197/1959

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

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

(APPELLATE DIVISION).
AFDELING).

197/1961

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

CAPITAL

GINGER MASHEANE & ORS.
Appellant.

versus/teen

THE QUEEN
Respondent.

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

Appellant's Advocate (1) Unterhalter (2 & 3) G. Cohen. *Respondent's Advocate* A.J. Krog.
Advokaat van Appellant *Advokaat van Respondent*

DLO PLO

(Leave-WLD) *Set down for hearing on:* Tuesday 10th November, 1959
Op die rol geplaas vir verhoor op:

L. 10.11.

~~t.b.h. 10~~

Coram: Beyers, Holmes et van Wyk JJ.

G.A.V.

Partes: Monday 16th November, 1959
appeals of all three appellants are dismissed

E. de Beer
AC

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter of:

MASHEANE & OTHERS ..... Appellants

versus

REGINA ..... Respondent.

CORAM: BEYERS, J.A., VAN WYK et HOLMES A.JJ.A.

HEARD: 10th November, 1959. DELIVERED: 16 NOV. 1959.

J U D G M E N T.

HOLMES, A.J.A.: The three appellants, who are Native men, were charged before a judge and two assessors with the murder of the deceased "upon or about the 21st January 1958 and at or near Alexandra Township in the district of Johannesburg." They pleaded not guilty but were convicted and were sentenced to death.

The evidence was circumstantial, and the case presents an interesting exercise in the drawing of inferences from proved facts. The principles are well settled. I state them for convenience:

/"In reasoning.....

"In reasoning by inference there are two "cardinal rules of logic which cannot be ignored:

"(1) The inference sought to be drawn must "be consistent with all the proved "facts. If it is not, the inference "cannot be drawn.

"(2) The proved facts must be such that "they exclude every reasonable inference "from them save the one sought to be "drawn. If they do not exclude other "reasonable inferences then there must "be a doubt whether the inference sought "to be drawn is correct."

Per WATERMEYER J.A. (as he was then) in R. v. Blom 1939 A.D. 188 at 202/3.

The facts may be set out as follows:

1. At 7 p.m. on 21 January 1958 the deceased, a young Native man, boarded a bus in Johannesburg, bound for his home in Alexandra Township. Two companions were with him.

2. Before the bus reached Alexandra Township,

/a group.....

a group of seven Native men, including the three appellants, boarded it without paying their fares. The bus was full. This was between 7 and 8 p.m. They were in an angry mood. One of them said: "Hulle is hier. Hulle is hier." They proceeded to assault the deceased. In particular the second appellant hit the deceased on the head with the butt of a revolver. Another of the seven intruders, named Dan, (not one of the appellants) also had a firearm in his hand. During the assault, they told the deceased that he had to point out where a man named Kadietsa could be found. (The deceased knew Kadietsa.) He said he would point out where he was at the corner of Fifth Avenue and Hofmeyer. At one stage one of the intruders said to the deceased: "We have for a long time been telling you, but you won't listen." The deceased's two companions managed to leave the bus. The deceased would in the ordinary way have got off the bus at Third Avenue, Alexandra Township, where he lived. But he was held in the bus by the appellants. The bus went past the Sixth Avenue stop, and the Ninth Avenue stop, and the first appellant told the driver to pull up near Twelfth Avenue. That was where the appellants lived, or at any rate they frequented that vicinity. There they

/and.....

and their associates forced the deceased to get off the bus with them and "they took him off with them" - obviously as a prisoner. This was between 8 and 8.30 p.m. This was the last time that the deceased was seen alive by any of the witnesses.

3. A few hours later, that is to say shortly before 1 a.m. on 22 January 1958, the deceased was admitted to the Alexandra Clinic with a bullet wound in the head, from which he died the next day.

4. There is no evidence as to where the deceased was found shot or how he came to the Alexandra Clinic.

5. There is some evidence that deeds of violence are not uncommon on the Alexandra buses, and there was a passing reference to a gang known as the "Msomi gang".

