Case No 190/88

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MATLAKALA ELIZABETH MOTAUNG	1st Appellant
SANNA TWALA	2nd Appellant
SOLOMON MOTSOAGAE	3rd Appellant
LINDA ALAXANDRA HLOPHE	4th Appellant
LORRAINE ZANELE SOBUZI	5th Appellant
PHINEAS MASEKO	6th Appellant
PRISCILLA NTHABISENG MOREME	7th Appellant
DANIEL MBOKWANE	8th Appellant
SIPHIWE GOODBOY MSIPHA	9th Appellant

and

THE STATE	Respondent

CORAM: HOEXTER, SMALBERGER, MILNE, JJA et FRIEDMAN, NIENABER, AJJA

HEARD: 14 May 1990

DELIVERED: 17 August 1990

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA,

In the Transvaal Provincial Division each of the nine appellants was convicted of murder with extenuating circumstances. Three of the appellants were sentenced to imprisonment for life. On each of the remaining six appellants a shorter term of imprisonment was imposed. With leave of the trial judge the appellants appeal against their convictions and sentences.

During July 1985 daily life in many Black townships in various parts of the country was disrupted by rioting and other forms of violent disorder. One Black township thus afflicted was Duduza on the East Rand, where four young men died in shootings. In Duduza the belief was generally held that the four men in question had been shot by the police. The joint funeral of the four dead men was held on the afternoon of Saturday 20 July 1985.

The funeral was attended by thousands of people and the local cemetery was unable to accommodate all the mourners. A portion of the crowd stood outside the cemetery. Also there present was a 24 year old woman, Rosaline Maki Sikhosana ("the deceased"). In the court below the deceased was often referred to simply as "Maki". The deceased was suspected of being a police informer and the lover of a police sergeant. While the service at the graveside was in progress a section of the crowd just outside the cemetery set after and caught the deceased. The deceased was then surrounded by a bloodthirsty and violent mob. In the course of a sustained and savage assault at the hands of this mob, during which she was set alight, the deceased was battered to death.

The sequel to the killing of the deceased was the trial of eleven persons ("the accused"), including the nine appellants, on a charge of murder in the Springs Circuit

Local Division. Before the trial further particulars as to the thrust of the State's case were sought on behalf of the accused. Responding thereto the State detailed (in para 1) the assault or assaults alleged to have been committed by each accused upon the deceased. The defence inquired whether persons other than the accused had participated in the killing of the deceased. The State answered affirmatively, and went on to say:-

> "....die beskuldigdes was deel van 'n groep mense wat die oorledene aangerand het, maar die identiteit van hierdie persone is aan die Staat onbekend so ook wat elkeen gedoen het. Dit word wel beweer dat hulle die oorledene onder andere gejaag, gevang en op die grond neergegooi, geskop, met stokke geslaan, op haar gespring en/of aan die brand gesteek het."

In response to a further inquiry the State affirmed (in para 6) that in order to establish criminal liability on the part of the accused it relied on the doctrine of common purpose; and (in para 9.5) it furnished the following particulars of the facts from which such common purpose was

to be inferred -

"Die bestaan van 'n gemene opset en die beskuldigdes se aanhang daarvan word van onder andere die volgende feite afgelei:

(a) Die oorledene is aangeval deur 'n groep mense waarvan die beskuldigdes deel uitgemaak het en/of waarby die beskuldigdes hulle gevoeg het;
en/of

(b) Die aanvallers van die oorledene, waarby die beskuldigdes ingesluit is, het tydens die aanranding 'n kring om die oorledene gevorm;
en/of

(c) Die oorledene is aangerand deur die beskuldigdes soos in par. 1 **supra** vermeld en/of die ander lede van die groep soos in par. 6 **supra** vermeld, gesamentlik en/of in teenwoordigheid en ten aanskoue van die een of ander lede van die groep;
en/of

(d) Tydens die aanranding soos voormeld het die groep mense waaronder een of ander van die beskuldigdes deur hulle gedrag en/of gebare en/of die uitering van woorde mekaar en andere aangespoor en/of aangepor om die oorledene aan te rand en/of dood te maak.
Onder andere is woorde met die volgende strekking geuiter:-

(i) Sy moet geslaan word en/of
(ii) Slag haar af en/of
(iii) Sell-out; beriggewer en/of
(iv) Laat sy brand/gebrand word."

The trial was heard by a court consisting of HARTZENBERG, J and two assessors. The accused, who were represented by counsel, all pleaded not guilty, and at the close of the State case each accused testified in his or her own defence. For the sake of convenience reference to individual appellants will hereafter be made by using the number which he or she bore as an accused at the trial. The trial court acquitted accused nos 6 and 7. The remaining accused (the nine appellants) were, as already mentioned, each found guilty of murder with extenuating circumstances. They were sentenced by the trial judge on 24 June 1987. In what follows I shall indicate the age of each appellant with reference not to the date of sentence but as at the date on which the deceased was killed.

Accused no 1, a woman aged 27, was sentenced to

ten years imprisonment. Accused no 2, a woman aged 23, was sentenced to imprisonment for life. Accused no 3, a man aged 26, was sentenced to fifteen years imprisonment. Accused no 4, a man aged 26, was sentenced to imprisonment for life. Accused no 5, a woman aged 31, was sentenced to ten years imprisonment. Accused no 8, a man aged 28, was sentenced to ten years imprisonment. Accused no 9 was a schoolgirl in standard six who shortly before had turned fourteen. She was sentenced to imprisonment for five years, half of her sentence being conditionally suspended for a period of five years. Accused no 10, a man aged 21, was sentenced to imprisonment for life. Accused no 11, a youth aged 15, was sentenced to twelve years imprisonment.

The case is as appalling as it is unusual. It is appalling because it involved a prolonged and utterly barbaric attack upon a defenceless young woman. It is

unusual because during the trial the court had to contend with few of the knotty problems of identification which usually arise in a prosecution for murder following upon a killing by mob violence. Problems of identification were largely eliminated for the following reason. The deceased, having been pursued, caught and brought to the ground, was set alight. The attack upon her which ensued, and which continued until she had been butchered to death, was recorded by means of video cameras. The resultant video film provides grim and incontrovertible evidence of what physical acts were performed by those of the appellants who participated actively in the attack upon the deceased. Upon the screening of the video film the overt acts of violence are there for all to see, while the accompanying sound track conveys to the listener a distinct impression of the mood of the mob hounding its helpless

victim. In the result the scope of the inquiry at the trial was largely confined to the state of mind and intention of each identifiable aggressor, and the nature and extent of his or her criminal liability for the death of the deceased.

Among the witnesses for the prosecution there were two news cameramen who had attended the funeral in question. At the request of the State, and with the consent of the defence, their names were not revealed when they respectively took the witness-stand. They will be referred to respectively as "C1" and "C2". C1 worked for an overseas television network and he was armed with a video camera and a sound recorder. C2 was a freelance photographer. He had a video camera and he was accompanied by a sound-recording assistant. From the stage of the assault already indicated, C1 and C2 made video tape recordings at the scene of the assault. At the

trial an edited video film was handed in and screened a number of times. This was done after HARTZENBERG, J had dismissed an objection by the defence to the admissibility of the exhibit. It is unnecessary here to recount the circumstances in which the exhibit was produced or how it came into the possession of the South African Police. As a result of a number of important admissions made on behalf of the appellants during the course of the trial, by the time the stage of argument was reached in the court below the issue of the admissibility of the video film had become one of academic interest only. In this court the admissibility or otherwise of the exhibit formed no part of the argument advanced on behalf of the appellants. In its judgment the court below recorded the following finding:-

> "Ons is ..... tevrede dat indien 'n persoon op die film geëien kan word, sodanige identifikasie aanvaar kan word, net soos wat dit aanvaar kan word dat mense die dinge gedoen het wat op die videoband uitgebeeld word."

The correctness of this finding was not challenged by counsel for the appellants. Also handed in at the trial was a series of still photographs of certain scenes recorded by the video cameras. These photographs were incorporated in exh "F" which contains eleven groups of photographs. Each group of photographs in exh "F" appertained to a particular accused and was given a number corresponding with the number of such accused.

Mention has already been made of the fact that the video film begins when the attack upon the deceased is already well under way; the initial stages of the assault are not depicted. At the trial it was further common cause that due to the editing of the original video tapes the scenes unfolding in the video film do not all occur in a proper chronological order. This irregular sequence becomes obvious upon a screening of the film. What was done at the appeal stage in order to put beyond dispute the

true sequence of the events will be mentioned hereafter.

A State witness at the trial was Mr A A Mahlangu, whose work it is to train interpreters. He is proficient in both Zulu and Afrikaans. Having viewed and listened to the film Mr Mahlangu prepared a transcript of what he had seen and heard. The transcript was handed in at the trial as an exhibit. It incorporates a translation from Zulu into Afrikaans of those utterances in the sound track which are in the Zulu language.

Not surprisingly the video film played a pivotal role at the trial. It likewise loomed large in argument before this court. For a proper grasp of the essential facts of the case, and in particular for the purpose of assessing the disposition and frame of mind of the mob surrounding the deceased after she had been set afire, it is, I consider, essential to view and to listen to the film. This court did so on a number of occasions shortly

before the hearing of the appeal. The written word can but imperfectly convey the dreadful impact of what is portrayed and heard upon a screening of the video film. However, a concise and accurate verbal description of the film and its sound-track is to be found in the judgment of the court below. It is necessary to quote it in full. I preface the quotation by mentioning two matters which are common cause. The first is that the name "Joel" is a reference to det sgt Joel Msibi of the South African Police, the man who was believed to be the lover of the deceased. (Msibi who was a State witness denied that the deceased had been his lover.) The second is that the name "Linda" is a reference to accused no 4. The learned judge gave the following description of the video film:-

> "Die videoband....beeld onder andere die volgende uit: 'n groep mense word gewys en ten spyte van 'n gepraat kan 'n man wat sê 'Move in, move in' gehoor word. Iemand sê 'Msheni'; dit beteken 'Laat sy geslaan word'. Die oorledene wat aan die brand is, kan in 'n lêende posisie gesien

word. Sy kom tot in 'n knielende posisie en probeer met die flenters van 'n reeds verskeurde romp haar onderstewe bedek. Sy word van regs af deur 'n vrouepersoon geskop sodat sy val. Sy kom weer in 'n hurkende posisie en word deur 'n man van voor teen die bors en gesig geskop. Weer val sy om en weer probeer sy orent kom, maar word dan van links deur 'n man teen die kop geskop. Rook kan op haar kop gesien word en vlamme kan op haar kop en haar klere gesien word. Sy val agteroor. Daar word op haar getrap. Sy word met klippe gegooi. Sy word met langwerpige voorwerpe geslaan. Sy word op die kop getrap. Die woorde 'Come in, come in' word gebesig. 'n Man spring in die lug en kom met sy voet op haar nek af. Sy lê met haar gesig na die grond. Iemand besig die woord 'Com' wat 'n verkorting is van 'Comrade'. Sy word weer eens geskop. Iemand skree 'Bopa, bopa'. Dit beteken 'Gee iemand 'n kans om iets te doen.' Sy word deur 'n vrou met 'n rooi pet geslaan met 'n langwerpige voorwerp. Die woorde 'Ho, ho' en 'Ho man hashutwe' wat beteken 'Hokaai, laat kiekies van haar geneem word' kan gehoor word. Daar is 'n malende skare rondom haar en die Zoeloe-ekwivalent van die woorde 'Laat sy afgeslag word' kan gehoor word. Goed word na haar gegooi deur die vrou met die rooi pet. Iemand sê in Zoeloe 'Brand haar'. 'n Man met 'n geruite hemp se mond beweeg en hy maak handgebare. Sy word herhaaldelik op die kop geslaan en getrap. Die woord 'Let him die' en 'The bitch' kan in die lawaai onderskei word. Sy word deur verskeie mense geskop en getrap en in Zoeloe word geskree 'Laat haar opvlam' en

'Laat sy verbrand word'. 'n Jongman met 'n geel hemp, 'n swart kortbroek en 'n rooi kledingstuk om sy middel verskyn prominent in die beeld en hy skop haar verskeie kere teen die kop terwyl van die skare haar skop. Daar word geskree 'Viva, viva Mandela' en 'Let him burn'. Daarna lê sy tussen die skare met 'n vuur op haar.

