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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TOZAMILE CLIFF MOOI ..... FIRST APPELLANT

MTHETHELELI LUCAS ..... SECOND APPELLANT

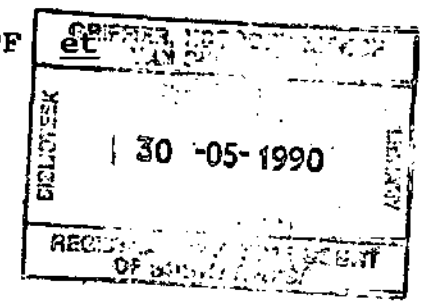
and

THE STATE ..... RESPONDENT

CORAM: BOTHA, E M GROSSKOPF et KUMLEBEN JJA

HEARD: 14 MAY 1990

DELIVERED: 30 MAY 1990



J U D G M E N T

KUMLEBEN JA/....

KUMLEBEN JA:

The two appellants stood trial with 14 other accused in the Eastern Cape Division of the Supreme Court on a charge of murder. The first appellant was accused no 2 and the second appellant accused no 1: for convenience I shall continue to refer to them as such. Both were convicted of murder. No extenuating circumstances having been found, the death penalty was imposed. The court a quo, however, granted leave to accused no 2 to appeal to this court against his conviction and sentence (the finding that there was no extenuation); and this court gave leave to accused no 1 to appeal against sentence only.

The charge arose from the death of Thozamile Michael Dondashe in or near the Kwa Nobuhle township, Uitenhage district, on 24 October 1985. The events leading to his death were described by his mother and

his sister, Tozama Dondashe, who were State witnesses. Late that afternoon the deceased ran into his home injured. As he was washing his wounds his pursuers arrived. They demanded that he be released to them, alleging that he was a police informer. A crowd gathered outside the house. Eventually, after the house had been damaged, set alight by a petrol bomb and entered into by some of the crowd, the deceased's father instructed him to accompany those who had come for him. The following evening his body was found about 1 kilometre from his home at a spot on the outskirts of Kwa Nobuhle. His skull had been crushed and his head, face and body burnt. The indications were that the head injury caused his death before the burning took place.

I turn to consider, first, whether accused no 2 was correctly found guilty of murder.

The grounds for this conviction are thus stated in the judgment:

> "According to Tozama he (accused no 2) too was one of those who entered the home of the deceased and removed him therefrom. In his confession to the magistrate, EXHIBIT K, he describes how they went into the home of the deceased and how he was taken out of the house. He goes on to describe how the deceased was taken to the spot where he was put to death and how on the way to that spot he struck the deceased over the back with a piece of copper piping. He also describes how other members of the group assaulted the deceased and how he was set alight.
>
> Accused No. 2's abbreviated statement to Captain Köhne EXHIBIT X.2, is much to the same effect as EXHIBIT K. What is more accused No. 2 pointed out to Captain Köhne on 14 February 1986 a spot which was only some 10 paces from the spot where the body of the deceased was found by Warrant Officer Meiring. His knowledge of the spot taken with the other evidence against him is a further factor pointing to the guilt of accused No. 2."

The conviction was thus based primarily on the confession to the magistrate (exhibit K) and a statement (exhibit X2) made to Captain Köhne. The

judgment, one notes, does not indicate whether, should these two statements be left out of account, the other two considerations (the pointing out per se and the evidence of Tozama Dondashe) were considered sufficient, jointly or severally, to justify the conviction.

The correctness of the reception of these two statements must in the first place be examined. In fact the enquiry can be further restricted to the question of the admissibility of the confession to the magistrate (exhibit K). I say this since, if it was admissible, the other statement to the police officer takes the matter no further; if it was not - for reasons which at this stage need not be given - exhibit X2 must also be held to have been incorrectly admitted. The admissibility of two similar statements made by

accused no 1 was also contested at the trial. The court, quite correctly, decided that the admissibility of all four statements should be considered at one separate interim hearing, a trial within a trial, since the evidence relating to each might interpenetrate. As it happens, however, the evidence on the statements made by accused no 1 does not bear upon the question whether the confession and statement of accused no 2 were correctly admitted. Such evidence may therefore be left out of account and need not be referred to. (As a matter of fact the statements made by accused no 1 were also held admissible.)

With this somewhat protracted prelude, I turn to consider whether exhibit K ought to have been received in evidence.

The following undisputed facts relate to this

enquiry. Accused no 2 was arrested on 21 November 1985. He was not questioned by the police until 17 December 1985 when W.O. Pentz interviewed him in his office at the Uitenhage police station. He made a statement which was recorded by Pentz. The accused that afternoon was taken before a magistrate, Mr Steyn, at Uitenhage. He was accompanied by Det. Sgt. Masiba. The magistrate put the customary preliminary questions to the accused to satisfy himself that the accused was acting freely and voluntarily. The questions and answers included the following:

> "Het die polisie of enige ander persoon u aangerand of gedreig om die verklaring af te lê? --- NEE.
>
> Is u deur enige persoon beïnvloed om die verklaring te maak? --- NEE, MAAR HULLE HET GESÊ EK MOET KOM SÊ WAT EK HULLE GESÊ HET. HULLE HET GESÊ HULLE SAL LEES WAT EK GEPRAAT HET EN AS EK NIE SÊ WAT EK HULLE GESÊ HET NIE, GAAN EK KAK.
>
> As hulle nie so gesê het nie, sou jy uit jou eie wil 'n verklaring wou kom maak? --- NEE, DAN SOU EK

NIE GEKOM HET NIE, WANT DAAR WAS IEMAND WAT HULLE VOOR MY GESLAAN HET EN EK HET TOE BANG GEWORD, WANT EK WIL NIE SO GESLAAN WORD NIE.

Maar ek het jou mos nou verduidelik dat jy onder geen verpligting is om 'n verklaring te maak nie, verstaan jy? --- JA, EK VERSTAAN, MAAR EK SAL MAAR LIEWER PRAAT ANDERS WORD EK GESLAAN.

Het iemand gesê jy sal geslaan word as jy nie praat nie? --- JA, MNR. PENTZ HET SO GESÊ.

As jy nie bang is nie, sou jy 'n verklaring afgelê het? --- NEE, EK SAL NIE. EK WIL PRAAT OMDAT EK BANG IS.

Wil jy uit jou eie 'n verklaring aflê of net omdat jy bang is? --- NEE, MAAR EK IS BANG.

Verklaarder meegedeel dat hy nie verplig is om 'n verklaring te maak nie en hy verkies om nie 'n verklaring te maak nie."

In the light of these answers, no statement was made or recorded. The form (exhibit M), on which the preliminary questions and answers appear, was signed by the magistrate and given to Masiba. On his return to the police station he handed it over to Pentz in the presence of the accused. When Pentz read it he was

angry. He instructed Masiba to take the accused back to the cells.