6. None of the accused gave evidence or made a statement.

This might be a convenient stage to discuss the effect of the absence of defence testimony. In R. v. Ismail 1952(1) S.A. 204 (A.D.) at 209/210 SCHREINER J.A. laid down the approach as follows: ~~and we agree with it:~~

"That this fact (i.e. that the accused

/gave.....

"gave no evidence, may be given weight
"in deciding on the guilt of an accused
"person is of course clear.... it
"would of course be wrong, in cases
"resting on circumstantial evidence,
"to require that the inference of guilt
"should be inevitable, without the
"factor of the absence of defence tes-
"timony, before that factor could be
"used. If that were so it could only
"be used where it was unnecessary. On
"the other hand it is right to bear in
"mind that there is no obligation upon
"the accused to give evidence in any
"sense except that if he does not do
"so he takes a risk. The extent of
"that risk cannot be analysed in terms
"of logic; it depends on the correlation
"and assessment of the factors by the
"trier of fact, that is, on his judgment.
"When the matter comes on appeal the

/judgment.......

"judgment of the appellate tribunal,
"subject to certain limitations, fixes
"again the measure of the risk taken.
"Each case has to be dealt with in re-
"lation to its own circumstances; con-
"siderations which may have to be taken
"into account in any particular case
"are the strength or weakness of the
"Crown case, the apparent certainty with
"which the accused could have answered
"that case, if he were innocent, and
"the probability or improbability of
"the accused's failure to testify being
"explainable on some hypothesis un-
"related to his guilt on the charge in
"question."

The argument on behalf of the appellants was that in the present case the absence of defence testimony carried the matter no further because at the conclusion of the Crown case there was insufficient evidence to warrant an inference implicating the appellants in the death of the deceased, and because the appellants' failure to testify may well be

him off the bus near Twelfth Avenue, where they were wont to foregather. It was submitted to us that "the corner of Fifth Avenue and Hofmeyer" might be some place away from Alexandra Township, for example in Johannesburg, to which they might have wished to take the deceased later. As to that, I am satisfied from the context that the reference was to Alexandra Township, in which, according to the evidence, the bus route runs along the principal thoroughfare, Selborne Street, and is intersected by a succession of Avenues.

Counsel further submitted, with regard to the absence of defence testimony, that at the conclusion of the Crown case, there was room for the view that the deceased met his death at the hands of some person or persons unconnected with the case. As to that, there is some evidence that deeds of violence are not uncommon on the buses. But it would be indeed strange if the deceased met his death on the same night, in the same area, and by the same sort of weapon as that carried by one of the appellants, at the hands of some persons other than those who had captured him.

/Counsel..........

Counsel also argued that fear of gang discipline might have kept the appellants out of the witness box. ~~Assuming such a fear,~~ it must be weighed against two other

Quite apart from the fact t[illegible] he very least, the finger of regard, I question whe[illegible] gly at the appellants, and differently from ar[illegible] e. of not giving [illegible] the argum[illegible] m of the opinion that the [illegible] strong to expect an explanation [illegible], that they could have answered it if inn[illegible]d that their failure to do so is not explainable on any ~~probable~~ PLAUSIBLE hypothesis unrelated to their guilt. In the circumstances of the case, therefore, the absence of defence testimony can be given a fair measure of weight.

One is now in a position to look at the ~~position~~ facts. as at the conclusion of the whole case. Having regard to the ruthless picture painted by the Crown evidence, as already discussed, and the absence of any defence testimony, it is asking too much of human credulity to draw from the facts of this case any reasonable inference other than that one or other of the appellants, or their associates, shot

/the deceased.....

the deceased.

