HALSSAAK 92/75

G.P.-A. A. 466

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

(APPÈL DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

C. MTEMBU & ANDER
Appellant.

versus/teen

DIE STAAT
Respondent.

Appellant's Attorney Dio Doo *Respondent's Attorney* Dep A G (Jhb.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate [illegible] *Respondent's Advocate* [illegible]
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 25:9:1975
Op die rol geplaas vir verhoor op

(W.P.A) 58.11

[illegible]

The Court allows the appeals of all three Appellants and their convictions and the sentences imposed on them in respect of the murder charge are set aside.

(Judgment per Corbett JA 29/9/75)

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

CHARLES MTEMBU ..... First appellant,

SOLOMON MOKWENA ..... Second appellant

and JACK KHUMALO ..... Third appellant

versus

THE STATE ..... Respondent.

Coram: Jansen et Corbett, JJ.A., et Kotzé, A.J.A.

Date of hearing: 25 September 1975.

Date of delivery: 29 September 1975

J U D G M E N T

CORBETT, J.A.:

The three appellants appeared before VERMOOTEN, A.J., and assessors in the Witwatersrand Local Division upon a charge of murder and a charge of assault. They were all

convicted/.....

convicted on both charges and, in the case of the murder charge, the Court held that no extenuating circumstances were present. Each of the appellants was, accordingly, sentenced to death. Sentence in respect of the conviction for assault was postponed pending the decision of the State President as to whether to show clemency in regard to the death sentences. The trial Judge granted leave -

(a) to all three appellants to appeal against their convictions; and

(b) to appellant No. 1 (Charles Mtembu) to appeal against his sentence, should the appeal against the convictions fail.

It is upon this basis that the matter now comes before this Court.

The evidence which was placed before the trial Court established, beyond all doubt, that the deceased, a Bantu man named Daniel Mekaleni, was murdered on the night of 28 February 1974. In regard to the convictions

the sole issue on appeal is whether the three appellants were correctly identified as the persons who attacked and killed the deceased. As to sentence (in the case of appellant no. 1) the issue is whether, in the event of his having been correctly convicted, the Court should have found extenuating circumstances and, if so, what the appropriate sentence should be.

The State case against the appellants rested principally on the evidence of an eye-witness, a Bantu female named Priscilla Madonsela, who was the complainant in regard to the assault charge. Before outlining her evidence, however, it is convenient to give some description of the scene of the crime and its environs. In the vicinity of Rosherville power station, which is situated in the district of Johannesburg and about 15 miles from the centre of the city, there is a blue gum plantation covering an area about half the size of a rugby ground. At the time when the crime was committed this plantation was the locale for what appears to have been a fairly thriving illicit liquor trade. There were a number of so-called

"shebeen...../

"shebeen queens", who plied their trade in a clearing in the plantation. A number of these "queens" and their hangers-on, together with various other vagrants and out-of-works, lived in the plantation. They slept under the trees or in make-shift shelters. Adjacent to the plantation there are two dams separated by a narrow strip of land. There is a footpath which leads from the clearing in the plantation (where the liquor was sold) through the trees in the direction of the one end of the two dams. Here it links up with a footpath which runs along the strip of land between the dams.

On the morning of 1 March 1974 the body of the deceased was found just off this footpath between the dams. The body was lying on the edge of one of the dams, with the head under the water. The deceased was dead. The body exhibited seven stab wounds. According to the post-mortem report, the content of which was admitted by the defence to be correct and which was handed in by consent, the most serious wound appears to have been one

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in the upper, right-hand portion of the chest, which perforated the upper lobe of the right lung and cut the pulmonary artery. In addition, there were two wounds in the lumbar area of the back, one on the right shoulder, one on the lateral aspect of the shoulder, one on the left shoulder blade, and one just to the left of the twelfth thoracic vertebra. These latter wounds appear either to have been superficial or to have missed vital organs. The cause of death was stated to be stab wounds, a stab wound in the right pulmonary artery and haemorrhage.