The next morning, 18 December 1985, he was again taken by Masiba to the same magistrate. On this occasion Mr Steyn recorded inter alia the following on exhibit K, before the confession was taken down:

> "Ek vra vervolgens die verklaarder om in sy eie woorde aan my te vertel hoe dit gebeur het dat hy na my kantoor gekom het om sy verhaal aan my te vertel. Die volgende was sy verduideliking (neergeskryf in sy eie woorde) --- Ek het nou self besluit om hierheen te kom en ek het die speurder gesê ek wil 'n verklaring kom doen by die landdros en toe sê hy, hy sal my afstuur toe bring hulle my."

> "Het die polisie of enige ander persoon u aangerand of gedreig om die verklaring af te lê? --- NEE. Sien bladsy 4 en 3.

> Is u deur enige persoon beïnvloed om die verklaring te maak? --- Nee.

> Is u deur enige persoon aangemoedig om die verklaring af te lê? --- Nee, maar ek het verlede

nag met my mede beskuldigde gesels en ons het nou besluit om die klagtes te erken."

"U het weliswaar aan my gesê dat u nie deur enigiemand aangerand, gedreig, aangemoedig, beïnvloed of beloftes aan u voorgehou is nie ten einde u te oorreed om die verklaring te maak. Ek wil u egter nogtans vra om my in u vertroue te neem en as daar na u oordeel enigiets onbehoorlik gebeur het wat u beïnvloed het om na my toe te kom om die verklaring te maak, dit nou aan my te openbaar. Verstaan en begryp u wat ek so pas aan u verduidelik het? --- Ek verstaan maar niks het plaasgevind nie."

The confession proper follows. It was handed to Pentz on their return to the police station.

The admissibility of this confession was disputed on the ground that the accused was threatened and that it was consequently not voluntarily made. The court, relying on the provisions of sec 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 ("the Act"), held that the accused had not discharged the onus of proving that the confession was

induced by any threat and it was ruled admissible.

That he was threatened was as strenuously denied by Pentz as it was persistently asserted by the accused. Although a number of other witnesses were called on behalf of the State at the interim trial, the determination of this issue depends essentially on the evidence of these two key witnesses. For this reason it is necessary to refer in some detail to each's account of the events leading up to the confession.

According to the accused, when he was brought to Pentz's office by Masiba on 17 December 1985, Det. Const. Faleni was also present. The accused was questioned about the murder. Pentz opened the interview by saying that he (the accused) was in his (Pentz's) "stomach" and that he should do exactly as Pentz instructed him. (This rather perplexing answer

was furnished through the interpreter. In the course of the questioning which followed the accused stated what was said to him in Afrikaans: "Jy moet weet jy is in my maag en jy gaan doen wat ek wil hê jy moet doen." It then transpired that there was a misunderstanding and that "maag" should read "mag".) Pentz spoke Afrikaans to him at this interview, but with Faleni present to interpret if necessary. At a certain stage Faleni and Pentz left the office, leaving him with Masiba. They returned with a young man whose head was bleeding. He was unknown to the accused and, more particularly, was not one of the other accused in this case. Pentz held this person's head by his hair and forcibly drew his (Pentz's) knee up into his face. This caused him to fall down and his nose to bleed. Pentz and Faleni then trampled on him. Pentz left him lying on the floor and came over to the accused. He said that he would be similarly assaulted if he did not

say what Pentz wanted him to say. This prompted the accused to make a statement which Pentz recorded and read over to him and which he signed. This person was assaulted before the statement was taken down and remained in the room, lying on the floor, until it was completed. (At the interim trial the accused admitted that he was the author of the statement, in the sense that he was not told what to say, but denied that it reflects the truth.) Pentz then said he must repeat the statement before a magistrate and that, should he refuse, he would receive the treatment meted out to this other person. Pentz added that, if he deviated from the statement made to him, he would "kak". He was also told by Pentz not to disclose to the magistrate that he had been instructed to confess to him. The accused confirmed that he complained to the magistrate that he had been threatened and, as we know, the magistrate in the circumstances did not record a

confession. Before they left to return to the police station Masiba read the statement. His comment was: "Kwedien (young man), what shit have you told that magistrate? This White man is going to 'moer' you." When Pentz read this document on their arrival at the police station he was angry and said "jy het my gebrand", implying that he had let him down or made a fool of him. The accused was dismissed and locked up in the cells for the night.

The next morning in due course he again found himself in Pentz's office. The latter's opening remark was: "What shit did you tell the magistrate yesterday?" He went on to say that the accused was to return to the magistrate and retract what he had said about being threatened and that if he did not agree to this, Pentz would shoot him and tell his parents that he had been killed in attempting to escape. Pentz also

said that he (the accused) should say that it was he who had approached Pentz with the request that he be sent again to the magistrate; that what he had said the previous day was untrue; and, finally, that he was to explain his change of mind by telling the magistrate that during discussions with his co-accused overnight it was decided that he should admit his guilt. Coerced by these threats he again accompanied Masiba to Mr Steyn before whom, acting in accordance with Pentz's instructions, exhibit K was executed. When it was later shown to Pentz he seemed satisfied.

Pentz tells a very different story. On 17 December 1985, after questioning the accused at the cells, they proceeded to his office. There he was interrogated for for about an hour. They spoke to each other in Afrikaans, but Masiba was present to interpret if necessary. The accused was in fact fluent in

Afrikaans. Without any persuasion or preliminaries, the accused was prepared to make a statement to him. As it was being recorded, they were interrupted by Sgt. Bester and Const. Oosthuizen who brought accused no 7 into that office. They explained to Pentz that they had arrested him and in doing so were obliged to apply force. Pentz noticed some fresh blood under the nose of accused no 7, though it was not actually bleeding, and that he was covered in dust. After they had made this report to him, he asked the two policemen to wait with accused no 7 in the adjoining front office until he was through with accused no 2. On completion of the statement, the accused on his own initiative asked to be allowed to repeat it before a magistrate. On his return from the magistrate, he and Masiba rejoined Pentz in the front office. As soon as the accused saw Pentz, and before any other words were spoken, he said "baas, neem my terug na die 'mandjie' (ie the

magistrate) toe, ek wil my 'mistake' gaan regmaak." This he repeated without explaining what the mistake was. He (Pentz) realised something was wrong but did not ask the accused to explain what had happened. Instead he took the document (exhibit M) from Masiba and read it. His reaction was one of extreme anger ("verskriklik kwaad") coupled with disappointment. Though the accused was still pleading with him to be allowed to return to the magistrate to make amends, Pentz simply told Masiba to take him away: "vat hom net uit, vat hom weg net voor my, gaan sit hom terug in die selle." The next morning the accused was taken from the cells and brought to Pentz. He took the accused to collect other suspects. He did not at any stage raise the question of yesterday's 'mistake'. During this operation the accused frequently asked to be taken back to the magistrate but Pentz paid no attention. On their return to the police station, only because the accused

was so persistent, Pentz telephoned Mr Steyn. He made it clear to the magistrate that he was not interested in sending the accused back to him but the magistrate said "as die man wil kom, bring hom na my toe". This prompted Pentz to instruct Masiba to take the accused back to the magistrate. Pentz could not remember whether he read exhibit K on their return or whether he questioned the accused to make certain that no further 'mistake' had occurred.