I turn now to the question of common purpose. It was argued that there was no proof that any of the appellants knew that Dan (one of the party) had a firearm; or that appellants No. 1 and 3 knew that appellant No. 2 had a firearm. In my view this submission can be dismissed as insubstantial. Quite apart from the improbability of the contention, No. 2 appellant hit the deceased on the head in the bus with his revolver, and Dan carried his firearm in his hand. Then it was argued that there was no proof that any of the appellants knew that Dan's firearm was loaded; or that appellants 1 and 3 knew that No. 2's firearm was loaded. The answer is that they must have contemplated the reasonable possibility of it being loaded and they were reckless whether it was loaded or not. It was also contended that there was no proof as to which, if any, of the appellants were present at the shooting. The answer is that they were all present and acting in concert when they captured the deceased and were seen taking him towards the place which they frequented, and, in the absence of defence testimony, it can properly be inferred in the circumstances of this case that they were still

/together.....

together when the business was finished. Are they then all responsible for the murder? As to that, it was submitted that there was no proof as to which of the appellants knew that the deceased would be shot. On the authorities, it is sufficient if they must have contemplated that he might be shot. R. v. Cain 1959(3) S.A. 376 (A.D.) at 381(G) and cases there cited. The blunt facts are that all the appellants knew that they were associating in an armed and outrageous kidnapping and that they were forcibly taking their prisoner to the place where they usually foregathered. In this ruthless and violent atmosphere, it can properly be inferred, in the absence of any defence evidence to the contrary, that they must have foreseen the reasonable possibility of the firearm being used against the deceased. Violence, firearms, and death are ever an easy and sombre trinity. Hence they must have foreseen the possibility of his death, and were reckless whether it resulted. Accordingly there must be imputed to each of the appellants the intention to kill. Each is therefore guilty of murder. R. v. Hercules 1954(3) S.A. 826 (A.D.) at 831.

In the result, the appeals of all three appellants are dismissed.

Neville Holmes

BEYERS J.A.)
VAN WYK A.J.A.) CONCURRED .....

HIS LORDSHIP: Where a different test is applied; that is entirely a different consideration, because then you are entitled to argue on the proof beyond a reasonable doubt. At this stage you have to argue 'no evidence'.

MR. COHEN: That is so, My Lord.

HIS LORDSHIP: Are you withdrawing the application?

MR. COHEN: I withdraw the application, My Lord, and without calling evidence I close my case.

- DEFENCE CASE -

COUNSEL COMMENCES TO ADDRESS THE COURT /

COURT ADJOURNS AT 12.45 p.m.

ON RESUMING AT 2.35 p.m.

J U D G M E N T.

STEYN, J:-

In this matter the three accused stand charged with the crime of murder, it being alleged that on or about the 21st of January, 1958, at or near Alexandra Township, in this district, they wrongfully and unlawfully and maliciously killed and murdered GERALD NDHLOVU.

At the commencement of this trial certain admissions were made by Mr. Cohen on behalf of all three the accused, these admissions being accepted by Mr. Krogh appearing for the Crown. Those admissions were the following:

The deceased - Gerald Ndhlovu - was removed from the Alexandra Clinic to the Edenvale Hospital, at approximately 1 a.m. on the 22nd of January, 1958. He was removed by an ambulance driver in the employ of the

/ Peri-Urban ...

Peri-Urban Areas Health Board. This driver identified the body of the deceased at the Government Mortuary, on the 28th January,1958. The body was escorted from the Edenvale Hospital by Lucas, on the 24th January, 1958, to the Government Mortuary, and on the 25th January, 1958 Lucas identified the body. Thirdly, that when the deceased was conveyed from the Alexandra Clinic to the Edenvale hospital, he was still alive and sustained no further injuries - nothing further happened to his body. Fourthly, on the 28th January, the body was identified to the assistant-curator, Mr. Smit, at the Government Mortuary, as being the body of Gerald Ndhlovu, the identification being by one Matebula and by one Ndhlovu, in addition to the two already mentioned. Mr. Smit in turn identified the body on the 27th of January, to the district surgeon Dr. Weintraub, and the body was marked No. 187/58 and that the photographs produced and marked Ex. A, were photographs of the deceased.