Reverting to the evidence of Priscilla Madonsela, it appears that she came to live in the plantation in August 1973. She became one of the "shebeen queens". She and the deceased lived together. She stated in evidence that she knew the three appellants. Appellant No. 1 and appellant No. 3 (Jack Khumalo) also lived in the plantation, while appellant No. 2 (Solomon Mokwena) often came there to visit appellant No. 1. Appellant No. 2 was known to her by the name of "Mafuta". On the night of Thursday, 28 February 1974 Priscilla closed down her shebeen business at about 9 p.m.

That evening she had seen the three appellants at the clearing where the shebeens operated but they had already gone off somewhere. Priscilla and the deceased then left the clearing and walked together to the place in the bush where they normally slept. They followed the footpath through the plantation and turned into the path between the two dams. Shortly after they had done so, three persons jumped up out of the tall grass flanking the path and attacked them. She was able to recognize their attackers as appellants Nos. 1, 2 and 3. Her initial description of the attack was as follows (appellants 1, 2 and 3 having figured as accuseds 1, 2 and 3 respectively in the Court below):

> "Hulle het toe die oorledene vasgegryp en hom gesteek. Ek het geskree. Besk. 1 het my toe geslaan, en my met 'n mes gedreig. Ek het weggehardloop. Hy het my agterna gesit. Ek het in die gras ingehardloop en verdwyn."

Thereafter she elaborated upon this description. She stated that when appellant No. 1 hit her she was knocked down. Thereafter she got up and ran away, pursued by appellant No. 1. While running away she looked back and

saw/.....

saw appellant No. 2 holding the deceased down by his legs and appellant No. 3 stab the deceased with a knife. While she was being attacked by appellant No. 1 a fourth, shortish person also jumped up out of the grass but she was unable to identify him.

After running away Priscilla hid herself. The following (Friday) morning she looked for the deceased but was unable to find him. She enlisted the aid of his brothers who worked in the vicinity, and together they went to the place where the attack had occurred. There they found the body of the deceased lying on the edge of the dam, as already described. Shortly after this the police arrived.

During the course of cross-examination and questioning by the Court certain inconsistencies and defects in Priscilla's evidence were revealed. The more important of these were:-

(1) Her initial account of the attack, as given in evidence-in-chief, apart from stating that "Hulle het toe die oorledene vasgegryp en hom gesteek"

(see/....

(see the extract from her evidence quoted above), made no specific mention of appellant No. 1 having actually stabbed the deceased. In fact, in her elaborations of this account she created the impression, to begin with, that appellant No. 1 turned upon her before any stabbing took place. When pointedly asked by the trial Judge whether she had told him everything that appellant No. 1 did on this occasion she replied in the affirmative. Her evidence then proceeded (in answer to questions by the Court):

> "According to what you have told me in your evidence-in-chief, all I understand from you that Accused No. 1 did is the following: she said to me that while she and her husband were walking towards their sleeping place, when they came to a slight turn, these three accused jumped up there and 'hulle het die oorledene vasgegryp en hom gesteek'.--- Yes.
>
> Now what I don't know yet, and what I want to have clarity on, is who of the three accused stabbed him. And if it was more of the three than one, will you tell me?-- I saw Accused No. 1 distinctly stabbing the deceased."

From further questioning it appeared that Priscilla

averred/....

averred that she saw appellant No. 1 stab the deceased before he attacked her and before appellant No. 3 stabbed the deceased.

(2) In her evidence-in-chief Priscilla stated that all three appellants had knives. Under cross-examination she stated that she did not see a knife in the possession of appellant No. 2. When confronted with this conflict she stated that appellant No. 2 had "something which could have been a stick but I could not see clearly what it was, but it was a weapon." The evidence then proceeded:

> "MR. LANDSDOWN: Why did you say yesterday then that all three had knives?-- It was something like an iron which he had, that is why I say it was a knife.
>
> You see, in a stabbing case, it is a very serious answer, that the accused concerned had a knife.----
>
> All right - is there no answer?--
>
> BY THE COURT: The advocate is putting it to you this way: he says, you can't, in a serious case like this, make allegations against accused No. 2 and say he had a knife, and now come and say yes but it might have been a knife, because

it looked like an iron. That is what the advocate is saying to you. Can you explain that to her?-- It was a dangerous weapon, my lord, a sharpened piece of iron.

MR. LANDSDOWN: This is not the piece of wood which you suggested just now then, the stick?- I did say it was like a stick, a short stick, but it was not that, it was a dangerous weapon."