Pentz's account of what is alleged to have taken place is riddled with a number of improbabilities and unsatisfactory features - in fact riven by them. In chronological sequence, though not in order of importance, they are the following. It is unlikely that the accused, having completed his statement to Pentz, would have asked of his own volition to repeat it before a magistrate. It is as improbable that the

accused, who had voluntarily decided to make a confession to a magistrate, would within a comparatively short space of time, and for no apparent reason, change his mind and decide not to do so. Moreover, he then falsely tells the magistrate that he was threatened when, had he changed his mind, there was no reason for him to furnish this or any other explanation. He could simply have said on arrival that he no longer wished to make a statement. It is obviously important to an investigating officer (particularly if there are no eye witnesses to the killing in a murder case) that a suspect, if willing to confess to a magistrate, should do so. Yet when the accused returned, Pentz did not ask him what the "mistake" was all about, why he had made a false allegation about being threatened or what had made him decide against making a confession to the magistrate. Pentz's explanation that he was so angry that he in

effect lost the power of speech can only be described as ludicrous.

His behaviour the next morning borders on the bizarre. The accused continues to plead with him to be given another chance to confess before a magistrate but Pentz has so lost interest that, but for the suggestion or instruction on the part of the magistrate over the telephone, no confession would have been forthcoming with the assistance of Pentz. If the accused had in fact made a mistake that same afternoon, as Pentz alleges the accused said, the change of mind could not have arisen from a discussion with his co-accused that night. In that event why does he furnish this as the reason for deciding to make a confession? It all points to Pentz's evidence about a mistake being false. How likely is it, one may ask, in the light of what happened when the accused went to the magistrate the

first time, that Pentz would not have read exhibit K without delay to make certain that the accused was not again leading him a dance. Moreover, it is inconceivable, having regard to what the accused did when he went to the magistrate the previous day, that Pentz would not have asked him what he intended telling the magistrate before arranging for him to go a second time.

On Pentz's evidence, considered alone, one is driven to the inescapable conclusion that he has not given a truthful account of what took place: it has the unexpungable odour of misconduct.

His evidence is thus dealt with in the judgment:

> "He was subjected to lengthy cross-examination and in our view did not falter in any respect under cross-examination. His evidence was consistent throughout and there is no reason in our view to

reject his evidence. We are of the view that Pentz was a truthful witness and that we can place full reliance on his testimony. Admittedly it may be said to be improbable that accused No. 2, having been taken to a magistrate on the afternoon of 17 December 1985 and having informed the magistrate that he was there because he had been threatened and eventually having declined to make a statement, changed his mind that same afternoon immediately after being brought back from the magistrate and asked that he be taken back. However, accused persons do change their minds and it does not seem to us that the fact that accused No. 2 changed his mind is anymore improbable than accused No. 2's version of a strange man whose build and stature he was unable to describe, having been assaulted in his presence and left lying on the floor whimpering and bleeding during the entire period that his statement was being recorded. If the probabilities of the two versions are weighed up against one another then, in our view, at the very best for accused No. 2 the probabilities can be said to be evenly balanced, in which event he will not have satisfied the onus which rests on him of proving his version on a balance of probabilities."

At the conclusion of his evidence Pentz had been questioned by the trial judge. The nature of his questions indicates that he was mindful of certain of the unsatisfactory features of Pentz's

evidence to which I have referred. Pentz was, for instance, asked: why he did not query the "mistake"; why he did not question the accused's assertion that he had been threatened (the question put by the court inadvertently referred to an "assault" but there was no misunderstanding about what was meant); why the accused who had just come from the magistrate would have been so anxious to return; and why the accused, if he had wished to cure the "mistake" the following day, would not have explained his mistake to the magistrate, rather than offer the explanation that a supervening discussion with his co-accused was the reason for his reappearance before him. Pentz, one need hardly say, was unable to answer these questions satisfactorily. During this questioning one detects - and this is in no way surprising - a note of scepticism on the part of the court. However, as appears from the extract from the judgment quoted

above, these startling improbabilities in the evidence of Pentz are hardly addressed in the judgment. The one alluded to is that the accused (within a comparatively short period of time) changed his mind when he went to the magistrate on the first occasion. But in the context of the evidence, this fact cannot simply be dismissed with the observation that "accused persons do change their minds", as said in the judgment. It is true that persons - not only accused persons - do so. It must, however, be a rare occurrence for a person, who is moved to confess voluntarily, to change his mind twice during the course of one afternoon: he was initially prepared to confess, decided against doing so, and then said that was a mistake and pleaded to go back to the magistrate. Finally, with reference to the reasons for the acceptance of Pentz's evidence, the improbability in the accused's version - if such it be

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- relied upon in the judgment cannot, having regard to the nature and quality of Pentz's evidence, serve to make it reliable or worthy of belief.

In an attempt to reconcile the inconsistency in the behaviour of the accused with the evidence of Pentz, Mr Bursey, who appeared on behalf of the respondent, argued along these lines. Though not threatened by anybody, the accused feared that he would be assaulted if he did not volunteer a confession. He therefore decided falsely to state that he was threatened when he first came before the magistrate to enable him, when he later made a confession (to satisfy Pentz and prevent an assault), to successfully challenge in due course its admissibility in court. This intricate explanation for his conduct is fanciful

beyond words. One need only say that, if he feared an assault at the hands of Pentz, a procedure calculated to provoke one would be to undertake to confess, fail to do so, and then falsely accuse Pentz of having threatened him. (Cf. Masiba's indelicate remark on reading exhibit M.)

Turning to the accused, in the judgment on the admissibility of the confessions, it was said that the accused was "a most unsatisfactory witness" and that "his evidence contains a number of contradictions and inconsistencies and is highly improbable in a number of respects." The judgment does go on to deal with one alleged shortcoming in his evidence.

It appears that the main ground for rejecting the evidence of accused no 2 was his denial that

accused no 7 was brought in during the interrogation. A number of State witnesses, in addition to Pentz, say that he was. (On their evidence accused no 7 was brought in to an office occupied by a number of policemen for the period of time necessary for a brief report to be made to Pentz on how he came to be arrested.) It may well be that in this regard the evidence of accused no 2 is incorrect. The indications are that it was. This led the court to conclude that the presence of accused no 7, slightly injured, inspired the false story on the part of the accused that another person had been assaulted in his presence. It was for this reason, so it is said, that he denied the presence of accused no 7 during that interview. The court apparently decided that, because accused no 7 was in fact in that office during the interrogation, no one else could have been brought into that office and assaulted as he alleges. This reasoning appears to me,

with respect, to be questionable. If the presence of accused no 7 was the source of the accused's story, there was no reason for him not to have said that another person was <u>also</u> brought in and assaulted. It was unnecessary for him deliberately to deny that accused no 7 was there, an allegation which could easily be refuted by a number of State witnesses and, for all the accused knew, by accused no 7 himself. The accused who is described as an intelligent person would, one may suppose, have realised this. It simply does not follow that someone, in addition to accused no 7, could not have been brought in.

