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Case No 242/1986

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MOJALEFA REGINALD SEFATSA	First Appellant
REID MALEBO MOKOENA	Second Appellant
OUPA MOSES DINISO	Third Appellant
THERESA RAMASHAMOLA	Fourth Appellant
MOTSEKI CHRISTIAAN MOKUBUNG	Fifth Appellant
MOTSIDI GIDEON MOKONE	Sixth Appellant
DUMA JOSHUA KHUMALO	Seventh Appellant
FRANCIS DON MOKGESI	Eighth Appellant

and

THE STATE	Respondent

CORAM: BOTHA, HEFER, SMALBERGER JJA, BOSHOFF et STEYN AJJA

HEARD: 2 NOVEMBER 1987

DELIVERED: 1 DECEMBER 1987

JUDGMENT

/BOTHA JA ...

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/BOTHA JA ...

BOTHA JA:-

On 3 September 1984 Mr Kuzwayo Jacob Dlamini, the deputy major of the town council of Lekoa, was murdered outside his house in Sharpeville, near Vereeniging. A mob of people numbering about 100 had attacked his house, first by pelting it with stones, thus breaking the windows, and then by hurling petrol bombs through the windows, thus setting the house alight. Mr Dlamini's car was removed from the garage, pushed into the street, turned on its side, and set on fire. As his house was burning down Mr Dlamini fled from it and ran towards a neighbouring house. Before he could reach it he was caught by some members of the mob, who disarmed him of a pistol that he had with him. He was then assaulted. Stones were thrown at him and some members of the mob went up to him and battered his head with stones. Thereafter he was dragged into the street, where petrol was poured over him and he was set alight. He died there.

/These ...

These events led to eight persons - they are the eight appellants in this case - being charged in the Transvaal Provincial Division before HUMAN AJ and assessors on two counts. Count one was a charge of murder, arising out of the killing of Mr Dlamini, to whom I shall henceforth refer as the deceased. Count two was a charge of subversion, which was framed in terms of section 54(2) of Act 74 of 1982 (the Internal Security Act), with reference to certain circumstances surrounding the killing of the deceased, which will be detailed later. Count two contained alternative charges of arson and malicious injury to property. All the appellants pleaded not guilty to all the charges. For convenience I shall refer to the appellants collectively as the accused and individually by means of the numbers allocated to each of them in the Court a quo. At the conclusion of a lengthy trial the trial Court convicted the accused as follows:

Count one: accused Nos 1, 2, 3, 4, 7 and 8

/convicted ...

convicted of murder;
accused Nos 5 and 6 convicted of public violence (this being a competent verdict in terms of section 258 of the Criminal Procedure Act 51 of 1977).

Count two: all the accused convicted of subversion.

In respect of the convictions of accused Nos 1, 2, 3, 4, 7 and 8 on the charge of murder the trial Court found that there were no extenuating circumstances. Consequently each of these accused was sentenced to death. In respect of the convictions of accused Nos 5 and 6 of public violence, each of them was sentenced to 5 years' imprisonment. In respect of the convictions of subversion all of the accused were sentenced to 8 years' imprisonment. In the case of accused Nos 5 and 6 it was ordered that their sentences of imprisonment were to run concurrently.

The trial Judge granted leave to all the accused to appeal to this Court. In his judgment granting leave the learned Judge specified certain grounds upon which he considered that leave should be granted. The first issue

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to be considered in this appeal is whether the trial Judge intended to curtail the ambit of the appeal by limiting it to the grounds specified in his judgment (this was the contention advanced on behalf of the State) or whether the grounds specified were merely the reasons mentioned by the learned Judge for granting leave which was intended nevertheless to be leave in general terms (as was contended for on behalf of the accused). This issue was argued separately, as a preliminary matter, at the outset of the hearing of the appeal. At the conclusion of this part of the argument the Court announced that counsel for the accused would be allowed to argue the appeal without any limitation as to the scope of the grounds he wished to canvass and that the Court would deal with the preliminary arguments in its final judgment. In order to explain why this course was followed, and also with a view to the basis upon which the factual issues will be dealt with later in this judgment, it is necessary first of all to

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survey some aspects of the course of the trial generally and of the trial Judge's judgment on the merits, and thereafter to advert to the application for leave to appeal and the trial Judge's judgment thereon.

The trial was, as I have said, a lengthy one. A large number of witnesses were called to testify, both for the State and for the accused. Amongst the witnesses called by the State were a number of eyewitnesses of the events, or parts of the events, in question. Of these, the names of three must be mentioned now: Jantjie Mabuti, Mrs Alice Dlamini, and Joseph Manete. Mabuti gave the most detailed account of the entire sequence of the events. In his evidence he implicated accused Nos 1, 4, 5, 6, 7 and 8, all of whom were known to him. Mrs Dlamini, the widow of the deceased, testified to part of the events, and implicated accused No 1, whom she knew. Manete described a part of the events that he witnessed, and implicated accused Nos 7 and 8, who were known to him.

/Accused ...

Accused No 2 was implicated by a confession that he had made to a magistrate, which was ruled to be admissible after a "trial within the trial", and also by a letter he had written to the Minister of Justice while in prison. Accused No 3 was implicated by means of police evidence as to the circumstances under which the deceased's pistol was found in his possession some time after the events.

During the cross-examination of the State witness Manete, counsel for the accused informed the trial Judge that he (counsel) was in possession of a statement made by Manete which was prima facie a privileged statement, having been made by the witness to an attorney for the purpose of obtaining legal advice. Counsel argued that he was nevertheless entitled to cross-examine Manete on the contents of the statement. It will be necessary later in this judgment to examine the nature of the argument that was put forward by counsel and what transpired during its presentation to the Judge a quo. For present

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purposes the point to be recorded is that the trial Judge at the conclusion of the argument delivered a judgment in which he held that he had no power to order Manete to be cross-examined about the statement. Accordingly he ruled that such cross-examination be disallowed.

All the accused gave evidence denying complicity in the events that led to the killing of the deceased. Most of them denied having been at or near the scene at any relevant time and some set up alibi defences of an elaborate nature, involving the calling of many witnesses. In addition, a number of witnesses were called to contradict some of the general observations deposed to by the eyewitnesses called by the State, particularly Mabuti.

In a comprehensive judgment on the merits of the case HUMAN AJ analysed all the evidence in detail and furnished full reasons as to why the trial Court accepted the evidence of certain witnesses and rejected that of others. With regard to the eyewitnesses called

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by the State, the trial Court found that some of them were unreliable and that no weight could be attached to their evidence; others the trial Court found to be both credible and reliable witnesses. In the latter category were the three witnesses whose names I have mentioned already: Mabuti, Mrs Dlamini, and Manete. It is clear from the judgment that the trial Court considered Mabuti to be a particularly impressive witness; the Court's opinion of him, as recorded by the trial Judge, was that he was an extremely competent, intelligent and honest witness. During the course of the events in question he had deliberately from time to time moved from one vantage-point to another in order to be able the better to observe the events, with the specific object of later making a full report of what he had seen to the police (which he did). The Court found, on an analysis of his evidence, that he was able to make the observations to which he testified and that they were reliable. Of

/Mrs ...

Mrs Dlamini the trial Judge observed that her honesty could not be questioned (nor was it), and that her observations were found by the trial Court to be reliable. As to Manete, the trial Judge remarked that in respect of some details his evidence was subject to valid criticism. The trial Court treated his evidence with caution, but nevertheless found it to be acceptable, particularly in so far as he implicated accused Nos 7 and 8. In this regard it must be noted that the trial Court, in assessing the State case, placed reliance on the fact that Mabuti and Manete corroborated each other in a number of material respects. (This aspect of the trial Court's approach will be referred to again later.) With regard to the witnesses for the defence, the trial Judge canvassed numerous contradictions and other unsatisfactory features in the evidence of each of the accused, which the trial Court regarded as justifying the rejection of the denials of complicity by the accused as being false beyond reason-

able doubt. Similarly, the evidence of the witnesses called in support of the alibi defences and in refutation of some of Mabuti's general observations was scrutinized at considerable length, in order to demonstrate the grounds upon which the trial Court concluded that that evidence, in so far as it was material, was also false beyond reasonable doubt.

Against this background I now turn to the application for leave to appeal. The application contained no less than 22 separately enumerated grounds upon which leave was sought, some of which were of a composite nature. I do not propose to quote these grounds. For the most part they related to specific findings of fact by the trial Court and to the acceptance or rejection by the trial Court of the evidence of particular witnesses. For instance, in para 10 the ground of appeal put forward was that the trial Court had erred in accepting the evidence of Mabuti, for a number of reasons, including the

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fact that his evidence was in conflict with that of certain named defence witnesses on particular stated issues of fact. In a limited number of instances, however, the grounds of appeal advanced were based on the supposition that the State evidence was acceptable. For instance, in paras 1 and 2 it was said that there was no evidence that any act of any of accused Nos 1, 2, 3, 4, 7 and 8 had caused the death of the deceased, while in para 12 it was alleged that the trial Court had erred in finding on the basis of the State evidence that accused Nos 5 and 6 were guilty of public violence. Particular mention must be made of para 14, in which the ground of appeal raised was that the trial Judge had erred in law in disallowing the cross-examination of the witness Manete in regard to the statement made by him to the attorney of record in the case. For the rest, the last few grounds of appeal related to the finding that there were no extenuating circumstances in regard to the six

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accused convicted of murder, and to the sentences of imprisonment imposed on all the accused, as mentioned earlier.

In his judgment on the application HUMAN AJ said the following:

> "Insofar as the application for leave to appeal to the Appellate Division is concerned on the charge of murder and the subsequent sentence of death there are at least twenty-two grounds advanced in the application for leave to appeal. It is unnecessary to repeat them all in view of the fact that I am of the view that there is no reasonable prospect of success insofar as the facts found proved by this Court is (sic) concerned but on three other grounds, being questions of law, I am satisfied that I should grant leave to appeal to the Appellate Division."

The learned Judge proceeded to deal with the three grounds he had in mind as follows. First, with reference to an argument advanced by counsel for the accused that there was "no causal connection proved between the acts of the several accused and the deceased's death", the learned

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Judge quoted at length certain passages from three of the judgments delivered in S v Khoza 1982 (3) SA 1910 (A) and then said:

> "..... it seems to me that the question of causality is in the melting pot and should once and for all be decided authoritatively by the Appellate Division. On that ground I am, therefore, of the opinion that leave should be granted."

The learned Judge continued as follows:

> "But there is a second ground in law why I should grant leave to appeal and that is that I disallowed the cross-examination of the witness Manete in regard to a privileged statement that he had made. Another Court may come to the conclusion in that respect that I erred in law and that may have been to the prejudice of the accused generally, especially accused nos. 7 and 8."

The learned Judge mentioned that counsel for the State had referred him to section 201 of the Criminal Procedure Act, and, having quoted the provisions of that section, went on to say:

> "I must point out that I gave a separate

> judgment in this respect and I did not agree with the judgment of an English judge which was quoted to me by Mr Unterhalter for the defence. However, I am still of the view that another Court may come to a different conclusion despite the provisions of the section to which I have just referred on the ground that where it is in the interests of an accused such cross-examination should have been allowed."

The judgment continued as follows:

> "The third ground on which I grant leave to appeal is the question of my interpretation of section 54(2) as well as the provisions of section 69 of the Internal Security Act No 74 of 1982. Another Court may come to a conclusion that my interpretation was not altogether correct in law."

Having stated the three grounds of appeal as quoted above, the learned Judge concluded:

> "I am therefore disposed to grant leave to appeal to all the accused for leave to appeal (sic) to the Appellate Division."