It was also put to her that, when giving evidence at the preparatory examination, she had not made any mention of a weapon in the possession of appellant No. 2: to which she replied - "It was a mistake".

For the rest the State case rested on certain circumstantial evidence and certain admissions, express and tacit, made by appellant No. 1.

Among the first policemen to arrive at the scene of the crime on Friday morning were Det.-Sgt. Scheepers and Det.-Sgt. Meyer, both of the S.A. Railway Police. They were actually called to the plantation area to investigate a report concerning the finding of another dead body (which has nothing to do with the present case), when they were approached by Priscilla and the deceased's two brothers

and/.....

and taken to the scene of the crime. After the discovery of the first body Scheepers had given instructions that all the persons found in the plantation area be rounded up and assembled at a central point. This was done under Meyer's supervision and about 30 Bantu men and women were brought together. Among them was appellant No. 1. When Priscilla joined this group she went up to Meyer and said to him -

> "Baas, daardie man wat daarso staan, hy is Umfalazi, hy het my man doodgemaak saam met Mafuta."

This allegation had reference to appellant No. 1 and Appellant No. 2 ("Mafuta"). Appellant No. 1 was standing about 1½ yards from Meyer. According to Meyer appellant No. 1 -

> "... het so half geskrik, en toe teruggedeins."

He said nothing. Appellant No. 1 was then arrested.

Thereafter appellant No. 1 took the police to certain ashpits in the Rosherville compound where he pointed out appellant No. 2, who was also arrested. From there Meyer took the two appellants to the charge office in his motor-car. On the way there, appellant No. 1 was heard

to say to appellant No. 2 - they were sitting in the back of the car -

> ".... laat ons liewers die waarheid praat, dit gaan nie help jy gaan lieg vir die baas nie."

On the same day appellant No. 1 expressed the desire to make a statement before a magistrate. He was taken before one and the gist of his statement reads:

> "Mafuta het rusie gehad met ander man. Hulle het mekaar gevloek. Hulle gaan na plek waar hulle bier gedrink het. Hulle gryp mekaar daar. Mafuta haal toe n mes uit en steek die oorledene. Mafuta hardloop toe weg. Ek het toe na my vrou gegaan. Ek het daar geslaap. Vandag het blankes en die polisie daar gekom. Ek was toe gearresteer saam met my vrou. Die mense het my aangerand. Dit is manne wat daar gedrink het die dag van die bakleiery. Dit is al."

The admisibility of this statement was contested by the defence on the ground that it had been extorted by violence. In the Court a quo the trial Judge (sitting alone) tried this issue and ruled that it was admissible. This ruling has not been challenged on appeal.

Another State witness, Det.-Sgt. Campher of the S.A. Railway Police, stated that on 2 March 1974 appellant

No. 1 took him to a water furrow near Jupiter Station (this is apparently situated in the Rosherville area) and, pointing to the furrow, told Campher that he had thrown a knife into the water the previous night. (Presumably this referred to the night of 28 February since appellant was in custody on the night of 1 March.) Owing to the size and depth of the furrow it was not possible to look for the knife.

Finally, the State called another "shebeen queen", one Sayinile Majola. She deposed to having seen appellant No. 1 on the Friday morning and having noticed that the dust-coat which he was wearing had splashes of blood upon it. She stated further that when the police appeared on the scene the appellant No. 1 ran away. In this context it must be pointed out that Sgt. Scheepers was asked about this. He said that when he first encountered appellant No. 1 he was wearing a dust-coat but that there was no blood thereon.

The three appellants all gave evidence in their own defence. They all denied having been involved in any attack upon the deceased and Priscilla.

The evidence of appellant No. 1 was, briefly, to the effect that his girl-friend, Emily, was a liquor seller at the plantation and that he used to sleep with her there. On the evening in question he had two cartons of Bantu beer to drink. After dark he left the shebeen clearing and went with Emily to their sleeping place. There were two other women there. They all slept throughout the night. He had no knowledge of the alleged assaults on the deceased and Priscilla. He made various allegations as to why Priscilla should falsely accuse him of the crimes but it is not necessary to go into the details of these.