Fifthly, Sgt. de Waal held an identification parade at Wynburg Police Station, on the 9th of April, 1958, and that the first accused - who was a suspect and present on the parade, was pointed out by the witness Ronnie Aaron Ndaweni, without any hesitation, as being the person who had assaulted Gerald Ndhlovu on the bus on the night of the 21st of January, 1958, while the bus was proceeding along Louis Botha Avenue, Orange Grove.

Lastly, that the defence does not contest the general conduct of the identification parade, nor does it contest the interpretation from one language

/ into ...

into another language at that parade.

After Mr. Krogh for the Crown, had enumerated these admissions - Mr. Cohen on behalf of all three accused, agreed that the admissions so made were correctly made.

I am dealing next with the evidence.

Ernest Roborethe was called and in brief his evidence amounted to the following: that he and Aaron or Ronnie, and the deceased - only three of them - boarded a Public Utility Transport Corporation bus, in Noord Street, at approximately 7 p.m. The lights were on in the bus, which was a bus without a conductor, the payment of the fare being made to the driver. The entrance to the bus being near the driver at the front of the bus. Ernest says that he sat down and the other two sat behind him - about four paces behind him - the one being on the one side of the aisle and the other on the other side of the aisle in the bus. He says that he sat in about the centre of the bus. At a stop in Orange Grove some people boarded the bus, one of whom pulled the deceased, whom he knew as Garret Indeleli (Ndhleleni) out of his seat by the jacket and took him towards the back of the bus. He says that he knew one of these people and knew him as Ginger, and that accused No.1 was that person. He says he knew him from the Plaza Bioscope in Alexandra, where he had frequently seen him. He says that accused No.1 slapped Aaron in the face, and he and the others with him also took Aaron to the back of the bus. Because he saw his two companions being taken to the back of the bus and being assaulted, he thought that he was in for the same type of treatment,

/ so ...

so at the Bramley bus stop he alighted; although he had intended going further. He says that he saw accused No.1 striking Aaron with the open hand somewhere in the face, or on the head. He says that accused No.1 was one of those who pulled Aaron out, but that No.1 was the only one who had pulled the deceased out from his seat. He qualified that further by saying he does not know who actually pulled Aaron out of his seat, but that No.1 was one of them. He says that this group comprised of approximately six to ten people, but that he could not identify any of the others. He says that when the deceased was taken to the back of the bus, he could see that the people who took him were not joking and he could see that they were angry. He says he does not know whether the deceased said anything, but he heard one of the group say: "They are here in the bus," as they got into the bus. He could not say if they had any weapons in their hands.

He says that he knew a man by the name of Kadietsa and he had seen Kadietsa and the deceased together at the Beer Hall. Further, that the deceased had no injuries when he last saw him, and that after he alighted from the bus that night he never saw the deceased again. He says that he reported the incident to Aaron or Ronnie's mother, because he lived in the same avenue as Ronnie, but because the deceased's mother lived too far away he did not report to her that night. It was put to him that if No.1 accused denied all knowledge of this incident and that he was making a mistake, what would he say thereto, and he replied that he would still say that No.1 was there. He said that he

/ heard ...

heard one of the group say, "they are here in the bus", but he does not know who actually said so, but that person was one of the group who got on together at the same time.

The witness Ronnie Aaron Ndaweni corroborates this evidence to a certain extent and contradicts it in other respects. He says that he, the deceased, the witness Ernest and a person called China, boarded the bus together. (Ernest did not mention China.) He says that the time was approximately 7 p.m. and he sat in the second seat from the front of the bus to the best of his recollection. In this regard he contradicts Ernest also, and he further contradicts him when he says the deceased was on the seat immediately behind him, and that Ernest was sitting in line with him just across the aisle on the other side. We have given due regard to this contradiction in the evidence, that is, as to the exact place where they were sitting in the bus. He goes on to say that at Osborne Road, Orange Grove, the bus stopped as it had done previously, and there the three accused and others boarded the bus. According to him there were five in all; he says they got in one after the other. He says that No.1 accused was the first one into the bus, and as he looked round he saw the deceased was no longer behind him. He saw that the five who had boarded the bus were looking around at the people, and the next thing he saw was that they had hold of the deceased at the back of the bus. He says they came forward with the deceased, and when they came to where he was - that is the witness Aaron - they said to the deceased, "where is your friend that was with you?" Whereupon the deceased pointed him out. He says

