144/71

G.P.-S. J: 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

1. ANTHONY JAMES BALOMENOS 2. RICHARD MARK BROOKER
3. ANDRÉ JOHN PRETORIUS — **Appellant.**

versus/teen

THE STATE

Respondent.

Appellant's Attorney Israel, Sackstein & Simon — *Respondent's Attorney* Dep. Gen. (Attys)
Prokureur van Appellant — *Prokureur van Respondent*

Appellant's Advocate Mr. W. Osler S.C. (Mr. F. Zwarenstein S.C. Mr. Hannon) — *Respondent's Advocate* T. P. McNally (D. Nanson, A. U. Landsdown, T. P. McNally)
Advokaat van Appellant — *Advokaat van Respondent*

Set down for hearing on 8 — 11 — 1971
Op die rol geplaas vir verhoor op

3. 4. 5.

Botha J.A., Wessels J.A., Potgieter J.A.

WLD
9.45 - 11.03 am.
11.20 - 12.50 pm.
2.16 - 4.31 pm.

Wessels J.A.: Order as per judgment filed

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

ANTHONY JAMES BALOMENOS ... First Appellant

RICHARD MARK BROOKER ... Second Appellant

ANDRÉ JOHN PRETORIUS ... Third Appellant

and

THE STATE ... Respondent

Coram : BOTHA, WESSELS et POTGIETER, JJ.A.

Heard : 8 NOVEMBER 1971. Delivered : 26 November 1971

J U D G M E N T

WESSELS, J.A. :

During two evenings, on 5 and 6 July 1970 respectively, appellants embarked upon a series of criminal adventures which, on the latter occasion, culminated in the death of an innocent Bantu nightwatchman. On the first occasion they were accompanied by a youth then aged about 15-16 years. The appellants were somewhat older, being respectively about 19½ years, 17 years and 16½

2/.....years

years of age when the crimes were committed. The appellants were arrested on 14 October 1970, and on that day each appellant made a confession which was duly recorded in writing. These confessions were admitted in evidence against them at the subsequent trial, which commenced on 16 August 1971 before Theron, J., in the Witwatersrand Local Division.

Appellants and the youth above referred to, were charged with robbery (3 counts), attempted robbery, theft (2 counts) and murder. The appellants pleaded guilty to all the charges, save that of murder. The youth pleaded guilty to the charges of robbery and attempted robbery, but not guilty to the charges of theft and murder. His plea was accepted by the prosecutor. It is appropriate to mention that the charges of robbery and attempted robbery related to events which took place during the evening of 5 July 1970, whilst the charges of theft and murder related to the events which took place on 16 July. It was common cause that, in so far as the charges of robbery and attempted robbery were concerned, a fire-arm was used in order to threaten the

various complainants.

The youth (who was the fourth accused, and is referred to in the evidence as Leon (or Linky) Simon) was found guilty on three counts of robbery and one of attempted robbery, and a finding was made that aggravating circumstances were present. As to the further charges of theft and murder, the fourth accused was found not guilty and discharged. His trial was separated from that of the appellants, and, after the report of a probation officer had been obtained, Theron, J., in lieu of punishment in so far as the first count was concerned, ordered, in terms of the provisions of section 342(1)(d) of the Criminal Code, that he be sent to a reform school. The remaining three counts were treated as one for the purposes of sentence. The punishment imposed was five years imprisonment, suspended for a period of three years as from the date of his discharge from the reform school, on condition of his not being convicted during that period of any crime involving dishonesty or the use of drugs.

4/.....The

The appellants were found guilty on the charges to which they had pleaded guilty, it being held, in addition, that aggravating circumstances were present in respect of the charges of robbery and attempted robbery. At the conclusion of the trial on the murder charge, the appellants were found guilty thereon without extenuating circumstances. The judgment of Theron, J., in regard to sentence, contains the following passage :

> "In regard to the question of extenuating circumstances, Mr. Zwarenstein has suggested that I should take into account the youth of Accused No. 1. I should also take into account that after the shooting he suggested that they return to the scene to ascertain whether the deceased was injured or not. As I mentioned in the course of my judgment, the accused gave evidence and his evidence was so unsatisfactory on so many aspects that I do not regard this as a serious suggestion. If he was serious, he could have approached that garage, not necessarily that evening but the following day. But what they did was to resolve not to return to the garage but to look for a possible report in a newspaper. Furthermore, it was suggested as an extenuating circumstance that Accused No. 1 gave the police all possible assistance. That fact lost its value because of the false statement made to the magistrate. He then falsely tried to exonerate himself and pass the blame onto

Accused Nos. 2 and 3. Because Accused Nos. 2 and 3 were under the age of 18, I am very glad that by law I am given a discretion in regard to the sentence.

I find that there are no extenuating circumstances in this case. The youth of the accused is not per se an extenuating circumstance. The gravity of the offence committed substantially neutralises this factor. They are reasonably well-educated young men with full appreciation of what they were about. They ventured upon unlawful excursions to commit robberies and thefts and for their protection they armed themselves with loaded firearms. In carrying out their unlawful common purpose, the deceased was fatally wounded. That, in my view, excludes any suggestion of extenuating circumstances.

That is the unfortunate conclusion I have come to - unfortunate for Accused No. 1 that at the stage when this crime was committed, he was beyond the age of 18. Unfortunately the law does not give me any discretion in regard to the sentence to be imposed upon him. I will do what the law requires me to do in this case.

But in regard to Accused Nos. 2 and 3 I will exercise my discretion in their favour. Although they both said that there was no appointed leader, the facts of the case speak for themselves and it is obvious to me that Accused No. 1 took a very active part, strongly suggesting that he was the leader. He was the person who provided the mode of conveyance, he provided the firearms, he instructed No. 3

> Accused when to drive and when to stop and where to go to, he was the man who left the car armed with a firearm to try and silence the night-watchman. He seems to have taken a very leading part, and that in my view makes the blameworthiness of the other two slightly less than that of Accused No. 1."

In the case of first appellant, Theron, J., imposed the death sentence in respect of the murder charge, and postponed the passing of sentence in respect of the remaining charges.

After evidence in mitigation, and the contents of reports by probation officers, had been considered by the learned trial Judge, he sentenced second and third appellants as follows :

SECOND APPELLANT :

(a) Counts 1, 2, 3 and 4 (Robbery and attempted robbery). Three years' imprisonment on each count.

(b) Counts 5 and 6 (Theft) - dealt with as one for the purposes of sentence - two years' imprisonment.

7/.....(c)

(c) Count 7 (murder). Fifteen years' imprisonment.

Theron, J., directed that the sentences referred to in paragraphs (a) and (b) above be served concurrently with that referred to in paragraph (c) above.

THIRD APPELLANT :

(a) Counts 1, 2, 3 and 4. Two years' imprisonment on each count.

(b) Counts 5 and 6 - dealt with as one for the purposes of sentence - two years' imprisonment.

(c) Count 7. Twelve years' imprisonment.

In the case of third appellant it was similarly ordered that the sentences referred to in paragraphs (a) and (b) above be served concurrently with that referred to in paragraph (c) above.

The Court a quo granted leave to appeal to this Court as follows :

1. FIRST APPELLANT : against his conviction of murder without extenuating circumstances and

the sentence of death imposed upon him.

2. SECOND APPELLANT : against the sentence imposed upon him.

3. THIRD APPELLANT : against his conviction of murder without extenuating circumstances, and against the sentence imposed upon him.

For the sake of convenience, I shall hereinafter refer to the appellants as first, second and third accused respectively. Where necessary, the above-mentioned youth, Leon Simon, will be referred to as fourth accused.

There is, at the outset, a matter to which reference is necessary, although it is not directly relevant to any issue raised on appeal before this Court. The very nature of the charges in the indictment proclaimed the possibility that the outcome of the case could have most serious consequences for the youthful accused. Prior to the commencement of the trial, the possibility existed that difficult issues of fact could arise for determination at

the conclusion of the trial. The learned Judge chose to sit alone, thus denying himself the benefit generally to be derived from the assistance of assessors. This Court has on previous occasions adverted to the desirability of a trial Judge sitting with assessors in all serious cases, and especially where the death sentence may be imposed. Generally speaking, a verdict based upon the unanimous opinion of more than one trier of fact, inspires a far greater degree of confidence than one based upon the opinion of a single trier of fact. (R. v. Mati and Others, 1960(1) S.A. 304; S. v. Adriantos en 'n Ander, 1965(3) S.A. 436). I have not overlooked the possibility that in this case circumstances may have existed which made it difficult, if not impossible, to call upon the aid of assessors, or which otherwise rendered it inexpedient to do so. In the absence of any report by the learned Judge a quo, such as is required to be furnished by him in terms of the provisions of section 367 of the Criminal Code, this Court is, however, not in a position to express any opinion in regard thereto.