There are other factors to be taken into account in deciding whether as a probability the accused was <u>deliberately</u> <u>untruthful</u> in saying that he was threatened by way of the assault upon this other

person:

(a) If one concludes - as I believe one must - that, on the undisputed evidence and that of Pentz, the accused was in fact threatened, and that this is the only logical explanation for both his conduct and that of Pentz as regards the two visits to the magistrate, then it appears highly unlikely that the accused would have contrived such an unusual story of how the threat came to be made rather than simply stating the form the threat or threats actually took.

(b) Alternatively, <u>if</u> in fact he was not threatened in any way, one would have expected that a fabricated threat would have been a less involved and detailed one and one less susceptible to exposure as false: for instance, as he later averred, that Pentz threatened to kill him.

(c) The episode giving rise to, and in a sense constituting, the threat, on my reading of the record appears to have been related in convincing detail both in evidence-in-chief and under cross-examination. Moreover, if fictitious, it was thought out in a comparatively short space of time. According to Pentz, his interrogation of the accused started at noon and it is recorded on exhibit M that at 3 p.m. he began his interview with the magistrate. At that interview, as appears from exhibit M, he spoke of this

assault upon another person in his presence.

(d) The confusion about "maag" and "mag", though in itself insignificant, is rather revealing. The accused's misunderstanding of what was said to him puts the fact that he was thus admonished beyond doubt: "jy moet weet jy is in my maag (mag) en jy gaan doen wat ek wil hê jy moet doen". It follows that Pentz's denial that he said any such thing is false. On the accused's version this initial admonition is consistent with what subsequently took place.

In the result it cannot, in my view, be said with certainty that the accused's evidence of the assault is deliberately false. If, however, this is assumed to be the case, two further comments are called for: first, even if the accused was not threatened in this manner, the evidence - as I trust I have indicated - is overwhelming that a threat of some sort was made before the first visit to the magistrate; second, the threat made on the morning of 18 December, which led directly to the confession, was not based on any alleged assault on another person and, with Pentz

discredited, stands uncontradicted.

Apart from relying on the evidence of the State witnesses De Lange, Bester and Oosthuizen on the question whether accused no 7 was brought in, the court, as I have said, relied principally on the evidence of Pentz. This is confirmed by the concluding passage of the judgment in the interim trial, which reads as follows:

> "As I have already said, we accept the evidence of Pentz as being truthful. It follows that we are satisfied from the evidence of Warrant-Officer Pentz that accused No.2 made his statement to the magistrate on 18 December 1985 freely and voluntarily and without having been unduly influenced thereto. The evidence of Pentz in this regard is corroborated by the evidence of the magistrate, Mr Steyn, who saw accused No.2 both on 17 December 1985 when he did not take a statement from him and on 18 December 1985, when he recorded his statement. Mr Steyn questioned accused No.2 before taking his statement and he is satisfied that he was at ease and that he had not been unduly influenced into making a statement. We unreservedly accept the evidence of Mr Steyn."

.....

"We have accordingly come to the conclusion that on the totality of the evidence accused No. 2 has failed to satisfy the onus which rests on him to establish on a balance of probabilities that the statement which he made to the magistrate, EXHIBIT K, was not freely and voluntarily made."

The above reasoning in the judgment calls for passing comment in two respects: If in fact Pentz ought to be believed, the question of onus of proof does not arise. And the fact that the accused on the second occasion appeared to Mr Steyn to be at ease and said that he had not been threatened does not materially corroborate Pentz's evidence: cf. S v Hoosain 1987(3) S.A. 1 (A) at 10 F - G. Be that as it may, it is correct to say, as has already been stressed, that his evidence was the corner-stone of the State case.

For this reason the evidence of other State witnesses was, with respect correctly, not relied

upon or dealt with in any detail in the judgment or in argument before us. Masiba and Faleni, the two policemen who were closely involved in the interrogation and other events involving the accused, were found to be unsatisfactory witnesses. Having said that, it is still somewhat surprising that they failed to corroborate the evidence of Pentz on certain crucial aspects of the case. Masiba, for instance, when asked whether a person was brought in and assaulted in the presence of the accused, said: "Perhaps I, if it happened in my presence, perhaps I would remember that". Masiba was described in the judgment as a "shocking witness" and the same could be said of Faleni. The other State witnesses, who have thus far not been mentioned in this judgment (Det.Const. Smith, Mr (formerly Sgt.) Bester, and W.O. Oelofse), gave peripheral evidence and, although apparently called to do so, could not for various reasons state

positively that the assault on this other person did not take place. They were not constantly in the office where Pentz normally works and there is some uncertainty about the office used, or used throughout, for the questioning on that day. In the circumstances further discussion of their evidence will serve no useful purpose.

In the result I cannot agree with the conclusion reached in the court a quo. Pentz's denial of a threat is to be rejected for the reasons stated. To my mind, on a proper appraisal of all the evidence, the accused has shown on a balance of probabilities that threats were made as alleged by him and that they induced the confession the second time round. It follows that exhibit K ought not to have been received as evidence in the trial.

Accused no 2 explained how the statement, exhibit X2, came to be made to Capt. Köhne. On 18 December 1985, after the accused had confessed, Pentz told him that he was not finished with him yet and that there was something else he would have to do. On 14 February 1986, before the accused set off with Capt. Köhne, Pentz reminded him of this earlier instruction; told him what to point out; said that whilst doing so, he should narrate to Köhne some details of what happened when the deceased was killed; and added that if he did not comply with these instructions he would be shot. Pentz denies all this. However, since he has been shown to be a dishonest witness in the matter of threatening the accused, his denial carries no weight. In the circumstances, particularly since the onus was on the respondent to prove that this statement was voluntarily made, it too ought to have been excluded.

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Mr Bursey next submitted that the other evidence (apart from exhibits K and X2) tendered as part of the State case proved the murder charge against the accused. (After the statements had been admitted, the accused did not give evidence on the merits.) This argument was based on the evidence of Tozama considered in conjunction with what the accused pointed out to Kohne.

According to Tozama, when she arrived at her house that afternoon, there were a crowd of people in the street outside, some of whom were onlookers. She noticed accused no 2 in the yard next door. He held a stone in each hand and another accused outside their home was in possession of a two litre bottle of petrol. Inside the house she came upon the deceased, who at that stage had some head and other injuries. Stones were being thrown at the house and its windows broken.

The assailants wanted the deceased to be handed over to them. Someone threw an iron bar at him which struck him on the arm. Another said "Come out Whitey (the deceased) so that we should go to the meeting". By this time part of the house had been set alight. At a later stage she saw accused no 2 with others trying to pull the deceased out of the house whilst she and others were trying to prevent this. A tug-of-war ensued until the deceased's father told him to stop resisting and go along with them. She said that accused no 2 accompanied the deceased's escorts but could not say whether and, if so, at what stage accused no 2 left the group. Soon after she left the house she was forced to turn back. Before she retraced her steps she noticed that no 2 was one of the persons who made her mother return to the house. (The evidence of the mother, Jane Nomisile Dondashe, confirms that of her daughter on what took place at her house but

takes the matter no further.)