However, the learned Judge then added a further final paragraph to his judgment, which commenced by mentioning that accused Nos 5 and 6 had been convicted of public violence.

He then referred, in passing it seems, to accused No 4. He said that it had been argued on her behalf that there was no evidence proving that certain words of incitement which she had shouted (according to the finding of the trial Court, as will appear later) had been overheard or acted upon by other members of the mob. The learned Judge made no comment on this, but simply reverted to accused Nos 5 and 6 by saying, in conclusion of his judgment:

> "I am also disposed to grant leave to accused nos. 5 and 6 to appeal on the charge of public violence."

It will be convenient to dispose at once of the issue whether or not the trial Judge intended to limit the ambit of the appeal to the grounds specified by him. In my opinion, although the judgment granting leave is not ideally clear, the learned Judge did intend so to limit the scope of the appeal. Having regard to the fact that he expressed the view that there was no reasonable

prospect of success in relation to the facts found proved by the trial Court, it is difficult to conceive that he could have intended to allow the accused to canvass the trial Court's factual findings on appeal, for, ex hypothesi, that would have been a futile exercise. This view is fortified by his use of the words "but on three other grounds, being questions of law", by which the findings of fact were implicitly excluded from consideration. The manner in which the learned Judge enumerated the three specified grounds of appeal, as quoted above, also militates against the possibility that he intended to grant leave in general, unrestricted terms, for it would be difficult to reconcile the way in which he expressed himself with an intention merely to state reasons for granting leave generally. In that light his statement that he was disposed to grant leave to all the accused cannot, in my view, properly be construed as granting leave generally, over and above the three grounds of appeal which had been specified. Nor

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does the final paragraph of his judgment materially alter the position. In the context, the granting of leave to accused Nos 5 and 6 to appeal against their convictions of public violence was most probably based on para 12 of the application for leave, to which reference was made earlier, in which it was alleged that the trial Court had erred in finding on the basis of the State evidence that accused Nos 5 and 6 were guilty of public violence. In effect, the learned Judge added a fourth ground of appeal, relating to accused Nos 5 and 6, to the three grounds already enumerated by him, but I do not think that he intended thereby to open the door to a consideration of the trial Court's findings of fact in regard to either the conduct of accused Nos 5 and 6 or any other aspect of the case. Similarly, the reference to the argument advanced on behalf of accused No 4, mentioned above, was most likely meant merely to indicate a point that could be considered on appeal, without any intention to enlarge the ambit of

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the leave granted so as to embrace an attack on the trial Court's findings of fact. Finally, the learned Judge omitted to deal pertinently in his judgment with the question of leave to appeal against the finding that there were no extenuating circumstances on the murder count or against the sentences imposed in respect of the other convictions. It is not clear whether the learned Judge, by not mentioning this aspect of the matter, intended to convey that leave to appeal in that regard was being refused, or whether his failure to deal with it was merely an oversight. But whatever the position may be in that respect (and I shall revert to it later), I do not consider that it could serve to justify an inference that the learned Judge intended to grant leave to appeal in respect of the convictions themselves in terms broader than those specified in the judgment.

It will be recalled that the ambit of the leave to appeal granted by the Judge a quo was argued as a

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preliminary issue at the outset of the hearing of this appeal, and that the Court then ruled that counsel for the accused would be allowed to canvass all the issues that he wished to raise. It is necessary now to explain why this ruling was made. It was not based upon a consideration of the terms of the judgment granting leave, taken generally, nor upon the arguments addressed to the Court as to the interpretation of the judgment. The basis of the ruling was a narrow one, and it related solely to the circumstances pertaining to the witness Manete. To sum up: Manete was an eyewitness called by the State, whose evidence the trial Court found to be acceptable, particularly in regard to the complicity of accused Nos 7 and 8; in assessing the State case, as I pointed out earlier, the trial Court had placed reliance on the fact that Manete and Mabuti had corroborated each other in material respects, and Mabuti was a most important witness for the State; but the trial Judge had

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disallowed cross-examination of Manete on a statement made by him; leave was sought to appeal against that ruling; and the trial Judge granted leave on that ground, remarking that the accused, particularly accused Nos 7 and 8, could have been prejudiced in that respect. In these circumstances it was clear that if this Court were to decide that the trial Judge had erred in disallowing Manete's cross-examination a re-appraisal of the entire case would be called for, leaving aside the evidence of Manete. But at the stage when the preliminary issue was being debated the other issue as to the cross-examination of Manete was yet to be argued. It was obvious that the latter issue involved a principle of considerable importance and it was felt that it would be inadvisable to call for argument on it and to decide it in the context of considering the preliminary issue. Accordingly it was for the purpose of catering for the possibility of the Court ultimately finding that Manete's cross-examination

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had been wrongly restricted, and of a re-appraisal of the remainder of the evidence in that event, that the Court made the ruling under discussion. It was upon that footing that counsel for the accused was given free rein in his argument.

The possibility thus catered for has not eventuated. For reasons to be stated later, the conclusion arrived at, after consideration of the arguments presented on this score, is that the trial Judge cannot be faulted for having disallowed the cross-examination of Manete to the extent that he did.

That, however, does not yet put an end to the preliminary issue. Counsel for the accused argued in the first place that the trial Judge's judgment on the application for leave to appeal, properly construed, did not limit the grounds upon which the appeal could be argued. For reasons which appear from what has been said above, that argument fails. But in the second place

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counsel argued that even if the trial Judge did intend to restrict the grounds of appeal to those enumerated by him, this Court could and should nevertheless allow the appeal to be argued on a broader basis, inclusive of all the grounds put forward in the application and some others too. In one sense, this argument is now academic, since full argument on the appeal has been allowed in any event, for the reasons explained above. But in another sense the argument is still of residual relevance, for upon the answer to it will depend the limits of the issues which fall to be discussed in this judgment. I therefore proceed to deal with the argument.

It is generally accepted that leave to appeal can validly be restricted to certain specified grounds of appeal (see R v Jantjies 1958 (2) SA 273 (A) at 275 A; S v Williams en 'n Ander 1970 (2) SA 654 (A) at 655 F-G; S v Sikosana 1980 (4) SA 559 (A) at 563 A-B). In practice this is frequently a convenient and commendable

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course to adopt, especially in long cases, in order to separate the wheat from the chaff. On the other hand, this Court will not necessarily consider itself bound by the grounds upon which leave has been granted. If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground to be argued. This is well illustrated by the judgment of SCHREINER ACJ in R v Mpompotshe and Another 1958 (4) SA 471 (A) at 472 H - 473 F. In my view, however, it requires to be emphasized that an appellant has no right to argue matters not covered by the terms of the leave granted. His only "right" is to ask this Court to allow him to do so. In Mpompotshe's case supra SCHREINER ACJ referred to "matters which this Court should think worthy of consideration", and to the power of the Court "to condone the delay and grant leave to appeal on wider grounds than those allowed by the trial

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Judge". A formal petition for leave to appeal on wider grounds is not an indispensable prerequisite, since the matter is before the Court, whose members would be conversant with the record, but the remarks I have quoted show that the Court will certainly decline to hear argument on an additional ground of appeal if there is no reasonable prospect of success in respect of it. I should make it clear that I am dealing here with the widening of grounds of appeal in respect of an appeal against a conviction. I am not dealing with the situation where leave has been granted to appeal against sentence only and the appellant seeks to appeal against his conviction - as to which, see S v Langa en Andere 1981 (3) SA 186 (A) at 189 F - 190 F; nor am I dealing at the moment with the converse situation where leave has been granted to appeal against a conviction and the appellant seeks to appeal against his sentence - as to that, see S v Shenker and Another 1976 (3) SA 57 (A) at 58 H - 61 E,

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to which further reference will be made below.

In the present case the grounds of appeal, other than those enumerated by the trial Judge, which counsel for the accused sought to argue (and, in the event, did argue) were, for the most part, wholly without substance. Were it not for the peculiar situation arising from the point relating to the cross-examination of Manete, as described above, this Court would not have allowed argument to proceed on those grounds of appeal. The difficulty caused by the point about Manete's cross-examination has now been resolved, as I have indicated. In these circumstances there is no occasion for this Court in the present judgment to furnish reasons for its view that the grounds of appeal to which I have referred are without substance. The position is analogous to that which would have existed had the accused petitioned the CHIEF JUSTICE for leave to extend the grounds of appeal stated by the trial Judge. Accordingly I shall make no

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further reference to the additional grounds of appeal which were argued but which are considered to be without merit. I would only mention in general that the trial Court's strong findings of credibility and reliability in respect of Mabuti and Mrs Dlamini, as well as the trial Court's criticisms of the evidence of the accused and their witnesses, are fully borne out by a perusal of the record.

In two instances, however, apart from the grounds of appeal allowed by the trial Judge, the arguments raised by counsel for the accused are not entirely devoid of merit. They relate, firstly, to the conduct of accused No 1 which the trial Court found to have been proved, and, secondly, to the inference as to the complicity of accused No 3 which the trial Court drew from the facts found proved against him. I shall deal briefly with these matters later in this judgment. In addition, a question was raised in argument before this Court which

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had not been referred to in the Court a quo at all, nor even in counsel's heads of argument, but which requires consideration. It relates to the propriety of the convictions of accused Nos 5 and 6 of both public violence and subversion. This will also be dealt with later in this judgment.

As to the trial Court's finding in regard to the absence of extenuating circumstances and the trial Judge's sentences, Shenker's case supra is authority for the proposition that this Court is empowered to consider an appeal against sentence even if leave has been granted to appeal against conviction only. I imagine that in that situation, too, the Court would entertain an argument directed against sentence only if it were satisfied that there was a reasonable prospect of it succeeding. In the present case, however, I do not wish to pose this question, for, as I have pointed out, it is not clear from the judgment of the trial Judge whether or not he

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intended to refuse leave to appeal in respect of the finding in regard to extenuating circumstances and the sentences imposed. Accordingly, in so far as it may turn out to be necessary, I shall deal with these matters at the end of this judgment, as if leave had been granted in those respects.

That concludes my survey of the ambit of this appeal.

It will be convenient to deal first with the second ground of appeal mentioned by the trial Judge, i e the matter of Manete's cross-examination. How the point arose and was dealt with in the course of the trial requires to be described in some detail. After the cross-examination of Manete by counsel for the accused had been in progress for some considerable time, counsel requested the trial Judge to order that the witness should temporarily stand down and leave the court-room. The trial Judge acceded to the request. Thereupon counsel informed

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the trial Judge that he was in possession of a statement that the witness had made to an attorney, which was in fact a communication made by him as client to such attorney whom he had consulted, and which was accordingly privileged. From exchanges between counsel and the trial Judge during later stages of the debate that ensued, the following further information relating to the statement emerged: it was made by the witness during a consultation with his attorney for the purpose of obtaining legal advice on a matter concerning him (the witness) in relation to the very trial which was being heard; the attorney concerned was the very same attorney who was the instructing attorney acting on behalf of the accused in the trial; and the attorney had made the statement available to counsel for the accused after having sought and obtained the views of a number of members of the Law Society, which were to the effect that the matter should be put before the trial Court in order to seek its guidance.

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On being informed of the existence of Manete's privileged statement which counsel had in his possession, the trial Judge raised with counsel the question whether the Court would have any power to order the witness to answer questions in regard to the statement, in the event of the witness not being prepared to waive the privilege attaching to it. Counsel submitted that the trial Judge did have that power. In support of this submission counsel relied on R v Barton (1972) 2 All E R 1192. In fact, he read out the whole of the judgment in that case to the trial Judge. In view of the importance which counsel attached to that judgment, both in the Court a quo and in argument before this Court, and having regard to the tenor of the judgment, I feel constrained to quote it in full. It was a judgment delivered by CAULFIELD J in the Crown Court at Lincoln. In the quotation which follows, I have emphasized certain passages for ease of reference back later.