10/.....The

The train of events, leading up to the shooting of the deceased, commenced on 5 July 1970, when fourth accused introduced first accused to second and third accused. It appears from the evidence that all of them had at some time prior to that occasion engaged in criminal conduct of some kind or another. First accused, the son of fairly well-to-do parents, was at the time studying dentistry. He had matriculated, and had a short spell of compulsory military training, before being discharged as medically unfit. He had a motorcar of his own, and was also allowed the use of his mother's motorcar. He had a banking account which, so he claimed in evidence, was in credit to the extent of about R100 at the time the offences in question were committed. He was the owner of a .38 calibre revolver, which was licensed in his name. He stated in evidence that he frequently conveyed substantial sums of money for his father, and on those occasions armed himself with the revolver. In addition he also possessed a smaller fire-arm, a 6.35 millimetre Browning self-loading pistol. He was conversant with the use of these fire-arms.

After completing standard 8 at school, second accused left school and found employment. For reasons which need not be detailed here, he left home and went to stay with third accused at the latter's parental home. These two accused were close friends. Third accused left school after failing to pass standard 8. He continued his studies for some time by means of a correspondence course, but eventually took up employment as a window dresser. The accused all had their homes in Johannesburg.

Immediately after being introduced to each other during the evening of 5 July, they discussed the possibility of robbing attendants of petrol filling stations, and forthwith decided to do so later that evening. First accused used his mother's motorcar for the purpose of conveyance. At his suggestion, third accused acted as driver. It was planned to use first accused's revolver in carrying out the robberies. Although the accused gave different versions as to precisely what was said in regard to the use of the revolver, it appears from their evidence that they all accepted that it would only be produced in order to frighten

the petrol attendants and not to inflict injury upon them. It was their intention to seek safety in flight if difficulties were to arise. If any one of them were to be caught, he was not to divulge the names of the others.

In his judgment, the learned Judge a quo dealt with the evidence of the accused relating to the use of the fire-arm in carrying out the robberies, "because it has a bearing on the question of credibility, and also on the subjective intention of each of the accused on the 16th of July, because all three of them said that ..... the agreement not only applied to the events on the 5th of July, but they said it also applied equally to the events at the time of the shooting of the deceased." After reviewing the evidence, the learned Judge a quo said the following :

> "However, it seems clear that they had this firearm with the intention of using it when confronting the Bantu petrol attendants, and I accept the evidence of Accused No. 2. What was present in the mind of him and all the others was the belief that on the mere production of the firearm, and pointing it at the attendants, this would so frighten these Bantus that they would hand over their takings. That seems to have been the result achieved on that night, on each occasion except perhaps

> •ne, when one of the Bantu attendants with a presence of mind switched off the lights, compelling the three accused, with their young associate, to flee to the car."

In a later passage the learned Judge refers to discrepancies in the evidence, and the fact that none of the accused mentioned this "non-violence pact" in the written statements made to the magistrate, and states that these circumstances created suspicion as to the nature of the pact. He however, concludes as follows :

> "As I mentioned before, it seems to me that on the first occasion when they went out on this unlawful excursion, they did not intend to use the firearm because they had a firm belief, and anticipation, that the mere production of the firearm and aiming at the Bantu attendants, would be sufficient for them to create that fear which they intended, to obtain the money, and they seemed to have been right in that regard in practically every instance."

In my opinion, the above-cited passages from the judgment indicate that the learned Judge was satisfied, despite the unfavourable impression the accused created in giving their evidence, that during the evening of 5 July none of them in fact contemplated the possibility that the fire-arm might be used in certain circumstances by any

of them for a purpose other than that agreed upon, e.g., for the purpose of killing or injuring any person either in carrying out a robbery or in facilitating flight. It is of some importance to note that, according to the evidence of first accused, verbal threats that they would shoot were uttered when the fire-arm was produced to frighten the petrol attendants. These threats were not uttered with any intention of shooting, but merely to frighten the petrol attendants. It does appear from first accused's evidence that he, at least, did contemplate the possibility that a shot might be fired into the air if it were necessary for the purposes of escape. Second and third accused disputed his evidence that this possibility had been discussed with them.

During the evening of 16 July, the accused (excluding fourth accused, who took no part in the criminal adventures on that occasion) met, and decided to steal radios, ~~tape-recorders, etc.,~~ from parked motorcars. First accused had on this occasion once more borrowed his mother's motorcar, and third accused acted as driver. It is common cause that on this occasion both the .38 revolver and the Browning pistol

were in the [illegible], although [illegible] this defence the evidence of first [illegible] of the other two, as to [illegible] it is above that the firearms were available. The learned Judge [illegible] the evidence of [illegible] [illegible] that a firearm was [illegible] to him by [illegible] that night. [illegible] accused later that the .38 revolver was kept in the cupboard, which [illegible] kept locked. There was also [illegible] concerning the firearm which was in accused's possession. Although he had stated to the magistrate on the day of his arrest that he had a "small Browning pistol" in his possession, he gave evidence at the trial to the effect that he [illegible] in his description of the firearm, and that he in fact [illegible] the .38 revolver, which first [illegible]. In this connection it must be borne in mind that it was not [illegible] the trial that [illegible] wounded [illegible] had been fired from the Browning pistol. The learned Judge [illegible] [illegible] the Browning pistol. [illegible] firearm, which was based on adequate grounds, [illegible] not justified in

I.............[illegible]

appeal. There is no appeal by second accused against his conviction of murder.

The accused first stole from locked motorcars the articles mentioned in the two theft charges, and thereafter proceeded to the block of flats where deceased had been employed as a nightwatchman. The block of flats has parking bays on the ground level, and a driveway from the street leads to the entrance, which was one without doors. They arrived at about 11 p.m., and drove into the parking area. First appellant got out of the motorcar in order to investigate which motorcars contained radios or tape-recorders. At that stage the deceased came upon the scene. First appellant entered the motorcar, and they drove off. They decided to return later, expecting that the nightwatchman would by then be asleep. When they returned at approximately 2 a.m., third accused was driving, first accused was seated ~~next to him and second accused~~ was seated at the back, immediately behind first accused.

Apart from the three accused, there were no eye-witnesses to the shooting incident. Each of

the accused gave a version of what occurred in the statements made to three different magistrates on the day of their arrest (14 October 1971). Second accused's statement was the first to be recorded, at about 10.55 a.m. He dealt at some length with the various criminal adventures in which he and the other accused participated during the period of 5 - 16 July. As to what happened on the night of 16 July, he stated :

> "Anthony, André and myself went to steal radios, and tape recorders from cars in the garages of blocks of flats. We had stolen a few radios before we proceeded to a block of flats directly behind the Wanderers Sports Club. We drove into the garage and drove right to the end of the garage and turned the car around. The watchboy then came out and asked us what we wanted in the garage. We said we wanted nothing and started to drive off to go out of the garage. The watchboy then started shouting at us and we stopped the car. André drove, Anthony was sitting next to him and I was sitting in the back seat. André stopped the car. Anthony got out and pointed his pistol at the watchboy. On this occasion I also had a small Browning pistol with me which Anthony gave me. Anthony said to the watchboy, "Keep quiet otherwise I will shoot you". The watchboy then said "Shoot me if you want to". André said to Anthony "Let us get out of here," Anthony

then got into the car again. We were then driving out of the entrance to the garage. I and Anthony then both pointed our pistols at the watchboy through the windows. Then there was a loud bang and Anthony said "Come on let us get out of here quickly". I then turned round and saw the watchboy staggering holding his chest and I saw him dropping to the floor. We then drove off and went home. I can swear that my gun did not go off and Anthony said his did not either. That is all."

Third accused's statement was recorded during the afternoon (at about 3.50 p.m.). His statement which deals only with the shooting incident, reads as follows :

On a certain date (about June - July 1970) we went out. We were four together.

The others were Richard Brooke, Leon Simon and Anthony Balomenos. We went out to get radios from cars. As we were going into one of the garages a night watchman came to us to see what we were doing. We all got into a car. Leon and Anthony was sitting in the front seat. Richard and I sat on the back seat. Anthony drove the car. As we were going out of the garage, the night watchman ran up to us with a stick in his hand. As he was about to hit us, Richard took out a gun and asked whether he should shoot or not. Anthony agreed that he should shoot. He then shot the watchman. We then went off in the car. I did not see what happened after the shot. That is all."

