Record.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

ADAM SONAI 1st Appellant

Jacob Motsuko 2nd Appellant

and

REGINA Respondent

Coram:Centlivres,C.J.,Hoexter,Steyn,de Beer et Reynolds JJ.A.

Heard: 7th.December,1956. Reasons handed in: 10-12-56

J U D G M E N T

STEYN J.A. :- The appellants were convicted by RAMSBOTTOM J. sitting with two assessors, on an indictment of murder and sentenced to death, no extenuating circumstances having been found. Their appeal to this Court was dismissed.

The reasons may be briefly stated. It appears that at half past eight on the night of 7th April,1956, the deceased was proceeding along a street in Pimville Location, in the company of one Benjamin, and of two women, Mary and Anna, when two men came from the side of the street and confronted them. Benjamin, Mary and Anna all say that they recognised these men as being the two appel-

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-lants, Adam and Jacob. According to these witnesses Jacob remarked "Here they are", and fired a shot which took no effect. The women jumped aside, but the deceased and Benjamin remained where they were. Adam then also fired a shot which struck the deceased. According to the medical evidence the bullet penetrated his heart and left lung. Adam and Jacob then ran away.

Mr. Kaplan, for the appellants, submitted that the evidence of these witnesses identifying Adam and Jacob as the assailamts, is unreliable, and should not have been accepted by the trial court. He relied mainly on the insufficiency of the light, the briefness of the opportunity for observation and the excited condition of the witnesses, and suggested further that the witnesses may have been under the influence of liquor and that the somewhat detailed description which Anna and Mary gave of the clothes worn by the appellants indicates that they were describing more than they could in fact have observed.

As to the visibility at the scene of the crime, it is not contested that it was already dark when the deceased was killed and that the witnesses are mistaken when they say that there was a moon as well as street lights. The moon had reached its last quarter on 3rd April,

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and such moon as there was on 7th April did not rise until after midnight. There are, however, two street lights, one some seventy paces and the other about a hundred paces from the scene of the crime. That does not mean that these lights are a hundred and seventy paces apart. They form a triangle with the spot where the deceased met his death. The distinctness of vision at this spot at the relevant time was not tested, and it may be assumed that it was not such as to afford clear sight even at a short distance, but the evidence of all three eye witnesses is to the effect that there was light enough there for them to see that the persons facing them were Adam and Jacob. This evidence finds support in the statement by Detective Constable Isaac Sindi to the effect that he often passes along this street, that he knows what the light is like at this spot and that a person could be recognised quite well in this light. The fact that the witnesses were mistaken in their belief that the moon contributed to the visibility, although it is relevant to the reliability of their observations, cannot, of course, reduce the degree of visibility which in fact existed. The trial court was aware of the error into which they had fallen, but nevertheless accepted their evidence that the light was sufficient to enable them to recognise the assailants and it

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cannot be said that the trial court was not justified in doing so. It is true, further, that the encounter between the eye witnesses and the two persons confronting them was a brief one and that from the moment the first shot was fired they must have been affected by fright and excitement which may have given rise to confused impressions. Had these two persons been strangers to them, the correctness of the identification in such light as there was, may well have been open to serious doubt. But the evidence is that they were not strangers by any means. Anna knew Adam intimately. He had been her lover for some time. One would expect that, in ordinary circumstances at any rate, a momentary glimpse would have been sufficient to enable her to identify him with certainty. There is evidence which the trial court accepted that as the two persons were approaching, Anna remarked "Here "is Adam and the other one," or "Here is Adam". That was before her faculties could have been disturbed by the firing of the first shot. The "other one" was Jacob whom she knew as the friend of her former lover and whom she had often seen in his company. Benjamin, who had succeeded Adam in Anna's affections, knew him well, and had also known Jacob for a long time. He had on a former occasion been involved in an