/ that ...

that No.1 accused then took him by his jacket, by his shoulder, and pulled him along to the back of the bus. No.2 accused had hold of the deceased at that time. No.2 accused also had a revolver in his hand with which he struck the deceased on top of the head, using the butt of the revolver, which had a ring attached to it - similar to the revolvers carried by Police. He says that No.1 accused struck him, that is Aaron with his fists, while No.2 struck the deceased with the revolver. He says that he only saw one blow being struck on the head of the deceased with the revolver, because he was being beaten at the time himself. He repeated that when the deceased was being brought forward from the back of the bus, he was held by No.2, while No.1 caught hold of him - the witness Aaron. He said at that time the others also followed in single file, and when he Aaron, was taken to the back of the bus, all five of this group also went to the back of the bus, and were there when he was being assaulted. He says that he saw no other weapons except for the revolver in the possession of No.2. He said that whilst they were being beaten they were told to point out where Kadietsa could be found. The deceased thereupon said that he would point out where Kadietsa was at the corner of Hofmeyer and Fifth Avenue. He said that another one of the group named Boy, said to the deceased,,"we have for a long time been telling you but you would not listen." I pause to point out that Mr. Cohen objected to this question and answer, whereupon the witness himself said that these people were altogether at the time, and after argument Mr. Cohen requested that his objection merely be noted at that time. I gave a ruling at the time to

/ the ...

the effect that this objection would stand over pending Mr. Cohen's decision whether he would raise this, or any other objections later, when all the evidence regarding the alleged gang-operation and conspiracy had been led. This matter was however not mentioned again. Ronnie (Aaron) says in regard to accused No.3, that he stood next to the back window of the bus, and when No.3 moved slightly forward, some distance forward, he (Aaron) was able to move forward and open the rear window and jump out. He did this when they entered Alexandra Township, and at Pan African. I pause to point out that according to my note, this witness said that he opened the emergency exit, not that he broke it. This may account for other matters to which I shall refer in a moment. Even if I am wrong in my note however, it will not materially affect the position as I will show in due course. The witness further said that after he jumped off he did not go straight home, but he later, the same night, went to the deceased's house, where he reported the matter to the deceased's parents as the deceased was not home yet. He said the five people whoentered the bus were the three accused, and two people called Roy and Maxie. He says they ran into the bus, and he heard them say, "hulle is hier, nulle is hier." He says that when the deceased pointed him out as the deceased's friend, he denied that and said that he had only boarded the bus with the deceased. He says that No.1 is the one who asked the deceased where his friend was. He also confirms that when he saw the deceased for the last time, there were no injuries on him.

Dr. Barnard of the Edenvale Hospital, stated that on the 22nd of January,1958, the deceased was admitted

/ to ...

to the Edenvale Hospital in a critical condition. He was semi-conscious and his condition was due to a wound on the back occipital region of the head.

Dr. Weintraub, the district surgeon, held a post-mortem on the body of the deceased on the 28th of January. He gave a detailed report ofhis findings. Suffice it to say that it seems to be common cause and not disputed, that the injuries and the cause of death were the following:- The only injury found on the deceased was a bullet wound; there was no other sign of injury such as wound have beencaused by a blow with the butt of a revolver, but if such a blow had been glancing, or if a hat had been worn it might have affected the position in so far as signs of injury were concerned. Dr. Weintraub further said that the hair of the deceased, as it appeard on the photograph, might have a bearing on the absence of signs of injury. He did however say,that if more than one blow was struck he would have expected signs of injury. That question was put to him, because at the Preparatory Examination, the witness Aaron had testified to more than one blow. In this Court Aaron said that he only saw one blow, but assumed that there had been more than one, because of the noises made by the deceased - although he, Aaron, was being assaulted at the same time. As I said it is not challenged - and it appears to be common cause - that the bullet wound was the cause of death, and that all the fractures of the skull were in the region of the track of that bullet which caused all the injuries found by Dr. Weintraub.

