be tried by a Judge and jury. This action of the presiding Judge is alleged by the accused to constitute an irregularity. "

It appears from the record that the appellant pleaded not guilty and then made his request to be tried without a jury before the jury were sworn. In his report the learned trial judge said that "the point raised is whether an accused person who has "elected to be tried by a judge and jury is bound by his election." He then referred to his own decision in Regina v Bolani (1955 (1) S.A. 175) in which he held that an accused is so bound. Continuing the learned judge said : "When I gave my ruling I "was unaware of the decision of Herbstein J. in Regina v Williams "(1954 (4) S.A. 637). Similar problems have arisen before and "other judges. In refusing to allow the accused to depart from "his election I applied my decision in Regina v Bolani. If that "was a wrong decision, and, if the trial judge has a discretion "to allow the accused to change his mind, I ought to have in-"quired as to the reason why he wanted to change. I did not "do that, and if I ought to have done so, no doubt the accused "suffered prejudice. "

In Regina v Ndhlovu (May 1955) this Court differed from both the cases referred to by the learned trial judge in his

report and held that an accused is at liberty to withdraw his demand to be tried by a judge and jury at any time before a jury is empanelled and sworn. From this it follows that the learned judge erred in ruling that the appellant had to be tried by a judge and jury. The proceedings were, therefore, irregular. The appellant should have been tried by a judge and assessors, assessors being necessary in terms of Sec. 21 (a)(2) because the charge was one of attempted murder.

Counsel for the Crown contended that, if this Court should come to the decision at which I have arrived above it should nevertheless not set aside the conviction and sentence. He relied on the proviso to Sec. 374(1) which reads as follows:-

" Provided that, notwithstanding that the court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has, in fact, resulted from such irregularity or defect. "

I have difficulty in holding that the proviso is applicable to the present case. The appellant was entitled to be tried by a judge and assessors : he was not so tried and as far as

he was concerned he was tried by a court which was not competent to try him. Similarly when an accused on remittal for trial by an inferior court demands a trial by a superior court the only competent court in terms of Sec. 229(1) is a judge without a jury : a court consisting of a judge and jury would be an incompetent court. Section 375 makes special provision for cases where an accused is tried by a court which was not competent to do so and it seems to me that the Legislature, having made this special provision, must be taken to have intended that the proviso to Sec. 374(1) should not apply when an accused has been tried by a court which was not competent to do so. Apart from these considerations I do not see how it can be held that where an accused has been convicted and sentenced by a court which was not competent to convict and sentence him such a conviction and sentence is valid. For all these reasons it seems to me that the appeal must succeed.

The appeal is allowed and the conviction and sentence are set aside and it is left to the Crown to decide whether there will be a fresh trial in terms of Sec. 375(a) of Act 31 of 1917.

Hoexter JA.
Steyn JA. } concur.

week before the 4th July 1954 had a quarrel with his wife Lucy. There is no doubt that he suspected her of cohabiting with his brother in law on July Mkwai and that he taxed her with this. Indeed in the evidence he said he had on occasion seen them lying together. Asked what he did about it in the way of attacking July Mkwai he pointed to the fact that he had only one eye and was very vulnerable in the fight and not prepared to offer any violence, even although he caught them red-handed in sexual intercourse. The impression which he made was that he is a man with a marked inferiority complex. There is no doubt that there was great hatred in his heart for Mkwai and that hatred probably extended to the members of his wife's family. One of the wife's brothers had advised her to leave the accused which she did with all of her eight children and went to live at her parents' place. Before this happened there had been an incident when the wife Lucy had called members of her family together and invited the accused to give particulars as to when and where she had misbehaved with July Mkwai as alleged by the accused. On that occasion Johnson Msuqweni a member of the wife's family had struck him on the head with a stick. That is common cause. The accused did not retaliate excepting that there is some evidence that he made a pass at Johnson with a knife.

The next incident in this case occurred on the night of July the 4th when it is clear that the two deceased were killed.

I will review the crown evidence relating to the events of the 4th July. The first witness was Lucy the wife of the accused.