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"This is a novel application in my experience. We are on circuit and counsel, who have given the greatest possible assistance, have themselves been in some difficulty in carrying out the research necessary in order to help the court. This accused man is facing a number of counts which allege that, in the course of his employment as a legal executive with a firm of solicitors in this county, he has fraudulently converted to his own use moneys which formed part of an estate which he was administering on behalf of either executors or administrators. He is also charged with theft and falsification of accounts; all these counts are said to have arisen out of his administering, in the course of his duties, certain estates. It is not necessary for this ruling also to state that in the Crown case the Crown alleges that in one or two instances he was an executor or trustee of estates.

These, of course, are very serious counts and allegations that are made against him. After arraignment, but before impanelling the jury, counsel for the accused made an application to me to make a ruling on a point that had been taken by a solicitor who is a partner in the relevant firm. A subpoena has been served on the solicitor by the defence and, included in the narrative of the subpoena to attend to give evidence, is what in effect is the old-fashioned notice to produce documents, and those documents of which notice is given to produce are, I am told (and I assume for the purposes of this ruling), documents that have come into existence in the solicitors' office where the solicitor

is acting as the solicitor to executors or administrators in the administration or winding-up of estates; and those documents in respect of those estates are not documents that would otherwise be relevant or admissible in this trial. They are not the subject of any charge against the accused, and on the Crown case they would not be in evidence. But I am told by counsel for the accused, and I have to assume that this is absolutely correct for the purposes of this ruling that the documents, or certain of the documents included in the notice to produce, will help to further a point that is going to be raised in defence of these charges and, subject to correction from counsel for the accused, that really is the ground on which he seeks to make this application. Putting it in another way, counsel says that in the interests of his client justice would not be done unless these documents were disclosed. Counsel contends that certain of those documents may or do contain evidence which will help the accused in resisting these counts to which he has pleaded not guilty.

The solicitor has acted perfectly properly, as one would expect, throughout. He in fact is a witness for the Crown, and therefore the subpoena to give evidence which has been served on him was really unnecessary. This ruling is concerned simply with the notice to produce that is incorporated in the subpoena. Having taken the advice of the Law Society, the solicitor has taken the point that these documents are privileged and therefore he does not have

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to produce them. He has taken this point in a purely professional way; he has not taken it aggressively. When the defence application was made he was not in court officially, and in any event he is a witness for the Crown. He was not represented and I took the view that as a matter of justice he should have the opportunity of receiving independent advice and having separate representation before me. So the matter was adjourned for a day or so and now counsel has made submissions to me on behalf of the solicitor to support his contention.

The principles of legal professional privilege are fully set out in Professor Cross's book on evidence to which I have been referred, and generally speaking it is perfectly simple to decide whether or not a particular document is privileged. As Professor Cross says in his book:

> 'Communications passing between a client and his legal adviser, together, in some cases, with communications passing between these persons and third parties may not be given in evidence without the consent of the client if they were made either (1) with reference to litigation that was actually taking place or was in the contemplation of the client, or (2) if they were made to enable the client to obtain, or the adviser to give, legal advice.'

And of course the privilege is one that is claimed by the client. Further, it is fairly

/plain ...

plain from what counsel for the solicitor has submitted to me on his behalf that a solicitor has a duty to alert his client to this particular point, and indeed to take this point even though the client has not himself had the opportunity to take it. So the solicitor has acted perfectly properly throughout. In the normal case in civil proceedings this is the sort of application which would come to be determined prior to the trial, and the documents which were the subject of objection by the solicitor would be produced to the master or judge and then the judge, who would not be trying the action, would look at the documents and give a ruling, and of course the procedure is well laid down as to what should be done. That is why I was in some difficulty as to how to determine this application, which of course is being made in the absence of the jury. So I have not seen any of these documents and therefore, apart from what I have heard from counsel, I do not think that it is possible for me to make any ruling on the ground that these documents were documents that had any reference to litigation that was actually taking place or was in the contemplation of the client, or secondly - going to the second point made by Professor Cross - that the documents were made to enable the client to obtain, or the adviser to give, legal advice.

I am not going to decide this application on the basis that either one or other of those two principles is not satisfied in this particular application. I think the correct principle is this, and I think that it must be restricted to these particular facts in a criminal trial, and the principle I am going

to enunciate is not supported by any authority that has been cited to me; I am just working on what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown. I think that is the principle that should be followed.

I am not going to express in any detail what documents should or should not be in evidence in this case. Of course, those documents, when they are produced in this case, will have to contain evidence that is both relevant and admissible. Those two points will have to be satisfied, and no doubt the Crown will be alert to object if there is any evidence in the documents which is neither relevant nor admissible, but where there is evidence which is in the possession of the solicitor that is relevant and admissible to a contention by the accused either pointing to his innocence or resisting his guilt, that document in my judgment is not privileged and the solicitor must obey the subpoena and notice to produce that has been served on him. I am at this stage only stating what I think is the principle to be followed, and from what I have been told on behalf of the solicitor he is desirous of co-operating.

/The ...

> The documents can no doubt be examined by counsel for the defence in the company of counsel for the Crown, and I see no reason why the solicitor should not have his own separate adviser present at the time. I have no doubt then that the point I have made in this ruling will be appreciated and only those documents which are relevant and admissible will be brought before the court. Therefore I do not set aside this subpoena and I do not set aside the notice to produce."

As to the first passage emphasized in the quotation above, counsel for the accused, when reading it to the trial Judge, paused after each sentence in order to stress that he was putting forward contentions in the present case which were identical in substance with those referred to in that passage. As to the last two passages emphasized in the quotation above, counsel said that they embodied the principle on which he was relying for the submission that he was entitled to cross-examine Manete on his statement.

Immediately after counsel for the accused had concluded his reading of the judgment in Barton's case

/to ...

to the trial Judge, the following exchanges took place between the learned Judge and counsel:

> "COURT: My difficulty is I do not know how this statement will assist, even if I adopt that principle, how will this statement assist the accused to prove their innocence? How can I make a ruling before I know that?
>
> MR UNTERHALTER: Well, My Lord, without going into the matter in any detail ...
>
> COURT: Well, I must know.
>
> MR UNTERHALTER: Yes. Well, if I may, with Your Lordship's permission do so, the contents of this statement are to the effect that the implication of accused no. 7 and no. 8 is not a voluntary implication, but an implication that was dictated to this witness and because of that ...
>
> COURT: I beg your pardon? It was not a voluntary what?
>
> MR UNTERHALTER: It was not a voluntary implication of accused no. 7 and 8, but he was told to implicate them. In other words he is not giving the evidence absolutely untrammelled, he did it because he was told by the police to do it."

After further argument by counsel for the accused (during which no fresh light was thrown on the contents of the statement), the trial Judge enquired from counsel for the

State what his attitude was, whereupon counsel for the State responded briefly that he was unaware of what was contained in the statement and that he objected to the disclosure of its contents on the ground of the privilege attaching to it. Thereafter Manete was called back to the witness stand. The trial Judge explained to him that counsel for the accused wished to cross-examine him on the statement that he had made to the attorney, that this statement was privileged, that he could claim privilege or waive it, and that he was entitled to seek legal advice on his position if he wished to do so. The witness said that he recalled having made a statement to an attorney. The following then appears from the record:

> "Now you see, you cannot be questioned about that statement because it is a privileged statement. -- Yes, I understand.
>
> Unless I order you to answer questions about that statement. Now, in order for me to determine what to do I must enquire from you whether you claim privilege, in

/other ...

other words you refuse to answer questions about that statement. -- Yes, I refuse.

Pardon? -- Yes, I do not want to answer questions about that statement.

You do not want to answer questions about ... -- Yes.

So you claim privilege? -- Yes."

Counsel for the accused then presented further argument to the Court a quo. He referred to the comments on Barton's case appearing in Phipson on Evidence (12th ed) para 585 at 242 (see now the 13th edition para 15-07 at 294) and in Cross on Evidence (5th ed) at 290-1 and 315. Finally, he placed before the trial Judge a passage in the speech of LORD DIPLOCK in Secretary of State for Defence and Another v Guardian Newspapers Ltd (1984) 3 All E R 601 (H L) at 605 d-g. That case concerned a statutory provision relating to the disclosure of certain sources of information. In the passage cited LORD DIPLOCK referred to the discretion that an English judge had under the common law to decline to order disclosure of sources of information, despite their relevance to an issue in

/particular ...

particular proceedings, where such disclosure would be contrary to some public interest; he said that the classic example of the exercise of this discretion was where disclosure of the identity of police informers was sought; he mentioned that the discretion had been extended by the House of Lords to other sources of information, in different contexts; and then he went on to say the following:

> "The rationale of the existence of this discretion was that unless informants could be confident that their identity would not be disclosed there was a serious risk that sources of information would dry up. So the exercise of the discretion involved weighing the public interest in eliminating this risk against the conflicting public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue on which it is required to adjudicate should not be withheld from that tribunal. Unless the balance of competing public interest titled (sic ? tilted) against disclosure, the right to disclosure of sources of information in cases where this was relevant prevailed."

Counsel for the accused told the trial Judge that he was invoking "that principle" for the submission that disclosure

of Manete's statement should be permitted.

The trial Judge thereupon gave judgment on the matter. He reviewed the authorities to which he had been referred, and concluded as follows:

> "I am of the view that where the witness claims privilege in regard to a statement that he had made to a professional person and he does not waive that privilege that I have no power to order him to be cross-examined about that statement. I therefore cannot accede to defence counsel's request that I should order him to be cross-examined on that statement which he admittedly made ..... to ..... an attorney, acting for the accused at the present stage."

I have dwelt at some length on the course of events in regard to the present matter in the Court a quo because when counsel for the accused argued the matter in this Court it appeared that there was, if not a change of front, at least a distinct shift in the emphasis of his argument. Although he still relied heavily on Barton's case supra, the main thrust of his argument in

/this ...

this Court was that the trial Judge had a discretion as to whether or not he would allow Manete to be cross-examined on his statement, and that the learned Judge, by holding that he had no power to do so, had not exercised his discretion at all, or at least not properly. I shall deal later with the argument in regard to the discretion and the authorities cited to us by counsel. For present purposes the question is whether the trial Judge was ever invited to exercise a discretion. When this question was put to counsel for the accused in the course of his argument in this Court he fairly conceded that that had not been done in so many words, but he urged that it had been done implicitly. The point about this enquiry is, of course, that there may possibly be no room for entertaining an argument on appeal that the trial Judge had failed to exercise a discretion, or that he had exercised it improperly, if in fact he had not been invited to apply his mind to the exercise of a discretion

/at ...

at all.