As regards the pointing out, which is now to be considered without any reference to what the accused said at the time to Köhne, the latter's evidence was to the following effect. On 14 February 1986 he accompanied the accused on a "pointing out" exercise arranged by Pentz. The accused guided him to the house from which the deceased was taken and from there to the area where he was killed. The accused was plainly expected to point the actual spot where this took place. Köhne's note in this regard reads: "Kon nie presiese plek uitwys nie - dui slegs omgewing aan - ". This Köhne confirmed in evidence: the accused was unable to point out a precise place. In fact, he wandered about for some time until he stopped and said: "Dit moet hier rond wees." The accused maintained that he was one of the crowd who saw the police carrying the

body of the deceased as they emerged from a bushy area. When he was obliged to point out a spot in the bush, he chose one at random.

Köhne in turn pointed out this spot to Pentz. Meiring afterwards showed Pentz the place where the deceased had been killed. (Meiring had seen the body lying near a footpath in this bush before it was removed.) Mr Bursey argued that his pointing out a place some 10 metres from where the body was found, cannot be co-incidence and therefore proves that he was at the scene when the deceased was killed. This submission is to be rejected for more than one reason. The evidence on both sides indicates, at least as a reasonable possibility, that the accused was genuinely uncertain where the place was that he was required to point out. Meiring did not explain how he marked or fixed in his memory the spot from which the body had

been removed, nor did Köhne say how he had taken note of the "omgewing" indicated by the accused: there was no reference to distinguishing features at either place. And, finally, Pentz was shown the two spots and it is his evidence that they were about ten metres apart. The unfavourable inference sought to be drawn therefore depends upon the evidence of Pentz. But he was shown to be an unreliable and untrustworthy witness. In the result the pointing out does not further the State case.

The question is then whether the evidence of Tozama, standing alone, proves the complicity of the accused in the murder of the deceased. There is a passage in the main judgment which suggests that this may well have been the view of the court. In dealing generally with the liability of all the accused, it reads:

"(I)t cannot be said that the State has proved beyond a reasonable doubt that the intention to kill had already been formed by all members of the mob by the time that they reached the home of the deceased.

We reached this decision due to the fact that there is evidence before us that at least certain of those who had gathered at the home of the deceased were at some stage or another intent on taking the deceased to a meeting presumably to enable the meeting to investigate the allegations against him that he was an 'impimpi' or informer.

In our view it would be safer to hold that the intention to kill the deceased was formed at the stage when he was removed from the house for it is apparent that he was taken from there directly to the place where he was put to death and we hold accordingly.

Having come to this conclusion it is in our view only acts of association with the actions of those who caused the death of the deceased which were perpetrated during his removal from the house and thereafter which can be relied on by the State for the conviction of any of the accused of murder on the basis of common purpose."
(My underlining.)

It is not clear to what precise stage of the events the underlined words are intended to refer. Be that as it

may, on Tozama's evidence accused no 2 actually participated, in the manner described by her, at least until the deceased was being escorted from the house and she was told to return to it. But on her evidence one cannot say: (i) for how long the accused accompanied the group and thus continued to associate himself with their actions; (ii) what was said, and heard by the accused, about the intended purpose of the abduction; (iii) whether the deceased was in fact killed that afternoon, bearing in mind that the body was discovered only on the evening of the following day; and (iv) if so, at what stage of the "meeting", or for what reason, the accused was fatally assaulted. In the absence of evidence in the above regard, or of proof that the accused was a party to a prior agreement to abduct the deceased in order to kill him, the requirements for the application of the doctrine of common purpose in a case such as this have in no

way been satisfied: See S v Mqedezi and Others, 1989(1) S.A. 687(A) 705 I - 706 C; and S v Jama and Others 1989(3) S.A. 427(A) 436 D - I.

Mr Bursey's final argument in support of the murder conviction of accused no 2 was based upon evidence given by him in extenuation after the verdict of guilty. Counsel's submission was that such evidence can be taken into account and, considered in conjunction with that of Tozama, proved the accused's complicity in the murder.

In leading the accused's evidence in extenuation, his counsel referred him to exhibit K, which was of course at that stage evidence before court. The accused confirmed, and to an extent explained, what he had said in that statement: that he struck the deceased with a copper pipe on the way to

the bush; that on arrival there the deceased was questioned inter alia about his collaborating with the police; and that he pleaded with them not to kill him. He added - this allegation does not feature in exhibit K - that the deceased was taken to this place in the bush rather than to the place where the "courts" or meetings were normally held because the sister of the deceased might trace them there. The accused was thereupon cross-examined at length on vital aspects of the case. The questioning on the merits (as opposed to facts which normally relate exclusively to extraneous extenuating circumstances) fell into three categories: (i) questions arising from what the accused had said in exhibit K; (ii) those relating to the evidence of Tozama; and (iii) various others.

Category (i)

At the outset of the cross-examination the accused was asked whether what was recorded in exhibit

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K was in fact the truth. This he admitted. Although now held to be inadmissible, to appreciate the questions asked in this category it is necessary to quote what he said in exhibit K:

> "Ek wou weet waarom hulle hom soek. Hulle sê toe hulle soek na wapens by Whitey. In dieselfde straat waar Whitey was sien ons toe 'n klomp mense by 'n huis. Ons is toe die huis binne. Ek sien toe vir Whitey in die huis en hy het 'n wond op sy kop gehad wat gebloei het. Denge en Vuyani het toe vir Whitey uit die huis gehaal. Ons loop toe saam met hom. Op pad het ek vir Whitey met 'n koperpyp in sy rug geslaan. Ons is toe na 'n bos toe. Ons het hom ondervra oor die wapens wat hy gehad het. Hy het ons vertel waar hulle is en gesê dat daar drie wapens was. Whitey smeek ons toe om hom nie te slaan en nie dood te maak nie. Ons het hom toe geslaan en Stagga het hom toe met 'n byl gekap. Vuyani het toe petrol oor Whitey gegooi. Omdat ek nie geweet het dat Whitey doodgemaak sou word nie het ek weggehardloop. Toe ek terugkyk het ek gesien dat Whitey brand. Ek het toe huis toe gegaan en daar gaan wag. Dit is al."
> (My underlining.)

The accused was taxed on the underlined portion of his confession. He was highly evasive and was unable to

explain away this incriminating statement.

Category (ii)

It is not clear what purpose these questions were intended to serve. The evidence of Tozama had been accepted and certainly needed no confirmation from the accused. (It, one may mention, was not refuted by his answers.)