That was the stage the case had reached at the end of the hearing on the 25th of August, this year. On

/ Wednesday ...

Wednesday the 26th there was certain legal argument, in respect of which I have already given a fairly detailed ruling.

On Thursday the 27th of August, the case was resumed, commencing with the continuation of Aaron's evidence. He said that he knew the three accused very well. He however contradicted Ernest as to how they (the witnesses) sat in the bus. He confirmed however, that No.1 accused caught hold of him, Aaron. When I say confirmed I mean repeated under cross-examination. He said that at that time the deceased was being held by No.2. He said that Ernest would be wrong if he said that No.1 assaulted the deceased, because in fact the deceased was assaulted by No.2, while No.1 assaulted him, Aaron, the witness. He said in regard to the parade and the admission accepted by the Crown in respect of that: "I always had it in mind that No.2 assaulted deceased, and not No.1 accused. I pointed out No.1 as the person who had been there and who had assaulted us. The only person who had interferred with the deceased was No.2 who had beaten deceased while I was being beaten by No.1" Now, in view of the admission accepted by the Crown, we accept that this witness pointed out No.1 as the person who assaulted the deceased; which is of course in conflict with his evidence in this Court. That, in our view, is probably the most serious criticism of the Crown evidence in this regard, and we have given due weight and consideration to that. But the witness Aaron continued and said that when this group boarded the bus, the person Boy gave a warning that no man should leave the bus, only women.

/ Well ...

Well, that apparently was all the factual evidence which the Crown had at 11.30 on the 26th of August. The Crown had intended leading other general evidence which in terms of my ruling, however, it could not do. If the case had however, been concluded at that stage, speaking for myself, and, Ithink for the learned assessors, there would have been a great deal to say against the Crown case. Somewhat dramatically however, the Crown called two witnesses not previously called at the preparatory examination. The evidence of those two witnesses affected this case materially and considerably. Those witnesses were the bus driver, Ephriam Malinga and a self-confessed gambler, called Bernard Bello.

The evidence of the bus driver Ephriam, was to the effect that he remembered this occasion in January of last year, when he was driving this bus, because according to him it was the only occasion when passengers alighted in a group, with another person, at what he termed an unauthorised stop. (What he meant was at a stop where there was no bus "stop-sign", and where the bus did not normally stop." I said that that was his reason for remembering according to his evidence. Or perhaps his own interpretation of the reason. He however, proceeded to say the following: "I knew the deceased from childhood and knew him as Ndhleleni. He was the person who got off with the group, and I could see that he was forced to get off. I knew the deceased's parents, and a day or three days later I heard about the deceased's death , and in a way associated his death with what I had seen. I told his parents within days of learning of the deceased's death." That in our view is the more logical reason why he remembers this occasion. I am

/ perhaps ...

perhaps dealing with this evidence on the basis of placing the cart before the horse, for very good reasons. I am dealing firstly with what possible criticism there could be of his evidence before dealing with his evidence. The second criticism which was in fact directed by Mr. Cohen at his evidence was the completely fortuitous way in which the Crown stumbled on this very material witness. At mid-morning of Wednesday of this week, the Crown had no idea of the availability of this evidence. This witness says the reason for that was the following: He was never approached by anybody to make a statement, he had no interest in the matter apart from the report made by him to the deceased's parents. He did not know that this case was on, but had heard of a case prior to this one, and that he came down one day to this Court, to come and listen to any case. He heard people say, "there he is," and he was then approached by a person who said he was a Policeman, a person named Bamba, who then took him to Counsel for the Crown's office in this building, where me made a statement to the Sergeant in charge of the case. When we heard his evidence in chief, the learned assessors and I came to the conclusion, that this evidence was of such importance to this case, that every attempt should be made to test the credibility of this witness, because if after such a test, we could be satisfied that what he had said was the truth, the case assumed a completely different complexion to what it had previously had. The result was that I personally embarked upon an examination of the witness which Mr. Krogh was pleased to refer to as a "grilling", in an attempt, to the best of my ability, to test the