19/.....First

First appellant made a lengthy statement which was recorded during the afternoon of 14 October from 2.23 p.m. until 4.10 p.m. Before making his statement, first accused was asked certain routine questions by the magistrate before whom he appeared, and I set out hereunder the relevant questions and replies :

"6.(i) Do you expect any benefits if you make a statement? Yes - I may possibly be used as a state witness - I do not however insist on this.

6.(ii) If so, what benefits? I am acting on advice. I want to come clean. It is worrying me. I am afraid the other people who are involved threatened me.

9. Have you been assaulted or threatened by any person after this incident occurred? Yes - By Richard Brooker and André Pretorius - they are not members of police force but - "chappies" involved in this as well."

First accused dealt in some detail with various escapades, and gave the following version of the shooting incident :

"About a week later they came to my flat and said that we should go and steal some more tapes and radios. My revolver was locked in the kist and they asked for it so I gave them the key. They took my licensed

38 Special and a gun which belonged to my late grandfather - a .635 m. We went out in the motorcar and we drove around. André was driving and we went into Aston Villa Garage at Birdhaven. There was an African there so we drove out. We returned some while later and went in the garage again. André was driving and I was in the front passenger seat. Richard was in the back seat. I was not in possession of a fire arm.

As we were driving out the native boy came after us waving his stick. I got out and asked him to calm down as he wanted to hit the boot of the car with his stick. I got back into car and the African was swearing. André stopped the car again at the entrance of the building and swore back at the African.

Richard rolled down his window and took the .635 m. gun out and shouted should I shoot him. I shouted "No - don't be mad". But he shot. It was not clear whether the African had been wounded or not so André drove away.

Richard then said that he must have missed the African because he did not try to shoot him. A little while before this occurred we stole a radio and a tape from a white and black Valiant and tape recorder from a Alpha Romeo. Richard got these 3 articles out of the car and I was standing next to him outside the car.

André then took a tape recorder with the speakers from a Rambler. Prior to this he was sitting in the car. The shooting of the African happened after the tape recorders were stolen. We then rode to Hillbrow after the

African had been shot. I said we should return to see how the African is - if he had been wounded as I know the caretaker of the building. Richard stated that he had missed the African by miles. I then looked in the following days papers and saw nothing of an African been shot so I thought that he was all right."

At the trial first accused testified as follows in examination-in-chief as to how the shot came to be fired :

"Now, when you got to the Aston Villa garage on the second occasion early in the morning, did you get out of the car? --- I did.

For what purpose? --- To scan around and see which motor cars would be accessible for radios or tapes, whichever the case would be.

Now, did you notice this watchboy who eventually was shot? --- Not immediately. I walked around for a while, and he was coming from the entrance of the building.

Well, did you eventually notice him? --- Yes, I did.

And what did you do? --- I got back into the motor car and I said that we should leave.

Were you sitting next to Pretorius again? --- Yes.

And what did you say to him? --- I said that we should leave the garage.

And did you tell him how he should drive? --- I told him that he should drive slowly, and somebody mentioned that to avert suspicion - we had done this before - we should stop and ask him where a particular building was and tell him that we were looking for a building. In fact, we did stop and accused no. 3 did question the boy as to the whereabouts of a particular building in that area.

Now, when accused no. 3 spoke to this boy, this night-watchman, what was the reaction of the night-watchman? --- He seemed very edgy and frustrated. He was very panicky; for what reason, I don't know. I think he didn't understand the question that was put to him. We were very calm, etcetera, and it did look as though we were looking for a building.

Now, what did you do when he started making noises? --- I reached for my fire-arm from the cubbyhole of the car.

Yes? --- I took it out of a holster - it was always kept in a holster, a shoulder holster. I put the shoulder holster on the floor of the car, and I got out of the car and I went to the boy and I pointed the fire-arm at him, and I said to him "Calm down". I think I told him to shut up, because he was making excessive noise.

Was he armed with anything? --- He had a stick in his hand.

Now, having done that, what did you do next?---

I saw that it was pointless trying to calm him down, so I got back into the motor car. I picked up the holster and I put the fire-arm into it, and put the fire-arm with the holster back on the floor, and I said that we should leave the building.

Now, just before we go on. At that stage, if you had any intention of shooting the watchman, could you have done so quite easily? --- Very easily.

Was he within firing range? --- Yes.

How far away was he from you? --- About 5 yards.

Whose car did you use, by the way? --- It was my mother's car.

Was there any change of number plates or false number plates used? --- No, Sir.

Pardon? --- No, Sir.

Now, when you got back into the car, did the car remain where it was, or did it move away? --- Oh, we started to move away.

To where did you move? To what part did you go? --- Towards the street.

That is towards the exit? --- Yes.

Did you reverse or move forward? --- We moved forward.

So the bonnet of the car was pointing in

the direction of the exit? --- Yes.

Now, what was this watchman doing while you were driving out? --- When I got back into the motor car he stood where he was, and as we started to move, he was standing there and he had his stick in his right arm, if I remember correctly, and he was waving his stick and shouting.

Yes, did the car stop or continue moving? --- We stopped just at the entrance, where the entrance of the building is, where it meets the road.

Now, just tell His Lordship slowly, please, what happened next? --- I got back into the car and I realised that it was pointless trying to argue with this night-watchman. So I said that we should go, and we were going. The car stopped where the exit meets the public road, and I think the boy was still shouting and somebody - I can't remember exactly who it was - swore back at him, and we were leaving. I think that Pretorius mentioned as well that we should leave.

Did Brooker at that stage say anything to you? --- Brooker said "Shall I shoot?".

Now, did you take him seriously when he said this? --- He said it in a jocular manner, and as we had made this pact that nobody would ever get shot or anything, I immediately, I surmised that he would shoot into the air, if he was going to shoot, but he said it in a jocular manner and I thought well, he won't shoot because I never saw a gun in his hand or anything.

Was there any purpose in shooting this watchman at all? --- There was no purpose at all.

Now, did you reply to this question when he said "Shall I shoot?", or "Shall I shoot him?"? --- I said "Yes".

Was that because you didn't take him seriously? --- Yes, as well as that everybody had been adamant that no violence would be used, and before nobody had ever got hurt, or nobody had ever tried to hurt anybody.

Now, in your statement to the police you gave a different version. You said something to the effect that he asked you "Shall I shoot?" or "Shall I shoot him?", and you then said "Don't be mad, man". Do you remember putting that in your police statement? --- Yes, Sir.

Was that true or untrue? --- It was untrue.

Why did you give this untrue explanation to the police? --- I was afraid that I would implicate myself.

Now, when the police took your statement, were any promises made to you, or anything of that kind? --- No.

Any threats? Nothing? --- No.

When this accused no. 2 said "Shall I shoot?" or "Shall I shoot him?", did you see in which direction the fire-arm was pointed, or did you see whether he had a fire-arm in his hand? --- Yes, I glanced around to see

where the African night-watchman was, and at this stage Brooker had the gun facing at right angles to himself.

Was that in the direction of the watchman, or away from him? --- No, the watchman, if he had to shoot the watchman or in the direction of the watchman, he would have had to turn right round, at least another 90 degrees, when I glanced round to see the boy, because I turned round towards my right and I was looking like this, and I could hardly see the night-watchman, because he was directly behind the lefthand side of the boot, and when Brooker had the gun, the gun was facing in this direction. So he would have had to turn 90 degrees at least to shoot at the boy.

After the shot was fired, did you realise that he had struck, or that a bullet had struck the night-watchman? --- No.

You didn't. Did you see him fall or stagger, or anything of that kind? --- No.

In fact, your back was towards him, was it? --- Yes.

Under cross-examination by counsel appearing for second accused, first accused said that there was no discussion at all as to the possible use of fire-arms before they set off to steal from motorcars during the evening of the 16th. He also stated that on the day of his arrest he heard that the night-watchman had been fatally

wounded. He added that up to that time he was under the impression that second accused had shot into the air. He said that after driving away from the garage he felt no concern "because of the pact that we had made that nobody would ever shoot at anybody. So I was under the impression - I surmised that the boy hadn't been shot at." This "pact" refers to the discussion they had on the 5th July prior to committing the various robberies.