Category (iii)

Under this heading new evidence emerged from the accused which was relevant to the merits and was to the following effect. The deceased was abducted by the "Comrades", a faction or gang operating in that township. Although the accused was not a member, he sympathised with some of their aims. He was disappointed and angry when he heard that the deceased was said to have collaborated with the police. He realised before this incident that when informers and collaborators are tried by Comrades in their "courts"

they are normally either killed or severely injured. He did, however, also say that in the instant case he did not suspect that the deceased would be killed: he thought that they would "merely hit him." A further question and answer on what he anticipated might happen to the deceased read as follows:

> "You see Mr Mooi there is one further aspect I want to go into, once you reached the bush and the group was questioning and assaulting the deceased, the deceased had pleaded for mercy and that he not to be - that he should not be killed, what happened then? --- So the people who were questioning him as well as the grown-up people, those people were older than us, decided that he should merely be punished and be released. I was shocked to see Stager take an axe and chop the deceased and when accused No. 16, Vuyani, took petrol and poured it over him, I was shocked and I ran away because I did not know that he would be killed. Had I known that deceased would be killed I would not have followed up to the bush and I thought we were proceeding to the so-called court where the meeting would have been held."

In the course of being questioned by the court he admitted that he noticed accused no 16 carrying a can

of petrol as they went from the house to the bush; that petrol is used for "necklacing", that is, burning a person to death by placing a tyre around the neck and igniting it. He, however, said that he did not take particular note of the petrol and it did not occur to him for what purpose it would or might be used.

It is clear, as a general proposition, that in a trial an inadmissible statement cannot be used for any purpose against its author and, in particular, he cannot be cross-examined on it (cf: Rex v. Perkins 1920 A.D. 307 at 310 and Rex v. Gibixegu 1959 (4) S.A. 266 (E) 269 A - D). S. 217(3) of the Act creates an exception to this general rule. How its provisions are to be applied on appeal, if at all, in a case of this nature is a question which need not be decided. I say this, since, if it is permissible to take cognisance of the evidence in category (iii), such (considered in

conjunction with the other admissible evidence) would seem to prove the State case.

In his evidence falling within this category the accused said he realised that a person in the situation in which the deceased found himself could be killed. Tozama, as has been mentioned, could not take the evidence beyond the stage when she turned back. The accused, however, acknowledged that he did accompany the group to the place where the killing took place; in fact, that he only left the group after the deceased had been struck with an axe and petrol poured over him. He admitted that he had seen one of the group carrying petrol in a container as they proceeded to this place. In the light of other evidence, his statement that he did not know for what purpose the petrol was being taken along with the deceased is unacceptable. A reasonable inference is that he knew

that it would or could be used to set fire to the deceased and, with that knowledge, he remained with the group. These facts, amplifying as they do the evidence of Tozama, to my mind, may well justify the conclusion that the decision of the court a quo was correct, notwithstanding the fact that exhibits K and X2 were incorrectly admitted.

In the circumstances it becomes necessary to address the legal question raised in argument: viz. whether, when an accused person has been found guilty of murder, evidence in extenuation can ever have any bearing upon such finding. (I shall throughout refer to this decision on guilt as a "finding" rather than a "verdict".)

In considering the question it is to be noted that evidence in extenuation could include: (i) evidence not only of the accused but also of other

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witnesses called on his behalf and evidence led in rebuttal by the State; (ii) not only an admission of guilt on the part of the accused at that stage of the proceedings but also other evidence given by him, or for that matter by some other witness or witnesses, which cures a defect in the State case; (iii) evidence which establishes for the first time that, although the accused was incorrectly found guilty of murder, he is guilty of some lesser offence, of which he may be competently convicted on an indictment for murder; or (iv) evidence which may be forthcoming - the converse of the situation now under consideration - which proves that the finding of guilt was wrong or casts doubt on its correctness.

To recognise that a finding of guilt on a murder charge can be reconsidered by taking such subsequent evidence into account, gives rise to a number of

difficulties. They all stem from the fact that the finding in that event cannot be regarded as final. To mention some of them: (a) Such a conclusion would enable the defence to cure a defect in its case, perhaps revealed in the judgment, on the ground (or pretext) that such evidence relates to extenuation. The State could do likewise (despite the finding in its favour), as indeed it did in the present case, whether or not this was its objective. (b) Any further evidence relating to the merits could to a greater or lesser degree lead to the reopening of the case. (c) In certain circumstances, when evidence is given in extenuation, there may be no clear line of distinction between that which pertains to extenuation and that which relates to the merits. If the trial court decides that the latter is to be taken into account to alter the finding in favour of the accused, the prosecution would no doubt be informed beforehand. But

if such evidence is considered for the first time on appeal, either to reverse or alter the finding in the interests of the accused or to support a conviction which otherwise could not stand, prejudice to one or other party could result. The court on appeal could be called upon to reassess the probabilities and findings of credibility in the light of the further evidence which the trial court could not have considered before its finding on the merits and may not have considered afterwards in reference to that finding. In that event one would have the unsatisfactory result of a finding of guilty being rescinded or a lesser "verdict" substituted or a conviction upheld on evidence not taken into account by the trial court. For instance, in the present case, it might have been necessary to decide whether Tozama's evidence before the finding ought to stand in the light of the conflicting evidence given by the accused after the finding. (d) The

difficulties which in certain instances arise from the fact that the onus of proof to secure a conviction resting on the State differs from that which an accused is required to discharge in order to prove extenuation, are likely to be exacerbated if this question is affirmatively answered.(Cf. S v Sephuti 1985(1) S.A. 9 (A) at 18 E - 19 B; and S v Shabalala 1966(2) S.A. 297 (A) at 300 A - C.) (e) Even the relatively simple case of an accused admitting his guilt after the finding (for instance, after a false alibi has been rejected) is not without complications. In such a case an accused is encouraged to make a clean breast of it in order that he may place before the court information on extenuation, if such exists, and thus ensure that the court has a discretion in deciding whether or not the death penalty ought to be imposed. The merits of such a course, one knows, are invariably explained to an accused by his counsel or, if

unrepresented, by the court. If his subsequent evidence in extenuation can be taken into account on appeal to justify the conviction, the explanation of his legal position, and his decision on the course to take, would both be extremely difficult. He, with or without the advice of counsel, would be required to weigh up the prospects of success on appeal against the dire consequences of not tendering evidence in extenuation. This is an unsatisfactory situation, particularly if one has regard to the fact that extenuating circumstances as a ground for not necessarily imposing the death sentence was introduced (in terms of s 61 of Act 46 of 1935) solely in the interests of the accused. (See Rex v Lembete 1947(2) S.A. 603 (A) at 609.)

With these observations on the effect of upholding Mr Bursey's contention, I turn to

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our case law on the subject.

One knows that a murder trial is unique, and differs from others, in that a twofold enquiry can be involved: firstly, an enquiry to determine the guilt or innocence of the accused and, secondly, if he is found guilty of murder, an enquiry into the question whether there are extenuating circumstances. There are thus two separate findings involved in such a case and no (final) verdict ensues before the latter finding. This much is clear and has never been called into question. (See for instance S v Sparks & Another 1972(3) S.A. 396 (A) at 404 E.) However, this procedural dichotomy has been discussed and commented on in a number of decisions of this court but - and this is to be emphasised - in the particular context of the different questions calling for decision in each of those cases.