/ truthfulness ...

truthfulness of the witness in addition to the testing done by Mr. Cohen. We have without hesitation and unanimously come to the conclusion that this witness, who made an extremely favourable impression on us, was telling the truth in every respect, and to the best of his ability.

He is corroborated in most important details by Bernard Bello who despite the fact that he is a self-confessed gambler (and appears to be a successful gambler at that, by reason of his dress and his appearance) also has no interest in this case. He professes friendship for the accused as fellow-gamblers, and in fact it was put to both Bernard and the bus driver by Mr. Cohen that both of them took food to the accused at the preparatory examination. If that is so, it would indicate friendship, although it was suggested to Bernard that he was manufacturing his evidence, no possible reason was advanced to him or to us why he should be doing that. In fact, in reply to a question by me, he said that there had never been trouble between himself and the three accused. I do not propose to analyse their evidence in extreme detail, they corroborate each other in very material respects, and from that evidence we are satisfied beyond any shadow of a doubt that both these witnesses were truthful and had no reason to fabricate anything against the accused. The effect of their evidence is simply this in a nutshell, that the three accused, and at least four others boarded this bus, did not pay their fares and cornered the deceased. At some spot in Selborne Avenue between 11th and 12th Streets, Alexandra Township, the same group of seven people (of which the three accused were three)

/alighted ...

alighted from the bus and compelled the deceased to do so with them. At that stage accused No.3 had hold of the deceased somewhere at his back by his jacket. The object may have been to make the deceased carry out his prior promise to show them where Kadietsa was. It is not necessary for us to come to any final conclusion in that regard. The fact of the matter is that the evidence as a whole clearly establishes, in our view, that of this group of seven - two at least had revolvers - that they forced the deceased out of the bus, No.3 making sure that he went by holding him at the back by his jacket, and that that was the last time, on the evidence before us, that the deceased was seen alive. Four or five hours later he arrived at the clinic with this bullet wound and subsequently died as a result thereof. We are satisfied that the reason given by Bernard Bello for his late appearance as a witness, is entirely an acceptable one, and that he too was fortuitously found at the eleventh hour by the Crown.

These two witnesses corroborate each other in regard to some of the group standing on the steps of the bus, and when the sound of breaking glass was heard, one of them went to see what it was about - that that one according to them had a revolver, and ordered the driver not to proceed without him. The breaking of the glass is somewhat of a mystery, because if it was caused by the escape of Aaron, there is a contradiction as to where it occurred, If however, my note of Aaron's evidence is correct, then he did not break the window but opened it, in which case there may have been another separate breaking of the window. However, we regard

/ these ...

these contradictions to which I have referred as not being material when the evidence is looked at as a whole.

On that evidence we find that the theee accused together with others, four perhaps (as named individually by Bernard Bello, who knew them all well) boarded this bus with a common purpose. That common purpose being to talk to the deceased. Thereafter they left that bus in a group and that was the last that was seen of the deceased alive, apart from his arrival at the clinic. So here we have the picture as a whole of seven people boarding a bus and not paying their fares, ordering people (excepting women) not to leave the bus; accosting two people in the bus; questioning them; having in their possession two revolvers, and, after that, coercing the deceased out of the bus, whereafter he was not seen alive again.

In addition, according to Bernard, when the bus was more or less at the Tower Garage,he heard No.2 accused say to the person Maxie, and referring to Bernard and his friend Billy, "hoe is dit die twee?" Whereupon Maxie replied: "Los hulle, hulle is net 'easy' targets."