The appellant No. 2 denied all knowledge of the plantation. He stated that he lived at the time in White City, Soweto, and that on the night in question he slept at home with his wife, Rosie Nkosi, and their children. He denied having been arrested at the ashpits

of the Rosherville compound and said that his arrest had taken place in a road at Rosherville, while he was looking for work there. Rosie Nkosi was called to confirm this alibi. She was told of his arrest on the Sunday. She last saw him early on the Friday morning when he said that he was going to his temporary work. It is to be noted that during the cross-examination of appellant No. 2 it was suggested that Rosie Nkosi did not exist. Sgt. Scheepers, however, was sent to the address given by appellant No. 2 and Rosie was found.

The appellant No. 3 stated that he had been living in the plantation with his wife, Sibongile, for five months prior to the death of the deceased. On the night of 28 February 1974 he slept with Sibongile in the plantation. He knew nothing of the attack upon Priscilla and the deceased. He alleged that as a result of an incident in January that year, which need not be detailed, Priscilla had a grudge against him. His wife Sibongile was not called as a witness. According to him she had gone home,

broken/....

broken her leg and been admitted to Dundee hospital. He did not know of her present whereabouts. He was arrested about the middle of March.

The trial Court accepted Priscilla's evidence as to the attack upon the deceased and herself and her identification of the appellants as being three of the attackers, rejected the alibis put forward by the appellants, holding them to be untrustworthy witnesses and found the appellants guilty of both the murder of the deceased and the assault upon Priscilla. It should, however, be mentioned that the Court experienced some difficulty in reaching a conclusion, as the following concluding remarks in the judgment demonstrate:

> "Hierdie was nie 'n maklike saak waarin om tot 'n beslissing te geraak nie, en my twee assessore wil hê dat ek op rekord stel, en ek doen dit met graagte, dat hulle met groot moeilikheid in hierdie saak tot 'n beslissing gekom het. Een van die dinge wat hulle besonderlik hinder is die uitwerking van Rosie Mkosi se getuienis in hierdie saak. Nogtans het ons, na sorgvuldige oorweging, en veral in die lig van die omringende omstandighede, saam met Priscilla aan die een kant, en die leuenagtige getuienis van die drie beskuldigdes aan die ander kant, tot 'n beslissing gekom, en dit is dat die Staat sy bewyslas gekwyt het om bo redelike twyfel te bewys dat

die drie beskuldigdes die oorledene aangeval het en gedood het."

On appeal appellants' counsel emphasized (i) the principles by which a Court should be guided in cases involving evidence of identification, as set forth, e.g., in S. v. Mehlape, 1963 (2) S.A. 29 (A.D.) and S. v. Mthetwa, 1972 (3) S.A. 766 (A.D.); and (ii) the caution which must be exercised before convicting an accused upon the evidence of a single witness (see S. v. ffrench-Beytagh, 1972 (3) S.A. 430 (A.D.), 445-6). It was submitted that the trial Court had paid insufficient attention to the principle referred to in (i) above and that, in regard to appellants Nos. 2 and 3, the Court had failed to take into account the dangers inherent in the acceptance of the evidence of Priscilla, a single witness.

In regard to the evidence of identification, it seems to me that there is substance in counsel's argument. It is true that the three appellants were known to Priscilla (appellant No. 2's denial of this cannot be accepted and was not supported by his counsel) and that this is an

important factor, but account must also be taken of the opportunities which she had to observe and correctly identify the attackers. The attack took place at 9 o'clock at night. A half-moon was shining. The period of time over which the action took place must have been a very short one. There was movement, some of it very violent movement, all the time. Priscilla was obviously very frightened. She was screaming. She was thrown to the ground and threatened with a knife. At the first opportunity she ran away. Some of her observations were apparently made while in the act of running away. It is therefore, manifest that the opportunity for careful, accurate observation was minimal. She asserted in her evidence that she recognised the three appellants, but no endeavour was made in the Court below to test this assertion by ascertaining exactly what she saw and how clearly she saw it. One does not know, for example, whether she recognised the attackers because she saw their faces or because of some other physical feature or characteristic

or because of the clothing they were wearing. And, if she saw their faces, whether she saw them full-face or from an angle. There is no clear indication at what stage during the attack she recognised the attackers and, apart from the person who attacked her, how far away they were when she recognised (or purported to recognise) them. All in all, the nature of the evidence presented by the State on this aspect of the matter was so cursory that I have considerable difficulty in concluding that at the end of the case all reasonable possibility of error in identity had been eliminated (cf. S. v. Mehlape, supra, at p. 33 A - B).