Under cross-examination by counsel appearing for the State, first accused denied that he was the leader, or that there was any leader. He explained that although he was slightly older than the other accused, he was in fact less well-built than they were, and hadn't had as much "adventure" as they had had. As to certain false statements made to the magistrate and his failure to mention facts referred to in his evidence, first accused said :

> "Did you mention this non-violence pact in your statement to the Magistrate? --- No, Sir.
>
> Why not? --- The shock of hearing that the boy was dead, sort of put me off balance, and as you will see, there are a few untrue facts

in my statement, as well as there are some things which I have omitted. It was just sort of once knowing that the boy had been shot, I knew that he was dead and I knew that we were guilty, and sort of one thing followed the other, and not realizing I put it all in my statement. Now is the only time I can sort of exonerate myself by telling what is true and what is untrue.

But you went so far as to try and exonerate yourself in your statement, by saying for example that when no. 2 aksed you whether he should shoot, you said "No, don't be mad"? --- Correct.

Well, if you had had in your mind the thought of exonerating yourself, surely one of the most important things you would have mentioned, was this non-violence pact? Why didn't you? --- Because it had been inferred that accused no. 2 had said that I had shot the boy. So therefore I went and made my statement as a biased person, because I sort of thought that he had - well, he had in his statement sort of said that I had shot, and he never did admit that he had shot, and I knew that I hadn't shot. In my statement I sort of tried to not implicate myself.

But if you had mentioned this non-violence pact, that would have put the whole lot of you in a better light, surely? --- I was interested in putting myself in a better light."

He was cross-examined as to what they planned to do if they were to be surprised in the act of stealing from motorcars. He answered as follows :

29/....."Now

"Now, did you envisage that on this expedition to get car radios and tape recorders, there might be some opposition from either the owners, or some standers-by or passers-by or night-watchman? --- That happened on one occasion, that we were, and we fled.

You fled? --- Yes, and there was a gun present on this occasion as well.

So you did consider, did you, you did envisage, that that might happen again on the 15th/16th July? --- We never thought about it. We never discussed that.

But you must have thought about it, if it had happened once already? --- Yes.

So you thought that when you broke into these cars, there might be somebody who would make trouble for you? --- Yes.

And what were you going to do about it? --- Like we had arranged before.

Namely? --- That nobody would be hurt, and if anybody was caught, we should all try and get away and good luck to the ones who got away, and the ones who got caught were on their own.

What part was the firearm or firearms to play? --- No particular part.

In saving you trouble? --- No particular part on these occasions."

Under further cross-examination he testified as follows :

30/....."So

"So do you say that in your discussions as to what you would do in regard to stealing radios and tapes from cars, the guns didn't feature? --- No, Sir.

So was it purely on your own initiative then that you took the gun out of the cubbyhole and pointed it at the watchman? --- Yes, Sir, because he was making an excessive noise and I think he misunderstood when we asked him where this particular building was, and I got out to try and calm him down and I saw it was pointless. Therefore I got back into the car and I said "Let's just go, before he gets our number or something".

First accused stated in evidence that they had not yet tampered with any motorcar when the deceased came upon the scene. He said that it was his impression that third accused had stopped in the drive-way to see whether there was traffic in the road, and that it was then that second accused said, "Shall I shoot?". He also said that second accused asked the question "jocularly", and he (first accused) didn't take him seriously, since he thought at the time that the Browning was not loaded. Asked whether they continued stealing from motorcars after the shooting, he replied, "We went on one occasion after that, because I wasn't aware at all that the boy had been shot."

Second accused stated in his evidence that prior to 5 July he had had no experience in the handling of fire-arms. He gave the following account of the shooting in examination-in-chief :

> "Yes, and then? --- We drove into Aston Villa, a block of flats, and Anthony got out of the car, looking around for tape recorders and radios. He didn't touch any cars or anything, he was just looking, and a watchboy came out of the entrance of the flat and he stood by the exit and he saw us. He started approaching us, so Anthony got back in the car and turned the car around to drive out of the exit, and as we were going out he started shouting at us and that.
>
> Who started shouting? --- The watchboy, the night-watchman, and Anthony got out of the car and pointed the gun at him and told him to keep quiet, and then André said "Come on, let's go".
>
> Who said "Let's go"? --- Pretorius, accused no. 3, and we drove down the driveway, going into the road, and we both pointed our guns out the window, there was a bang, and then I can't remember which of the two said "Let's go, let us get out of here quickly", but we drove off, and on the way home I said to Anthony "Well, my gun didn't go off", and he said "Well, I can swear mine didn't either", and that is what we left it at. We said, oh well, we will look in the paper tomorrow and see what happened. I also said to him "I am sure I

32/.....saw

saw the African fall", so he said "No, he was still shouting at us when we drove off". We just left it at that, we were no further than that.

All right now, you mentioned guns. Where did these guns come from, and at what stage in the proceedings? --- That particular night?

Yes? --- When we got into the car, Anthony .....

Was ~~at~~ at no. 3's home? --- Yes, at Pretorius' home, and Anthony passed the revolver back to me.

Where did he get that from? Did you see where he took it from?--- No, I don't know where he took it from. He just passed it back to me.

And which gun was it that he passed back to you? --- To the best of my knowledge it was a bigger gun than that one, used as an exhibit.

Was it a pistol - that is a pistol, or was it a revolver? (Before reply) Do you know what a revolver is? --- Well, it was a bigger gun.

Yes? --- And I left it on the back window ledge of the car.

That is the revolver now? --- Yes, that is the bigger gun.

The larger gun, yes? --- And I don't know what Anthony did with this other gun, whether it was in the cubbyhole, it must have been, I think, he used to keep them in there.

He was asked by his counsel to explain why he had mentioned in his statement to the magistrate that he was armed with "a small Browning pistol". He testified as follows :

"Now at the stage when you say that the deceased was shot, who then had guns in their hands? You had one? --- And Balomenos.

And the gun that he had in his hand - or let us take yours first, what gun did you have in your hand, this one or the other one? --- I had the other one. Although in my statement I did say I had the Browning, after the incident accused no. 1 said to me "Oh, you had the Browning", and so I just took it, I had the Browning, and when I made my statement to the Magistrate I said I had the Browning, but at that stage I didn't know which one had fired the shot or anything.

When no. 1, you say, said you had the Browning, did you know in your mind which of the two guns was the Browning --- No.

You know now of course? --- Yes, I know now.

And when you made the statement to the Magistrate, did you know when you said "I had the Browning", did you know what particular

gun you were referring to, in your own mind?--- In my own mind I knew which gun I was referring to.

And that was? --- That was the big revolver.

And not this one here? --- No.

When cross-examined by counsel appearing for first accused in regard to his statement to the magistrate, he said that in referring to the Browning pistol he was in fact describing the fire-arm which he had, namely, the revolver. He denied that he said, "Shall I shoot?" in a jocular manner. He added that although he asked the question, he had no intention of shooting. Under further cross-examination, he testified as follows :

"Now when he said "Yes", did you intend to shoot or not? --- No I didn't take notice of his answer.

Why not? --- Because I didn't mean it in any way.

You didn't mean it in any way? --- My question to him wasn't meant.

Well then I am going to suggest to you it was put in such a way that accused no. 1 didn't take you seriously? --- No, he didn't

take me seriously when I asked him.

Isn't it correct that on a number of occasions there were threats of shooting made and no shot was ever fired? Is that correct?--- No.

Oh, you say shots were fired? --- No, shots were not fired.

If you don't understand my question please tell me. I am not trying to mislead you. I will put it to you again. When you held up these garage attendants on the 5th of July, on some occasions threats were made that these attendants, these boys, would be shot? --- Yes.

No effort was ever intended that any shooting should take place? --- No, we all - we never intended to shoot.

Now you were about to say "we all" - what? --- We all decided not to shoot.

Yes, you had all decided long beforehand, before the 16th, that you would not shoot at anybody? --- That is correct.

And is it also correct that the suggestion was made among you that if any shooting was to be done, it would be done in the air to frighten people? --- No.

Or do you not remember that? --- I was under the impression at the time of the garages that there were no bullets in the gun."

He was referred to the statement of third

accused in which the latter had said that second accused had fired a shot, and asked whether third accused had explained to him why he had implicated him as the person who had fired the shot. He answered that third accused had explained to him that the police had given him the impression that he (second accused) had already admitted that he shot the deceased. (In this regard, it must be remembered that second accused made his statement during the morning, and third accused his during the afternoon). He said that he was not suggesting that first accused misled him into taking part in criminal conduct. He admitted that he had been "involved in events" before meeting first accused. He agreed that it was "quite clearly understood that no violence should ever be used", and that on the night of the 16th, "There was never any intention on anybody's part that shooting should take place, that anybody should be injured or killed." He insisted that no shot was fired from the fire-arm which he was pointing in the direction of the night-watchman.