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assault upon Adam, for which he was prosecuted and punished. Not only must his attention have been drawn to Adam and his companion by Anna's remark, but after the second shot had been fired he also went up to about two and a half paces from the two persons facing him, ~~and~~ before they turned and fled. He was then the worse for fear, but if he knew them well, as he says he did, there is, bearing in mind that they were at such close quarters, nothing unaccpptable in his statement that he did in fact recognise them, ~~and~~ even if it was in the half light of the street lamps, and in any case his evidence is to the effect that he had at that stage already seen who they were. The other eye witness, Mary, was not as well acquainted with the appellants as Anna and Benjamin were, but she did know them by sight. Benjamin, Anna, Mary and the deceased were, apparently, walking together. When the first shot was fired they were approximately six paces from their attackers. Benjamin and Anna, at any rate, knew them very well, they were face to face and there was light from the street lamps by which they could be distinguished. In such circumstances the brevity and disquiet of the encounter would not preclude reliable recognition. Mr. Kaplan argued that the identification by Benjamin and Mary may have been influenced to some extent by Anna's remark "Here is Adam".

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Whatever the effect of that remark may have been upon Mary, Benjamin seems to have known these men so well that he is not likely to have been confused thereby in perceiving who they were. Neither does the somewhat detailed description by Anna and Mary (more detailed in the case of Anna) of the clothes worn by Adam and Jacob cast any real doubt upon the correctness of their identification. The clothes usually worn by a wellknown person may be observed at a glance. It may be that in regard to some details they reconstructed from memory what they had not actually seen on this occasion, but that in itself would not show that the persons they were looking at were not Adam and Jacob. The suggestion that these eye witnesses may have been under the influence of liquor, with the result that their powers of observation may have been affected, finds no support at all in the evidence. It is true that alcohol was found in the blood of the deceased, but according to the district surgeon the percentage found showed that at the time of his death the deceased was definitely not intoxicated. Anna and Mary, denied that they had taken any liquor at all. Mr. Kaplan argued that this denial must be false and is to be accounted for by the probable consumption of liquor in the company of

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the deceased by Anna and Mary themselves. This argument clearly involves a non sequitur, but even if it were to be assumed that Anna and Mary did have liquor that day , together with the deceased, there would be no reason to suppose that they were more intoxicated when they met the assailants than the deceased was, and the medical evidence is that he was not then under the influence of liquor at all.

Mr. Kaplan referred to various other matters which may have an indirect bearing upon the identification of the appellants, but I did not understand him to press them upon this Court and I do not propose to deal with them except to say that there is no substance in any of them.

The trial court found that Benjamin, Anna and Mary were not unsatisfactory witnesses, and after the fullest consideration of their evidence and the criticisms advanced against it, came to the conclusion that the appellants were beyond reasonable doubt the persons who attacked the deceased and caused his death. For the reasons indicated above this Court was not satisfied that the trial court had erred in coming to that conclusion.

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RAMSBOTTOM, J: The accused are charged with murder. On the night of the 7th April of this year at Pimville a man Thembisile Soya was shot. The Crown case is that he was attacked by two men, both of whom fired shots, one of which struck the deceased and killed him. The Crown alleges that the two men were the accused.

The crime of murder consists of the unlawful intentional killing of a human being. In order to obtain a verdict of guilty of murder, the Crown must prove against each of the two accused that he killed the deceased, that he killed him intentionally and unlawfully. The onus is on the Crown to prove each of these facts beyond reasonable doubt.

I have mentioned that two shots are said to have been fired, and that only one bullet struck the deceased, but if both the accused were engaged in the shooting, that is, if there was common purpose between them that they should shoot and kill, both would be responsible for the shot that caused the death. When two people join together to do something which is wrong and one of them does it, then the other is equally guilty with the one whose act actually caused the death.

The witnesses for the Crown were two women, Anna and Mary and a man, Benjamin. They all tell the same story with slight variations. At half past eight on Saturday night on the 7th April, Anna, Mary, Benjamin and the deceased left the place where they all four lived, in the company of a woman called Lizzy, who had spent the afternoon and evening with them. They were taking Lizzy part of the way home. They accompanied her to a point where they turned back and on the way back they

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were confronted by two men who came to the centre of the raod from a point at the side of the road where there is a fencing pole. This is a big stone pole. They say the two men were the two accused. Anna says that she heard the second accused say "Here they are" and he at once fired a shot from a pistol or revolver which he held in his hand. This shot did not hit anybody. The two women at once jumped to the side of the road. The two men, Benjamin and the deceased, remained in the road. Almost immediately the first accused fired a shot which struck the deceased.