Perhaps I should mention first the medical

/evidence ...

evidence as to the nature of the injuries to the deceased persons. Dr. Naude gave evidence of the cause of death in the case of July Msuqweni was laceration of the brain and brain tissues and he described numerous wounds which he found on the head; comminuted fractures of the skull. I should add that July Msuqweni was an old man of 80 years and the father of the accused's wife Lucy. In the case of Albert Msukweni the cause of death was extensive pulping of the brain. It appears that this man's head was smashed in. It appeared to the doctor that the wounds had been caused by a blunt instrument or instruments. Albert was a son of the old man and he was also known as Klein July.

Now I turn to the evidence of Lucy the wife. She spoke of the matrimonial quarrel that I have mentioned and said that she left her husband on the advice of her relatives, to go and live with her parents, that on the night of July the 4th she was visiting at the hut of July Mkwai. She had with her a baby and there were present in July Mkwai's hut herself, July Mkwai and his wife and three children. After dark - it might have been any time from 8 to 9 p.m. - she says that a number of people arrived at the hut of July Mkwai; some of them came into the hut and others remained outside. She said she could not give the number of people but there were many and she specially mentioned that the lower part of their faces were covered with blankets; all of these men excepting the accused were wearing blankets, she said. When the accused came into the hut he pointed to July Mkwai, addressing the men accompanying him, saying "this is the man", or rather according to this witness the accused said "There he is." Thereupon these blanketed

/men ...

men started hitting him in the hut. She said that the accused had a sort of shining thing in his hand which she thought might have been the head of an asegai. She added that the accused stabbed at her brother in law July Mkwai but he evaded the thrust. She said that July Mkwai managed to get away and ran away. She then goes on to describe events that took place outside the hut. She said that July Mkwai managed to get away and ran away. She said that these blanketed men assaulted her father, the first deceased, and her brother, the second deceased. That evidence was modified in cross examination as regards the assault on her father and brother. She said what actually happened was that she had run away and that she only heard the sound of blows but saw nothing. It is quite obvious that her evidence in relation to the assaults upon the two deceased was a reconstruction of what she had heard. Indeed her daughter who also gave evidence said that she, the daughter, had described to her mother what she had seen and she the daughter was an eye witness of some of the things that happened. The fact that Lucy was prepared to state on oath at one time that she had seen things that she had not really seen is a circumstance which must be taken into account in assessing the value of her evidence. There is this to be said for her that under cross examination she readily admitted that she was really describing only the blows which she had heard.

The next witness was July Mkwai the brother in law of Lucy. He also testifies to this family meeting that I have mentioned when the accused was called upon to particularize his charges against Lucy. He also describes the assault by Johnson on the accused.

/Describing ...

Describing the events of Sunday the 4th July he said that the accused came to his hut with a number of people who had blankets on and who came into his hut. He said that these men who accompanied the accused arrived in motorcars which stopped some distance from the hut, the rest of the journey to the hut being done on foot. He says that all of these men including the accused had their faces covered with blankets which they were wearing and which were all of the same pattern. He said that these men came and stood in the hut - I now read my note of his evidence - "came into my hut and looked at me. The accused came in and he pointed at me with a long knife and said 'this is him.' These people then started hitting me; they had long sticks and when raising them they would strike the roof of the hut," and the witness attributes to that circumstance the fact that he is still alive. He says that he managed to get away; that the accused tried to stab him in the neck but he pulled another man towards him who collided with the accused and so enabled July Mkwai to evade the stab. He then says that he was chased outside by some more of these people three of thempursued him and struck him on the hip bone and the back of his neck; then he says he fell down and was found at the spot where he fell and taken to hospital - I presume in an ambulance - he did not see the assaults on the deceased persons. July Mkwai was cross examined but his evidence was not greatly shaken in cross-examination. One point in which this witness differs from the other witnesses is this, he stated that the accused was also wearing a blanket and that he had what he described "black fore-eyes," meaning one supposes, black tinted spectacles. He is the only crown witness who

/testifies ...

testifies to that feature. The other two say that he was wearing the patch that he is now wearing.