But it does not end there because, as I have already indicated, Priscilla was not an entirely satisfactory witness and her evidence can hardly be said to satisfy the test applied when the Court is asked to convict on the testimony of a single witness, viz. that it should be "clear and satisfactory in every material respect" (see S. v. ffrench-Beytagh, supra, at p. 446).

I have already detailed two major criticisms of her evidence, i.e., in regard to whether she saw appellant No. 1 stab the deceased and whether appellant No. 2 had a weapon. The latter criticism is, in my opinion, particularly well-founded and it shows Priscilla up in a very unfavourable light, namely, as a person quite ready to gild the lily. It will be recalled that when confronted with a conflict in her evidence in that she had originally stated that all three appellants had knives, whereas later she said appellant No. 2 did not have a knife, she then put him in possession of a "stick" which in the course of a few questions became transformed into a "sharpened piece of iron". Perhaps one of the most damning indictments of Priscilla's evidence came from Scheepers himself. While being cross-examined about certain reports made by Priscilla to himself and discrepancies between these reports and what she stated to the magistrate at the preparatory examination, he stated:

"U Edele/...

> "U Edele, wat sy aan my vertel het en wat sy aan die landdros gaan vertel het, is twee verskillende sake. Op een stadium sê sy so, kom sy voor die landdros dan verander sy haar storie dan vertel sy iets anders."

Other criticisms of Priscilla's evidence were made in argument and it was pointed out that it exhibited some confusion about the exact sequence of events. This, of course, is understandable but it nevertheless underscores the danger of relying upon such testimony when critical issues of identity depend thereon.

There is no indication in the trial Court's judgment that the Court was fully aware of the inadequacies of the evidence relating to identification or that it appreciated that before it could act on Priscilla's evidence alone it had to be convinced that it was clear and satisfactory in every material respect. Indeed, the very facts that appellant Nos. 2 and 3 were convicted ~~virtually on Priscilla's evidence alone and that the Court~~ appreciated that there were defects in her evidence (the two major criticisms mentioned above were referred to in

the judgment of the Court a quo), seems to confirm that this latter problem was overlooked. The trial Court appears to have relied heavily upon the finding that the appellants were untrustworthy witnesses, particularly in the case of appellants Nos. 2 and 3. This, of course, is partly a correlative to the finding that Priscilla was a reliable witness but, in so far as the finding was based upon independent grounds, it must not be elevated too greatly in importance. There do not appear to be substantial grounds for finding appellant No. 3 to have been an untrustworthy witness; but, in any event, false testimony by an accused person is no substitute for prima facie proof by the State.

The case of appellant No. 1 stands apart: for two reasons. Firstly, in the nature of things Priscilla had a better opportunity to observe the person who specifically attacked her (whom she alleges was appellant No. 1); and, secondly, because of the various items of evidence

circumstantial/....

circumstantial and otherwise, which have been referred to above and which were adduced in order to link him with the crimes. The trial Court leaned heavily upon this additional evidence as being indicative of the guilt of appellant No. 1 and confirmatory of the evidence of Priscilla.

While it is true that the person who attacked Priscilla would have come closer to her, at the time she would have been in dire terror and, no doubt, would have been endeavouring to avoid her attacker. Moreover, her evidence identifying appellant No. 1, in the moonlight, as her attacker is subject to all the criticisms as to lack of particularity, etc. which have been mentioned above.

As to the so-called confirmatory evidence, the various items, taken either individually or cumulatively, are, in my opinion, not sufficient to bolster up a State case based essentially upon the unsatisfactory

evidence of a single witness. I shall briefly consider these items in turn.