That is the evidence of the three eye-witnesses who gave evidence for the Crown. The medical evidence is that the deceased died as a result of a bullet wound which struck him in the body and penetrated his heart and left lung.

Two empty cartridge cases were found at the scene and a bullet was recovered from the body of the deceased.

The two accused do not dispute the fact that two men attacked the four people as I have described; they do not deny that two shots were fired and they do not deny that the deceased was killed as a result of the firing of one of these shots, but they say that whoever fired these shots, they the accused, were not the people.

Accused No: 1 says he was not there at the time of the shooting. Accused No: 2 says that he was not there and that he was at home with his family.

The issue in the case, therefore, is whether the two accused have been identified beyond all reasonable doubt as the two assailants. The Crown must satisfy

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us beyond all reasonable doubt that the two accused are the two men. It is not for the accused to prove their innocence; the Crown must prove their guilt. and if there is any reasonable doubt in the matter, they are entitlted to be acquited. If, on the other hand, there is no reasonable doubt, they must be convicted.

This shooting took place at night and the argument put forward by counsel for the defence was that in the prevailing lighting conditions, there might well have been a mistake in the identification.

Counsel has also argued that the witnesses for the Crown were not such truthful witnesses that the Court can accept their evidence beyond reasonable doubt. These contentions must be examined. The lighting conditions were not perfect. At the place where the shooting occurred there are street lights, but the two nearest street lights are some distance from the point where the shooting actually took place. One light is seventy yards away and the other one hundred yards away, roughly in the opposite direction. The Crown witnesses all say that there was moonlight, but it is clear that there was no moon at the time when this shooting took place. The time would have been somewhere after half-past eight and possibly near nine o'clock. At nine o'clock, early in April, it is normally fairly dark unless there is some light. There was no moon and the street lights were some distance away. Nevertheless, all the Crown witnesses say that it was not very dark and that there was sufficient light for them to recognise the accused. They received some slight corroboration from a police witness, who says he knows that place and he says that the lights

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are good enough to light up the place where the shooting occurred. If the two accused had been strangers to the two women and to Benjamin, the lighting conditions which prevailed might have been of greater importance, but the two accused were not strangers. The first accused admittedly had been the lover of Anna. According to her, that relationship lasted for several months and came to an end in 1954. In the interim she had seen accused No: 1 from time to time and knew him very well indeed. She says that the second accused was a friend of the first accused and that he often visited her in the company of the first accused. It is not disputed that the two accused were friends. In fact, No: 2 accused says that he spent part of the morning of the Sunday, 8th April, in the company of the first accused. Anna recognised the two men as her former lover and his friend, Jacob Motsuko.

Now it is common knowledge that one can recognise a person whom you know well even if the light is not very strong. Mary, the second woman witness, says she only knows the two accused by sight, but she says she knows them well by sight and she knows that the first accused was Anna's former lover. Benjamin says that he knew accused No: 1 for a long time. He says "I know No: 1 well" and, in fact, a short time before the shooting Benjamin and the first accused had been involved in an assault case, an assault committed by Benjamin on the first accused.

We have come to the conclusion that as far as the light was concerned, there was sufficient light for identification beyond any reasonable doubt. But in all cases like this, one has to consider very carefully the credibility of the Crown witnesses. These Crown witnesses have accused these two men and the two men say that they were not there and that they did not do it. As I have already said, it is not for the accused to

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prove their innocence, and before they can be found guilty beyond all reasonable doubt, we must be satisfied about the credibility of the Crown witnesses. That credibility was attacked on several grounds. The first is that the Crown witnesses all say that there was a moon. The moon only came up after midnight, so that there was no moonlight at the time of the shooting. We have comet to the conclusion, however, that these witnesses are not untruthful or dishonest. They knew that there was some light at the spot but that light probably came from the street lamps. As counsel for the Crown has pointed out, these people spent the night there guarding the body of the deceased man; the moon rose after midnight and, no doubt, they observed it then. The conclusion we have come to is that they honestly believed that there was a moon at the time of the shooting. They were mistaken, but that does not affect their credibility. It only affects their accuracy of observation.