In S v Shabalala 1966(2) S.A. 297 (A) it was held that, although there is one (overall) enquiry ("ondersoek") viz. whether the accused is guilty of murder with or without extenuating circumstances, such enquiry ought to be conducted in two separate and successive phases. The point in issue was whether previous convictions ought to be proved before or after the finding on extenuating circumstances. S v Fisher en 'n Ander 1969(2) S.A. 632(A) affirmed this two-phase approach in reference to facts similar to those in the present case. Three accused had been found guilty of murder without extenuating circumstances and sentenced to death. Before sentence was passed one of them gave evidence in extenuation - in fact on behalf of the others. He renounced his previous evidence and said that he was solely responsible for the commission of the offence. On appeal the other two accused, by way of a special entry, contended that the trial court

ought to have had regard to this evidence since it was competent for the court, on the strength of such evidence, to set aside or alter the finding on the merits. The trial court (Corbett J) had rejected this argument. This court (Van Blerk JA with Holmes JA and Trollip JA concurring) confirmed this view, holding at page 636 A - B that:

> "(W)aar die Verhoorhof eenmaal, soos hier aan die einde van die eerste stadium van die verhoor, 'n uitspraak van skuldig aan moord gedoen het, dié uitspraak finaal is en die Hof nie die bevoegdheid het om dit te heroorweeg of te wysig nie, nòg uit hoofde van sy algemene inherente bevoegdheid, nòg kragtens art. 187 (2) van die Strafproseswet."
> (s 187(2) has been replaced by s 176 of the Act).
> (My underlining).

The court a quo in S v Shoba 1982(1) S.A. 36 (A) had ruled that the evidence of an accused in extenuation could not be tested by cross-examination. In correcting this misdirection, this court said that the

enquiry into the existence of extenuating circumstances was an integral part of the trial and for that reason a right exists to cross-examine during the second phase of the enquiry.

It is against this background that the decision in S v Mavhungu 1981(1) S.A. 56 (A) is to be considered. The appellant was one of 4 accused charged with murder. He pleaded guilty. Evidence was nevertheless led by the State in view of the possibility of the death sentence being imposed. According to the only witness called to give evidence on the incident itself, the appellant was the person directly involved in the killing of the deceased. The appellant elected not to testify and closed his case. He was found guilty of murder and thereafter gave evidence in extenuation. He told of his participation in the crime and in doing so

contradicted the State case in two important respects. He denied that he took part or was present at the time of the killing and said that in any event the deceased was not the person they had conspired to kill: they had another victim in mind. Although the trial court accepted the evidence of the appellant in preference to that of the State witness, it found no extenuation and the appellant was sentenced to death. Afterwards appellant's counsel had second thoughts about the correctness of the plea of guilty and applied to the trial judge (a) for leave to appeal and (b) for the evidence in extenuation to be regarded as evidence on the merits. Leave was granted as sought in (a) but nothing was said about (b). On appeal it was contended that this court could have regard to the evidence in extenuation in considering the merits of the conviction and that the verdict should be altered to one of being an accessory after the fact to murder.

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Counsel for the respondent in his heads of argument accepted these contentions. The court, nevertheless, raised the question whether a remittal of the case to be tried afresh was not the best course to adopt. It, however, in the result decided against doing so for reasons set out in the following passage of the judgment at page 64 C - G:

> "After due reflection I do not think that remittal is the appropriate course for the following reasons. The offence was committed and appellant was arrested more than two years ago. He was convicted and sentenced to death on 17 October 1979. So he has been awaiting the outcome of these proceedings for a considerable time. If the case were to be remitted for re-trial, its ultimate outcome would be further delayed. That delay may be appreciably prolonged by reason of a possible further appeal to this Court against the decision on the re-trial by appellant or even the State. Such an appeal is a real possibility since the legal problem now raised by appellant's counsel on the merits is not free from difficulty, as will presently appear. Moreover, since his arrest appellant has made a clean breast of his complicity in the commission of the offence; he has stood his trial; he there gave a full version of the part he had allegedly played in the

> commission of the offence; it was accepted by the trial Court; and he was duly granted leave to appeal to this Court. In all those circumstances to subject him to a re-trial before another Court with the ensuing delay and uncertainty of its outcome, instead of now disposing of the matter finally on the record of the proceedings before us, would be unduly prejudicial to appellant. After all, this is not a case where, if the present appeal succeeds, the appellant will go scot-free; a verdict of guilty of being an accessory after the fact in respect of the murder will then be substituted, for which he can be appropriately punished by us; so the ends of justice will still be adequately served."

The court next remarked on the fact that counsel for the appellant had sought to rely on the provisions of s 316(3) and (4) of the Act to have this evidence before the court on appeal but that the court a quo had made no order in this regard. It was against this background, which I deemed necessary to set out in some detail, that the court concluded "that there is a simpler, better reason why we can on appeal in this case have regard to the evidence in extenuation in

adjudicating on the correctness or otherwise of the Court a quo's verdict". (65 C - D).

These reasons follow:

> "Section 330(1) of the prior, now repealed Criminal Procedure Act 56 of 1955, as amended, provided that, where the Court 'in convicting the accused of murder' was of the opinion that there were extenuating circumstances, it could impose any sentence other than the death sentence. In S v Shabalala 1966 (2) SA 297(A) this Court held that the sub-section involved a twofold procedure: first an inquiry into the accused's innocence or guilt of the alleged murder, and, if his guilt was found proved, then a further inquiry into the presence or absence of extenuating circumstances. But, despite that procedural dichotomy, this Court (through Rumpff JA) at 300B of that case, and through Holmes JA in S v Sparks and Another 1972 (3) SA 396(A) at 404E, affirmed that in reality, where the accused is convicted of murder, there is only one overall proceeding and a single, albeit composite, verdict of guilty of murder with or without extenuating circumstances, as the case may be. The trial only ends when such a verdict is delivered. That also applies now under the corresponding s 277(2) of the present Act, since its relevant wording remains substantially the same. It follows that, for the purpose of an appeal against that verdict, the record of the

> evidence of the entire proceedings must be laid before this Court for its consideration. And in considering whether the verdict was right or wrong this Court can also have regard to the evidence adduced in extenuation. Thus where, for example, an issue on appeal is the identity of the murderer, it would be quite unrealistic and wrong for this Court in considering the verdict of guilty to ignore credible testimony given by the accused in extenuation admitting that he was the murderer. Similarly, there is no reason why that should not also be done where credible testimony is so given by the accused proving that he was innocent. Hence, in the present case we can, I think, have regard to appellant's evidence given in extenuation in determining what offence he was guilty of." (65 D - I).