Die volgende toneel is waar sonder die vlam wat so pas vermeld is, sy lê en deur 'n jongman met 'n stok geslaan en geskop en getrap word. 'n Klein seuntjie slaan haar met 'n voorwerp. Dan kom 'n man met 'n rooi broek en 'n wit trui aangedraf met 'n massiewe klip in sy hande. Hy laat dit op haar bors val en die woorde 'Ja, dankie maka bulawe' wat beteken 'Ja, dankie, laat sy doodgemaak word' kom uit die skare. Dieselfde klip word deur die jongman wat haar met die stok geslaan het, opgetel en weer op haar bors laat val. Histeriese vrouestemme word gehoor wat skree 'Linda, Linda, enthloko, enthloko'. Dit beteken 'Linda, Linda, op die kop, op die kop'. Die klip word dan deur die man met die rooi broek en 'n ander een opgetel en op die oorledene se bors laat val. Die woord 'Ama tyre' wat 'buiteband' beteken kan gehoor word. Iemand sê in Zoeloe, 'Dit is jou koek hierdie, Joel' en ook 'Waar is 'n buiteband sodat ons dit plaas, dit sal self brand'. Die woorde 'Please don't shoot us, Kosati' word gebesig. Dit is bedoel om te beteken 'Moet ons asseblief nie afneem nie.' Iemand sê dan in Zoeloe, 'Begin met Joel se koek'. Die man met die rooi broek sê 'Moja', 'n Swartmaaktaalwoord wat beteken 'Dit is mooi', en

wys met sy duim na bo soos wat die Romeinse keiser soms in die Colosseum gedoen het. Vuur word gemaak op die oorledene se buik en dye. Iemand sing in Zoeloe 'Jou koek, Joel.' Die Zoeloewoorde wat beteken 'Hy of sy het die hasepad gekies' kan gehoor word, asook die woorde vir 'Hy of sy sal kom, ek sal teenwoordig wees, julle moenie 'worry', julle moenie 'worry' en 'Ek is nie bang vir sulke dinge van die stryd nie, ons broers en susters is in die tronke'. Nog vuurmaakgoed word op die oorledene gegooi. 'n Man met 'n klip in sy regterhand kom nader en die woord 'Shaya' wat 'Slaan' beteken word gehoor. Die man gooi die klip en mis. 'n Ander man tel die klip op en tref. Die eerste een tel weer die klip op en slinger dit met beide hande na die liggaam waarop die vuur steeds brand. 'n Stem wat in Zoeloe skree 'Los julle die vuur uit, los julle die vuur uit' is hoorbaar. Op daardie sombere noot eindig die band."

After the video film had been admitted in evidence certain admissions were made on behalf of seven of the nine appellants. Accused no 2 admitted that she saw some "inflammable fluid" being thrown upon the deceased; that thereafter she saw flames on the deceased; that she struck the deceased with an object; that she kicked the

deceased; and that she jumped upon the deceased. Accused no 3 admitted that while standing in the crowd he tramped upon the deceased, but he added that this was an involuntary action as the result of having been pushed. He admitted that he had been present when two persons dropped a stone upon the deceased. Accused no 4 admitted that he had dropped a stone upon the deceased's body; and that thereafter, and with the help of a youth, he picked up the stone and again dropped it upon the deceased; and that he was the person depicted upon the still photograph exh "F 4.3". Accused no 5 admitted that during the assault upon the deceased she kicked the deceased. Accused no 9 admitted that she witnessed the assault upon the deceased; that she saw flames on the deceased; that she picked up the branch of a tree and struck the deceased therewith; and that she also kicked the deceased. Accused no 10 admitted that he had witnessed the assault upon the

deceased; that her assailants said that she was an informer; and that he (accused no 10) had kicked the deceased on her buttocks and legs. Accused no 11 admitted that at the place and time of the assault he had struck the deceased with a stick; that he kicked the deceased; and that he placed a stone on the deceased.

Since in the video film the sequence of events is distorted this court during argument requested counsel on each side to prepare and file with the registrar further heads of argument reflecting, in so far as the nine appellants are concerned, the correct chronology of events; and indicating the precise stage of the assault at which each appellant was present at and/or participated in the assault, together with a description of the nature and extent of such participation. After argument had been concluded counsel on both sides co-operated in the preparation of a single document (to which reference will

be made as exh "X") which embodies the desired information. We are indebted to counsel for their further labours.

Most of the matter contained in exh "X" is common cause. It also deals with matter in regard to which the State and the defence make conflicting submissions. Some of the matters thus in dispute will be mentioned, and resolved, in the concluding part of this judgment. In truncated form, and omitting reference to issues in contention between the appellants and the respondent, I proceed in the paragraphs numbered (1) to (63) hereunder, to set forth the true sequence of events as reflected in exh "X":-

(1) The deceased lies on the ground surrounded by a crowd of people. There are some flames on her clothing and on her head; and on the ground near her.

(2) A person wearing green trousers tramples upon the deceased.

(3) The deceased is in a sitting position. There are still flames on her back which is partially bare. There is clothing on the upper part of her torso. Her lower body has been stripped of clothing. There is smoke in her hair.

(4) The deceased tries to pull clothing over her exposed buttocks. Accused nos 2, 9 and 11 are present. Accused no 2 kicks the deceased on the head. The deceased falls forward (away from the camera).

(5) Accused no 9 jabs at the deceased with her right foot while the deceased lies on the ground. Flames reappear on the deceased's head and there is smoke in her hair. She raises herself into a kneeling position and the lower body of accused

no 11 is visible.

(6) The deceased, in a kneeling position, lurches to her left.

(7) Accused no 2 kicks the deceased on the head and she falls to her left side.

(8) A man in a red shirt kicks the deceased on the head. Flames reappear as the deceased falls onto her back. Accused no 11 has his arm aloft while accused nos 8, 9 and 10 stand in the front of the crowd. Accused no 10 appears to be saying something.

(9) Using a stick accused no 11 strikes the deceased on her legs some four times. The deceased lies on her back. There are flames on the ground.

(10) The man in the red shirt kicks the deceased on the head and she rolls onto her right side.

(11) Accused no 2 strikes the deceased with a length

of hosepipe.

(12) Using a stick or a branch accused no 9 strikes the deceased approximately seven times on her lower body. The deceased rolls onto her stomach.

(13) A man with a red shirt around his waist tramples upon the deceased's head.

(14) Accused nos 2 and 9 are still hitting the deceased.

(15) The deceased lies on her back while a man in a purple/blue shirt and a woman dressed in blue jump upon the deceased.

(16) With the length of hosepipe accused no 2 administers a further blow to the deceased. Up to this stage accused no 2 has struck in all some six blows with the hosepipe to the deceased's head and shoulders. During this attack the

deceased tries to shield herself with her arm.

(17) The deceased lies on her right side with pieces of clothing on her arms and around her waist. There is a fire on the ground next to her.

(18) The deceased pushes herself up a short distance, raises her head, and rolls over to her right.

(19) A man clad in a red shirt and blue trousers kicks the deceased on the head, as a result of which the deceased falls onto her right side or her back. Accused nos 3, 8, 9 and 11 are seen in the crowd. Using a stick a man in a blue and white striped shirt ("the man in the striped shirt") strikes the deceased on the head a number of times. A woman in a red cap twice throws an object at the deceased.

(20) Accused nos 3, 8, 9 and 11 are in front of the crowd. Accused nos 3, 8 and 9 make movements

with their hands.

(21) Accused nos 3 and 9 are seen close-up. Accused no 11 executes a trampling movement but at this stage the deceased is not visible.

(22) Accused no 10 tramples on the deceased's buttocks. Accused no 9 executes a prodding or trampling movement on the deceased. The man in the striped shirt strikes the deceased on her head with a stick.

(23) Accused no 1 appears and kicks the accused once on the buttocks. Accused no 1 appears to be saying something. Thereafter she disappears.

(24) Accused no 10 tramples on the deceased's buttocks. The man in the striped shirt again strikes the deceased with a stick.

(25) Accused no 10 tramples on the deceased's buttocks. Accused no 9 tramples approximately

three times on the deceased's buttocks. Accused no 10 again tramples a number of times on the deceased's buttocks. The woman in the red hat tramples on the deceased's buttocks.

(26) Accused no 10 again tramples on the deceased. By this stage accused no 10 has executed in all some six trampling movements on the deceased.

(27) Accused no 8 stretches out his foot which lands upon the deceased's lower back.

(28) Accused no 3's foot makes contact with the deceased's body. The woman in the red cap kicks the deceased on the buttocks. Accused no 3 moves out of the inner circle. The man in the striped shirt strikes the deceased on the head with a stick.

(29) The foot of accused no 8 slips off the deceased's body as accused no 8 moves backwards.

(30) The deceased lies on her stomach with a strip of material around her waist. Her lower body is naked. Someone strikes the deceased on her back with a stick.

(31) A youth with a red jersey tied around his waist ("the youth") jumps upon the deceased's head.

(32) Accused no 2 jumps upon the body of the deceased.

(33) The youth kicks towards the deceased's head (and possibly misses).

(34) Accused no 11 stamps on the deceased's back/shoulder.