The second point on which they were attacked was that they all say that the deceased man had not partaken of liquor that day. After his death a sample of his blood was analysed and it was found that there was a very small percentage of alcohol in his blood. The evidence of the doctor was that he must have partaken of some liquor within eight hours of his death. The two woman witnesses say that the deceased spent the whole day in their company and that he did not have any liquor Now, the amount of liquor was really small and there would seem to be no reason for them to lie and say that he had not had any drink if they, in fact, knew that he had had some. The amount of alcohol found showed that it could not have been a case of their sitting down and spending the day drinking. It is

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possible that the deceased slipped away in the middle of the day and had something to drink without the women knowing about it. When people say the spend the whole day together, they may think afterwards that they never separated throughout the day, but we know that shortseparations occur of which people are afterwards forgetful, for example, a man or a woman who are in company may separate in order to go and relieve themselves. Separationsof that sort would hardly impress themselves on their memories, and it is quite possible that the deceased left the room for a short time, during which he had some drink without their having any knowledge of that. We do not think that that is a sound ground on which to attack their credibility.

Then it is said that they remember with remarkable detail what the two assailants were wearing. Their clothign is described in detail, the jacet, the shirt, the shoes and the hat as far as the first accused is concerned, and the jacket and trousers as far as the second accused is concerned. The description of the second accused's clothing, I think, was not quite as detailed as that of the first accused. Both Anna and Mary give these dewcriptions. Benjamin did not attempt to give a detailed description of the clothing. The argument was that the descriptions were so detailed, and Anna and Mary agreed so fully, that they are not telling the Court what they saw, but are describing clothing which they knew belonged to the two accused. In our opinion, however, this is not a truecriticism. As far as Anna is concerned, she knew these two men, she knew how they dressed and, on seing them, she would recognise their clothing as well as their faces, and would be able to give an

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accurate description afterwards. It was suggested that seeing a pair of brown and white shoes, she jumped to the conclusion that it was the first accused who was wearing them, and seeing the second man's clothing, including the lumber jacket, she jumped to the conclusion that it was being worn by the second accused. As far as Mary was concerned, it was contended that Mary would not have been able to identify the whole personality of the two accused because they were not so well known to her, but she says that although she had never spoken to them, she knew them well by sight. We do not think that the description of the clothing given by the two women throws any doubt upon their veracity.

As far as the demeanour of the witnesses was concerned, they did not impress us unfavourably. Anna was perhaps not as attractive a personality as the others. She is a young woman who has had as her lover the first accused and now has as her lover Benjamin. She may be a young woman of rather loose morals. The fact that the first accused is no longer her lover may give her some feelings against him. She says that he has tried to assault her on more than one occasion since they separated, but she assures the Court that she has no grudge against him and, in fact, she has conforted hersel by having Benjamin as her lover, and there seems to be no reason why she should want to force the first accused to come back to her.

We do not think, therefore, that any successful attack has been made on the credibility of the Crown witnesses. As far as their accuracy is concerned, I have mentioned that they are mistaken about the moon.

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It was argued that when the party found themselves confronted by the two men, Anna immediately exclaimed "There is Adam", Adam being the first accused, and it is argued that the other witnesses did not in fact recognise the man as Adam, but thought that he was Adam because of what Anna exclaimed. We do not, however, think that that is a reasonable possibility. The party of four met the two men at very close range. There was never more than five or six paces separating them at any material time. Not only that, after the shots had been fired, Benjamin went right up to them to a distance of about two or three paces from them before they turned and ran away. He was in a position to recognise and identify them very clearly. Another small point of credibility must be mentioned. At the Preparatory Examination Anna said that on seeing the two men she said "There is Adam" and in this Court she denied having said it, and she also denies that she said it in the Magistrate's Court. There is no reason why she should not admit having said that, and both the other witnesses say that she did say it. We are satisfied that she did say it, but that she has forgotten, and her present denial does not show her to be a dishonest or untruthful witness.