In view of the course of events outlined above, I do not agree with counsel's submission that the trial Judge had implicitly been asked to exercise a discretion, at least not in the sense in which the phrase "exercise a discretion" is ordinarily used in a court of law. The judgment of CAULFIELD J in Barton's case supra was the cornerstone of the argument in the Court a quo. That judgment, however, as I understand it, did not involve the exercise of a discretion. The principle on which the decision was stated to be based, to paraphrase it in broad terms, was that in a criminal case documents in the possession of a solicitor which would otherwise have been the subject of legal professional privilege, were not privileged from production when once it was alleged on behalf of the accused that they could help to further the defence of the accused by pointing to his innocence or resisting his guilt. It is clear that the mere

/allegation ...

allegation by counsel for the accused in that case that the documents in question would or might assist the accused in his defence was regarded by CAULFIELD J as a sufficient ground in itself for destroying the privilege. As pointed out earlier, with reference to the first passage emphasized in my quotation of the judgment in Barton's case, that is exactly the way in which counsel for the accused in the present case presented his argument in the Court a quo. It was never suggested to the trial Judge that he should peruse Manete's statement with a view to exercising a discretion as to whether or not cross-examination on it should be allowed. Such meagre information regarding the contents of the statement as was disclosed, was only elicited in response to questioning by the trial Judge. I appreciate that counsel for the accused had reservations about the propriety of divulging the contents of the statement until he had obtained a ruling on its admissibility from the trial Judge, but that cannot alter

/the ...

the basis upon which the ruling was sought. Nor did counsel's reliance on the remarks of LORD DIPLOCK in the Guardian Newspapers case supra, quoted above, take the matter any further. The discretion under discussion there related to the weighing of conflicting public interests in regard to the disclosure of sources of information, and it was referred to in the most general terms, unrelated to the relevant facts and circumstances of any particular case. The passage quoted could not have been intended to alert the trial Judge to the possibility of exercising a discretion related to the particular facts and circumstances of the present case, as opposed to the application of the broad principle adopted in Barton's case supra. Accordingly it is not surprising that the trial Judge, having decided, as he obviously did, not to follow the approach in Barton's case, did not in his judgment advert to the exercise of a discretion.

On the basis of the analysis above it is

/arguable ...

arguable that it is not open to the accused on appeal to challenge the ruling of the trial Judge on the ground of his failure to exercise a discretion properly or at all. I do not propose to pursue this point, however, since I prefer not to base my decision on such a narrow ground. The manner in which the argument for the accused was put forward in the Court a quo remains relevant, however, as will appear in due course, to the consideration of the argument addressed to this Court regarding the trial Judge's discretion and the way in which it was submitted that he should have exercised it. I proceed to deal with this argument.

In support of his contention that the trial Judge was vested with a discretion which he should have exercised in favour of allowing Manete to be cross-examined on his privileged statement, counsel for the accused referred to a number of Australian and Canadian cases, inter alia: Re Regina v Snider (1953) 2 D L R 9, Sankey v

/Whitlam ...

Whitlam and Others (1979) 53 A L J R 11, and Baker v Campbell (1983) 49 A L R 385. These cases are not directly in point, but counsel used them to demonstrate the application of "the principle that where public interests conflict that which is paramount must prevail" (Snider's case supra at 13). In the present case, counsel said, "two public policies are in conflict" (Snider's case supra at 43), namely, the public policy underlying the protection generally afforded against the disclosure of communications subject to legal professional privilege, and the public policy that no innocent man should be convicted of a crime. In such a conflict, counsel submitted, the latter public policy is paramount and must prevail. In this regard he relied on a passage in the judgment of GREENBERG JA in the well-known case of R v Steyn 1954 (1) SA 324 (A). It was decided in that case that an accused has no right to claim disclosure of statements made by State witnesses to the police. The passage relied on by counsel is the following (at 335 C-E):

/"I ...

> "I did not understand counsel for the appellant to contend that the concept embodied in the phrase in favorem innocentiae could be invoked in favour of the claim that the law entitled the appellant to disclosure, and that this would make the rule in civil proceedings inapplicable to a criminal trial, but in any case I do not think such a contention could be supported. In the branch of the law now under consideration the phrase is used to indicate a power in the court to relax a rule of privilege if the court is of opinion that such relaxation may tend to show the innocence of the accused (see Tranter v Attorney-General and the First Criminal Magistrate of Johannesburg, 1907 TS 415). In the present case the appellant has never contended that the magistrate wrongly failed to exercise this power, but that he was entitled by a rule of law to the disclosure."

Counsel contended that the trial Judge in the present case should have relaxed the rule of privilege attaching to Manete's statement, on the ground that cross-examination on that statement might have tended to show the innocence of the accused. It is to be observed at once, however, that the privilege which is applicable in the present case in regard to Manete's statement was not at all at stake in Steyn's case, viz the privilege flowing

/from ...

from the confidential nature of Manete's communication to the attorney for the purpose of obtaining legal advice. Nor was that kind of privilege in issue in Tranter's case supra to which GREENBERG JA referred. Tranter's case was concerned with the rule of public policy against the disclosure of the identity of a police informer, as recognized inter alia in Marks v Beyfus (1890) 25 Q B D 494 at 498, whence the exception in favorem innocentiae is derived. LORD ESHER said:

> "I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case, this rule of public policy is not a matter of discretion .....".

(In passing I point out that the phrases "the judge should be of opinion" and "a matter of discretion" presuppose

/that ...

that all the relevant information is before the Court.)

More recently, in D v National Society for the Prevention of Cruelty to Children 1978 A C 171 (H L) LORD SIMON said, in a passage (at 232) which was quoted in Sankey's case supra at 20:

> "The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged, so that, exceptionally, such evidence must be forthcoming when required to establish innocence in a criminal trial ....."

In my opinion, however, the rule of public policy against the disclosure of the identity of a police informer is not on a par with the principle of public policy underlying the legal professional privilege afforded to a client who consults an attorney for the purpose of obtaining legal advice (cf S v Mpetha and Others (1) 1982 (2) SA 253 (C) at 259 B-E). The latter is of a more compelling nature than the former. Wigmore (3rd ed) Vol VIII para 2291 says:

/"The ...

> "The policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent."

With reference to this passage FRIEDMAN J in Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others 1979 (1) SA 637 (C) at 643 H - 644 B spoke of "this fundamental right of a client" and rightly stressed that it was important

> "that inroads should not be made into the right of a client to consult freely with his legal adviser, without fear that his confidential communications to the latter will not be kept secret."

A recent comprehensive survey of the history and nature of legal professional privilege is to be found in the seven judgments delivered in the High Court of Australia in the case of Baker v Campbell supra ((1983) 49 A L R 385), which I have found to be most instructive.

/Although ...

Although, on the issue which called for decision in that case (which is not in point in the present case), the Court was divided (4 to 3), all the judgments appear to have recognized, in regard to legal professional privilege, that

> "this privilege is a mere manifestation of a fundamental principle upon which our judicial system is based"

(see *e g* at 417 line 32), and in my view the same holds true for our own judicial system. In amplification of the "fundamental principle" referred to, I quote the following excerpts from the judgment of DAWSON J (at 442-5):

> "The law came to recognise that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that this entailed immunity from disclosure of such communications between them."
>
> .....
>
> "Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it

is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. ..... The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself."

.....

"The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired: see Waugh v British Railways Board (1980) AC 521 at 535, 536. .....

The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view

/that ...

that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation."

.....

"Speaking for myself, and with the greatest of respect, I should have thought it evident that if communications between legal advisers and their clients were subject to compulsory disclosure in litigation, civil or criminal, there would be a restriction, serious in many cases, upon the freedom with which advice or representation could be given or sought. If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part."

With these views I respectfully agree. It follows, in my judgment, that any claim to a relaxation of the privilege under discussion must be approached with the greatest circumspection.

In the present case the essence of the situation with which we are dealing is this: in a criminal case it is sought to cross-examine a State witness on a statement

/which ...

which is privileged because it was made by the witness to an attorney in the course of obtaining professional legal advice; the witness refuses to waive the privilege; and the trial Judge is asked to relax the rule of privilege on the ground of an allegation made on behalf of the accused that such cross-examination might assist them in defending the charges against them. Whether in such circumstances the rule of privilege can ever be relaxed, as a matter of principle, need not be decided in this case. I shall assume that it can. But, on that assumption, I have no doubt that the question of the relaxation of the rule can only arise in the context of the exercise of a discretion by the trial Judge, based on a consideration of all the information relevant to the question. The mere allegation on behalf of the accused that cross-examination on the statement may enure to their benefit, without more, cannot, I conceive, be sufficient to enable the discretion of the trial Judge to come into play.

/Minimum ...

Minimum requirements, in my view, would include information as to how the statement came to be in the possession of the legal representatives of the accused; whether the legal advice sought related to the trial itself, and if so, in what way; what the contents of the statement were (the statement could be handed up to the trial Judge for his perusal); and, perhaps most importantly, in what manner and with what prospects of success the cross-examination could avail the accused in countering the charges against them. I do not see how the trial Judge can be called upon to assess the relative weight of the relevant conflicting principles of public policy without being supplied with information of the kind I have mentioned.

Having regard to the manner in which this aspect of the case was handled on behalf of the accused in the Court a quo, as described earlier, I am of the view that insufficient information was placed before the trial

/Judge ...

Judge in order to enable him to exercise a discretion in favour of the accused, by relaxing the rule of privilege and allowing the cross-examination of Manete on his statement. Although it appeared that the attorney to whom Manete had made the statement was also the attorney acting for the accused at the trial, it was not disclosed whether he was acting for the accused at the time when Manete consulted him, and if so, what the relationship was between Manete and the accused and how it came about that the attorney was advising a State witness while acting for the accused. The advice that Manete sought was related to the trial itself, so it was said, but it was not disclosed in what way. The contents of his statement were not made available to the trial Judge. The meagre information about the contents of the statement which was conveyed to the trial Judge, as mentioned earlier, did not constitute a sufficient basis for suggesting that his evidence in Court was perjured, or that he was testifying

/under ...

under duress. In short, on an overall view of the information placed before the trial Judge it was not made possible for him to form an opinion as to whether it would have been necessary or right to relax the rule of privilege or even whether such relaxation might have tended to point to the innocence of the accused implicated by Manete (Nos 7 and 8). There was no basis for thinking so; it was a matter of pure speculation. Consequently it cannot be found that the trial Judge erred in disallowing the cross-examination in question.

Before leaving this topic I should revert briefly to Barton's case supra. It is distinguishable on the facts, but apart from that, in so far as CAULFIELD J purported to lay down a general principle which could be thought to apply to the present case, I respectfully do not agree with it. My reasons for saying that appear, I hope, from what has been said above. I do not find it necessary to discuss the later references to, or comments

/upon ...

upon, Barton's case, to which we have been referred or which I have been able to trace, since these do not appear to me to be helpful in the context of the present case (see e g Phipson loc cit; Cross loc cit; Teasdale 1973 New Law Journal 51; Allan 1987 Criminal Law Review 449; Baker v Campbell supra per GIBBS CJ at 395; R v Dunbar and Logan (1983) 138 D L R (3rd) 221 at 251).

For these reasons the second ground of appeal fails.

I turn now to the first ground of appeal, referred to by the trial Judge as "the question of causality". For the purpose of dealing with this question it is necessary to set out the relevant facts. For convenience I shall first sketch the background to the events of 3 September 1984 and then describe the events themselves without reference to the roles played therein by the individual accused; this will be dealt with later. In what follows I shall not deal separately with the evidence

/of ...

of each of the witnesses whose evidence was analysed and accepted by the trial Court. Instead, I shall attempt to paint a composite picture gleaned from the facts found proved by the trial Court in its analysis of the evidence of the individual witnesses.

The town council of Lekoa, of which the deceased was a member and the deputy mayor, is a regional Black local authority established under section 2 of the Black Local Authorities Act 102 of 1982. Its area of jurisdiction includes Sharpeville. During June 1984 the council adopted a capital expenditure programme with a view to improving and expanding the amenities of the inhabitants in its area. To finance the programme it was decided to increase the service levies payable by the inhabitants by R5,50 or R5,90 per house per month. The increases were planned to come into effect on 1 September 1984. The deceased was known to have favoured the plan and to have pressed for its implementation. Many of the people of

Lekoa were strongly opposed to the increases. Protest meetings were held and it was decided that on 3 September 1984 (which was a Monday) the people of Lekoa would stay away from work and march to the offices of the council to protest against the increases. On that day rioting and violence on a massive scale erupted throughout the area of Lekoa. The cause, or at least a major cause, of the riots was the increase of the service levies. Hordes of people went on the rampage through the streets of the townships comprising Lekoa. The houses of town councillors and many other buildings were stoned and burnt down. The deceased and two other councillors were murdered on that day, and also a councillor of the neighbouring area of Evaton. A senior police officer with many years' experience of riot control described the events as the most violent, the most widespread, and also the best organized riots that he had ever experienced.