(35) A man clad in blue trousers tramples upon the deceased's back.

(36) The deceased is repeatedly trampled upon her buttocks and lower back.

(37) Accused no 5 tramples once upon the deceased's buttocks.

(38) A woman clad in a white jersey kicks the deceased twice on her left side. Accused no 9 prods or kicks the deceased with her foot.

(39) Accused no 5 tramples upon the deceased's buttocks. The woman in the white jersey kicks the deceased for the third time.

(40) The youth uses the heel of his shoe to kick the deceased on her head. Accused no 9 prods/kicks the deceased with her foot.

(41) The woman in the white jersey again kicks the deceased.

(42) The man in the striped shirt tramples upon the deceased's upper back.

(43) The deceased lies on her stomach. Accused no 9 tramples upon the deceased's lower back. Up to this stage accused no 9 has prodded or kicked the deceased on the buttocks and back some seven

times.

(44) The deceased lies on her back with her lower body naked. Someone strikes the deceased with a stick in the area of her groin.

(45) The youth kicks the deceased a number of times in the groin.

(46) A woman clad in Bermuda shorts strikes the deceased once with a stick.

(47) A woman in a blue dress kicks the deceased.

(48) A man in a blue shirt approaches the deceased. Accused no 11 appears and executes kicking movements. The man in the blue shirt kicks the deceased in her midriff. Other persons strike the deceased with sticks.

(49) The deceased lies on her back. The lower part of her body is covered.

(50) Accused no 8 is seen in the crowd as a spectator.

(51) Accused no 11 walks towards the deceased and strikes her with a stick. A small boy does the same.

(52) Accused no 11 then tramples upon the deceased's stomach three times.

(53) Accused no 4 appears with a stone and drops it on the deceased's stomach. The stone slides off onto her left hand side.

(54) Accused no 11 lifts the stone and places it upon the deceased's right shoulder.

(55) Accused no 4 and a man in a blue shirt lift the rock and drop it on the deceased's chest. The rock comes to rest upon her right shoulder.

(56) The deceased lies on her back with the stone on her left shoulder and flames on her left side.

(57) The deceased lies on her back with the rock on her left shoulder. There are twigs on the lower

half of her body. Some substance or material is burning close to her body. Some twelve spectators look at the deceased. One of them is accused no 4. He smiles at the camera.

(58) Accused nos 3 and 11 are seen as spectators. Accused no 11 stands near the body of the deceased holding a stick.

(59) Accused no 11 arranges paper or kindling on the twigs, some of which are alight.

(60) Accused no 10 takes a stone, makes as if to throw it, and then momentarily restrains himself. Thereafter he in fact throws the stone at the deceased, but he misses her.

(61) A person wearing a white hat throws a stone at the deceased.

(62) Accused no 10 again throws the same stone at the deceased.

(63) Accused no 10 again throws the stone in the direction of the deceased.

Next it is necessary to consider the medical evidence led at the trial in connection with the cause of the deceased's death, the possible stage of the infliction of those injuries which were mortal, and the likely time of actual death. A **post-mortem** examination on the body of the deceased was performed by Dr V D Kemp who is a district surgeon and also the head of the department of Forensic Pathology at the University of the Witwatersrand. Dr Kemp was called as a State witness. On the legs and head of the deceased Dr Kemp found superficial burns. On every part of her body, but especially about the head and face, there were multiple areas of abrasion. Certain of the abrasions were scrape-like and suggested that the deceased had been dragged along the ground. On both her buttocks there were tram-track abrasions indicating that she had

been beaten with an instrument like a stick. There was a fracture of the fifth left rib in front and inter-costal haemorrhages on the left side. There was a haemorrhage around the left kidney. Dr Kemp found sub-pleural petechial haemorrhages, which indicated the possibility that some degree of asphyxia might have been associated with the deceased's death. Dr Kemp found that the deceased had died from a fractured skull, subdural haemorrhage and cerebral contusion. The fracture of the skull was a very severe one involving the base of the skull and both frontal bones.

Dr Kemp was shown the video film. Noticing that the movements of the deceased in the opening scenes of the film were sluggish, Dr Kemp concluded that the deceased might have sustained cerebral contusion and experienced cerebral haemorrhage already before the happening of the events portrayed in the video film. Accordingly Dr Kemp

was unable to exclude, as a reasonable possibility, that the deceased might already have been fatally injured before any one of the appellants laid a finger upon her.

Upon the hypothesis that such fatal injury had already been sustained by the deceased before the stage of the assault at which the video film starts, Dr Kemp testified further that some of the assaults depicted in the video film might have exacerbated the earlier mortal injury or injuries and thus have expedited the deceased's death. However, Dr Kemp was unable to express any firm opinion as to whether the deceased's death had in fact been so hastened; and, if it had, what particular assault portrayed in the film had so hastened it. The tenor of the medical evidence has important legal implications in determining what criminal liability attaches to those of the appellants who took part in the attack on the deceased.

Dr Kemp was unable to determine at what stage of

the events depicted in the video film death ensued. He said, however, that at the stage when she lay on her back with the rock on her left shoulder (see para 56 of the summary of exh "X", **supra**) she might well still have been alive.

Next there must be examined the evidence given by each of the appellants. Accused no 1 told the trial court that before going to the funeral she drank a bottle of beer which left her "just happy.....warm." During the service she heard a noise and she saw a group of people running out of the cemetery. She joined the group which was standing in a circle around the deceased. People were jostling one another and remarking that they had found an informer. She pushed her way through to the inner circle and there observed what was happening. She saw the deceased lying on the ground. There were no clothes on the upper part of her body. Something resembling a jersey was burning.

Later the flames were extinguished and only smoke was given off. People were hitting the deceased with sticks; and they were kicking her on the body, legs and buttocks. According to accused no 1 she herself kicked the deceased once on her buttocks. She did so because she became angry when she heard that the deceased was an informer; and she wanted the deceased to feel pain. During her evidence in chief she was asked whether, having regard to the sustained assault witnessed by her, it had occurred to her that the people attacking the deceased would cause her death. She said that this had not occurred to her. In cross-examination she said that before she herself kicked the deceased she had watched what was going on for about half a minute, during which time the assault upon the deceased had been a continuous one. She said that she had not thought with what intention other members of the crowd assaulted the deceased. She was unable to say what the mood of the

crowd was. As to the probable consequences of the assault upon the deceased, accused no 1 said that while she thought that the deceased was experiencing pain the possibility that the deceased would be injured never crossed her mind.

Accused no 2 gave the following account of her participation in the assault upon the deceased. She knew the deceased personally and rumours had reached her that the deceased was an informer and the lover of Joel Msibi. Before the funeral accused no 2 drank two glasses of beer which did not affect her. She had been in the last group of mourners approaching the cemetery. Before she reached the gate to the cemetery she saw a crowd and people were saying "Burn her, burn her". Accused no 2 pushed her way through the crowd and found that people were assaulting the deceased whose hair and clothing were alight. Accused no 2 testified that she thought that the deceased was being

beaten because she was an informer. Her attackers were striking the deceased with sticks, and they were kicking her. The sight of the assault excited and angered accused no 2, and it aroused in her a desire to make the deceased feel pain. According to accused no 2 she then kicked the deceased; jumped on her; and struck her with a length of hosepipe "with all my might." At a later stage accused no 2 saw accused no 4 drop a rock onto the ribs of the deceased. Thereafter she saw accused no 4, assisted by another person, drop the rock upon the decased for a second time. At that stage, so testified accused no 2, she felt pity for the deceased; and she tried unsuccessfully to remove the rock. Asked whether the deceased was then dead or alive accused no 2 replied that her thought at the time was the deceased had fainted. She remained at the scene for a while in order to see whether the attack would continue, and then she went home. In cross-examination

accused no 2 was asked what she considered the intention of the rest of the crowd to be. She replied "I just thought they were making her feel the pain." Asked whether she contemplated the possibility of serious harm to the deceased as the cumulative effect of the assaults, her answer was:-

> "No, because there was nothing which could injure a person."

She was asked with what intention she had thought that accused no 4 dropped the rock upon the deceased. She said that the thought had never occurred to her. Towards the end of her cross-examination the following evidence emerges:-

> "And you mentioned that you were like a mad person?-----
> Yes.
> Especially when you used the hosepipe?---- Yes.
> Did the madness come over you because you had a feeling of hate towards this informer?---Yes, because she working with the police, she was an 'impimpi'."

The evidence of accused no 3 came to the following. On the day in question he drank much liquor, and by the time he joined the funeral, although he could walk straight, he was drunk. While he was standing at the gate to the cemetery he noticed people standing in a circle. He approached the circle to investigate and he pushed his way through a jostling throng until he saw the deceased lying on the ground. She was being severely assaulted. She was being kicked on the head and on the body; and people were hitting her with sticks. In trying to get away from the people surrounding the deceased, so testified accused no 3, he lost his balance which was already unsteady from drink; and his foot landed on the shoulder of the deceased and slid across her body. Accused no 3 said that he had no intention of kicking the deceased. The video film shows that while accused no 3 was viewing the assault upon the deceased, he gestured with

his hand. Accused no 3 sought to explain this gesturing by saying that it represented an attempt on his part to restrain the crowd from further assaulting the deceased.

Accused no 4 told the trial court that on the day in question he consumed a great deal of liquor. He was unable to indicate how much. Although the liquor made him stagger he said that his mind "was working." Having joined the funeral procession he entered the cemetery. People ahead of him pointed to something happening at their rear, whereupon accused no 4 and others went to investigate. At a distance of some eight paces he observed an assault upon a female person. He witnessed the assault for four or five minutes. The victim was being trampled upon, kicked, and struck with sticks. People standing next to him said that she was Maki, the lover of Msibi. According to accused no 4 he was unable to see whether it was in fact Maki because her face was

covered with dust; her clothes were torn; and her hair had been burnt. He thought that the woman was being assaulted because she was an informer. Afterward he heard a voice saying "It is now finished", from which he inferred that the victim was already dead. He moved to within two paces from the woman to see whether in fact she was the Maki that he knew. He then realised that the victim was neither breathing nor moving. He determined that she was not breathing by looking at her stomach. Noticing the presence of a cameraman, so accused no 4 testified, he decided "to do something that will draw people's attention." Accordingly he fetched a rock and threw it upon the deceased's body. Assisted by another, accused no 4 then dropped the same rock on the deceased a second time. He explained the second episode in the following words:-

> "....because I was very happy and I had consumed liquor, and also when I heard people saying 'Linda, Linda, enthloko' meaning 'Linda, Linda, on the head', I then thought the people were

> appreciating what I had done and that I should do it."