Some point has been made of the fact that Anna says she saw the two men at the pole and saw them coming from the pole to the middle of the street, whereas the others did not see them until they came on to the street. That point, I think, only affects the opportunity for identification. Admittedly the time was not very long, but in all the circumstances, as I have said, we have come to the conclusion that there was ample opportunity for correct identification.

Now, it is not enough for the Crown to show

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that the Crown witnesses are credible people. Before the Crown can claim a verdict it must be shown beyond all reasonable doubt that the two accused are not to be believed and that their evidence is false. If what they say may reasonably be true, they must be acquitted and it is necessary, therefore, to consider in detail whether the evidence of the two accused can with reasonable possibility be true. The first accused says that he was not there and took no part in the shooting. If he was not there, then he was somewhere else and he ought to know where he was. He was informed on the following day, the 8th April, a Sunday, that the police were looking for him and on Monday 9th he reported to the police station at Kliptown. What happened was that Constable Isaac Cindi went to the house of the mother of accused 1, where accused 1 lived, on the Sunday morning., the 8th at 9.30 or 10.0 o'clock, and enquired for the first accused. The first accused was not there. He says when he returned home his mother told him that he was wanted, and he went to the Kliptown police station on the Monday. He knew what he was wanted for. If his mother did not tell him clearly, it was at least clearly told to him at the Kliptown police station. In re-examination he said that he wasfirsttold at the Kliptown police station when the murder had taken place. Consequently he was told that he was alleged to have shot a man on Saturday night at about 9.0 o'clock and one would have expected him to be able to say "I did not do it, I was not there, I was at such and such a place", but he did no such thing. Now his evidence in this Court on that part of the case was thoroughly unsatisfactory. In cross-examination he said that he did not know where he was on the Saturday night. The question put

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to him was "Where did you spend the previous evening between eight o'clock and ten o'clock" and his answer was "I do not know where I was". Then he was asked whether he could remember, when he was told about the murder on the Sunday, the next day, where he had been on the Saturday night; he said he did not remember where he was. Re-examined by his own counsel, he said that he was told at the Kliptown police station that the murder had taken place on Saturday night. He said that he was then asked where he had been on Saturday night, and he had said that he did not know where he had been.

Pausing at this stage, if a man has been told by the police that he need not say anything and he then keeps silent, no inference can be drawn against him from the fact that he keeps silent, but that is not the case here. The accused did not keep silent. He was asked where he had been on the Saturday night, and he replied that he did not know. After he had given that evidence, he was examined by one of the Assessors. He said "I think I slept at home because I always sleep at home. It is not likely that I slept anywhere else". And then eventually he said "I did sleep at home". That was his evidence. He then went further and said "I was at home the whole day of Saturday. I was not feeling well, so I was at home the whole day." Now, if he can remember that now, he would have been able to remember it on the Monday following the shooting and he would not have told the police that he did not know where he had been; he would have said "I was at home all day, I was not feeling well". We are satisfied that the first accused is not telling the truth.

Then there is another point in regard to him. Although he says he bore no grudge against any of the four persons, he is accused of accosting, the evidence

shows that he may well have had a grudge against Benjamin. Benjamin had succeeded him as Anna's lover. Anna says that accused No: 1 had attempted more than once to assault her in the street. A short time before this shooting there had been trouble between the first accused and Benjamin. According to Anna, accused 1 had visited the place where she and Benjamin lived, he had met her in the street and had tried to assault her. She says that Benjamin came to her assistance, and that Benjamin then assaulted the accused. Benjamin gives similar evidence. He says that he took an iron from the first accused and struck the first accused with it. He says that he was charged with assault and fined £10 or one month's imprisonment. The first accused admits that he was assaulted by Benjamin, but says that he had been to a yard where his aunt Ellen lived, and as he was leaving the yard, without any provocation, Benjamin attacked him with a chopper. He was rendered unconscious and regained consciousness in hospital. The story of that assault told in this Court differs in details which are not unimportant from the statement made by the accused to the police. I need not go into that, but the fact remains that he was assaulted by Benjamin before the shooting, and it is by no means unlikely that he had a grudge against Benjamin. That may account for his accosting the party of which Benjamin was one, and the firing. As far as the first accused is concerned, we find that the Crown has proved beyond all reasonable doubt that he was one of the two men and that he fired the fatal shot. There is no doubt on the evidence that that shot caused the death of the deceased.