The deceased lived in Nhlapo Street, Sharpeville.

His house was one house removed from the intersection of Nhlapo Street with Zwane Street. I shall refer to the house between the deceased's house and Zwane Street as the corner house. On the other side of the deceased's house, in Nhlapo Street, was the house of one Maile. In Zwane Street, near to the intersection with Nhlapo Street, was the house of one Radebe. The yard of that house was used as a place for doing repair work on motor cars. On the day in question a number of motor vehicles were parked there.

At about 7 o'clock in the morning a large crowd gathered in Zwane Street. They were singing and rowdy. They moved to the intersection with Nhlapo Street, then into Nhlapo Street and towards the house of the deceased. They pelted the deceased's house with stones. At that stage members of the police arrived on the scene in large vehicles. They dispersed the crowd by using tear-gas and firing rubber bullets. After the crowd had

/scattered ...

scattered, the police spoke to the deceased in front of his house and tried to persuade him to leave. He refused to do so. He was armed with a pistol. The police left the scene.

After the departure of the police, the crowd regrouped themselves. About 100 people, men and women, gathered together in Zwane Street. They were singing "freedom songs". Some of them went into the yard of Radebe's house and siphoned off petrol from the vehicles parked there into containers which they took along with them. The mob moved along Zwane Street and turned into Nhlapo Street. The vanguard ran towards the deceased's house and hurled stones at it, breaking the windows. The deceased was in the house, together with Mrs Dlamini. Members of the crowd shouted repeatedly (I quote from the evidence on the record, as it was interpreted in Afrikaans): "Laat ons breek, laat ons breek, die huis breek en aan die brand steek." The deceased and Mrs Dlamini opened the

/door ...

door of the house and went outside to confront the mob. Some of them shouted: "Ons is op soek na jou, Dlamini, die 'sell-out', wat met Blankes baie te doen het, of met hulle eet." The deceased and Mrs Dlamini went back into the house and closed the door. The deceased fired a shot into the crowd, hitting one of them. This angered the mob, which became extremely aggressive. A woman in the crowd, who was standing in front of the house, shouted repeatedly: "Hy skiet op ons, laat ons hom doodmaak".

In the meantime some members of the crowd were busy making petrol bombs in the yard of the corner house. They poured petrol from the containers they had brought along into bottles, some of which also contained sand. The bottles, or bombs, were passed on to other members of the mob, who were told to throw them into the deceased's house. This was done, and the house caught fire. Mrs Dlamini fled and succeeded in reaching safety in the neighbouring house of Maile. The deceased's house was

/then ...

then surrounded by the rioters. Petrol was poured over the kitchen door and it was set alight. The deceased tried to extinguish the flames. The deceased's car was pushed out of its garage and into Nhlapo Street, where it was turned on its side and set on fire. Petrol bombs were thrown into the house from all sides.

The deceased emerged from the house, holding his pistol. The crowd in his immediate vicinity retreated. The deceased ran in the direction of Maile's house. Just as he reached the fence between the two yards, which consisted of a couple of slack strands of wire, he was set upon by a small group of two or three or more members of the mob. A scuffle ensued, during which the deceased was dispossessed of his weapon. As he was crossing the fence, he was felled by a stone which was thrown by a man standing a couple of paces away and which struck him on the head. As he was lying on the ground, stones thrown by the mob rained down on him. Some members of the mob

/went ...

went up to him and struck his head with stones. When he was lying quite motionless, he was dragged into the street. Attempts were made to place him on his burning motor car, but each time he slid off it. Petrol was poured over him and he was set alight. A woman shouted that the people should not burn him. Another woman slapped her in the face. As the deceased was left to burn, the crowd, which still numbered 100 or more, sang loudly and gave the Black Power salute. They then started to move off in the direction of the Administration Board's buildings.

When the police arrived on the scene again at about 9 o'clock, they found the deceased's house and motor car and his body still smouldering. The deceased was dead.

A medical post mortem examination revealed that the deceased was still alive when he was set alight, but that he had sustained two sets of injuries, each of which

/was ...

was fatal by itself. The one set of injuries consisted of severe wounds to the head, caused by blows. The deceased would have died of these injuries, even if he had not been set alight. The other set of injuries consisted of burns all over his body. He would have died as a result of these burns, even if he had not sustained the head injuries.

I turn now to the role played by each of the accused, as found by the trial Court, in the gruesome events outlined above. Although accused Nos 5 and 6 are not directly involved in the present enquiry, it will be convenient to include them in this survey.

Accused No 1. He was one of the persons who grabbed hold of the deceased near the fence between the houses of the deceased and Maile, and who wrestled with the deceased for the possession of his pistol. He was also the person who threw the first stone at the deceased as he was crossing the fence, which struck him on the head

/and ...

and felled him. (The first-mentioned finding was based on the observations of Mabuti, and the second on the observations of Mrs Dlamini. It was argued on behalf of accused No 1 that there was a conflict between the evidence of Mabuti and that of Mrs Dlamini which could not be resolved, since Mabuti did not see the throwing of the stone by accused No 1 and Mrs Dlamini did not see accused No 1 grappling with the deceased. The trial Court considered this alleged conflict fully and carefully, as appears from the judgment of the trial Judge, and found that it did not exist. In my view the reasoning of the trial Court is unassailable. The fallacy in the argument for the accused is that it presupposes that either or both of the witnesses must be untruthful or unreliable simply because their observations did not coincide. Such an approach to the evidence is unsound. Mabuti and Mrs Dlamini were making their observations of fast-moving events from different vantage points, and there is no improbability inherent in postulating that accused No 1,

/after ...

after having grappled with the deceased for the gun, moved off some paces and from there threw a stone at him. Moreover, as the trial Judge pointed out, there was other evidence confirming the correctness of the observations of both witnesses. Some time after the events accused No 1 took the police to the house of accused No 3 with a view to finding the deceased's pistol. At that time the police did not know of accused No 3's involvement in the affair. In fact accused No 3 was in possession of the deceased's pistol, which he handed over to the police. This evidence, coupled with accused No 1's false denial of it, showed that accused No 1 knew that accused No 3 had obtained possession of the pistol from the deceased and this confirms Mabuti's evidence that accused No 1 was one of the group who wrestled with the deceased for the possession of the pistol. On the other hand, after the deceased had been felled by the first stone thrown at him, Mrs Dlamini heard him exclaim: "Ja-ja, wat maak jy?" "Ja-ja" was the nickname

/of ...

of accused No 1, but Mrs Dlamini did not know that, although she knew accused No 1. This confirms her evidence that accused No 1 threw the first stone that felled the deceased. In the result there is no reason for differing from the trial Court's findings that accused No 1 grappled with the deceased for the possession of his pistol and that he was the man who threw the stone that felled the deceased.)

Accused No 2. He was one of the mob which stoned the deceased's house before the first arrival of the police on the scene. He himself threw a stone which struck a window on the right-hand side of the house and broke it. When the police arrived and dispersed the crowd, he was affected by the teargas used by the police. He went into a yard and washed his face. After the crowd had re-assembled, he rejoined it in front of the deceased's house. He saw that the deceased was standing outside his house. He saw that the house was on fire and that it was

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surrounded by many people. He threw a stone at the deceased. It struck the deceased on his back. When the police arrived again, he ran away. (The facts recited above appear from a confession made by accused No 2, a letter written by him from prison to the Minister of Justice, and statements made by him to a police lieutenant in the course of pointing out certain places.)

Accused No 3. He was one of the small group of men who caught hold of the deceased as he was running in the direction of Maile's house, and who wrestled with him for possession of his pistol. He was the man who in fact succeeded in taking the deceased's pistol away from him. (These findings of the trial Court rested on inference. There was no direct evidence that accused No 3 was on the scene. Neither Mabuti nor Mrs Dlamini knew accused No 3 and neither could identify him. The validity of the trial Court's inference was challenged in this Court. In brief, the evidence against accused No 3 was

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as follows. On 9 November 1984 Detective Sergeant Wessels was taken by accused No 1 to the house of accused No 3. Wessels did not know where accused No 3 lived; he was directed how to get there by accused No 1. Accused No 3 was pointed out by accused No 1 to Wessels as the person who was presumably in possession of a pistol. Wessels asked accused No 3 whether he had a fire-arm in his possession and the reply was affirmative. Accused No 3 took a pistol from between some cardboard boxes, through an opening in the ceiling of his house, and handed it to Wessels. The pistol was exh 1 in the Court a quo. Accused No 3 explained to Wessels that he had taken the pistol away from some children who were involved in riotous activities in the vicinity of the deceased's house on 3 September 1984. The pistol, exh 1, was proved to have belonged to the deceased. Apart from the fact that he admitted handing a pistol to Wessels, accused No 3 denied the substance of Wessels's evidence. He said that he had told

/Wessels ...

Wessels that he had only obtained the pistol on 4 September 1984, when he had come across a couple of youths arguing about the pistol, which, one of them said, had been picked up in a scrap-yard. He denied that exh 1 was the pistol that he had handed over to Wessels. He was unable to offer any explanation as to how accused No 1 could have known that he was in possession of the pistol. The trial Court accepted the evidence of Wessels and found that accused No 3 was an untruthful witness. On a perusal of the record I can find no warrant for disagreeing with the trial Court's assessment of the witnesses. Having regard to the nature of the lies told by accused No 3 in his evidence, and particularly to the explanation that he gave to Wessels as to when and where he had obtained the pistol, coupled with his professed inability to explain how accused No 1 would have known that he had the pistol, I am of the view that the trial Court was fully justified in drawing the inference, as being the only reasonable

/inference ...

inference, that accused No 3 was the person who had dispossessed the deceased of his pistol.)

Accused No 4. She was one of the crowd that converged on the deceased's house before the first arrival of the police. She was given a placard to carry aloft, on which was written "Arena Shelete" ("Ons het nie geld nie"). When the police dispersed the crowd, she was struck on the head by a rubber bullet fired by the police. After the crowd had re-assembled, she was again part of it. She was standing in front of the deceased's house when he fired a shot, hitting someone in the crowd. It was accused No 4 who then shouted repeatedly: "Hy skiet op ons, laat ons hom doodmaak." Subsequently, when the deceased was set alight in the street and a woman remonstrated with the crowd not to burn him, it was accused No 4 who slapped this woman in the face. (The argument on behalf of accused No 4, referred to in the last paragraph of the trial Judge's

judgment on the application for leave to appeal, as mentioned earlier, and repeated in this Court, that there was no proof that anyone in the crowd had heard what the accused was shouting, is without substance. Mabuti, who heard the accused's shouts, was standing at the time on the far side of Nhlapo Street, opposite Maile's house. If he could hear what accused No 4 was shouting, there can be no doubt that other members of the mob, who were much closer to her, must also have heard the words shouted. Whether anyone reacted upon her instigation is a question relating to the general issue of causation, which will be dealt with later.)

Accused Nos 5 and 6. They were part of the vanguard of the crowd which ran towards the deceased's house and hurled stones at it, after the crowd had been dispersed and had re-assembled. They were not seen to have thrown stones themselves, but they were the leaders of the vanguard in the sense that they were running right

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in the front, with the others, who were throwing the stones, following. Accused No 6 was the person who was struck by the bullet fired by the deceased. He was hit in the leg.