In reaching this conclusion there was no prepared and one may therefore infer, no detailed argument presented on the correctness or suitability of the course adopted. And the implications and complications of such a course, to which I have referred, were apparently not raised or considered. It would appear that the special and unusual circumstances referred to in the first-quoted passage from the judgment weighed

heavily with the court in reaching its decision. Though Fisher's case is referred to in the judgment, at page 64H, only that portion of that decision which held that there was no "wrong judgment" delivered "by mistake" appears to have been taken into account. Fisher's case also decided that the court had no inherent right to rely, with reference to the merits, on the evidence given in extenuation. Finally, as regards Mavhungu's case, it should be noted that, although the court pertinently decided that evidence in extenuation could be taken into account in favour of an accused in deciding whether the first finding was correct, the illustration in the judgment (of an admission in extenuation proving the identity of the accused) makes it clear that an even-handed operation of this principle was intended and sanctioned. (In an earlier unreported decision of this court in Themba Nene v The State (No 86/76 : judgment delivered on 2

September 1976) the same view was taken obiter with reliance upon what was said in Shabalala's case and Sparks's case.)

In S v Theron 1984(2) S.A. 868(A) it was contended that there was no onus on an accused person to prove extenuating circumstances. In rejecting this argument, which was based inter alia on Mavhungu's case, Rabie CJ (with the concurrence of the four other members of the court) questioned, at page 879 D - H, the correctness of Mavhungu's case in these terms:

> "Ek het, met eerbied gesê, bedenkinge oor die juistheid van die stelling in Mavhungu se saak wat hierbo aangehaal is, anders as wat mag blyk uit S v Hlatswayo 1982(4) SA 744(A), waar ek met die uitspraak van Holmes AR saamgestem het. Waar 'n moordverhoor in twee fases, soos hierbo genoem, geskied, kom dit my as twyfelagtig voor of dit heeltemal juis is om te sê dat daar net één ondersoek en net één bevinding (of net één 'composite finding') is. In die twee fases van die verhoor is daar immers twee geskilpunte wat duidelik van mekaar te onderskei is: die een het betrekking op die vraag of die misdaad moord bewys is, en die tweede op die vraag of daar versagtende

omstandighede by die pleeg van die misdaad was. Aan die einde van die eerste fase word die beskuldigde, by behoorlike bewys van die elemente van die misdaad moord, aan moord skuldig bevind, en nadat daardie bevinding gemaak is, volg die ondersoek na die vraag van versagtende omstandighede - 'n ondersoek wat op die kwessie van vonnis gerig is. Nadat 'n bevinding hieroor gemaak is, word dan die toepaslike straf opgelê. Die Hof maak derhalwe nie 'n bevinding soos 'skuldig aan moord sonder versagtende omstandighede', of 'skuldig aan moord met versagtende omstandighede', nie. Daar is in werklikheid twee afsonderlike bevindinge, teen elkeen waarvan daar (met die nodige verlof) geappelleer kan word. Daar dien ook op gelet te word dat 'n beskuldigde wat op 'n aanklag van moord teregstaan, in die klagstaat van moord aangekla word, en nie van moord sonder versagtende omstandighede, of moord met versagtende omstandighede, nie. Daarbenewens moet ook vermeld word dat ook in daardie sake waarin daar gesê word dat daar by 'n moordverhoor net één ondersoek en net één bevinding is, daar terselfdertyd gesê, of aanvaar, word dat daar twee geskilpunte is en dat die bewyslas met betrekking tot daardie twee geskilpunte nie op dieselfde party rus nie."

Thus, although there can be no doubt that there is no final verdict until a ruling on extenuation is given, this decision emphasises that there are two separate findings, involving separate

enquiries and supports the view for which the accused contends.

In Mnyandu and Another v The State, an unreported decision (No 528/87: judgment delivered on 1 June 1988) this court (Corbett and Smalberger JJA and Nicholas AJA) expressed doubt about the correctness of the conclusions reached in Mavhungu's case and said that, in the light of Theron's case, it may have to be reconsidered.

The facts of this case oblige one to do so and for the reasons given, in my respectful view, it ought not be followed. It is rather to be recognised and affirmed that evidence given in extenuation cannot at any stage be relied upon to set aside, vary or substantiate the preceding finding on the guilt of a person on a murder charge. This conclusion, one need hardly add, does not affect the right to apply to lead further evidence in terms of s 316 of the Act. It

must also be noted that the converse does not apply: the court can have regard to extenuating facts emerging from the evidence led before an accused is found guilty. The acknowledgement of this "exception" - if it is so to be regarded - is in the interests of an accused person and can cause no prejudice to the prosecution.

A conviction of public violence being a competent verdict on a charge of murder, at the trial some of the co-accused were convicted of this lesser offence. Mr Kuny, who with Mr Chetty represented the appellants, conceded that on the admissible evidence accused no 2 was guilty of public violence. As regards sentence, he submitted that we should be guided by the sentences imposed on the other accused for this offence, but with due regard to the particular facts relating to this accused's complicity. This I have

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done, and consider that a sentence of the order of four years' imprisonment with a further year conditionally suspended would be appropriate. However, the accused has been in custody since November 1985. S 282 of the Act does not authorise this court to antedate the sentence: S v Mgedzi & Others 1989(1) S.A. 687(A) at 716 G - 717 B. In the circumstances one can only impose a wholly suspended sentence to ensure that the punishment is in the result fair.

The appeal of accused no 1, though no less important, can be more briefly dealt with. It is, as I have said, confined to the question whether the trial court was correct in finding that there were no extenuating circumstances. The court referred to the gruesome nature of the deed; the fact that the accused took the law into their own hands and in effect executed the deceased; and that accused no 1 had not

actually delivered the fatal blow. The participation of accused no 1 is thus summarised in the judgment on extenuation:

> (A)ccused No. 1 was one of those who held one of his arms as he was taken away towards the spot where he was put to death. As they proceeded on their way the deceased was repeatedly assaulted by members of the crowd. Accused No. 1 states in his confession, EXHIBIT J, that he also assaulted the deceased by striking him five times with a piece of steel piping which he had in his possession. He says further in his confession that the deceased was also stabbed along the way. In the statement which he made to Lieutenant Du Plessis, EXHIBIT Y.2, accused No. 1 goes on to describe how at the spot where the deceased was put to death he assisted in tying the deceased's feet together."

In the circumstances Van Rensburg J decided that the accused had not played a subordinate role. Counsel's argument to the contrary is not borne out by the evidence. Mr Kuny was unable to advance any further argument on the other alleged grounds for extenuation: that accused no 1 was part of a group and did not act as an individual; that the deceased was said to be an

informer; and that the motive for his death was a political one. Each of these possible grounds was considered by the court a quo and rejected. Mr Kuny did not submit that in doing so it had misdirected itself. I agree and, after examining the evidence in relation to them, cannot say that the court's finding on extenuation was wrong.

The appeal of the first appellant (accused no 2) succeeds partially. His conviction and sentence are set aside. In substitution the following order is made: "Accused no 2 is found guilty of public violence and sentenced to one year's imprisonment which is suspended for five years on condition that he is not found guilty of public violence committed during the period of suspension." The appeal of the second appellant (accused no 1) is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

BOTHA)
E M GROSSKOPF) - JJA - Agree