The second accused also denied that he had been

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a party to the shooting. He said that he had been at home on the Saturday night. His evidence was that he worked on Saturday and returned home from work on Saturday afternoon. He stopped work at 2.0 o'clock that Saturday afternoon and then went home. He played the gramaphone, playing some new records he had bought on Friday. He then went to Newclare to see whether he could find any gambling schools, and he then went home again to Pimville. He says it was getting slightly dark when he returned home. He was given some food by his niece, the girl Likeleli, and then he and his cousin, Webster, went to bed in Webster's room and spent the night there. He says the next day, Sunday, about 8.0 or 9.0 o'clock, which time was indicated by the position of the sun, he went to see his friend, the first accused. He says that the first accused told him that he was not feeling too well, his knee was giving him trouble. The second accused says that the first accused told him that his mother told him that the police had been there. He asked what the police were wanting him for. He said that he did not know, but it may be in connection with a case in which he had been chopped with the chopper.

Before I deal in detail with Saturday night, I want to deal with his evidence about the Sunday. We are satisfied that it is false. According to the second accused, he went to see first accused at about 8.0 or 9.0 o'clock. That was before the hour mentioned by Isaac Cindi as the time of his visit to the first accused, so the first accused would not have been able to tell the second accused that the police were looking for him. Further, it would appear from the evidence that the police informed the first accused's mother about the murder, and she told him what they wanted him for. It is very unlikely, therefore, that the first accused could have mentioned this to the second accused at 8.0 or 9.0 a.m. But apart from that, according to the second

accused, he spent until about 11.0 am. in the company of accused 1 at the first accused's house. He says that the first accused was sleeping on a studio couch. According to the first accused, at that time he was not at home; he had gone to the public baths where he remained until 11.0 a.m. We would not like to disbelieve the second accused because he is contradicted by the first accused, but the second accused is also contradicted by the evidence of Isaac Cindi, whose evidence we accept. Isaac Cindi visited the house of accused No: 1's mother between 9.0 and 11.0 o'clock that morning. He was looking for the first accused and the first accused was not there. When the second accused says that he spent from about 9.0 o'clock to about 11.0 o'clock chatting to the first accused at his house he is obviously not telling the truth. Why is he not telling the truth? Why does he lie about what happened on Sunday morning? The suggestion made by counsel for the Crown is that both he and accused 1 were trying to keep out of the way because they knew the police would be looking for them, and that is the probable explanation.

Now, with regard to the Saturday night, it is the second accused's story that he played the gramaphone, had his supper and went to bed accompanied by Webster. On Tuesday he reported to the police at Kliptown. He knew what the charge against him was and he stated that he was not guilty, but he did not tell them that he could prove at once that he had not taken part in the shooting. I say again, this was not a case where an accused person refrains from speaking because he has been warned that he need not speak. The second accused says that he was not told that he need not say anything. He says "I knew that I had

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slept at home and that Webster could give that evidence. I was told at the police station that I was being charged with having killed a man on Saturday night. I knew Webster could have told them that I had been with him on Saturday night. They did not ask me. They told me that I was charged with having killed a man on Saturday night. They did not ask me anything." One would expect an innocent man, in these circumstances, not to wait to be asked. He would say at once that he was at home, that he spent the night in the room with Webster and that he could prove it.