Accused No 7. He was part of the stone-throwing crowd. He was amongst the people who made petrol bombs in the yard of the corner house. He was the man who poured petrol onto the kitchen door of the deceased's house and set it alight. He was one of those who pushed the deceased's motor car from the garage into the street.

Accused No 8. When the crowd had re-assembled, he came across Manete and said to him: "Hoe-kom is jy nie saam met die mense nie? Hoekom baklei jy nie? Hoekom neem jy nie deel daaraan nie? Want ons baklei vir die 'community'?". He was one of those who made petrol bombs in the yard of the corner house. He handed out petrol bombs to the mob and commanded them to surround the deceased's house and set it on fire. He

/showed ...

showed people how and where to throw petrol bombs into the deceased's house. The people obeyed his instructions. He assisted in pushing the deceased's car into the street. Before the deceased was assaulted in Maile's yard, he (accused No 8) was in Maile's yard, carrying stones in his hand. After the deceased had been set on fire in the street, accused No 8 said: "Kom julle, nou gaan ons na die Munisipaliteit se jaart."

I proceed to consider the basis upon which the trial Court convicted accused Nos 1, 2, 3, 4, 7 and 8 of murder. The trial Court found that the mob intended to kill the deceased, and that the intention to kill had manifested itself at the time when his house was set alight.

The following passage in the judgment of the trial Judge reflects the approach of the trial Court, which, in my view, was fully justified on the evidence:

> "Daar kan geen twyfel bestaan dat die skare die opset gehad het om oorledene te dood op die stadium toe sy huis aan die brand gesteek

/is ...

> is nie want elkeen daar het toe besef dat òf oorledene verbrand òf hy vlug uit die huis en as hy vlug moet hy aangeval word. Toe hy wel gevlug het is hy onmiddellik ontwapen en daarna met klippe bestook tot hy daar roerloos gelê het en om te verseker dat hy wel dood was is sy liggaam na buite gesleep en aan die brand gesteek."

The same approach appears from the following passage in which the trial Judge explained why accused Nos 5 and 6 were found not guilty of murder:

> "Die Hof kan nie bo redelike twyfel bevind dat [toe] hierdie skare ..... alreeds die opset gehad het om oorledene te gaan dood toe hulle die eerste keer op pad na sy huis toe was nie. So 'n bevinding is ook nie bo redelike twyfel ons insiens bewys tydens hergroepering tot en met die gooi van klippe na die oorledene se huis. Op die stadium egter toe oorledene se huis aan die brand gesteek word is dit duidelik dat die opset was om oorledene ook te verbrand. Dit het almal besef, dat tensy oorledene vlug hy sou verbrand, en as hy vlug sou hulle hom onmiddellik in die hande kon kry en aanrand, soos dit ook geskied het, totdat hy oënskynlik dood was en daarna verbrand is."

There was no evidence that accused Nos 5 and 6 had taken any part in the activities of the mob after the deceased's

/house ...

house had been set on fire. Consequently the trial Court found that it had not been proved beyond reasonable doubt that accused Nos 5 and 6 had the intention to kill the deceased.

In the case of all the other accused, however, i e Nos 1, 2, 3, 4, 7 and 8, the trial Court found that each of them had the intention to kill the deceased. It found further that all these accused had actively associated themselves with the conduct of the mob, which was directed at the killing of the deceased. On the evidence, neither of these findings can be faulted. In the case of each of these accused, the conduct described above plainly proclaimed an active association with the purpose which the mob sought to and did achieve, viz the killing of the deceased. And from the conduct of each of these accused, assessed in the light of the surrounding circumstances, the inference is inescapable that the mens rea requisite for murder was present.

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In his judgment the trial Judge, dealing with the liability of the six accused in question for murder, quoted what was said in S v Williams en Andere 1980 (1) SA 60 (A) at 62 H - 63 H in regard to "mededaders" and "medepligtiges" (perpetrators and accomplices, or, as some would have it, principals and accessories), and, adopting the phraseology used in that case, stated the trial Court's conclusions in respect of these accused in the following terms:

> "Beskuldigdes nrs. 1 en 3 het oorledene ontwapen en sy pistool van hom geneem. Dit moes gedoen word omdat oorledene 'n bedreiging vir die skare ingehou het. Hulle daad vergemaklik die taak van die skare om die oorledene daarna met klippe te gooi en hom dood te maak. Nr. 1 het self 'n klip na oorledene gegooi wat oorledene op sy kop agter getref het. Hy is dus nie alleen 'n medepligtige nie, maar ook 'n mededader. Nr. 2, soos reeds aangedui, het ook die misdaad bevorder deur 'n klip na oorledene te gooi. Nr. 4 beskuldigde hits die skare aan om oorledene te dood en sy vereenselwig haar met die verbranding van die oorledene. Nrs. 7 en 8 die bevorder die pleging van die misdaad en verleen hulp aan die skare wie

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> se opset duidelik blyk om die oorledene te dood deur aktief deel te neem aan die verbranding van oorledene se huis."

It is more usual and, in my view, with respect, more appropriate to deal with the liability of these accused for murder on the basis of what is called in our practice "common purpose", and it is on that basis that I proceed to discuss the matter. It is implicit in the findings of the trial Court, I think, but in any event quite clear on the evidence, that each of these accused shared a common purpose, to kill the deceased, with the mob as a whole, the members of which were intent upon killing the deceased and in fact succeeded in doing so. And, as I have pointed out, all these accused by their conduct actively associated themselves with the achievement of the common purpose and each of them had the requisite mens rea for murder.

This is the setting in which consideration must be given to the argument on behalf of these accused that

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their convictions of murder were wrong because the State had failed to prove that their conduct caused or contributed causally to the death of the deceased. In the case of some of these accused it is perhaps debatable whether a causal connection between the conduct of each, individually, and the death of the deceased had indeed not been proved, but in the case of others it must be accepted without doubt, in my opinion, that no such causal connection can be found to have been proved. This is particularly obvious in the case of accused Nos 2 and 4, as will appear from what has been said earlier in regard to their conduct. I shall therefore assume, for the purposes of my judgment, that it has not been proved in the case of any of the six accused convicted of murder that their conduct had contributed causally to the death of the deceased.

Thus the question that must be faced squarely is this: in cases of the kind commonly referred to in our

/practice ...

practice as cases of "common purpose", in relation to murder, is it competent for a participant in the common purpose to be found guilty of murder in the absence of proof that his conduct individually caused or contributed causally to the death of the deceased? In recent years much uncertainty seems to have arisen around this question. This is regrettable, since cases involving a common purpose, as understood in our practice, are of such frequent occurrence that it would probably not be an overstatement to say that they arise practically daily in the criminal courts of our country. There ought not to be uncertainty in this area of the criminal law, and it seems to me to be imperative that a clear answer be given to the question that I have posed. Unfortunately, the uncertainty has been created by a number of decisions of this Court. I shall have to deal with them. The uncertainty has been heightened by a mass of legal literature which has been produced on this topic over many years, contained in large

numbers of articles in legal journals, in doctoral theses, and in textbooks. While readily acknowledging the great assistance that I have gained from a study of the literature, I have decided not to deal pertinently with the various divergent and often conflicting opinions and views expressed by particular authors. To do so would turn this judgment into an academic treatise and would defeat my object, which is to attempt to clarify the law as it is applied in practice, as briefly as possible, and with a minimum of references to legal subtleties and jurisprudential philosophizing. When I do refer, in what follows, to the views of the learned authors, without identifying the author or authors concerned, I do so solely in an effort to keep the discussion brief and certainly not out of disrespect for the value of their contributions.

The best way to approach the problem, I consider, is to examine how the question of causation in

/cases ...

cases of common purpose has been dealt with in the decisions of this Court, and to divide the enquiry into two stages, viz the period before the judgment in S v Thomo and Others 1969 (1) SA 385 (A), and the period thereafter.

Before 1969 this Court, in its judgments in cases of common purpose, did not pertinently address the question of causation, speaking generally. An exception was the minority judgment of SCHREINER JA in R v Mgxwiti 1954 (1) SA 370 (A) at 381 G - 383 B, which was concerned with a so-called case of "joining in". That type of situation can be left out of consideration, for it does not arise on the facts of this case: here, each of the accused (i e the six convicted of murder) became an active participant in the pursuance of the common purpose prior to the first fatal wounds being inflicted on the deceased. In the reported cases before 1969 clear instances can be found where this Court upheld the conviction of an accused for murder, on the basis of common purpose, where no

/causal ...

causal connection had been proved between the conduct of the accused and the death of the deceased. I shall mention three such cases. The first is the majority judgment in Mgxwiti's case supra. I had occasion to analyse that judgment in S v Khoza 1982 (3) SA 1019 (A) at 1051 E - 1052 A, and there is no need to repeat what was said there. The second is R v Dladla and Others 1962 (1) SA 307 (A) at 311 A-E, which was also referred to in Khoza's case supra at 1052 B. In both Mgxwiti's case and Dladla's case supra the Court was dealing with an accused who had participated in a murderous mob attack on the deceased, but whose own conduct was not shown to have contributed causally to the deceased's death. There is a close resemblance between the facts of those two cases and the facts of the present case. The third case to which I would refer, was of a somewhat different nature. It was of a kind which occurs more frequently in practice, but in which the principle relating to causation in the context

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of common purpose must be the same. The case is S v Malinga and Others 1963 (1) SA 692 (A). Five accused had set out in a motor car to commit the crime of house-breaking with intent to steal and theft. Accused No 4 was armed, to the knowledge of the others. On leaving the scene, the car in which the accused were travelling was overtaken by a police car which tried to stop the car of the accused. Accused No 4 fired a shot and killed a policeman. An appeal against the convictions for murder of the other four accused was dismissed. HOLMES JA (with STEYN CJ and WILLIAMSON JA concurring) pointed out at 694 F that

> "..... the liability of a socius criminis is not vicarious but is based on his own mens rea",

and went on to say at 695 A-B:

> "In the present case all the accused knew that they were going on a housebreaking expedition in the car, and that one of them was armed with a revolver which had been obtained and loaded for the occasion.

> It is clear that their common purpose embraced not only housebreaking with intent to steal and theft, but also what may be termed the get-away. And they must have foreseen, and therefore by inference did foresee, the possibility that the loaded fire-arm would be used against the contingency of resistance, pursuit or attempted capture. Hence, as far as individual mens rea is concerned, the shot fired by accused No. 4 was, in effect, also the shot of each of the appellants."
>
> (My emphasis.)

In my view, on the facts of that case it was impossible to find any causal connection between any conduct of the appellants and the death of the policeman. The concluding words in the passage of the judgment of HOLMES JA, quoted above, which I have emphasized, constitute a clear recognition, in my opinion, of the principle that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants (provided, of course, that the necessary mens rea is present).

In Thomo's case supra at 399 i f it was stated

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in general terms, which included a reference to a socius, that on a charge of murder it was necessary to prove that the accused was guilty of unlawful conduct which caused or contributed causally to the death of the deceased. In Khoza's case supra at 1056 D - 1057 B I expressed the view that, in so far as the statement related to a socius, i e a participant in a common purpose, it was obiter and in conflict with authority. This view is borne out, I consider, by the cases to which I have referred above. In addition, there is a further case to which I would now refer, which is most interesting. It is S v Madlala 1969 (2) SA 637 (A). Thomo's case was reported before Madlala's case - in 1969 (1) SA 385, but in fact the judgment in Madlala's case was delivered on 21 November 1968, before the judgment was delivered in Thomo's case, on 3 December 1968. STEYN CJ was a party to both judgments, and WESSELS JA, who wrote the judgment in Thomo's case, concurred in the judgment in Madlala's case.