The next witness was Johanna Modiba the daughter of the accused. I should mention perhaps in regard to the accused's wife that she was married to him by native custom and was therefor a competent witness against the accused. Johanna the daughter says that she was outside the hut of July Mkwai when a number of people clothed in blankets came to the hut. She saw them arrive, she said, in two taxis some distance away and when the accused went into the hut of July Mkwai she followed him in. She also said that her father pointed at July Mkwai. She says that he said when pointing out Mkwai "this is him" and that he pointed with a long knife. She said you could not see anything except the eyes of the men who accompanied her father because of the blankets that they were wearing over the bottom of their faces and hats that were worn low down over the head; but she said that her father had no blanket and his face was not covered. She said that she ran out of the hut and was caught by some of these people in blankets who called her saying "you are going with your father." These men, she said, hit July Msuqweni who is her grandfather with iron rods and she said that her father also struck him with an iron which would imply that he acquired this weapon after leaving the hut. She said "I actually saw my father strike, he struck many blows." Then she was asked about some more detail and she referred to the wound on her headwhich she had got and she showed a mark and said she was confused in her head and could not still remember some detail that was put to her. She said that she also saw the people attack her uncle

/Albert ...

Albert the second deceased. She said "my father and those with him struck Albert (Klein July) and broke the top of his head. This ofcourse corresponds with the doctor's evidence that the skull of the second deceased was pulped. She said in cross examination that she was quite close to the spot where the two deceased were assaulted. In each case she was six or seven feet away and could see. There was she said, a moon - she described it as, I think, a half moon - but I think it is common cause that the moon was between its first quarter and half moon. That could be expected to give some, but not great, assistance in seeing. She said for a while she was held onto by one of these men in blankets and her father gave her two of his children to look after. At a later stage, she said, the man released his hold on her and she was free to move about. The bodies of the two deceased were found about 60 to 70 yards apart and if her evidence is true it seems necessary that she should have moved herself from one spot to the other. This witness is open to criticism in two important respects. At the Preparatory Examination she said that they first assaulted Klein July and then the old man. In this court she reversed that order. She gave some further evidence which if it is accepted is extremely important; she says that after the assault she was taken by her father in one of the taxis to Springs where she spent the night in a garage and the following day was taken by her father to an Aunt who lived on the other side of Springs where she stayed for sometime until she was taken with the children to the Brakpan location. It was while she was staying with her Aunt she said

/she ...

she had a visit from her father the accused who volunteered to her that he had wanted to kill the witnesses grandfather and her uncle July Mkwai and her mother, but that the two deceased had also deserved to die. Now this somewhat sensational evidence was given for the first time in this court during cross-examination. It was certainly not given before the Magistrate, and on that point she said that she was about to say what her father had told her but the Magistrate stopped her and said he did not want to hear what other people said. I do not know what to think about that. The Magistrate might not have realised that the witness was stating something which the accused himself had said and that it was someone else whose evidence would be hearsay. The fact that that admission or that statement was only made in this court for the first time is a circumstance which make it dangerous for the court to place any reliance thereon. The witness in reply to a question by the court said that the wound on her forehead bled freely and blood did get into her eyes. She said also that she was crying and the tears helped to wash the blood out of her eyes as she wiped from time to time.

The next witness was Jackson Masinini who said that he Klein July, and old July were walking to old July's place when he heard a whistle and heard a woman shouting "Joh", a cry of distress. That attracted their attention and they went to see what was going on. He says that walking along with the old man they were assaulted by many people and that the accused took part in that assault. This witness said that his head was severely damaged in this assault and that he is not

/quite ...

quite right yet. One does not know whether he meant by that that his mind has been affected or whether he was still suffering from painful headaches. He did say that he noticed that during the assault the accused had a stick in his hand whereas at the Preparatory Examination he apparently said that the accused had "niks" in his hand.

Johnson was the last crown witness and he was the witness who stated that he found the two bodies about 70 yards apart. He also testifies to what was common cause that he struck the accused with a stick on the side of the head about six days before this. During the cross-examination of the crown witnesses Counsel for the accused put to them what the accused's version would be of the events on that night. He said that the accused would say he went there accompanied by men who he took with him as witnesses, that he was going there to fetch his wife and children, and took these men as witnesses. He would say that at a certain stage July Mkwai called out and summoned a number of people who approached with an apparently hostile intent so that the accused ran away. He was frightened and ran off. When the accused gave evidence however, that was not his version at all. What he did say I will now read. He opened his evidence by saying he did not merely suspect that his wife was sleeping with July Mkwai but he actually saw them. His evidence runs, "as a result certain members of my wife's family visited me. They came there not to see me but to hit me." I take it that refers to the occasion when Johnson assaulted him with a stick. He says "I was hit by July Mkwai."

/He ...