Under cross-examination by counsel for the State, second accused gave the following evidence as to

what they planned to do if the petrol attendants were not to be frightened by the production of a gun :

"And in your own mind, what did you think you would do if the petrol attendants were not frightened by the sight of the gun? Perhaps they thought it was a toy gun? What would you have done then? --- I would have fled.

Fled where? --- Back to the car.

And if they fled after you, came after you in pursuit? --- Well, we would have tried to get away as quick as possible.

And if you couldn't? --- Well, if we got caught, we did come to an understanding that if one of the party did get caught, there would be no names mentioned or addresses or anything like that. We would just say "I can't remember the names of the other chaps", or something to that effect.

But now you were four youngsters on that occasion and you had to go right up to these petrol attendants in order to rob them? --- Yes.

It wasn't a question of standing at a distance and telling them to throw the money over to you or anything like that. You had to go right up to them? --- Yes, we had to go right up to them.

And now, if they turned nasty, and decided to tackle you, what chance would you have had to get away in the car? --- I couldn't say.

38/.....Well

Well, isn't it obvious that you had some sort of plan about using the firearm, perhaps to frighten them with a shot? --- No, it never came up. At the garages before, when we did come into difficulty by the boys running away or switching off the lights, we did run and we managed to get into the car and go away."

He stated that he wasn't sure whether the fire-arms were loaded or not. He said, further, that after they had left the garage, he mentioned that he saw the deceased staggering. First accused, however, said that he was mistaken, since he (deceased) was still shouting at them as they left. Second accused concluded that he must than have been mistaken. He also stated that the friendship with first accused cooled off, and that at the time of their arrest he and third accused were no longer associating with him.

In his evidence-in-chief, third accused gave the following version of the shooting :

"Now on the night of the 16th, the shooting, you were driving the car? --- That is correct, yes.

Well now, you went to this particular garage and just tell His Lordship now what happened? --- Well, first of all we went to steal tape recorders and the native boy was

39/.....still

still awake - this was quite early - and so we decided to come back later on. When we came back I drove into the garage, right down, right into the garage and Anthony got out to go and see if there were anything - if there was any tapes in the cars, and as ~~we~~ he was coming back, the watchboy came out from where he was sitting and approached us. Anthony got back into the car and started speaking to him from the window, and he got out again with the revolver, pointing it at him, saying he must calm down. The native boy started shouting at him and telling us to get out, so then I spoke to the native boy, asking him if he knew where a certain block of flats was, and he didn't answer me. So Anthony got back into the car and as I was trying to get out, I just heard a shot go off.

Were you actually driving at the time when you heard the shot? --- That is correct.

Had you seen any movements of guns in the car? --- Well, I had seen Anthony take a gun from the cubbyhole, but I am not too sure what he did with it. I just saw them both looking out the windows, both of them, and I was under the impression that no one was going to use guns, I didn't even think of anybody shooting or pointing a gun at anybody.

Was there any suggestion of firing a gun into the air even? --- No.

Were you aware who had fired the shot at the time? --- No, not at the time, no.

40/.....Now

Now, did you see the deceased at the time of the shooting? --- Yes, I did.

Did you see what happened to him? --- When I turned around - when I heard the shot I turned around and I saw the African standing there with a stick, waving his stick. He hadn't fallen or anything, he was just standing there, and Anthony said "Come on, go".

And did you say anything? --- No, I just left.

You then drove out? --- Yes."

It is of some interest to note that third accused omitted reference to the question asked prior to the shooting, i.e., "Shall I shoot?". In the above-quoted passage from his evidence, he gave his account of the sequence of events in a spontaneous manner, i.e., without questions being put by his counsel. That the omission was not deliberate is clear; he had mentioned it in his statement to the magistrate and also adverted to it in evidence given at the trial, when the admissibility of his statement was in issue. He had, moreover, listened to the evidence given by first and second accused. The first question put in cross-examination by counsel for first accused directed third accused's attention

to his omission, whereupon he readily admitted that the question was asked immediately prior to the shooting. Third accused did, of course, give evidence at variance with his statement, in which he said that second accused had asked the question. At the trial he said that although he heard the question being asked, he did not know who asked it - he did not at the time identify the voice. When he was asked to explain his contradiction, third accused said, "At the time when I went to the magistrate, I was under the impression that Richard had shot the boy. I wanted to get myself off, I suppose, and put everything on someone else. So I just ---- (pause) ---- obviously thinking that Richard had already admitted shooting the boy, I automatically put everything on him." In answer to further questioning he said, "Richard had told me that he didn't make a statement stating that he had shot the boy - which I was told. That's why I changed it. Because I didn't want to get him involved if it wasn't him." It will be recalled that first accused sought to explain admitted falsehoods in his statement along the same

42/.....lines

lines, namely, that he uttered them because he was under the impression that second and third accused were putting all the blame on him, and that he retaliated by seeking to exculpate himself and to put the major blame on second accused.

I have dealt at some length with this aspect of the matter, for two reasons. Firstly, it appears from the judgment of the learned trial Judge that in his approach to the evidence of the accused, and particularly that of first accused, he gave considerable weight to the fact that in their evidence reference was made to matters which were not mentioned to the magistrates who recorded their statements, and also that falsehoods had been uttered. It is, of course, legitimate to refer to contradictions between evidence given at the trial and a statement made to a magistrate, in order to assess the credibility of the witness. It is, likewise, legitimate to have regard to the fact that false statements were made. In my opinion, it is however, unrealistic to draw inferences from these circumstances adverse to a witness without giving close consideration to

all the surrounding circumstances. Take the facts of the present case. The accused, who were youngsters, were arrested and brought to a police station, where they heard for the first time that on one of their criminal escapades a Bantu night-watchman had been fatally wounded, and that they were facing a charge of murder (and, in addition, charges of robbery and theft). First accused mentioned to the magistrate that he expected that he might be used as a state witness if he made a statement, adding that he did not insist on being so used. It is not known who sowed the seed of this possible benefit in the mind of first accused. He also stated, "I am acting on advice. I want to come clean. It is worrying me. I am afraid the other people who are involved threatened me." It is not clear who advised first accused. He stated that he discussed the matter with his parents, and they may have advised him or sought legal advice. The advice given to first accused may have suggested the possibility of being used as a state witness. Second and third accused acted without advice, parental or legal. Second accused made his statement during the morning. As to the shooting,

he exculpated himself, and, by implication, blamed first accused. He was closeted with the magistrate from 9.50 until 10.55 a.m. It is a curious, and to my mind, disturbing, feature that both first and third accused stated in their evidence that they had some knowledge of what second accused had said in his statement, particularly about the shooting incident. First accused said in evidence that it had been "inferred" that second accused had said that he (first accused) had shot the deceased, and that when he made his statement that afternoon he was "a biased person" and was "interested in putting myself in a better light". He did not wish to implicate himself, and for that reason falsely stated that in reply to second accused's question, "Shall I shoot?", he replied, "Don't be mad, man". In his evidence-in-chief he admitted the lie, and said that he had simply replied, "Yes". It is obvious that the truth was self-incriminatory, the lie exculpatory. Third accused stated in evidence that he had been told that second accused had admitted that he had shot the deceased and that he

He retracted the falsehood at the trial, and swore that in his evidence he was speaking the truth. Third accused, who probably knew nothing about the so-called doctrine of common purpose, was not directly involved in the shooting, and appeared to have been concerned to say "something" so as to be permitted to go home. In making his brief statement, he was obviously in a state of confusion as to who were in the motorcar at the time of the shooting and who the driver thereof was. He described his state of confusion to the fact that the fourth accused had accompanied them on a number of escapades, and that he understood from what the police had said, that fourth accused was in the motorcar when the shooting took place. When he gave evidence at the trial he had had time for reflection, and gave a version which no longer directly implicated second accused, who was his friend. On either version he was not directly concerned in the shooting of the deceased. If regard is had to the various circumstances which influenced first and third accused when they made their statements, the conclusion is justified that

their testimony on oath is to be scrutinised with care. In the circumstances of this case, it would be unwise to give any greater weight to the fact that the statements of first and third accused were in certain respects departed from in their evidence at the trial. The criticism that none of the accused referred in their statements to the so-called "non-violence pact", is in my opinion not valid. It must be borne in mind that the statements were volunteered, and not in the form of answers given to questions asked by an interrogator conversant with the relevance of certain facts to the substantial facts in issue. It is clear from the statements themselves that, in so far as the accused were concerned, the crucial question was, "Who fired the shot?". I doubt whether they appreciated the relevance of the agreement reached on 5 July, that violence would not be resorted to, to their several states of mind on 16 July.