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In the latter case HOLMES JA said at 640 F-H:

> "It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -
>
> (a) that he individually killed the deceased, with the required dolus, e g by shooting him; or
>
> (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
>
> (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S v Malinga and Others 1963 (1) SA 692 (AD) at p. 694 F-H and p. 695; or
>
> (d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder."

In this formulation of the legal position relating to common purpose it is quite clear, in my opinion, that there is no room for requiring proof of causation on the part

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of the participant in the common purpose who did not "do the deed" (i e the killing). This fortifies my view that it was not intended in Thomo's case to lay down that a causal connection had to be established between the acts of every party to a common purpose and the death of the deceased before a conviction of murder could ensue in respect of each of the participants.

After 1969 this Court continued to deal with cases of common purpose without adverting to the question of causation. Convictions of murder were upheld in cases where the accused's own acts, although showing an active association with the furtherance of a common purpose, mostly to rob, were not shown to have contributed causally to the death of the deceased. Two examples, following closely upon Thomo's case supra, are to be found in S v Williams en 'n Ander 1970 (2) SA 654 (A) at 658-659, and S v Kramer en Andere 1972 (3) SA 331 (A) at 334. Jumping some years, the same pattern appears in more recent

/decisions ...

decisions of this Court: see e g S v Shaik and Others 1983 (4) SA 57 (A) - note especially at 65 A: "..... the act of one becomes the act of the other if that act is done in pursuit of a common design" (my emphasis); S v Talane 1986 (3) SA 196 (A) at 206 E - 207 A; and S v Mbatha en Andere 1987 (2) SA 272 (A) at 282 B - 284 C. Of particular interest is S v Nkwenja en 'n Ander 1985 (2) SA 560 (A), which was a case of culpable homicide. The two appellants in that case had decided to rob the two occupants of a parked motor car. They simultaneously opened two of the doors of the car, one on each side, and assaulted the occupants, one of whom died. It could not be established which one of the two appellants inflicted the injuries on the occupant who was killed. The trial Court found that dolus was not proved, but culpa was, and convicted both appellants of culpable homicide. On appeal this Court was divided on the question whether, on the facts, culpa had been proved against the appellants.

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The majority of the Court found that it had, and sustained the convictions. JANSEN JA, delivering the judgment of the majority of the Court (JOUBERT JA and GROSSKOPF AJA concurring), said the following at 573 B-D:

> "Die appellante het saamgewerk met die verwesenliking van die gesamentlike oogmerk. Op grond van die voorgaande blyk dit dat beide gehandel het met culpa ten opsigte van die dood wat ingetree het. Strafbare manslag is die wederregtelike, nalatige doodslag van 'n ander en behels in die algemeen die vereiste van 'n kousale verband tussen 'n handeling van die beskuldigde en die dood. In die onderhawige geval is dit onseker watter appellant die dodelike geweld toegepas het en sou dit moeilik wees om aan die een of die ander van die appellante 'n handeling toe te skryf wat conditio sine qua non van die dood was. Maar in ons praktyk word in gevalle soos die onderhawige, waar daar voorafbeplanning was en dan deelneming aan verwesenliking van die gesamentlike oogmerk, nie altyd streng aan die vereiste van kousaliteit (sine qua non) gekleef ten einde die een deelnemer strafregtelik aanspreeklik te stel vir 'n gevolg van die handeling van 'n ander deelnemer nie. Sonder om die juiste grondslag van hierdie aanspreeklikheid uit te stip wil dit my voorkom dat albei appellante wel aan strafbare manslag skuldig is ....."

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In my opinion these remarks constitute once again a clear recognition of the principle that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants. The reference to "voorafbeplanning" is not significant, for it is well established that a common purpose need not be derived from an antecedent agreement, but can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design. Nor do I consider that the words "altyd" and "streng" really qualify the effective application of the general principle.

I turn now to a number of cases, decided in this Court in the early eighties, which have given rise to uncertainty.

In S v Williams en 'n Ander 1980 (1) SA 60 (A) JOUBERT JA explained the difference between liability as a co-perpetrator ("mededader" or principal) and liability

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as an accomplice ("medepligtige" or accessory) and said, in regard to the latter, at 63 E/F:

> "Volgens algemene beginsels moet daar 'n kousale verband tussen die medepligtige se hulpverlening en die pleging van die misdaad deur die dader of mededaders bestaan."

This remark has given rise to the question whether, in relation to cases of common purpose, some kind of causal connection is required to be proved between the conduct of a particular participant in the common purpose and the death of the deceased before a conviction of murder can be justified in respect of such a participant. In my view the clear answer is: No. It seems clear to me that the Court in Williams's case was not dealing with the law relating to common purpose at all. The only reference to common purpose in the judgment appears at 62 F-G, where, in dealing with the facts, JOUBERT JA said that it was not to be accepted that the accused had entered the train coach with a common purpose to commit a

/crime ...

crime in which the weapons would be used which were in fact used later to assault the victim. In my view the Court in Williams's case did not intend to supplant, qualify, or detract from, the substance of the practice of the Courts in relation to common purpose. I expressed this view in Khoza's case supra at 1054 C. It has turned out to be correct, having regard to the manner in which cases of common purpose have continued to be dealt with in the decisions of this Court subsequent to Williams's case, as mentioned above. In the present case I am dealing with the position of the six accused who have been convicted of murder solely on the basis of common purpose. Accordingly there is no need for me to enter upon a discussion of the purport of the above-quoted remark in connection with the liability of an accessory, or of the view now held by some authors that in cases of murder there is no room for basing liability on "medepligtigheid". For practical purposes, in applying the law relating to cases of common purpose, the judgment in Williams's case

can safely be left out of consideration altogether.

In S v Maxaba en Andere 1981 (1) SA 1148 (A) VILJOEN JA, having referred to Williams's case supra, said at 1155 E-G:

> "Ek wil met eerbied saamstem met Burchell en Hunt S A Criminal Law and Procedure band 1 te 363 dat daar geen towerkrag opgesluit is in die sogenaamde leerstuk van 'common purpose' nie. Soos uit die passasie hierbo uit Williams se saak blyk, moet, waar daar deelneming aan 'n misdaad is, elkeen van die deelnemers voldoen aan al die vereistes van die betrokke misdaadomskrywing voordat hy as mededader skuldig bevind kan word. Moord is 'n gevolgsmisdaad. Indien die Staat mededaderskap wil bewys, moet hy bewys, nie alleen dat elke deelnemer die nodige opset gehad het om die slagoffer te dood nie, maar ook dat sy aandeel bygedra het, daadwerklik of psigies, tot veroorsaking van die dood."

With great respect, I do not agree with the tenor and effect of these remarks. The learned Judge's approval of the statement by Burchell and Hunt that there is no magic about the "doctrine" of common purpose, as a basis for his conclusion that a causal connection between the conduct of

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the perpetrator and the death of the deceased must be proved, rests, in my respectful opinion, upon a misconception of what the learned authors sought to convey by that statement. A reading of the passages at 363-5 which constitute the context in which the statement appears, shows that the learned authors were concerned with the theme that the liability of a party to a common purpose was not vicarious but was founded on his own mens rea. This theme was developed apropos of the view expressed in the earlier cases that liability in respect of common purpose rested on an implied mandate. But the learned authors certainly did not intend to convey that it was necessary to prove a causal link between the conduct of a party to the common purpose and the death of the deceased. On the contrary, they said, in conformity with the case law referred to above, at 364:

> "Association in a common illegal purpose constitutes the participation - the actus reus. It is not necessary to show that

/each ...

> each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all."

And in a footnote they added:

> "Moreover, it is not necessary to show that there was a causal link between the conduct of each party to the common purpose and the unlawful consequence, see above, p. 352".

The references to Burchell and Hunt above are to the first edition; in the second edition, see at 430-5. The learned authors have retained the "no magic" statement referred to above, which is perhaps unfortunate, since it tends to suggest that a question-mark should be placed against the manner in which the Courts have dealt with cases of common purpose in recent times, which I think is unwarranted. I should add that I myself see no "magic" in the practice of the Courts - but I do see a lot of common sense and expediency in it. Reverting to the remarks of VILJOEN JA quoted above, he referred to a causal contribution to the death of the deceased, "daad-

/werklik ...

werklik of psigies", and at 1156 F/G he again mentioned a "psigiese bydrae ..... tot die dood van die oorledene", thus adopting the approach of some authors. With respect, it seems to me that the concept of "psychological causation" is so nebulous that it is practically incapable of effective application. In any event, VILJOEN JA's requirement of a causal connection in cases of common purpose is clearly in conflict with the great weight of authority constituted by the decisions of this Court, both before and after Maxaba's case, as discussed above. Finally, the requirement of a causal connection in the quoted remarks of VILJOEN JA was clearly an obiter dictum, as he himself pointed out at 1156 F-G. In the result, the judgment in Maxaba's case, in so far as it relates to the question of causation, can safely be ignored in the future treatment of cases of common purpose.

In S v Khoza 1982 (3) SA 1019 (A) the judgments of CORBETT JA and myself reflect a difference of opinion

as to the liability of an accused "joining in" in an assault upon a person who has already been fatally wounded. As I have indicated, that problem does not arise on the facts of the present case. Consequently no more need be said about it. I would merely point out that in the passage in the judgment of CORBETT JA at 1036 F - 1037 A, in which he referred to common purpose, there is nothing, in my respectful opinion, which militates against the views I have expressed above.

In S v Daniëls en 'n Ander 1983 (3) SA 275 (A) the problems of causation discussed in three of the judgments (those of JANSEN JA, TRENGOVE JA and VAN WINSEN AJA) in respect of accused No 1 in that case, arose because of a finding by the learned Judges that a common purpose between the two accused in that case had not been proved. These problems are accordingly not relevant in the present case. In the judgment of NICHOLAS AJA the matter was dealt with on the footing that the conviction of accused

/No 1 ...

No 1 in that case could not be sustained on a consideration of the problems relating to causation, but, significantly, he upheld the conviction on the ground that a common purpose between the accused to rob and kill the deceased had been proved (see at 302 F, 304 D-H). In my judgment I found that a common purpose between the accused to rob the deceased had been proved. At 323 E-F I said the following:

> "Volgens my beskouing is die geldende regsposisie dat, waar een van die deelgenote tot 'n gemeenskaplike oogmerk die handeling verrig wat die dood van die oorledene veroorsaak, en daar by die ander deelgenote die nodige mens rea aanwesig is, die handeling van die een wat die dood veroorsaak, as 'n kwessie van regsbeleid, beskou word as die handeling van al die deelgenote ....."

I adhere to that view, because it seems to me that it is borne out by the cases decided in this Court, as discussed above. I would add this observation: the approach reflected in the passage just quoted has been applied, in effect, in many cases of common purpose decided in the

/Provincial ...

Provincial and Local Divisions which in recent years have come, and are currently coming, on appeal before this Court, without the validity of the approach being questioned, but which never reach the Law Reports.