Accused no 4 went on to say that he was excited and pleased at the prospect that he might appear on television. He made a joke, involving a reference to Joel's cake burning, which made people laugh. In retrospect, so he said, his actions on the day in question were those of a madman. In cross-examination he said that when he left the shebeen he was staggering and could hardly stand. He was asked what he thought the people assaulting the deceased wanted to achieve. He answered that he had not thought of that. When he picked up the rock the effect upon him of the liquor had not worn off much, and he was staggering slightly. He conceded that the fact that the victim of the assault was an informer made him angry, but he denied that he had on that account decided to do anything. Accused no 4 was unable to explain why he had made references to "Joel's cake"; and he dismissed his

utterances as simply nonsense.

There is a portion of the cross-examination of accused no 4 which is of crucial importance in the assessment of his credibility. It involves the number of occasions on which he dropped the rock onto the deceased. The video film shows that accused no 4 dropped the rock onto the deceased twice: for the first time on his own and for the second time assisted by another. But in fact accused no 4 thereafter dropped the rock onto the deceased for a third time. The third occasion is not portrayed in the edited video film; but it is reflected quite clearly in the still photographs. During his evidence in chief and in the initial stages of cross-examination the testimony of accused no 4 was clear and explicit on the point that he had dropped the rock upon the deceased only twice. When the possibility of a third occasion was first mooted in cross-examination, accused no 4 promptly and

firmly rejected it. When confronted with still photographs he was finally constrained to admit that he must have dropped the rock upon the deceased three times; but he claimed to have no memory whatever of the third occasion, and he expressed great surprise at the revelation.

The version given by accused no 5 was the following. On the day in question she drank a good deal at a shebeen. When she left the shebeen she was drunk and staggering somewhat, but "she would see what she was doing"; and she was not so drunk that she could not remember what she was doing. She joined the funeral procession on its way to the cemetery, and at its gate she heard a noise behind her. People were shouting "Here is an informer". She went to investigate and forced her way through the crowd until she saw the deceased, who was known to her by sight, lying on the ground. People were kicking the deceased all over her body and beating her, mostly on

the legs and buttocks. The kicks were delivered with force, and many people were taking turns in kicking the deceased. One or two people jumped with both feet onto the deceased's back. Accused no 5 testified that she herself kicked the deceased twice. She did so because she was angry and she wished the deceased to feel pain. In cross-examination accused no 5 said that she was punishing the deceased as one would punish a child. She maintained that at the time she witnessed the assault upon the deceased the thought that she might be assaulted until she died did not cross her mind. Although the deceased was hurt she was not seriously injured. Although the attack to which the deceased was subjected was a severe one, so testified accused no 5, it was not so severe that, as she put it "the soul would leave the body."

Accused no 8 gave the following version of what he saw and did in relation to the deceased. On the day of

the funeral he drank at a shebeen before breakfast. He could not recall whether he consumed any liquor after his breakfast. He said that when he joined the procession of people winding their way to the cemetery he was under the influence of liquor but he was still able to walk. He was unable to get into the cemetery. Standing near its gate he heard a noise to the rear as if a fight were in progress. He proceeded to the group of people making the noise and pushed his way through to the front to see what was happening. When he penetrated the inner circle he saw a female being assaulted. She was lying on the ground and she was tring unsuccessfully to get up. As soon as she managed to get into a kneeling position she would be knocked down again. Accused no 8 heard the word "impimpi" mentioned and the words "Let her be beaten, let her be killed" being used. The deceased was being kicked on her body and head. There were flames on her back and

smoke was issuing forth from her head. Accused no 8 saw a woman jump on the deceased. According to accused no 8 the deceased was not known to him. He said that he was not angry with her and that he had no intention of assaulting her. Accused no 8 testified that in raising his right hand he was making a gesture to signify to the deceased's attackers that they should stop assaulting her.

Next he noticed a man with a video camera. What then took place was described by accused no 8 in the following words:-

> "At that stage I then thought that I should pose for that person who was taking a photo and I felt excited and happy and the liquor had affected me. I then pushed forward and then put my foot on her buttocks.....Somebody pushed me and I lost my balance and my foot was removed from her buttocks, I then proceeded watching."

When the intensity of the assault upon the deceased had lessened somewhat, so proceeded the evidence of accused no 8, he noticed that the deceased's skirt was lying on the

ground. He picked it up and placed it over the deceased. Accused no 8 then saw a man appearing with a rock which he dropped onto the deceased's chest. The same man, assisted by another, repeated this action. Accused no 8 then decided to leave.

Accused no 9 told the trial court that the deceased was known to her. Prior to the funeral she had heard rumours to the effect that the deceased was an "impimpi" and that she was the lover of det sgt Msibi. On the day in question she joined the procession to the cemetery, but because it was already full she went no further than its gate. She saw a group of persons assaulting someone; and she heard it being said that the victim was an "impimpi". She squeezed herself through the group and then saw that it was Maki who was being assaulted. The deceased was kneeling on the ground and people were hitting her with sticks and kicking her on the

head, body and legs. The deceased's clothing was burning. Her hair had already been burnt and it was smoking. The deceased was kicked so hard that she fell to the ground. Thereupon, so testified accused no 9, at a time when the deceased was either kneeling or lying on the ground, accused no 9 herself intervened. She kicked the deceased first on the head and then on the body; and then she proceeded to hit her with a stick. Accused no 9 said that she remained upon the scene of the assault for some 10 to 15 minutes thereafter. She then heard some talk of the police whereupon she decided to leave.

In cross-examination accused no 9 said that as far as she herself was concerned it was a terrible thing to burn a person; but at the time she did not think what result the attackers of the deceased had wanted to achieve by setting her alight. She said that in assaulting the deceased she had followed the example of older people.

She thought that the crowd wanted the deceased to feel pain. When she arrived at the scene of the assault the deceased was kneeling. Somebody kicked her on the head. The deceased brought her head up, and then she was kicked again on the head. A third person then kicked her. The third kick was so hard that the deceased fell to the ground. Accused no 9 conceded that having witnessed these three kicks she then began her assault by kicking the deceased on the head. As to the probable effect of the kicks preceding her own assault accused no 9 said the following in cross-examination:-

> "I put it to you that from those kicks that let somebody fall down, she could die. Do you agree? ----I cannot dispute that.
> To .....your own personal knowledge, would you say that you knew at that stage that kicks as hard as those delivered to the head can kill a person?--- No I did not know that."

After she kicked the deceased for the last time, so testified accused no 9, she remained at the scene of the

attack for approximately ten to fifteen minutes, during which time the deceased was still being assaulted.

The evidence of accused no 10 may be summed up as follows. The deceased was known to him. He had heard rumours that she was an informer and that she was having a love affair with det sgt Msibi. Between 8 and 9 am on the day of the funeral he drank two beers at a shebeen. He spent the rest of the morning buying groceries. He joined the procession on the way to the cemetery. While he was within the cemetery he heard a noise to the rear and he decided to investigate. A crowd of people were standing in a circle. With difficulty he forced his way through to its centre where the deceased was being assaulted. Reference was made to her as an "impimpi" or a "sell-out." The deceased was kneeling on the ground. There were flames on her back and smoke was coming from her head. The deceased was kicked in the face as a result of which

she fell and the fire on her back was extinguished. She was being kicked both on the body and on the head. Accused no 10 then decided that he too would assault the deceased. He testified that he kicked the deceased while she was lying on her stomach, but that it was difficult for him to say how many times he did so. His intention was to inflict pain upon the deceased. Before the stone was dropped onto the deceased she was beaten with sticks. During his evidence in chief accused no 10 said that he was angry with the deceased because she was an informer, and that he kicked her in order to make her feel pain. He said, however, that it had not been his intention to kill her; and that the possibility that the attack on her by the crowd might result in her death had not occurred to him. Accused no 4 was known to him by sight. After accused no 4 dropped the stone on the deceased he (accused no 10) thought that she was still alive. Thereafter a

fire was made on top of the deceased. By that stage, so testified accused no 10, he thought that the deceased was dead.

A camera-man appeared and accused no 10 thought that he should do something to ensure his own appearance on television. Accordingly he picked up what he described as "a small stone". He threw it at the deceased but missed her. He picked up the stone again and upon his second throw he succeeded in striking the deceased. During cross-examination it emerged that the size of the stone in question was rather larger than a cricket-ball; and that accused no 10 had thrown it at the deceased three or four times. He said that after the rock had been dropped upon the deceased he had formed the impression that the deceased was dead on the strength of the fact that he saw blood on her head "and that the stone was dropped three times."

During cross-examination accused no 10 emerged as

a thoroughly evasive witness. As a typical example of his hedging I quote the following passage from his evidence:-

> "Did you get the impression that she was seriously hurt when she fell down?--- She was seriously hurt where? .....
> You were surprised that she did not get up?----
> What made me surprised? .....
> When you saw the deceased lying and not get up, did you get the impression that she was seriously injured?----On that day?"

In the course of his cross-examination accused no 10 testified that at the time of the attack upon the deceased he had never considered what the intention of the attackers was; and the possibility that the deceased might die had not occurred to him. I quote again from his evidence:-

> "Apart from thinking of death, did you think of serious injury perhaps on that day?----I thought that she would get injured and after treatment in the hospital, she gets cured like other people."

Accused no 11 told the trial Court that he had not known the deceased at all. When he arrived at the cemetery on the day of the funeral he stood at the gate.

While he was singing with other people he heard a noise to the rear; people were saying "Hit him, hit him, hit him." He joined the group from which the noise came, and he heard people saying "We have found the impimpi." He pushed his way through the crowd and he then saw people tearing at the clothes and the hair of the deceased. Her assailants poured the liquid contents of a bottle over the head of the deceased, whereafter smoke came from her hair. When he first saw the deceased she was standing. According to accused no 11 he was then pushed from the inner circle of persons surrounding the deceased. He made his way back to the inner circle and he saw that the deceased was lying on the ground with a fire burning on the ground close by her. He said that the deceased was trying to get up but that she was unable to do so because she was being kicked on all sides by her attackers.

Angered by the fact that she was an "impimpi",

accused no 11 seized a broomstick and struck the deceased with it on her left shoulder. He also kicked her in the ribs. People were jumping on the deceased. Accused no 11 testified that he then kicked the deceased a second time; and he trod on her back. He saw a camera-man; and he was pleased at the prospect that he was going to appear on television. While the deceased was lying on her back he "bumped" his foot on her stomach, and hit her with a broomstick. At that stage, however, he thought that the deceased was already dead, and he said that in so doing he was merely acting for the camera-man. He saw the large stone being dropped on the deceased by accused no 4 (whose identity was unknown to him at the time). In imitation of this action accused no 11 himself took the stone and place it upon the deceased. He saw accused no 4, assisted by another, again drop the stone on the deceased. At a later stage, and when there was already a fire burning on the

deceased, accused no 11 heaped twigs on her burning body.