We now have to ask ourselves, with this overall picture in mind, what happened after the accused and the others left the bus with the deceased? Now, in approaching the evidence and arriving at our conclusion, we have attempted to the best of our ability, to apply the tests laid down in the case of Rex vs. Blom 1939 A.D. page 188 at page 202. What is required when the Crown asks the Court to draw an inference is the application of two tests which are the following:

"The inference sought to be drawn must be consistent

/ with ...

with all the proved facts, and if it is not, the inference cannot be drawn. Secondly, the proved facts should be such that they exclude every reasonable inference from them except the one sought to be drawn if they do not exclude other reasonable inferences then there must be a doubt that the inference sought to be drawn is correct."

In this regard, Mr. Cohen submitted on behalf of the accused that one inference, for example, that cannot be excluded is that, even if the accused and others left the bus with the deceased, in the intervening four, five or six hours before the deceased appeared at the Clinic, some of them, including the three accused, could have left the group, or the deceased could have met an entirely different group. I point out in this regard that according to the evidence which we have accepted, No.1 accused took a leading part; he took the deceased to the back of the bus. No.2 accused assaulted the deceased over the head with a revolver, and No.3 accused heralded him out of the bus. In the absence of any evidence to the contrary, can we say in vacuo - in the air - that these three who took a leading part, reasonably probably left the deceased? The way we see it is that at the last moment when the deceased was seen alive, he was in the company of a group including the three accused, who had evidenced a certain amount of antogonism, at least, towards him; in that group there were two revolvers, and between the three accused there was one revolver in the possession of No.2 accused. They forced this man away from the bus and some hours later he was found with a bullet wound in the

/ head ...

head.

In applying the above tests to the best of our ability we have all three unhesitatingly come to one conclusion only: that all the facts proved are consistent with the inference which we have drawn and to which I shall now refer. It is consistent in toto with the facts as disclosed by the evidence as a whole, and those facts, in our view, exclude every reasonable inference from them save the one we are drawing. There is no evidence of any description whatsoever in front of us, which could lead us to say that the accused may have left this group at sometime before the injury was inflicted on the deceased. Nor are any of the other inferences, which Mr. Cohen asked us to draw, in any way reasonably justified by the evidence in front of us that is, as opposed to speculation, which is idle and which in any event may make almost anything possible and, perhaps, even sound probable.

We have come to the conclusion that in the absence of any other possible or probable explanation (the accused having elected not to give evidence, or to call any evidence) we are driven to the one inference only, and that is that in furtherance of a common purpose the deceased received this injury in the form of a bullet wound, from one or other of the three accused, or from one of the group associated with them in the execution of their common purpose. We are satisfied that they all knew what the purpose was, and that there is nothing on the evidence which would justify us in finding that there is any other possible, or probable, or reasonable inference,but that the deceased met his death at the hands of the accused in the execution of a

/ common ...

common purpose, namely, to extract information from the deceased.

The result is that all three the accused are unanimously found guilty of murder as charged.

HIS LORDSHIP: Yes, Mr. Cohen.

MR. COHEN: I shall be obliged to Your Lordship for a short adjournment.

- COURT ADJOURNS at 3.40 p.m.

ON RESUMING AT 3.55p.m.

COUNSEL ADDRESSES THE COURT IN MITIGATION/

STEYN, J:-

On the evidence as we have heard it, and on our conclusions, as I have formulated them, we have nothing and less than nothing in front of us to show any provocation or any action under the influence of drugs or liquor, or anything that would point to any of the recognised factors regarded as extenuating circumstances. We are impelled by this factor to find that there are absolutely and entirely no extenuating circumstances whatsoever.

REGISTRAR: Ginger Masheane, Willie Swarts and Thomas Billy Jacobs, you have been found guilty of the crime of murder, know you or have you anything to say why sentence of death shall not be passed upon you according to law?

ACCUSED NO.1: My Lord, I have nothing to say. All I would like to draw the Court's attentionto, is the fact that these two last witnesses that the Court had said they found tobe truthful,were people who came here for no reason and they were listening to the trial, and/...