Accused two's counsel did not call Webster or any other witnesses from the second accused's home, but in his argument yesterday he contended that they ought to have been called, presumably by the Crown. In order to give the second accused every opportunity, and in order to investigate the case as fully as possible, the Court decided to have before it the three persons he had mentioned. These three persons were his sister, Agnes, his niece Likeleli, and his cousin Webster. None of these three witnesses assists him in any way. Agnes, after making it clear that she did not remember what had happened that Saturday afternoon, recalled that the accused had been there, played the gramaphone and had some food, but she says she left the room to go to her own room to bed before he went to his bed. She, therefore, does not assist him at all. She was not feeling well, she was pregnant, and he could well have retired and joined the first accused after she had gone off for the night. Neither Likeleli nor Webster say anything which was in anyway credible. They were either telling falsehoods, or they knew nothing about what happened on the night of

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the seventh April. I do not propose to spend time in discussing their evidence. It was of no value whatever and gives no support to the second accused. The best thing that can be said in his favour about it is that he cannot be shown to have been responsible for it. We have come to the conclusion that the second accused was not telling the truth about what he did on the Sunday and he also was not telling the truth about what he did on Saturday.

Counsel for the Defence argued on behalf of both the accused that even though they were lying in their defence that did not prove them guilty. In some circumstances that may be true. The fact that an accused person lies does not necessarily mean that he is guilty of a crime, but where an accused person raises the defence that he did not take part in the crime because he was somewhere else, and where that defence fails because it is proved that his evidence in support of it is false, then one asks oneself why does he give false evidence? The inference can certainly be drawn that he gave false evidence because the Crown case was true. This is the kind of case where false evidence on the part of the accused tends to support the evidence of the Crown witnesses. Here we have three credible Crown witnesses who all say that the second accused was one of the assailants and we have come to the conclusion that his evidence in support of his defence of an alibi is false. We find proved beyond all reasonable doubt that he was one of the assailants.

The next question which must be dealt with is what crime has been proved against the two accused.

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There is no doubt that the shots which were fired were unlawful shots. It has not been suggested that there was any lawful reason or excuse for their firing the shots. One of these shots killed a man. That man, therefore, was unlawfully killed. The question then is whether the unlawful killing was culpable homicide or murder. If it was intentional the crime would be murder and if it was unintentional the crime would be culpable homicide. In considering the question of which it was, I shall deal with the case of the first accused first. The Crown must prove beyond all reasonable doubt, if it wishes for a verdict of murder, that the killing was intentional, and the Court cannot find a verdict of guilty of murder unless it is satisfied beyond all reasonable doubt that the killing was intentional.

Nothing has been said by either of the two accused which suggests that the killing was unintentional. Their defence is that they were not there and they did not do the shooting. The question of their intention, therefore, must be decided upon inferences drawn from the circumstances, and the circumstances proved are that the two accused held up a party of four, two men and two women, and that two shots were fired at a range of not more than six paces. One of these shots struck one of the four people. Now it seems to me that the only inference that can be drawn from these facts is that there was an intention to hit, and where a person fires at another, intending to hit him, or reckless whether he hits or not, and then if the person dies, the crime is murder. The intention to kill exists not only where the person shooting or striking desires the death of his victim, but it

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exists where he intends to inflict some grievous bodily harm which he knows is likely to cause death, and where he is reckless whether death results or not. If one man points a pistol at another and fires it at him, he intends to do some grievous bodily harm. He knows that if he hits, the wound is likely to be a grievous one and he knows also that a bullet wound is likely to cause death. If, in thses circumstances, he fires, reckless whether death results or not, then in our law, if the victim dies, he is guilty of murder.

As far as the first accused is concern,ed we find he fired the fatal shot at close range intending to hit, and reckless whether death resulted or not.

Now, he hit the deceased, not Benjamin. It may be that he intended to hit Benjamin and that he hit the wrong man, but that does not assist him. If a man fires, intending to kill one person and he kills another, he is guilty of murder. At the time of the shooting the deceased was standing next to Benjamin. It may be that in pressing the trigger the first accused pulled his weapon slightly to the right and that the bullet, instead of striking Benjamin, for whom it was intended, struck the deceased. That does not assist him. We find that he pointed the revolver and fired, intending to hit and reckless whether he killed or not. That being so, we find the first accused guilty of murder.

Now, the second accused was with him. He had a pistol and he fired the first shot. The evidence is, and we believe it, that it was he who said "Here they are". The evidence is that he made full common cause with the first accused. He knew that the shots

/ were to be ..

were to be fired and he fired one himself and it is clear beyond all reasonable doubt that there was a common purpose between him and the first accused to shoot and to hit, reckless whether death resulted or not.