At the time when he gave evidence at the trial accused no 11 was seventeen years old. He had left school after completing standard one. Despite his youth and lack of education, however, a reading of his evidence shows, in my opinion, that accused no 11 has a keen intelligence. He gave evidence at length, both in chief and in cross-examination. He was self-possessed in the witness-stand, but he revealed himself as an evasive and coolly impudent witness. His resort to quibbling and subterfuge is reflected, for example, in his dodging of questions relating to the temper of the mob encircling the deceased. I quote from his cross-examination:-

> ".....can you perhaps remember whether you noticed what the mood of the crowd was that was there?----
> May I just ask you this: can anybody see what is your mood now?
> Unfortunately I am asking the questions in this court. If you cannot say, you can just say no.
> -------Then I do not understand the question.

> You cannot say what the mood was? Were the people shouting, were they angry?----I cannot say what is your mood now."

Accused no 11 clearly wished to avoid questions regarding his appreciation of the possible fatal consequences of the attack upon the deceased -

> "Now, your evidence was that you thought what you were doing was right because the older men were doing it?-----Yes.
> .....
> Did you ..... before you left the scene, did it cross your mind that the older people or some of them had caused the death of the deceased?---- No, it never occurred to me. I never thought of that.
> .....
> Do you have any idea who caused the death of the deceased?---- No, I cannot say who it was.
> Is it not the people who were there and were assaulting the deceased?---- I do not know.
> What do you think? You have got no idea?----No, I have no idea."

From a reply given by accused no 11 at a later stage of cross-examination it would seem that the possibility of the death of the deceased as a result of assault was indeed

present to his mind. When he was being questioned with reference to a particular scene portrayed in the video the following was said:-

> "The reading is 069. Do you know what you did there at that stage?----No, I did not do anything. I was stopping this boy so that he could stop kicking the deceased on her private part.
> .....
> Why did you want to stop this boy?-----Because he was kicking the deceased on her private part and she could die as a result of that."

So much for the evidence of the appellants themselves. A further defence witness at the trial was an associate professor of psychology at the University of Illinois, Professor Edward F Diener. Prof Diener has made an intensive study of the psychology of crowds and their anti-social behaviour. In his evidence Prof Diener sought to evaluate the behaviour and the moral blameworthiness of certain of the appellants.

Prof Diener described himself as one of the

leading experts on the process of what is known as "deindividuation." According to the witness this is a process which produces human behaviour akin to that of a person who is hypnotised or drunk. Prof Diener's evidence was that, depending upon the intensity of the particular process involved, deindividuation may impair or even destroy the ability of an individual to foresee the probable consequences of his actions. Prof Diener was present at the trial when accused no 4 and accused no 10 testified; and he read a transcript of the evidence given by accused nos 1, 2, 5 and 9. In addition, and with the assistance of defence counsel and an interpreter, the witness conducted interviews with each of the aforementioned six appellants. In his evidence at the trial Prof Diener expressed the opinion that it was "quite plausible" that four of the appellants (accused nos 1, 2, 5 and 10) had been affected by deinviduation to an extent -

> "...that they did not appreciate that death could ensue from their actions or from the actions of the group."

It would appear that deindividuation is characterised **inter alia**, by a lack of self-awareness on the part of the person subjected to the process. Prof Diener explained, however, that while his American students were able to respond to his questions concerning their self-awareness, those of the appellants questioned by him in this connection had found the concept difficult to grasp. Prof Diener's opinion that at the time of their participation in the assault upon the deceased some of the appellants had a diminished capacity for thought and reflection was based in part on their evidence that their memory of the assault upon the deceased was poor and fragmentary; and it was further -

> ".....evidenced in their reports that their thinking was different and unusual"

at the time of the assault.

It need hardly be said that the cogency of the opinions expressed by Prof Diener in regard to the ability of some of the appellants at the time of the assault to foresee the consequences both of their own actions and those of the general mob attack upon the deceased, depends in large measure upon an appraisal of the truthfulness or otherwise of the evidence given by the appellants at the trial; and the reliability or otherwise of the replies vouchsafed to Prof Diener by the appellants interviewed in response to the somewhat abstract interrogation attempted by him in circumstances less than ideal.

Prof Diener expounded the concept of deindividuation with reference to interesting laboratory tests conducted by him and by other researchers in this field. Such tests involved the observation of groups of persons in simulated crowd situations. The laboratory techniques employed and the nature and significance of the

experimental data thus obtained, were explored at very considerable length in Prof Diener's evidence. These matters are also dealt with in some detail in the judgment of the court below. Having given careful consideration to this part of the evidence in the case it suffices to say that I share the view of the trial court that none of the tests described by Prof Diener seemed to bear direct relevance to the circumstances wherein the assault upon the deceased took place.

Having regard to the particular facts of the present case I agree also with the following conclusion of the trial court:-

> ".....ons meen nie dat prof Diener se getuienis 'n behoorlik wetenskaplike gefundeerde basis daarstel waaruit ons kan aflei dat sommige van die beskuldigdes verminderd toerekeningsvatbaar was nie."

In weighing the cogency of Prof Diener's opinions in relation to the appellants I am further constrained to

agree with the following observations made by the trial judge in his judgment:-

> "....wat die beskuldigdes in hierdie saak aanbetref, behels dit, anders as in die geval van die toetse waarop prof Diener hom beroep en waar die ondervraging direk ná die voorval geskied het, 'n ondervraging oor 'n geestesgesteldheid wat bykans twee jare vantevore geheers het. Die beskuldigdes is in detail gekruisverhoor oor wat hulle geestestoestand was, en ons is tevrede dat baie min waarde geheg kan word aan hulle herinnering van wat hulle geestestoestand was. Uit die aard van die saak moet elkeen van die beskuldigdes se geheue daaromtrent geweldig vervaag het. Prof Diener gee dit ook geredelik toe. Dit moet gevolglik die betroubaarheid van sy afleidings verswak.
>
> Verder is dit net logies dat wanneer 'n beskuldigde gekonfronteer word met sy weersinwekkende optrede soos uitgebeeld op die videofilm, dat hy homself sover as moontlik daarvan sal distansieer. Prof Diener het dit ook toegegee. In soverre as wat hy dan na aanleiding van antwoorde deur die beskuldigdes aan hom tot die effek dat hulle nie kan glo dat hulle so opgetree het nie, die afleiding maak dat hulle so 'n persoonlikheidsverlies ervaar het dat hulle vermoë om hulle handelinge te reguleer volgens wat hulle besef reg en verkeerd is, eweneens aangetas was, moet daardie afleiding noodwendig ook baie minder gewig dra as wat prof

Diener daaraan gaan heg het.

It seems to me further, with respect, that Prof Diener's evidence may be open to criticism for the reason that it discounts what seems to be an obvious and fundamental fact. In the present case one does not, I consider, have to look very far for the motive which impelled those appellants whose active participation in the assault is common cause, to join in the attack upon the deceased. The motive is patent. It was to inflict pain and punishment upon what in the community to which the appellants belonged was an object of dètestation: an informer. To ignore this cardinal feature is to escape into the unreality of Cloudland. However, as I understand the evidence of Prof Diener, he did not consider that accused nos 1, 2, 5 and 10 harboured any such conscious motive. Taking a broad look at the case as a whole, that view of the state of mind of accused nos 1, 2, 5 and 10

appears to me to be fanciful and unsound. It is, moreover, directly in conflict with the testimony of each of these four appellants that she or he was angry with the deceased because she was a police informer.

Although accused nos 3 and 8 both denied that they had assaulted the deceased it is clear on their own evidence that each of them made physical contact with the body of the deceased when she was alive. Accused nos 1, 2, 5, 9, 10 and 11 each testified that when he or she assaulted the deceased she was still alive. Accused no 4, however, claimed that when he for the first time dropped the rock on the deceased ("the rock-dropping incident") the deceased was already dead. The rock-dropping incident was witnessed, **inter alios,** by two State witnesses respectively named Cyprian Jele and Stephen Tshabalala. Largely on the strength of their testimony, which in argument before us was severely criticised by counsel for the appellants, the

trial court found as a fact that at the time of the rock-dropping incident the deceased was still alive.

The trial court rejected the denials of accused nos 3 and 8; and it disbelieved the evidence of the remaining appellants regarding their state of mind when they participated in the assault upon the deceased.

The corner-stone of the trial court's judgment convicting the appellants of murder is to be found in two consecutive paragraphs of the learned judge's judgment (which for the sake of convenience I shall respectively letter as (A) and (B)), which read as follows:-

> "(A) Die videoband toon duidelik aan dat dit 'n woedende skare was wat op die oorledene toegesak het. Stokke en ander voorwerpe kan gesien word.
>
> In ons oordeel kon geen mens geglo het dat daardie aanval sou eindig voordat die oorledene dood was nie. Op die minste genome het elke persoon daar besef dat daar 'n uitstekende kans was dat die oorledene sou sterf.

(B) Elkeen van die nege beskuldigdes het gemeensaak gemaak met die moordbende en het deur hulle optrede bygedra tot die verhoging in felheid van die aanval op die oorledene.

Ons verwerp derhalwe al die beskuldigdes se getuienis dat hulle bloot die oorledene wou laat pyn voel het en dat hulle nie met die groep aanranders gemeensaak gemaak het nie."

The conclusion stated in para (A) quoted above may be dealt with very shortly. In my opinion it is supported by the overwhelming probabilities, and it is, I consider, quite unassailable. The video film demonstrates that the mood of the crowd was ferocious, ruthless and savage. It was bent upon the destruction of the deceased. What was going forward at the scene of the assault would have rendered it obvious to any ten year-old child of ordinary intelligence that the fate of the deceased was sealed: that she had not the faintest hope of surviving the merciless attack upon her; and that she was doomed to

die within a matter of minutes.

I turn to the conclusion stated in para (B). As will be made clear later in this judgment, the evidence does not satisfy me that in fact each and every one of the nine appellants acceded to a common purpose to murder the deceased. However, even accepting the correctness of the findings of fact set forth in para (B), and accepting further that the deceased was still alive at the time of the rock-dropping incident, the first question which arises in this case is whether, in the light of the medical evidence, it was legally competent for the trial court to find any of the appellants guilty of murder or whether, at worst for the appellants, they (or some of them) should have been found guilty merely of attempted murder. This is a vexed question which requires careful examination of legal precedent and authority.

The trial court found each of the appellants

guilty of murder by invoking the doctrine of common purpose. A "common purpose" is a purpose shared by two or more persons who act in concert towards the accomplishment of a common aim. In the past convictions for murder in group violence cases have led to much debate by learned writers on two related but distinct and separate issues. The one ("the causality issue") raises the question whether a participator in a common purpose to kill who accedes to the common purpose before the deceased has been fatally injured may be found guilty of murder in the absence of proof that his own conduct caused or contributed causally to the death of the deceased. The other ("the joining-in issue") raises the question whether what may conveniently be referred to as "a late-comer" may be found guilty of murder. A late-comer is one who becomes a participator in a common purpose for the first time at a stage when the deceased is still alive but after he has already been fatally injured. A useful catalogue of the legal litera-

ture on both issues is to be found in Rabie, **A Bibliography of SA Criminal Law** at 83-86.