The second reason for dealing ~~at some~~ length with this aspect of the matter, is to point to certain dangers inherent in the practice of confronting an accused person with statements made by other accused which implicate

the former, especially where the sole purpose of such communication is to persuade that accused to make a statement in reply, implicating his accuser. It is true that upon arrest an accused person, who has been apprised of his rights, may elect to answer the charge forthwith, and should not be denied the opportunity of satisfying the police that he is in fact not the guilty person. In many cases a detained person is freed because he did satisfy the police of his innocence. It is realised that a detained person, who desires forthwith to establish his innocence, may have to be given such particulars as will enable him to answer the charge. If an arrested person, realising his guilt, is in a mood to confess, he ought not to be discouraged from doing so, because he will in any event have a further opportunity of reconsidering his position before his statement is recorded. The purpose of having a confession recorded, is to have a written statement of the truth as deposed to by the person concerned; it is not an exercise for the purpose of gathering useful information for future cross-examination. The first proviso to section

244(1) of the Criminal Code governs the admissibility of confessions, but also postulates the circumstances in which a person is likely to make a truthful confession, i.e., when he freely and voluntarily confesses while in his sound and sober senses and without having been unduly influenced thereto. The confessions of first and third accused were correctly admitted, the requirements of the abovementioned proviso having been satisfied. At the trial it appeared, as I have indicated above, that their statements contained falsehoods. In their evidence both claimed that the lies were motivated by certain information given them by the police as to what second accused said in his statement. The accused were held to be unsatisfactory witnesses, and as this aspect of the matter was not fully investigated at the trial, ~~and~~ I would, therefore, not go beyond stating that if their explanations for lying were the truth, it would lend point to the danger of the practice above referred to; the accused would then have been given an incentive to lie. A court admits a confession as evidence against the person concerned because the requirements

51/.....regarding

regarding admissibility have been satisfied. Section 258(2) of the Criminal Code provides that a court may convict an accused by reason of a duly admitted confession, provided certain requirements are satisfied. It is however, in my opinion, implicit in this subsection, that a court is, nevertheless, required to consider at the close of the trial whether, having regard to all the evidential material then before it, the guilt of the accused has been established beyond any reasonable doubt. It is conceivable that a court may at that stage decide that the confession, or any part of it, is not the truth.

The learned trial Judge found it proved beyond any reasonable doubt that the shot which fatally wounded the deceased was fired from the Browning pistol. This finding was not in issue before this Court. It is in any event beyond question. It was also found to be proved beyond reasonable doubt that the shot was fired by second accused immediately after his question, "Shall I shoot?", had been affirmatively answered by first accused. The Court a quo apparently accepted

51A/.....that

that the question asked was as framed in the preceding sentence, and not "Shall I shoot him?". This difference has some relevance to the issue concerning the state of mind of first and third accused at the time of the shooting. The second accused does not appeal against his conviction. I shall assume for the purposes of first and third accused's appeal against their conviction of murder, that the finding by the Court a quo, that dolus was proved

52/.....in

in the case of second accused's wrongful conduct, either because he deliberately aimed at deceased, intending to kill him, or possibly fired the shot knowing that he might fatally wound the deceased and not caring whether that happened or not. The evidence as to precisely where deceased was when the shot was fired, and whether he was then stationary or moving about is wholly unsatisfactory. Equally unsatisfactory is the evidence relating to the question whether the motorcar was then stationary or being manœuvred preparatory to making a hurried departure.

I have already referred to the finding of the learned Judge a quo, based upon his acceptance of the evidence of second accused, that on the night of the 5th July (when the robberies were committed), none of the accused contemplated that the revolver might be used for any purpose other than that of instilling fear by its mere production.

53/.....In

In this connection, it is to be borne in mind that on that occasion threats of shooting were uttered, but merely for the purpose of simulating earnest in producing the revolver, without there being any intention whatsoever of carrying out the threats. In my opinion this finding, which is one favourable to the accused, is fully justified, and, moreover, of the greatest importance in determining whether it was proved beyond any reasonable doubt, in respect of first and third accused, that on the night of the shooting, they individually contemplated the possibility that, in the course of carrying out a theft, second accused (or any one of them) might fire a shot to kill or injure, and intended to accept the risk that their unlawful conduct might result in the death or injury of an innocent person. After analysing the evidence, the learned Judge found it proved beyond any reasonable doubt that "the three accused went on this venture that night, all three of them, knowing that two firearms were available and all three of them knowing that those firearms would be used if necessary". It is implicit in this finding that "knowing that those firearms would be used if necessary"

means knowing that they would be used, if necessary, to kill or injure. On the night of 5th July, as was found by the learned Judge, the accused had in fact expressly agreed to use the revolver, but only for the purpose of instilling fear in the minds of those persons who were to be robbed. The question arises as to how it came about that on the night of the shooting the three accused in fact contemplated the far more sinister purpose imputed to each of them.

As to this, the reasoning of the learned Judge appears from the following passage in his judgment :

> "On that evidence, therefore, and on that analysis of the evidence, there seems to me to be only one conclusion and that is that the three accused went on this venture that night, all three of them, knowing that two firearms were available and all three of them knowing that those firearms would be used if necessary.
>
> They weren't now out on an excursion such as on the 5th when they were to be faced by a Bantu petrol attendant who would take fright at the sight of a gun. What they contemplated and expected was that they, while busy and engaging in this unlawful excursion of removing radios and tape recorders, might be confronted

by their owners, or even bystanders, which would put them in a very difficult position, and for extricating themselves from that position they required these firearms. And it was within their comprehension and they did comprehend the reasonable possibility and the likelihood that an accomplice armed with his gun might use it with fatal consequences.

It is suggested that Accused No. 3 had now taken himself out of this common purpose. As the driver of the car he was endeavouring to move out of this garage. I have given careful consideration to that suggestion, but I find that I must reject it for the simple reason that if there was this delay of stopping and firearms being pointed at the man, the deceased, and the gunman returning to the car, and again firearms being pointed, questions being asked and a shot being fired, he had ample time and opportunity to move rapidly out of the garage because he had control of the mechanisms of this car. That he did not do. He waited until after the shot was fired, when he received the order "Get out of here quickly."

On those facts, as I say, there is only one conclusion I can come to - that Accused No. 2 wilfully fired this pistol at the deceased and wounded him fatally."

In so far as the issue of intention is concerned, I remind myself that it is a question of fact, and that a finding by the Court of first instance in regard thereto, will not be reversed on appeal unless this Court is satisfied,

upon adequate grounds, that the finding is wrong. But it is, in my opinion, equally necessary that the court of first instance should remind itself that the fact in issue is to be established, like any other fact in issue, beyond any reasonable doubt. More often than not, the fact can only be inferentially established, and in those circumstances the trier of fact should alert himself to the danger of substituting, albeit subconsciously, the maxim res ipsa loquitur for the cardinal rules of logic. Furthermore, in reasoning by inference, it must be clear that the premises are satisfactorily established. The necessity of approaching the issue of intention with the same degree of caution which is usually applied in the case, e.g., of disputed identity, is, in my opinion, self-evident.

In his approach to the issue of intention, the learned Judge, correctly so, used as his starting point the finding, that on the 5th July none of the accused contemplated any violent purpose in taking the revolver with them when they set out to rob petrol attendants. The learned Judge accepted that the express arrangement affecting

the purpose of taking the revolver with them, though of a "loose" nature, led to an understanding that the revolver would only be used for the limited purpose agreed upon, and not for the purpose of killing or injuring in order to carry out a robbery or effecting escape. The question whether each accused ought to have appreciated the possibility that one or other of them might, in a situation of panic, and notwithstanding the arrangement referred to, fire a shot with fatal consequences, either intentionally or negligently, does not arise for consideration. in this case

There is no basis in the evidence to support a finding that, prior to setting out on their venture to steal radios, etc., from parked motorcars, the three accused once again discussed the question of taking firearms with them, or for that matter, the need to have more than one firearm, having regard to the nature of their venture. Neither is there evidence to support a finding that the three accused at any stage discussed the question that in stealing radios from parked motorcars, it might be necessary to use firearms for a

purpose involving the possibility of the death or serious injury of an innocent ~~purpose~~ person. Each of the accused stated in evidence that there was at no stage any intention of using firearms in carrying out the thefts. First accused stated that it was "an understood law" that firearms were not to be used to kill or injure, and that he had explained to the other accused that it "would make matters worse" for them if they were to use firearms for that purpose. Third accused also referred to this discussion in his evidence. The learned Judge concluded that the three accused had falsely testified as to their intention, and that the circumstances justified a finding beyond any reasonable doubt that they "went on this venture ----- all three of them, knowing that two firearms were available and all three of them knowing that those firearms would be used if necessary."