We, therefore, find the second accused guilty of murder.

When a man has been found guilty of murder the Court is obliged to state whether there are extenuating circumstances present or not. That question may be investigated during the course of the trial, or it may be investigated after verdict. In the present case, the Court did not inform the accused's counsel that it would investigate the question of extenuating circumstances during the course of the trial; the nature of the defence precluded such an enquiry. But the accused will be given an opportunity now of raising any points in extenuation which they may wish to raise and of giving evidence on the question of whether or not extenuating circumstances existed.

/ HIS LORDSHIP .....

HIS LORDSHIP: Mr. Kaplan, do you wish to call evidence in regard to any extenuating circumstances which there may be?

MR. KAPLAN: My Lord, if the accused, after verdict, would now admit their guilt, then I could discuss the matter with them and they may then be prepared to say what the circumstances were. May I have a short adjournment to discuss the matter with the accused?

HIS LORDSHIP: Yes, the Court will adjourn.

(Court adjourns)

ON RESUMING:

MR. KAPLAN: My Lord, I have no evidence to call and I have no submissions to make.

HIS LORDSHIP: Does Counsel for the Crown wish to say anything?

COUNSEL FOR THE CROWN: My Lord, there is nothing I can say.

HIS LORDSHIP: The two accused have been found guilty of murder. As I explained, in a case where a man has been found guilty of murder, the Court must consider the question whether it appears that there are any extenuating circumstances. Extenuating circumstances are circumstances which reduce the gravity of the offence. To put it in a simple way, the ordinary punishment for murder is death, but if there are circumstances present which make the Court feel that the crime is deserving of a lesser punishment than death, then a punishment other than death can be imposed.

It is for the accused to show that there are extenuating circumstances. The burden of proof is not to show beyond reasonable doubt that there are extenuating circumstances, but it is for the accused

/ to show ..

to show that extenuating circumstances were present. In this case, no attempt has been made to show that there were extenuating circumstances, and no extenuating circumstances appeared from the facts proved before verdict. The only possible thing was that there had been trouble between the first accused and Benjamin , but that trouble did not in the circumstances show any extenuating circumstances; if anything, it showed that the first accused had a motive for killing and that he awaited his opportunity and waited for his victim in order to strike him down. That certainly does not show any extenuating circumstances.

As far as the second accused is concerned, no extenuating circumstances appear. That being so, we find that there are no extenuating circumstances.

COUNSEL FOR THE CROWN: My Lord, to complete the record, I hand in previous conviction admitted by each of the accused.

HIS LORDSHIP: You have been found guilty of murder. No extenuating circumstance has been found in the case of either of you. There is, therefore, only one sentence which the law allows me to pass upon you and that is the sentence of death.

I am about to pass that sentence, but before I do so I wish to hear from you, Adam, and from you, Jacob, whether there is anything you wish to say which you think may influence those whose duty it is to decide whether or not the sentence of death should be carried out. The Governor-General in Counsel exercises the royal prerogative of mercy. It is for the Governor-General and his ministers to decide whether the sentence I pass on you is to be carried out. If there is anything that either of you can say which will move the higher authority to commute

/ the sentence ..

the sentence to one of imprisonment, now is the time to say it. If there is anything which either of you wishes to say which may move the authorities to be merciful, please say it now. What you say will be recorded, and will be sent to the authorities for their consideration.

Now, accused No: 1, Adam, is there anything you wish to say?

Accused No: 1: I have nothing to say.

HIS LORDSHIP: And you, accused No: 2, Jacob, is there anything you wish to say?

Accused No: 2: I have nothing to say.

SENTENCE

HIS LORDSHIP: Adam Sonai, the sentence of the Court is that you will be returned to custody and you will be hanged by the neck until you are dead.

Jacob Motsuko, the sentence of the Court is that you will be returned to custody and you will be hanged by the neck until you are dead.

(Court Adjourns)

I, the undersigned, Norman Windsor Davies, official stenographer to the Supreme Court of South Africa, hereby certify that the foregoing is a true and correct transcription of the shorthand notes taken by me of the proceedings in this case.

N W Davies

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