Uncertainty in regard to the causality issue has been dispelled by the decision of this court in **S v Safatsa and Others** 1988(1) SA 868(A). That too was a case involving the death of the deceased through mob violence. Before the trial court eight persons were charged on various counts including murder. Six of the eight were found guilty of murder. The trial court found that each of the six had had the intention to kill the deceased. It further found that these six accused had actively associated themselves with the conduct of the mob, which was directed at the killing of the deceased. Those two findings were upheld in an unsuccessful appeal to this court by the six against their convictions for murder. The unanimous judgment of this court was delivered by BOTHA, JA. Having examined the evidence against each of

the six convicted of murder the learned judge of appeal remarked (at 893 G-H):-

> "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."

On behalf of the six appellants in the **Safatsa** case it was argued that they had been wrongly convicted because the State had failed to prove that their conduct caused or contributed causally to the death of the deceased. For purposes of his judgment BOTHA, JA assumed (at 894 F-G) that it had not been proved in the case of any one of the six that their conduct had contributed causally to the death of the deceased. An examination of earlier decisions of this court (which should be read in association with the illuminating analysis undertaken earlier by BOTHA, AJA in **S v Khoza** 1982(3) SA 1019(A) of both the

majority judgment in **R v Mgxwiti** 1954(1) SA 370 (A) and the unanimous judgment in **R v Dladla and Others** 1962(1) SA 307(A)) led BOTHA, JA to the conclusion that in cases of murder in which a common purpose to kill has been proved, the act of one participator is causing the death of the deceased is imputed, as a matter of law, to the other participators; and that the latter may be convicted of murder in the absence of proof of any causal connection between their conduct and the death of the deceased. At 900H the learned judge of appeal remarked that:-

> "....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."

Following shortly in the wake of the **Safatsa** case came the decision of this court in **S v Mgedezi and Others** 1989(1) SA 687(A). In a case involving mob violence the trial court

had invoked the doctrine of common purpose in convicting the accused of murder. The accused appealed against their convictions and sentences. The judgment of this court sheds further light upon certain facets of common purpose and it indicates guidelines for the practical application of the doctrine. The facts were these. Room 12 at a mine compound was shared by six team leaders who were regarded by their fellow-workers as informers. In a night of turbulence at the compound an attack was launched upon room 12 in the course of which four of the team leaders were killed. While the accused who were members of the attacking party were adequately identified, no State witness saw any of the accused inflict upon the deceased an injury which caused or contributed causally to their death. Again the unanimous judgment of this court was delivered by BOTHA, JA. For purposes of the present case reference may usefully be made to two brief excerpts from the judgment in

the **Mgedezi** case. In the first quotation an important principle is stressed. The point is made that a person who by mere chance happens to entertain, quite independently of the actual perpetrator, the same aim which impels the latter to commit the criminal deed, cannot for the purposes of the criminal law be regarded as sharing a common purpose with the actual perpetrator. The net of common purpose will enmesh only an accused who consciously recognises that his mind and that of the actual perpetrator are directed towards the achievement of a common goal. In this connection BOTHA, JA remarked at 712 B-C:-

> "Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of view of the accused, the common purpose must be one that he shares consciously with the other person. A 'common' purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former."

The practical implications of the principle enunciated in the passage quoted above are indicated earlier in the judgment in the **Mgedezi** case. At 705H-706B BOTHA, JA stated:-

> "In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in **S v Safatsa and Others** .....only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite **mens rea**; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see Whiting 1986 **SALJ** 38 at 39.)"

I return to the **Safatsa** case. It involved only the

causality issue. Referring to the case of joining-in by a late-comer BOTHA, JA (at 895E) was at pains to say:-

> "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 fatal wounds being inflicted on the deceased."

In the present appeal, on the other hand, the joining-in issue is squarely raised by the facts. If the evidence establishes the existence of a common purpose to kill the deceased, and the accession of any one or more of the appellants to such common purpose, their criminal liability has to be determined in the light of the reasonable possibility that their accession to the common purpose took place after the deceased had already been fatally injured; and that thereafter nothing done by any of the appellants expedited the death of the deceased.

Whether in such a situation a late-comer may be

convicted of murder is a question upon which it has so far not been necessary for this court to essay a categorical answer. But although the matter may be **res integra** in this court, over many decades various and conflicting opinions upon it have been voiced in earlier decisions of this and other courts.

In this court the matter was first mooted forty years ago in **R v Mtembu** 1950(1) SA 670(A). In that case S stabbed the deceased in the chest with a knife whereupon the appellant ran up and struck the deceased a blow on the head with a stick. By a majority of two to one (SCHREINER, JA and MURRAY, AJA, GREENBERG JA dissenting) the appeal from a conviction for murder was dismissed on the ground that the fatal blow had been dealt by S in furtherance of a prior common purpose between him and the appellant to attack any person they might chance to meet; and, accordingly, that the appellant and S were equally

guilty of murder. In his dissenting judgment GREENBERG was unable to agree that such prior common purpose had been sufficiently proved. In separate judgments delivered by SCHREINER, JA and MURRAY, AJA one of the matters discussed by each was whether, if no common purpose between him and S had been proved, the appellant would nevertheless have been guilty of murder since the fatal injury had been inflicted by S before the appellant intervened, and since the latter's blow neither caused nor hastened the victim's death. MURRAY, AJA considered that the question whether the appellant by striking the blow with the stick "assisted" S to murder the deceased should be answered in the negative. At 686 MURRAY, AJA remarked:-

> "It may, of course be said that the crime of murder was not completed in the present case at the time the appellant struck his blow, for the deceased was still alive. But the essential act had been completed, the wrongful, unlawful and intentional stabbing of the .....deceased. In the stabbing itself the appellant had no part, nor could he have had **mens rea** in relation to the

> infliction of the fatal wound before his intervention."

In the course of his judgment SCHREINER, JA said (at 677):

> "I find it unnecessary .....to express any opinion as to whether the guilt of the appellant might not also have been properly rested upon his having joined in what he could see was a murderous assault, which, although the fatal wound had already been administered when he intervened, was still being maintained by the second accused against the first accused (sic) to the extent that he was still holding him."
>
> (The reference to the "first accused" is a typographical error; it should be "first deceased").

SCHREINER, JA preferred (at 679) to leave his question open for future consideration. However, earlier in his judgment the learned judge of appeal had expressed doubt (at 678-679):-

> "....whether analysis based on causality may not in these cases be pushed beyond utility, and whether perhaps, liability should not depend upon the accused persons's having taken part, even without agreement and merely by way of assistance, in an assault which is known by him

> to be murderous and which results in the death of the victim irrespective of whether the fatal wound was causally connected with the conduct of the assister or not."

The concept thus proffered by SCHREINER, JA in **Mtembu's** case was developed and applied by him in the later case of **R v Mgxwiti (supra).** The deceased, who was in her motor car, was the prey of a violent mob. She was assaulted, her car was set alight, and she was incinerated. Although the appellant was party to a common purpose to kill the deceased, he was not a participant in the initial assault. He joined in later by stabbing at the deceased. In the course of his judgment GREENBERG, JA said (at 374 D-E):-

> "It was contended on behalf of the appellant that he cannot be held to be guilty of the murder, on the doctrine of common purpose, unless he associated himself with that purpose at a time when the deceased had not yet received a fatal injury. I did not understand that this contention was disputed on behalf of the Crown and I shall deal with the question on this basis."

However, GREENBERG, JA found that the appellant had

actively associated himself with the attackers and made common cause with them before the deceased had been fatally injured; and that he was therefore guilty of murder. DE BEER, AJA concurred in the judgment of GREENBERG, JA.

SCHREINER, JA took the view that the evidence did not prove beyond reasonable doubt (a) that the deceased had not received her mortal injuries before the appellant joined the attack upon her, but it did prove (b) that at that time the deceased was still alive. SCHREINER, JA nevertheless concurred in the dismissal of the appeal because on his understanding of the legal position proof of (b) sufficed to make the appellant guilty of murder. The learned judge of appeal proceeded to expound what may be conveniently described as "the **Schreiner** rule". At 382D - 383C SCHREINER, JA said the following:-

> "No doubt the basic approach to these questions which has been accepted by this Court is that of mandate (cf. **Rex v Mkize**, 1946 A D 197 at pp 205 and 206), and in general there is no place for

liability by ratification in the criminal law. (**Rex v Mlooi & Others**, 1925 A D 131). But where an accused person has joined a murderous assault upon one who is then alive but who dies as a result of the assault, it seems to me that no good reason exists why the accused should be guilty of murder if at the time when he joined in the assault the victim, though perhaps grievously hurt, was not yet mortally injured, but should not be guilty if the injuries already received at that time can properly be described as mortal or fatal. The alternative view is to hold that so long as the accused joined the assault while the deceased was alive he is responsible with the others for the death.

The practical advantages of the latter view are obvious, for, even where the body has not been burned or similarly disposed of, it will often in cases of a combined assault be impossible to say with any approach to certainty which of several successive injuries was fatal and what the prospects of survival would have been if one or more of the other injuries had not been inflicted. And whether a particular injury is or is not mortal or fatal must, especially in the light of modern surgery and medicine, be a question on which expert opinion will differ; it is, therefore, an unsatisfactory foundation for criminal responsibility, especially when such serious consequences follow upon the answer. Looked at from the point of view of the accused who has joined in a murderous assault there seems to be no reason for making his guilt depend on

what he could scarcely know about - whether any injuries already received by the victim were mortal or something less than that - instead of basing it on whether the victim was actually alive or not, a matter on which the accused might well be able to form an opinion.

In regard to reconciliation with legal principle it seems to me that a generalisation that whoever joins in the attack before death has actually ensued must be deemed in law to have contributed to the result would be unsatisfactory, for it might manifestly depart from the truth. I can see no objection, however, to according, in this narrow field, recognition to the principle of ratification - that whoever joins in a murderous assault upon a person must be taken to have ratified the infliction of any injuries which have already been inflicted, whether or not in the result these turn out to be fatal either individually or taken together.

However that may be, I consider the law to be that where an accused person has joined in an assault which he knows to be aimed at the death of someone else, his responsibility for the ensuing death will depend on whether the victim was alive at the time when the accused joined in the assault and not on whether the victim had or had not at that stage received mortal injuries."