In my opinion, the finding, that the accused set off on their venture, all three of them knowing that two firearms were available, is not supported by the evidence. First accused, in order to put himself in a better light when he made his statement to the magistrate,

gave a version of how the two revolvers came to be in the motorcar on that night, but admitted at the trial that it was untrue. At the trial he gave a version briefly to the effect that the revolver had for some time before the night of the 16th been locked in the cubbyhole. In so far as the pistol is concerned, he said that his recollection was not clear, but that second accused possibly retained possession thereof after some previous outing, or was given it before they set off on their venture. This version was rejected as false. Second accused said that first accused handed him a firearm in the motorcar as they were about to leave. The learned Judge said that he had "no hesitation in accepting the evidence of No. 2 accused, supported by No. 3, that the firearm was handed to him that night by Accused No. 1". Despite a careful reading of the evidence of third accused, I did not come across any passage which might be said to lend even some support to second accused's evidence. Third accused insisted throughout that the first occasion on which he saw a firearm being handled was in the basement garage shortly before the shooting. He explained that prior

thereto, no occasion existed for the handling of a firearm. Under cross-examination by counsel for the State he was asked, "Now when you set out on the 16th ..... what did you think would happen if you were tackled by somebody?" He replied, "Well, I was under the impression no guns were used when we stole tape recorders. Because it wasn't necessary." He was asked what was to happen if they were to have been interrupted while removing a tape recorder. He replied, "I'd just run. That was the only thing I thought of. I'd just run. Because I parked the car just right next to them and in a position that I could just drive off." He stated, further, that the first occasion on which he saw a gun that evening was when he had a glimpse of first accused removing something from the cubbyhole i.e., before first accused alighted from the motorcar in order to attempt to silence the deceased by producing the firearm. Third accused also said, "I just caught a glimpse of a gun. I'm not even sure if it was the gun, to tell you the truth. I knew that he kept a gun in the cubbyhole, and I took it for granted at the time that it was a gun." He also said that he did not see where

first accused placed the firearm after he entered the motorcar. He stated that on no occasion did he see second accused handling a firearm. In this connection it must be borne in mind that second accused was seated at the back, and that third accused was occupied in driving the motorcar at the time second accused was pointing his pistol at the deceased. Third accused's evidence in so far as it goes, rather lends support to first accused's explanation of how the revolver came to be in the motorcar that evening, i.e., that it was kept in the cubbyhole. In rejecting first accused's evidence regarding the presence of the revolver in the cubbyhole, the learned Judge referred to his omission to mention that to the magistrate. In my opinion this criticism is, for the reasons mentioned earlier in this judgment, without any real substance. The learned Judge also referred to the improbability that "there would have been sufficient time .... with the nightwatchman hard on their heels and wielding a stick, to have unlocked the cubbyhole, taken the firearm out of a holster, and then putting .... the holster on the floor of the car."

First accused was not asked to deal with this "improbability" in his evidence, and little weight, if any, can be given it. It is my impression, that in saying that the nightwatchman was "hard on their heels", the learned Judge may have confused two occasions, namely, the occasion when first accused alighted from the motorcar and the situation after he had entered the motorcar. As I read the evidence, it is on the latter occasion, when the motorcar was moving towards the exit, that the nightwatchman was "hard on their heels."

To sum up. The evidence goes no further than to indicate that when they set off on their venture first accused realised that two firearms were in the motorcar, that second accused at that stage only knew about one firearm, which had been handed to him by first accused and that third accused's evidence, that he only became aware of the presence of a firearm immediately prior to the shooting, may reasonably possibly be true. Whether third accused in fact appreciated that a firearm was in the cubbyhole when they set off, was not explored in the evidence.

63/.....In

In my opinion, therefore, the finding, that when the accused set off on the venture, all three of them knew that two firearms were available, is based on speculation rather than on acceptable evidence of sufficient weight to establish a fact of fundamental importance in regard to the next step in the reasoning of the learned Judge, namely, that the accused, on that occasion, deliberately armed themselves with two firearms, intending that, if necessary, they should be used to kill or injure.

In regard to this step in the reasoning of the learned Judge, I refer to the following passage in his judgment :

> "They weren't now out on an excursion such as on the 5th when they were to be faced by a Bantu petrol attendant who would take fright at the sight of a gun. What they contemplated and expected was that they, while busy and engaging in this unlawful excursion of removing radios and tape recorders, might be confronted by their owners, or even by-standers, which would put them in a very difficult position, and for extricating themselves from that position they required these firearms. And it was within their comprehension and they did comprehend the reasonable possibility and the likelihood that an accomplice armed with his gun might use it with fatal consequences.

64/.....This

This line of reasoning assumes that the accused deliberated ~~when~~ upon the possible dangers attendant upon robbing petrol attendants compared with that attendant upon stealing radios and tape-recorders from parked motorcars, and decided that the latter exploit was so much more hazardous that the use of two firearms, which might possibly have to be used with fatal consequences, was indicated, and with that purpose in mind armed themselves with two firearms when they set off on this venture. It was never suggested to the accused while they were in the witness-box that such deliberation was undertaken by them prior to their setting off on their venture. It is possible, but unlikely, that each of them independently pondered the question, and reached a similar conclusion regarding the hazardous nature of their intended criminal exploits during the evening of the 16th July. This was, however, not investigated at the trial. In so far as third accused touched upon the matter, ~~though in a different~~ context, it would appear that he did not think it was necessary at all to have a firearm available on that night, and gave a perfectly logical reason for his opinion, namely, the ease

with which they would be able to get away from the scene if they were to be disturbed. Although first accused said that it was easier to steal from some makes of motorcars than from others, he was not asked how long it takes to carry out the theft. For all one knows, the whole operation may possibly be completed within a matter of minutes. During that time third accused would be at the ready in the motorcar, parked in the immediate vicinity of the motorcar from which the radio was to be removed by one of the accused, leaving the remaining accused to be on the lookout. The reasoning of the learned Judge also assumes that Bantu petrol attendants would inevitably take fright at the sight of a gun, but that owners of motorcars and ordinary bystanders would react differently, and that in their case the accused might have to shoot in order to escape. Viewed objectively, it is my impression that it might well be said that armed robbery of petrol attendants at well-lit filling stations situated along public roads is the more hazardous undertaking. Armed robbery necessarily involves confrontation at close quarters;

stealing radios from parked motorcars contemplates that they will be unattended. In the case of filling stations there is always the possibility that motorists might drive up to the scene of the robbery to obtain petrol. It appears from the evidence that the accused on occasion parked their motorcar some distance away from the filling station, which made a speedy escape more difficult. In conclusion, it is ever so much more important not to be caught in the act of armed robbery; upon conviction a sentence of death may be imposed. This line of reasoning of the learned Judge does not in any way support the conclusion that when the accused set off on their venture, "they did comprehend the reasonable possibility and the likelihood that an accomplice armed with his gun might use it with fatal consequences."

It so happened that a shot was fired from a gun handled by second accused. But this fact is, in my opinion, equivocal. It is, at least, as likely that it was fired consequent upon a decision then taken on the spur of the moment, without any prior contemplation of the eventuality, as that it was fired because that which was contemplated in

fact eventuated.

In my opinion, for the reasons stated above, the learned Judge a quo was wrong in holding that it was proved beyond any reasonable doubt that when the accused set off on their venture on the night in question, all three of them, or any one of them, in fact contemplated the possibility that a shot might be fired with fatal consequences. Upon the acceptance of their evidence in regard to what was contemplated by them as to the use of the firearm on the night of 5 July, there existed no valid reason for rejecting as false their evidence in regard to their several states of mind at all material times up to the time that they were disturbed by the unfortunate deceased.