That being the existing state of the law relating to common purpose, it would constitute a drastic departure from a firmly established practice to hold now that a party to a common purpose cannot be convicted of murder unless a causal connection is proved between his conduct and the death of the deceased. I can see no good reason for warranting such a departure. Many of the authors who are opposed to the practice of the Courts have criticized its origins, both in relation to its rationalisation on the basis of implied mandate and in relation to the fact that it first came to us via the application of English law. In passing I would say that the much maligned notion of implied mandate seems to me not to be without merit, now that it is well recognized

/that ...

that the liability of an individual accused rests on his own mens rea alone (whether dolus directus or dolus eventualis), and that the English origin of the practice is no reason per se for rejecting it, if it satisfies the exigencies of the administration of our own criminal law. But that is by the way; for the purposes of this judgment matters of merely historical interest can be left aside. What is more important is that the authors who are critical of the practice of the Courts do not appear to have problems with the actual results achieved in the vast majority of cases. In the main the criticism is based on the argument that causation is a fundamental element in die definition of the crime of murder, which cannot be ignored; and it is said also that the concept of active association with the act of killing by another is too vague to serve as a touchstone for liability. In my view, however, in many cases where acceptable (and required) results are achieved by means of imputing the act of killing by one person to another person by virtue of a common purpose, the

/adherence ...

adherence to the requirement of a causal connection between the conduct of the latter person and the death of the deceased would necessitate stretching the concept of causation, inter alia by resorting to the device of "psychological causation", to such unrealistic limits as to border on absurdity. In the process there would be present a greater measure of vagueness and uncertainty than in regard to the application of the test of active association with the attainment of the common purpose. In any event, I do not think that the application of the latter test presents unmanageable problems. It simply involves an assessment of the facts of the particular case, and the factual issue to be resolved is no more difficult to resolve than many other factual issues encountered in any criminal case. The position of accused Nos 5 and 6 in the present case can be taken as an example. The trial Court found that it had not been proved that they had had the intention to kill the deceased. On the facts

/relating ...

relating to their limited participation in the events, prior to the setting on fire of the deceased's house, it might as well have found that the evidence fell short of proving an active association on their part with the purpose of the mob to kill the deceased. In regard to two cases mentioned earlier, however, viz Mgxwiti's case supra and Dladla's case supra, some authors have criticized or queried the result arrived at, as did counsel for the accused in the present case. I do not consider those cases to have been wrongly decided, but for present purposes the point to be stressed is that if it is assumed that the correctness of the result in those cases is debatable, that would be so, not because of doubt as to whether a causal connection had been proved between the acts of the accused and the death of the deceased in each case, but because it would be arguable whether, as a matter of fact, the evidence showed an active association by the accused with the acts of the mob which caused the

/death ...

death of the deceased.

In the present case, on the facts outlined earlier, there can be no doubt, in my judgment, that the individual acts of each of the six accused convicted of murder manifested an active association with the acts of the mob which caused the death of the deceased. These accused shared a common purpose with the crowd to kill the deceased and each of them had the requisite dolus in respect of his death. Consequently the acts of the mob which caused the deceased's death must be imputed to each of these accused.

I should mention that counsel for the accused argued that the final act of setting the deceased alight fell outside the purview of any common purpose to which the accused were parties and that they could therefore not be held responsible for the deceased's death. There is no substance in this argument. On the particular facts of this case the precise manner in which and the

/precise ...

precise means by which the deceased was to be killed were irrelevant to the achievement of the common purpose.

For these reasons the first ground of appeal fails.

The third ground of appeal relates to the convictions of all the accused for subversion. In view of the way in which the argument developed in this Court, this ground of appeal can be disposed of briefly. The charge against the accused was based on the following provisions of section 54 (2) of the Internal Security Act 74 of 1982 ("the Act"):

> "(2) Any person who with intent to achieve any of the objects specified in paragraphs (a) to (d), inclusive, of subsection (1) -
>
> (a) causes or promotes general dislocation or disorder at any place in the Republic, or attempts to do so;
>
> .....
>
> (e) prevents or hampers, or deters any person from assisting in, the maintenance of law and order at any place in the Republic, or attempts to do so;
>
> .....

/shall ...

shall be guilty of the offence of subversion ....."

The paragraphs in section 54 (1) on which the State relied in the charge read as follows:

"(c) induce the Government of the Republic to do or abstain from doing any act or to adopt or to abandon a particular standpoint; or

(d) put in fear or demoralize the general public, a particular population group or the inhabitants of a particular area in the Republic ....."

In terms of section 54 (8) the expression "Government of the Republic" includes inter alia any institution contemplated in section 84 (1) (f) of Act 32 of 1961, and the last-mentioned section refers inter alia to "municipal institutions ..... and other local institutions of a similar nature". Section 69 (5) of the Act provides:

"If in any prosecution for an offence in terms of section 54 (1) or (2) it is proved that the accused has committed any act alleged in the charge, and if such act resulted or was likely to have resulted in the achievement of any of the objects specified in section 54 (1) (a) to (d), inclusive, it shall

/be ...

be presumed, unless the contrary is proved, that the accused has committed that act with intent to achieve such object."

The particular facts on which the State relied in support of the charge were set out in a schedule annexed to the indictment. It is not necessary to reproduce that schedule here. It contained a statement of the acts performed by the mob at or in the vicinity of the deceased's house, with which the accused made common cause, and which have been summarized earlier in this judgment.

Those facts having been proved, the trial Court found that the conduct of the mob, which included the accused, fell within the ambit of paragraphs (a) and (e) of section 54 (2) of the Act. This finding was rightly not challenged on behalf of the accused. On the facts of this case there is accordingly no need to embark upon a general discussion of the precise scope of the paragraphs in question.

With regard to paragraph (c) of section 54 (1)

/the ...

the trial Court found that the town council of Lekoa was an institution as contemplated in section 84 (1) (f) of Act 32 of 1961. This finding was not challenged either. The trial Court found further that the acts of the mob were directed at inducing the town council of Lekoa to abstain from enforcing the payment of increased service levies, and that such was indeed the result of the riots, since it appeared from the evidence that the town council subsequently decided to abandon the project of levying increased charges. With regard to paragraph (d) of section 54 (1) the trial Court found that there was ample evidence to show that the inhabitants of Sharpeville were put in fear by the rioting mob.

In their evidence all the accused denied that they had any intent to achieve any of the objects specified in paragraphs (c) and (d) of section 54 (1). The trial Court found, however, that they had failed, on a balance of probabilities, to rebut the presumption provided

/for ...

for in section 69 (5). This was the only finding of the trial Court, on this aspect of the case, which was challenged on appeal. It was argued that the trial Court should have accepted the denials of the accused. The argument was doomed to fail. Not only were the denials of the accused contrary to the probabilities emerging from the evidence, but the trial Court also found that all the accused were untruthful witnesses. The record shows that the trial Court had good and sufficient grounds for rejecting the evidence of each of the accused. Accordingly there is no room for this Court to interfere with the finding of the trial Court.

So the third ground of appeal fails also.

Accused Nos 5 and 6, it will be recalled, were given leave to appeal against their convictions for public violence. It can be assumed that the leave was based on the ground that there was no direct evidence that either of these accused had actually thrown any stones themselves.

/On ..

On the facts of this case, however, it was not necessary for the State to prove that these accused had themselves thrown stones, for the evidence against them established clearly that they were in the forefront of the stone-throwing mob, and thus that they associated themselves with, and so were parties to, the execution of a common purpose to commit a riotous and violent disturbance of the public peace and security and invasion of the rights of others (c f R v Wilkens and Others 1941 TPD 276 at 289, 297; R v Cele and Others 1958 (1) SA 144 (N) at 153 B-C). On the other hand it is clear that the very same conduct of these accused, on which their convictions for public violence were founded, constituted the essential basis for their convictions for subversion. It is for this reason that the question was raised in argument before this Court, as mentioned earlier, whether it was proper to convict these accused both for subversion and for public violence. In my view it was not. Not only were the acts of the accused

/which ...

which constituted the basis of each of the convictions exactly the same, but the nature of those acts, in the particular circumstances of this case, was in substance very similar for the purposes of either of the convictions. The causing of "general dislocation and disorder" and the preventing or hampering of "the maintenance of law and order", for the purposes of paragraphs (a) and (e) of section 54 (2) of the Act, simultaneously involved the forceful disturbance of the public peace and security and invasion of the rights of others, for the purposes of public violence. On the particular facts of this case the proof of the former necessarily constituted proof of the latter. In substance the punishable conduct was the same. The only difference between the two crimes, in the circumstances of this case, was the specific intent required for subversion, as described in paragraphs (c) and (d) of section 54 (1) of the Act, which was, in terms of section 69 (5), presumed against the accused to have been present, and in one respect, viz the putting in

/fear ...

fear of the inhabitants of the area (paragraph (d)), the intent largely coincided with the intent involved in public violence as well. In these circumstances, applying the considerations of common sense and fairness referred to in R v Kuzwayo 1960 (1) SA 340 (A) at 344 A-C, these accused ought not to have been convicted of both crimes. I may add that the trial Court was probably not alerted to the position discussed above, because the convictions for public violence were considered in the context of competent verdicts on the charge of murder. Had all the accused been charged originally with both subversion and public violence the difficulty would have been more immediately apparent. In the result these convictions of accused Nos 5 and 6 and the sentences imposed on them in respect thereof cannot stand and will be set aside.

I turn next to the question of extenuating circumstances in regard to the six accused who were convicted of murder. None of them testified on this issue, but on

/behalf ...

behalf of them evidence was given by Professor Tyson, a highly qualified and experienced psychologist. I do not propose to discuss his evidence in detail. The trial Judge dealt fully with it in his lengthy and careful judgment on extenuating circumstances. The effect of Professor Tyson's evidence is summarized in the following passage:

> "I consider, on the basis of my assessment of the psychological literature, that it is highly probable that an individual in a mob situation will experience de-individuation and that this de-individuation will lead to diminished responsibility in much the same way as do the consumption of too much alcohol or great emotional stress."

It was argued before this Court that the trial Court had misdirected itself in finding that there were no extenuating circumstances, in view of the unchallenged evidence of Professor Tyson, as summarized above. I am unable to accept this argument. The views expressed by the witness were of a wholly generalized nature, and unrelated to the individual

/accused ...

accused. The generalization of the probability referred to by the witness cannot be specifically related to any individual accused in the absence of any evidence at all regarding the actual motivation and state of mind of such individual accused. No such evidence was placed before the trial Court. The position in the present case is governed by the reasoning in S v Magubane en Andere 1987 (2) SA 663 (A) at 667 G - 669 E, which was concerned with a different, but nonetheless closely analogous, context. Consequently there is no room for finding that the trial Court had misdirected itself in its assessment of Professor Tyson's evidence.

It was contended further that the trial Court had misdirected itself in placing reliance on the remarks of RUMPFF JA in S v Maarman 1976 (3) SA 510 (A) at 512 F - 513 A. Again, I am unable to accept this argument. Suffice it to say that there is nothing in the judgment of the trial Judge which could indicate that the trial

/Court ...

Court had referred to the interests of the community in any sense other than that sanctioned by the remarks referred to.

It was for the trial Court to assess the matter of extenuating circumstances. As is well known, the room for this Court to interfere with the trial Court's assessment is very limited. In this case, it has not been shown that the trial Court misdirected itself. It was not suggested that a Court could not reasonably have arrived at the conclusion reached by the trial Court. Consequently there are no grounds upon which this Court can interfere with the trial Court's finding that there were no extenuating circumstances.

Finally, as to the sentences imposed by the trial Judge on all the accused in respect of their convictions for subversion, it has not been shown that the trial Judge's discretion in the matter of sentence was not exercised properly. There is no room for this Court

/to ...

to interfere with the sentences.

The order of the Court is as follows:

(1) The appeals of appellants Nos 1, 2, 3, 4, 7 and 8 (accused Nos 1, 2, 3, 4, 7 and 8 in the Court a quo) against their convictions for murder and the death sentences imposed upon them are dismissed.

(2) The appeals of all the appellants against their convictions for subversion and the sentences imposed upon them in respect thereof are dismissed.

(3) The appeals of appellants Nos 5 and 6 (accused Nos 5 and 6 in the Court a quo) against their convictions for public violence and the sentences imposed in respect thereof are allowed;

/these ...

these convictions and sentences are set aside.

A.S. BOTHA JA

HEFER JA

SMALBERGER JA

BOSHOFF AJA

STEYN AJA

CONCUR