In **R v Chenjere** 1960(1) SA 473 (FC) the facts were shortly as follows. Without a prior common purpose

the appellant had joined with the mother of the deceased in a deliberate attempt to kill the latter when the deceased was already mortally injured but still alive. The appellant's appeal against his conviction for murder was dismissed by three judges in the Federal Supreme Court. TREDGOLD, CJ considered the **Schreiner** rule to be right "both in principle and on a practical approach" (at 474H) and he adopted it. The learned Chief Justice approached the problem thus (at 477A):-

> "What the Courts have to discover is whether a man has made himself an accessory to the crime of murder. If he accedes to anything it is to the crime as a whole, not a constituent element, however important that element may be."

In the course of his judgment BRIGGS, FJ stressed (at 480D-E) that the crime of murder is complete only at the moment of death, and said:-

> "It seems logically to follow that it is possible to associate oneself with a project to murder at any time before the death occurs, for until that time the offence is still in course of

commission."

Later in his judgment (at 481 F-G) BRIGGS, FJ remarked:-

> "I am, with great respect, not convinced by the argument that to strike a man who to one's knowledge has received a mortal wound, with the intention of assisting in another's project that he shall die, is analogous to striking a corpse. The fact that he is still alive seems to me to make a fundamental difference."

Next it is necessary to consider the true significance and effect of the decision of this court in the oft-discussed case of **S v Thomo and Others** 1969(1) SA 385(A), a judgment of WESSELS, JA in which STEYN, CJ and POTGIETER, JA concurred. The essential facts were these. Using a panga the second appellant had launched a violent attack upon the deceased in the course of which he sustained mortal head injuries. After the second appellant's attack upon the deceased had ended, and while the deceased was still alive, the third appellant (accused no 4 at the trial) intervened. While the deceased was

being held by a bystander the third appellant, with the intent to kill, stabbed the deceased several times in the back. It could not be found, however, that these stab wounds were causally related to the deceased's death. The trial court convicted the third appellant of murder. On appeal one of the questions which fell to be decided was whether the third appellant had been guilty of murder or the lesser crime of attempted murder.

The first inquiry upon which WESSELS, JA embarked was to consider whether a verdict of murder was justifiable on the basis of the doctrine of common purpose. In this connection the learned judge of appeal said the following (at 399 A-C):-

> ".....I am of the opinion that the evidence does not exclude the reasonable possibility that, when fourth accused intervened he was engaged upon an independent venture intending to kill the deceased by stabbing him. His mind may in fact not have been directed at all towards assisting second accused in the latter's conduct aimed at achieving the result which both of them had in

> mind ..... In every case the focus is on the conduct of the **socius**, its causal relationship with the results flowing from the principal actor's conduct and the former's state of mind when he engaged in the conduct complained of. It follows that fourth accused's guilt as a **socius** was not established beyond any reasonable doubt on the basis of the so-called common purpose doctrine."

Immediately after the passage quoted above WESSELS, JA proceeded to state (at 399 C-D):-

> "The final question to be answered is whether in law the verdict of guilty of murder can be justified upon the basis indicated in the minority judgment of SCHREINER, JA in **Mgxwiti's** case ....."

Having discussed the reasoning underlying the **Schreiner** rule WESSELS, JA roundly rejected it (at 399H - 400A) by remarking:-

> "The rule is contrary to accepted principle and authority, which have consistently required that on a charge of murder it must be established that, intending the death of his victim, the accused, irrespective of the fact whether he is charged as principal or **socius**, was guilty of unlawful conduct which caused or causally contributed to the death of the deceased."

In what follows it will be convenient to refer to the last-quoted passage as "the **Thomo** dictum." It seems to me, with great respect, that in assessing the correctness or otherwise of the **Schreiner** rule the **Thomo** dictum is of little assistance. I take this view for a number of cogent reasons which have already been formulated by others. First, for the reasons advanced by BOTHA, AJA in **S v Khoza** (**supra**) at 1056E - 1057A (augmented by the further and compelling considerations later set forth by BOTHA, JA in the **Safatsa** case (**supra**) at 896E - 897B), I respectfully agree with the conclusion of the learned judge of appeal that the **Thomo** dictum, in so far as it deals with the position of a **socius, is obiter.** Second, in so far as the doctrine of common purpose is concerned, I respectfully concur in the view expressed by BOTHA, AJA in the **Khoza** case (at 1057 A-B) that to postulate a requirement that the participator's conduct must be

causally related to the deceased's death runs directly counter to the majority judgment in the very **Mgxwiti** case itself. (Indeed, such a postulate is even more plainly at variance with the unanimous judgment of this court in **R v Dladla and Others (supra)**). Moreover, as is correctly pointed out by Professor Whiting, 1986 **SALJ** 38 at 45, in regard to the **Schreiner** rule the **Thomo** dictum rests upon two misconceptions:-

> "As to its basis, the court appears not to have appreciated that the (**Schreiner**) rule was intended not as something independent of the doctrine of common purpose, but as an extension of the doctrine to cover certain cases where the common purpose arose only after the act to be attributed had already been committed. As to its scope, the court appears not to have realized that the rule was not intended to cover cases where the intervention occurred only after the original assault had already ceased. This latter point is of particular significance, inasmuch as, on the facts before the court, third appellant would, even on the view taken by SCHREINER, JA, still only have been guilty of attempted murder, since his intervention occurred only after the second appellant's assault had already ceased. It was thus not necessary for

the court to have passed upon the correctness of the rule enunciated by SCHREINER, JA."

Some thirteen years after the **Thomo** case the necessity for considering the correctness or otherwise of the **Schreiner** rule arose in two minority judgments in the **Khoza** case (**supra**). The facts were the following. One MH (accused no 2 at the trial) and the appellant had been convicted of murder. The appellant appealed against his conviction. The evidence revealed that accused no 2 had attacked and mortally wounded the deceased by stabbing him. Thereupon, and while the deceased was still alive, the appellant joined in by striking the deceased two blows with a cane. The deceased tried to run away but was pursued by accused no 2 who did something else to him. The deceased died shortly afterwards. There was no evidence that before accused no 2 launched his attack upon the deceased there had existed between the appellant and accused no 2 any common purpose to kill the deceased. There was a

distinct possibility that the fatal wound or wounds had been inflicted by accused no 2 before the appellant joined in the attack, and it was improbable that the blows inflicted on the deceased by the appellant with a cane had any causal connection with the deceased's death. The crucial issue in the appeal was whether or not the appellant had joined in with the intention of killing the deceased. A majority of three judges decided that such an intention on the part of the appellant had not been established, and that he had not been shown to be guilty of anything more than the crime of common assault. The remaining members of the court (CORBETT, JA and BOTHA, AJA) took a different view of the facts. They considered that it must have been obvious to the appellant that the attack of accused no 2 on the deceased was a very serious one which might well result in the death of the deceased; and that, with this knowledge, the appellant joined in the

attack with the intention of associating himself therewith and furthering it. This finding by the minority pertinently raised for them a consideration of the joining in issue : was the appellant guilty of murder where his association with the murderous attack had begun only after all the injuries contributing to the deceased's death had been inflicted?

Adverting to this court's decision in **S v Williams en h Ander** 1980(1) SA 60(A) CORBETT, JA considered whether the appellant could be held criminally responsible for the murder of the deceased as an accomplice; and in this connection he discussed the nature of the requisite causal connection between the assistance provided by an accomplice and the commission of the crime by the actual perpetrator or co-perpetrators thereof. Without finding it necessary to come to any final decision as to what type of causation had been envisaged in the **Williams** case,

CORBETT, JA was driven to the conclusion that the appellant could not be held guilty as an accomplice to accused no 2 in regard to the murder of the deceased. The learned judge of appeal expressed the view (at 1035 C-D):-

> "....that for an accomplice to be found guilty of murder his assistance must be given before the perpetrator has completed the act which alone causes the death of the deceased. Put negatively, assistance furnished after the perpetrator has completed the act which alone causes the death of the deceased cannot render the assister liable as an accomplice to murder, whatever else the criminal consequences of such conduct may be."

Nor was CORBETT, JA swayed by the reasoning adopted in the **Chenjere** case (**supra**) that the act of murder is not complete until the moment of the victim's death. In this connection the learned judge of appeal remarked (at 1035H - 1036A):-

> "It seems to me that in a case of murder the liability of an accomplice is essentially based upon the assistance given by him to the perpetrator with reference to the act or acts of **the perpetrator** which cause the death of the

> deceased. Once the act or acts which ultimately cause the death of the deceased have been finally committed by the perpetrator, then, even though the victim may still be alive - and in that sense the crime is incomplete - intervention thereafter by another, with the intention of assisting the perpetrator to achieve his purpose but not having any causal effect on the death of the deceased, cannot in law or in fact be regarded as assisting the perpetrator. At the stage of intervention the perpetrator has done all that is necessary to achieve his object and the realisation of that object, viz the death of the deceased, is merely a matter of time."

In relation to the doctrine of common purpose and the criminal liability of a late-comer CORBETT, JA stated (at 1036 F-G):-

> "Whatever role common purpose may serve in the law relating to participation in crime .... it is clear that in order to impute the act of a perpetrator to another person on the ground of common purpose it is, in general, necessary that the latter should have acceded to the common purpose before the act in question was committed: see **R v Mtembu** 1950(1) SA 670 (A) at 673 - 4; cf **R v Von Elling (supra)** at 240 - 1)."

Dealing with the **Thomo** dictum CORBETT, JA remarked that it was not clear to him that it was intended to be **obiter**

(1038 B - C):-

> "....but whatever the postion may be I would respectfully associate myself with the Court's rejection of this (the **Schreiner**) rule."

And at 1038 D - F:-

> "I agree that the concept that an accused person who joins in an affray after the fatal blow has been struck, and without any prior arrangement or common purpose, can render himself criminally liable for the consequences of that fatal blow, i e the death of the victim, provided that the victim is still alive when he joins in, is not in accordance with our law. My reasons for coming to this conclusion should appear sufficiently from my general consideration of appellant's possible liabilityin this case on the ground of participation as a co-perpetrator, or participation as an accomplice, or on the ground of common purpose. In general it may be said that in the type of case postulated above, the necessary causal connection for legal responsibility is lacking."

Concluding that the appellant had therefore been wrongly convicted of murder, CORBETT, JA proceeded to review the evidence, in the light of which he held that the appellant's intervention had been accompanied by a mental

intent amounting to **dolus eventualis**; and that the verdict which the trial court should have returned was that the appellant was guilty of attempted murder.