The finding of the Court a quo, that second accused, with the requisite intention, fired the shot which fatally wounded the deceased, is not in issue before this Court. The issue which now arises for determination is whether, on the approach to the facts set out above, it was nevertheless proved beyond reasonable doubt that at the time of the shooting the conduct of first and third accused, and

their respective states of mind, were such as to constitute them socii criminis in respect of the murder. As a result of the error in his approach to the facts of this case, the learned Judge a quo did not investigate the question of first and third accused's guilt on this narrow ground.

In so far as first accused is concerned, the question turns largely upon the interpretation, in the circumstances, of his reply of "Yes" to second accused's enquiry, "Shall I shoot?" Is there proof beyond any reasonable doubt that first accused in fact appreciated, as a possibility, that second accused intended to shoot at the deceased in order to kill, or at any rate, to injure him so as to facilitate escape or to exclude the possibility of the motorcar's registration number being noted? In my opinion, this question cannot be answered without giving due weight to what had gone before. As I have already indicated earlier in this judgment, it was not proved that any of the accused contemplated the possibility that in carrying out their thefts from motorcars, a firearm might have to be used with fatal consequences, and were prepared to take that risk in order to carry out their

plans. When the deceased first came upon the scene, the accused had, so it would seem, decided that they would drive off. The deceased, however, was acting noisily, and first accused decided to silence him by threatening him with the revolver. When the deceased, unlike the petrol attendants, could not be intimidated, first accused did not fire a shot, either by way of warning or to incapacitate him, but got into the motorcar, saying that they should leave before their number is taken, or words to that effect. Third accused was of the same mind and began manoeuvring the motorcar in order to make for the exit. There is no evidence to suggest that deceased presented any obstacle, in the sense of making it impossible, or even difficult, for the accused to reach the exit from the garage and to drive off. The deceased, however, continued shouting at them, but was apparently intent upon urging them to depart. There is no evidence as to the lighting conditions in the basement garage at the time in question. In these circumstances second accused asked the question, "Shall I shoot?", which elicited the prompt reply, "Yes". The evidence is inconclusive as to where the motorcar

was in relation to the exit, and where the deceased then was in relation to the motorcar, save that the indications are that he was at the back thereof. In so far as third accused was concerned, the learned Judge found, in effect, that although he had ample opportunity to drive off before the shot was fired, he did not do so, but waited until the shot had been fired, and then drove off after having been commanded to "Get out of here quickly". The implication appears to be that third accused deliberately remained stationary in order to make it easier to shoot at the deceased. In my opinion this rather critical finding is not justified by the wholly inconclusive evidence relating thereto. There is no evidence justifying a finding beyond any reasonable doubt that third appellant was either by conduct or intention associated with the shooting of the deceased.

The case against first accused rests, in the main, upon the utterance of the single word, "Yes". In all the circumstances, a finding that he intended associating himself with the act of firing a shot at the

deceased with possible fatal consequences, is clearly consistent with the proved facts. I am, however, not satisfied that the proved facts exclude the reasonable possibility that first accused did in fact not intend to assent to the commission of such an act. I bear in mind that the learned Judge correctly held first accused's evidence, that second accused spoke jocularly, to be incredible. Third accused thought that the question was asked in order to frighten the deceased. It is an important circumstance that on the night of 5 July, the accused, who were little more than youngsters, did not contemplate using firearms in a manner likely to cause death or injury. As I have already indicated, it cannot be held on the evidence that they were of a different mind when they set off on their venture on the night the deceased was killed. First accused threatened the deceased with his revolver, but did not shoot, and it is unlikely that it appeared to him, even at that late stage, that it was, or might become necessary to shoot with possible fatal consequences. Even though he realised that the deceased might note the registration number of the motorcar, he did

nothing to indicate that he was then contemplating any other escape from the crisis than by getting out of the garage. The situation did not appear to have become more critical after he boarded the motorcar, which was then in a position to proceed to the exit from the garage. The prompt reply which first accused gave to the question asked by second accused does not, in all the circumstances, justify a finding beyond any reasonable doubt that he was assenting to murder and not merely to the firing of a shot to scare the deceased. As third accused stated, if the shot were not to have been fired, he would in any event have driven off.

In my opinion, the convictions of first and third accused on the murder charge were not justified and must be set aside. The sentence of death imposed on first accused and that of twelve years imprisonment imposed on third accused in respect of the murder charge must consequently be set aside as well.

It was not proved that either first or third accused knew that deceased had been fatally wounded by

73/.....second

second accused, and there can be thus no question of finding that they are guilty as accessories after the fact of murder.

In regard to first accused, the learned Judge postponed sentence on the remaining charges to which he had pleaded guilty. It is consequently necessary to remit the matter to the Court of first instance for the purpose of imposing suitable sentences in respect of counts 1 - 6. Leave will be granted to first appellant and to the State to lead evidence relevant to the matter of punishment.

In so far as second accused is concerned, the learned Judge, in sentencing him was no doubt influenced by his view of the facts. In my opinion he was mistaken in his view. The learned Judge was also mistaken in making a distinction between second and third accused on account of his impression that third accused was "rather easily led." This impression ~~conflicts with the reports~~ furnished by probation officers who carried out a thorough investigation. According to the opinions expressed by these two officers, it would appear that as between second and third accused, the latter had qualities

of [illegible], [illegible] influenced second accused, who was living in the home of third accused. It appears from these reports that second accused was the weaker personality, ("very introverted and placid") and did not exhibit the [illegible] and aggressive qualities which characterised third accused. It appears from these reports, which I found to be most helpful, that both accused were products of a particular type of home and social environment. It appears, furthermore, that both second and third accused have the potential to become useful citizens. In dealing with the question of sentence, there is no real justification for distinguishing between second and third accused, particularly not to the former's advantage.

Because of these mis[illegible], the court [illegible] to interfere. In interfering with the sentences to the extent set out below, the court is [illegible] of, and [illegible] present [illegible], the remarks of the learned [illegible] the need to bring home to young offenders, like the accused, that they may not [illegible] with [illegible] necessarily [illegible] as [illegible]

[illegible]..................[illegible]

they are youthful offenders. In sentencing them, however, the court is bound to have regard to the fact that they are youthful offenders.

In the case of second accused the sentence of fifteen year's imprisonment imposed in respect of count 7 (murder) is altered to one of ten year's imprisonment. In so far as counts 1, 2, 3 and 4 are concerned, the sentence is altered to one of eighteen month's imprisonment on each count. Counts 5 and 6 are treated as one for the purposes of sentence,

75/.....and

and the sentence of two year's imprisonment is altered to one of twelve (12) month's imprisonment. The sentences imposed in respect of counts 1 to 6 are to be served concurrently with that imposed in respect of count 7.

In the case of third accused, the sentence imposed in respect of counts 1, 2, 3 and 4 is altered to one of 18 month's imprisonment on each count. Counts 5 and 6 are treated as one for the purposes of sentence, and the sentence of two year's imprisonment is altered to one of twelve (12) month's imprisonment, which is to be served concurrently with that imposed in respect of counts 1 - 4.

The appeals of the three accused are allowed to the extent above set out, and it is accordingly ordered :

1. In the case of accused Anthony James Balemenos :

   (a) that the conviction of murder and sentence of death be set aside;

   (b) that the case be remitted to the Court a quo for the purpose of imposing sentences in respect of counts 1 to 6 (inclusive) after

hearing such evidence as the accused and the State may wish to lead in regard to punishment.

2. In the case of Richard Mark Brooker :

(a) that the sentence imposed by the Court a quo in respect of counts 1, 2, 3 and 4 be altered to one of eighteen (18) month's imprisonment on each count;

(b) that counts 5 and 6 be treated as one for the purposes of sentence, and that the sentence imposed by the Court a quo be altered to one of twelve (12) month's imprisonment;

(c) that the sentence imposed by the Court a quo in respect of count 7 be altered to one of ten (10) year's imprisonment;

(d) that the sentences referred to in sub-paragraphs (a) and (b) above be served concurrently with that referred to in sub-paragraph (c) above.

3. In the case of André John Pretorius :

(a) that the conviction of murder and sentence of twelve (12) year's imprisonment be set aside.

(b) that the sentence imposed by the Court a quo in respect of counts 1, 2, 3 and 4 be altered to one of eighteen (18) month's imprisonment on each count;

(c) that counts 5 and 6 be treated as one for the purposes of sentence, and that the sentence imposed by the Court a quo be altered to one of twelve (12) month's imprisonment;

(d) that the sentence referred to in sub-paragraph (c) above be served concurrently with that referred to in sub-paragraph (b) above.

P.J. Howard J.A.

BOTHA, J.A. }
POTGIETER, J.A. } CONCUR