He denied that he had drawn a knife on Johnson at this family gathering. "After the assault on me my wife took the children and went to July Mkwai. On the night when the Julys were killed - old July and Klein July - I went with certain three men. I do not know where they are now. I took these men because I was wanting to know from July Mkwai why he assaulted me and took away my wife and children. I took them because I wanted them to listen to the case as well. When I came to July Mkwai's hut I saw my wife and children. I did not point him out and the men with me did not assault July. I had nothing at all in my hands. I said, look here I have come to fetch my children. July Mkwai then walked out and I followed him. I stood outside the door." Then I have a note, "July Mkwai walked out I did not see what he did. I came outside and walked off home. I saw nothing when I walked away. I saw no other men." He added "the sight of my one eye is not too good. I can throw no light on the death of the two deceased." That was his evidence in chief and of course it bears no relation to the evidence which was adumbrated in cross-examination. Under cross-examination he said all sorts of conflicting things and suggested amongst other things that the three men who accompanied him had been fighting with the deceased. On the evidence I have reviewed and having due regard to the weaknesses which I have pointed out in regard to the crown witnesses the court has come to certain conclusions of fact. I have mentioned the back ground of the family dispute, theassault on the accused which is common cause. He was undoubtedly a man with a grievance. We accept the evidence that

/he ...

he arrived at the hut of July Mkwai with quite a considerable number of blanketed men with their faces concealed, who arrived in cars. That was not challenged in cross-examination, although during the cross-examination of the accused himself the accused denied that there were any cars. The accused arrived accompanied by what one might fairly call a "gang" of blanketed natives. It was an extremely sinister feature of this gang that their faces were covered by their blankets, which was obviously intended to prevent identification and is itself indicative of some evil intent. These natives we find were carrying sticks or iron rods and some of them including the accused entered the hut of July Mkwai. We accept the evidence that the accused pointed at Mkwai with a knife or asegai head saying, "this is the man" or "there he is;" that immediately thereafter July Mkwai was set upon by these blanketed men. We accept that the accused attempted to stab or stabbed at July Mkwai and that July evaded the stab and that he managed to escape. We find that the same gang continued its assaults outside and that these assaults resulted in the deaths of the two deceased. We infer from the accused's conduct and we accept as proved that his visit accompanied by these men was a visit organised by the accused, that these men were responsible for the deaths of the two deceased and that responsibility for these two deaths must be laid at the door of the accused, who used them as his instruments, even if he struck no blow. We are fortified in this conclusion by the fact that the accused in his evidence was clearly mendacious. We are not unmindful of the fact that an accused ought not to be

/convicted ...

convicted on the ground of his mendacity, but take the view that in the circumstances of this case his mendacity is a factor or circumstance which can be properly taken into account in assessing the guilt of the accused.

Finally, we take into account against the accused the fact that although two out of the three men he says he took with him "to listen to the case" were available as witnesses none was called by the defence.

Mr. Zeffertt Counsel for the accused who has said all that can be said on his behalf, argued that that inference was not a necessary inferencefrom the proved facts and when he was invited to say what other inference might reasonably be drawn from the proved facts said it was a reasonable possibility that when it was realised by the men folk of Lucy's family that the accused was taking the children away from their mother, it is reasonable to suppose that they banded together to attack the persons whom they regarded as kidnappers and that they got injured or killed as a result of such an attack, and that if that is what might have happened it should not be laid to the door of the accused. There is not a tittle of evidence to support this so called "reasonable possibility." It was certainly not put forward by the accused, whose story was at marked variance with the version which Counsel for the accused adumbrated in his cross-examination of various crown witnesses. We find the accused therefore guilty of murder.

We have considered whether or not there are extenuating circumstances and have unanimously concluded that there are none.

REGISTRAR: Johannes Ndhlovu (Modiba) you have been duly convicted of the crime of murder. Know you of or have you anything to say why sentence of death shall not be passed upon you according to law?

ACCUSED: My Lord Justice I have been found guilty of the murder what can I say, nothing.

- SILENCE IS CALLED FOR -

- S E N T E N C E -

DOWLING,J:-

Johannes Modiba you have been convicted of murder without extenuating circumstances. There is one sentence which I can pass. The sentence of the court is that you be returned to the custody whence you have come and that you be hanged by the neck until you are dead. The papers in this case will be sent to the Governor General accompanied by reports from myself and from the crown and it will be for the Governor General to decide whether or not the sentence shall be carried out.