The significance of the evidence of Priscilla's accusation in the presence of Scheepers depends entirely upon whether the appellant No. 1 heard and understood the accusation and, if so, upon what inference is to be drawn from his reaction thereto. It is not wholly clear on the evidence that appellant No. 1 did hear and understand the accusation. His startled reaction, as deposed to by Scheepers, might be taken as an indication that he did, but when he was cross-examined about this the prosecutor did not fully pursue the matter. In any event, I am not satisfied that his failure to deny the accusation can be taken, in the circumstances, as an implied acceptance of the truth of the accusation. He was, after all, in the presence of a policeman and, for various reasons, he might have thought that he should hold his peace. He was not cross-examined as to why he did not reply to the accusation. He is likely to have been startled by the accusation whether guilty or innocent.

The remark, made in the back of the police car, as to telling the truth might be taken as an indication that the speaker (appellant No. 1) had something to hide but, standing alone, it is of small significance. It might be capable of an innocent explanation; and here again it must be pointed out that there was no cross-examination of the appellant No. 1 on this point.

The statement made to the magistrate, while inconsistent with the evidence of appellant No. 1, hardly advances the State case in that it is exculpatory of appellant No. 1 and purports to describe an episode quite unrelated to the facts deposed to by Priscilla.

The evidence of the pointing out at the water furrow, in so far as it had any probative value at all, was, in my opinion, wholly inadmissible. The sting lies in the averment that appellant No. 1 stated, with reference to the furrow, that this was where he had thrown a knife into the water. As a common law admission, this was not

admissible/....

admissible since the State failed to lay the necessary foundation of admissibility by showing that it had been freely and voluntarily made. In fact, when he was cross-examined about this episode, appellant No. 1 alleged that he had been forced, by violence, to show Campher where the knife had been thrown. Nor can appellant No. 1's statement be admitted under the umbrella of section 245(2) of the Criminal Code since that section does not cover statements made at a pointing out (see R. v. Nhleko, 1960 (4) S.A. 712 (A.D.), at p. 721). The trial Court placed some reliance on this evidence: wrongly, in my view.

Finally, there is the evidence of Sayinile Majola. The trial Court had difficulty with regard to the allegation about blood on the appellant No. 1's dust-coat (bearing in mind the contrary evidence of Scheepers) and decided, rightly in my view, not to make a finding adverse to the appellant No. 1 on this account. The Court did accept that appellant ran away when the advent of the police was observed. Very little can be deduced from this.

For these reasons, I am of the view that the so-called confirmatory evidence, while it may raise a suspicion, does not strengthen the evidence of Priscilla sufficiently to establish the guilt of appellant No. 1 beyond a reasonable doubt. A fortiori the State failed to prove the guilt of appellants Nos. 2 and 3. I might add that the Attorney-General, who appeared on behalf of the State on appeal (but not at the trial), informed the Court, with commendable candour and objectivity, that he was unable to support the convictions.

Before concluding there are one or two observations that I would like to make in regard to the presentation of the evidence in this case. The first point is that there was no proper plan of the locality placed before the Court by the prosecution. In fact, it was only after the Court had raised the matter that a very rudimentary sketch plan drawn by Scheepers, apparently from memory, during a luncheon adjournment was put in. The lack of a proper plan made it difficult, for this Court at any rate,

to follow and evaluate the evidence. The second point relates to certain evidence which was led by the prosecutor with reference to appellant No. 1's statement to the magistrate. Scheepers described how the appellant was taken to the magistrate to make a statement and his evidence-in-chief proceeded:

> "Kan u aan die Hof..... het u later van die landdros af 'n verklaring ontvang?-- Ek het 'n verklaring ontvang.
>
> En het die verklaring ooreengestem met die rapport wat die beskuldigde No. 1 aan u gemaak het in die kantoor?-- Nee Edele.
>
> Het u Besk. No. 1 op enige stadium aangerand daar in u kantoor?-- Nee Edele, ons het dit nie gedoen nie.
>
> DEUR DIE HOF: Die verklaring van die landdros wat hy geneem het, het nie ooreengestem met wat nie, Sersant?-- Aan die rapport wat hy aan my gemaak het.
>
> Met sy vorige rapport aan u?-- Dis reg."

Since appellant No. 1's statement was exculpatory of himself, the implication of this evidence is that in his statement to Scheepers he incriminated himself. Evidence of a confession to Scheepers was not admissible and should not have been hinted at in this way.

The appeals of all three appellants are allowed and their convictions and the sentences imposed on them in respect of the murder charge are set aside.

JANSEN, J.A.)
KOTZé, A.J.A.) Concur.