I turn to the other minority judgment in the **Khoza** case. BOTHA, AJA took the view that the appellant had been rightly convicted of murder. At 1049 F-H BOTHA, AJA stated the problem which arose on his view of the facts and the resolution of it which he favoured:-

> "The problem posed by the facts relates to the requirement of an **actus reus** on the part of the appellant, and it arises because of the lack of proof of a causal connection between the appellant's assault and the deceased's death. It is the absence of the element of causation that leads my Brother CORBETT to the conclusion that the appellant is not guilty of murder, but guilty of attempted murder.
>
> On the other hand, on the approach adopted by SCHREINER, JA in **R v Mgxwiti** ....at 381G - 383B, the appellant is guilty of murder, despite the lack of proof of causation. In my view, with respect, the result arrived at on the basis of the approach of SCHREINER, JA is to be preferred to the conclusion reached by my Brother CORBETT. SCHREINER, JA's approach is ..... a pragmatic

> one which I consider to be soundly based on considerations of policy and practical exigency in the administration of criminal justice. (I leave aside for the moment the theory of ratification; I shall say something about that later.)"

BOTHA, AJA proceeded to quote with approval the passage from the judgment of SCHREINER, JA (at 382F in the **Mgxwiti** case, already quoted in this judgment) setting forth the practical advantages of the **Schreiner** rule, as well as passages from the judgments in the **Chenjere** case of TREDGOLD, CJ (at 476C - 477H) and BRIGGS, FJ (at 480C - 481H).

BOTHA, AJA stated (at 1051C) that if it were open to him to do so, he would follow and apply the **Schreiner** rule; and at 1051C - 1052G the learned judge considered whether he was precluded from doing so either by principle or authority. He pointed out that in cases involving more than a single accused in which liability is founded upon a common purpose to kill, accused persons had been held

criminally responsible for murder even though their acts were not proved to have contributed causally to the death of the deceased. As examples he cited the majority judgment in **Mgxwiti's** case and (at 1052 A -B) the unanimous judgment of this court in the **Dladla** case **(supra)**:

> "....in which a conviction of murder was upheld where the accused had actively associated himself with a murderous mob attack on the deceased but where there was no evidence that he himself had actually assaulted the deceased."

The conclusion to which BOTHA, AJA was impelled (at 1052 E-G) was that in cases of the kind under discussion:-

> "....the **actus reus** of the accused on which his criminal responsibility for the murder is founded, consists not in any act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill (see Burchell and Hunt, **South African Criminal Law and Procedure** vol 1 at 364). To couch the same idea in a different form : criminal responsibility for murder (where the requisite **mens rea** is present) can be founded upon an **actus reus** of another, or others, which latter conduct consists in the unlawful causing of the death of the deceased."

This last conclusion represents, so I consider, the logical and legal foundation of the unanimous decision of this Court in the subsequent **Safatsa** case.

The question which at once arises, however, (an answer to which will be attempted later in this judgment), is whether the conclusion reached by BOTHA, AJA at 1052 E-G in the **Khoza** case (and which has just been quoted) likewise provides a sound and satisfactory basis for the following proposition expounded by BOTHA, AJA immediately thereafter (at 1052H - 1053C):-

> "On this view of the law it follows, in my judgment, that there is no necessity to distinguish between participation in a common purpose to kill which commences before the deceased has received a fatal wound and such participation which commences after the deceased has been mortally wounded, but while he is still alive; nor, indeed, is any useful purpose to be served by such a distinction. The distinction is deprived of any real significance, in my opinion, as soon as it is recognised that a causal connection between the acts of the accused and the death of the deceased is not an

> indispensable requirement for a conviction of murder, and that a conviction of murder is competent on the basis of an **actus reus** (accompanied by the requisite **mens rea**) which takes the form of participation in, and active association with, the conduct of another person, or other persons, which causes the death of the deceased. Upon this footing I venture to suggest, with respect, that it is wholly artificial to exclude criminal responsibility for murder solely because the deceased was already fatally wounded when the accused joined in the assault, for I can perceive no persuasive force in postulating, in support of such a conclusion, that the **actus reus** of the main perpetrator(s) had been completed and that it was only a matter of time before the death of the deceased ensued. In fact and in law the crime of murder is not complete until the victim dies; up to that moment there is no reason, I consider, why an active association with the object of the main perpetrator(s) should not attract criminal responsibility for the result which follows thereafter. In my view, therefore, whether or not the deceased had been fatally injured before the commencement of the accused's participation is irrelevant, both in logic and in principle."

As to an acceptable jurisprudential basis for the **Schreiner** rule BOTHA, AJA observed (at 1053H):-

> "To hold the appellant guilty of murder I do not find it necessary to rely on the theory of ratification, mentioned by SCHREINER, JA in **Mgxwiti's** case **supra.** In my view, as will have appeared, I hope, from what has been said above, it is sufficient to found the appellant's liability simply on his active association with accused No 2's murderous assault on the deceased."

In the course of his judgment in the **Khoza** case BOTHA, AJA also dealt with the facts as found by him in the light of this court's decision in **S v Williams en 'n Ander** (**supra**). The conclusion reached in the **Williams** case had been the subject of some critical scrutiny (see eg Whiting 1980 **SALJ** 199; Snyman 1980 **TSAR** 188; Labuschagne 1980 **De Jure** 164). In exploring the reasoning in the **Williams** case BOTHA, AJA made it clear (at 1054 C-D):-

> ".....that I do not accept that it was intended in **Williams'** case to supplant, qualify or detract from the substance of the practice of the Courts in relation to common purpose in previous cases decided over a period of many years."

I would, with respect, share that opinion. The present

appeal does not, I consider, require examination of the decision in the **Williams** case. For the further reasons advanced by BOTHA, JA in the **Safatsa** case (at 898 C-I) I respectfully endorse his statement in the latter case that in applying the law relating to cases of common purpose the judgment in the **Williams** case may safely be left out of consideration.

I return to the **Khoza** case. BOTHA, AJA concluded (at 1055F) that it would be in conformity with the principles of our law to find the appellant guilty of murder. The learned judge proceeded to consider (at 1055F - 1057C) whether there was any binding authority which precluded such a verdict. Having reviewed cases such as **R v Mtembu (supra)**, **R v Von Elling** 1945 AD 234, and **S v Thomo and Others (supra)** BOTHA, AJA ultimately decided that no binding authority prevented him from giving effect to his views. His conclusion was therefore that the appeal

should be dismissed.

The view of the legal position adopted by BOTHA, AJA in **Khoza's** case was espoused by THIRION, J in **S v Dlamini and Others** 1984(3) SA 360(N). In the course of a thoughtful judgment the learned judge cited a number of examples designed to illustrate the difficulties which in practice might be encountered upon the application of the opposite view that the late-comer is guilty of murder only if his assault causally contributes to the death of the victim. THIRION, J was attracted by the pragmatism of the **Schreiner** rule, stating (at 367 C-D):-

> "It is socially important that wrongdoers who, with intent to kill, join in a murderous assault on a living person should be held liable for his death when it results from that murderous assault. An accomplice in a murderous assault should not escape conviction for murder simply because quite fortuitously the injury which causes the death has been inflicted before his participation commences."

It cannot be gainsaid, I think, that upon an

utilitarian approach to the problem the **Schreiner** rule has much to commend itself. As far as legal policy is concerned, however, a number of considerations should not be overlooked. The first is this. Although the practical advantages to which SCHREINER, JA alluded in **Mgxwiti's** case may be obvious, it is no less clear that they are entirely one-sided: they favour the prosecution and burden the accused. Second, while seen from the angle of the late-comer it may be fortuitous whether his joining in makes him guilty of murder or merely of attempted murder, the same may be said of many situations in which an accused is found guilty of an attempted crime and not the completed crime. As pointed out by Whiting in 1986 **SALJ** 38 in footnote 58 at p 50, this is the position more particularly in cases of so-called "completed attempts" where the accused has done all that he set out to do, but fails in his purpose. Third, when seen from the point of

view of the desirability that wrongdoers who join in murderous assaults should be adequately punished, it cannot be said that a failure to apply the **Schreiner** rule will necessarily frustrate the administration of criminal justice. As pointed out by WESSELS, JA in **Thomo's** case **supra** (at 400A):-

> "It must be borne in mind that an accused will not escape the consequences of his proved unlawful conduct in assaulting a mortally injured person, because he may, depending upon the nature of his own conduct and state of mind, still be guilty of attempted murder, assault with intent to murder or to do grievous bodily harm or common assault."

(See further Kok (1985) 9 **SACC** 56; M C Marê (1990) 1 **SACJ** 24 at 38.)

It seems to me that in considering which of the two minority judgments in the **Khoza** case correctly states the position governing criminal liability for murder in joining-in cases involving the application of the doctrine of common purpose, the answer should be determined by

reference to legal principle.

In so approaching the matter it is essential at the outset to define the logical problem presented by the joining-in issue. In attempting such a definition I can do no better than to borrow the words of Professor Whiting in the article (1986 **SALJ**) to which a number of references have already been made. In the course of a lucid and helpful discussion of the issue the learned author says (at 49) that:-

> "...the essence of the problem is not whether one can be guilty of murder where one's only association with the killing is non-causal in nature, but whether one can be guilty of murder where such non-causal association arises only after all the acts contributing to the victim's death have already been committed."

With that succinct delineation of the problem involved I entirely agree.

Earlier in this judgment the question has been foreshadowed whether the conclusion reached by BOTHA, AJA

at 1052 E-G in the **Khoza** case provides a secure foundation for the further proposition (developed in the passage at 1052H - 1053C) that it is unnecessary to distinguish between participation in a common purpose to kill which begins before the deceased has been fatally wounded and such participation which begins thereafter but while the deceased is still alive. As to that, and with great respect, I am disposed to think that in truth there is a fundamental difference between these two situations. In my view the disparity is correctly stated by Whiting (**op cit**) at 49:-

> "Although the crime of murder is of course not complete until the victim dies, liability for the victim's death depends on responsibility for conduct which has caused it. While such responsibility need not always arise directly - simply from the fact that it is the accused's own conduct - but may also arise indirectly or mediately - through the attribution to the accused in terms of the doctrine of common purpose of the conduct of some other person or persons - the vital point remains that an accused cannot be guilty of murder unless he bears re-

> sponsibility for conduct which has caused the victim's death. Thus, to hold an accused liable for murder on the basis of an association with the crime only after all the acts contributing to the victim's death have already been committed would involve holding him responsible **ex post facto** for such acts. The criminal law is firmly opposed to liability based on **ex post facto** or retrospective responsibility and does not recognise it in any other situation. It would therefore be contrary to accepted principle to recognise it here."

In the minority judgment in the **Mgxwiti** case (at 382H - 383A) the principle of ratification was invoked in support of the **Schreiner** rule. Such invocation indicates a recognition on the part of the learned judge of appeal that the application of the rule involved retrospective criminal liability. In **Khoza's** case (at 1053H) BOTHA, AJA preferred to found the appellant's criminal liability for murder simply on his active association with the murderous assault of accused no 2 in that case. However, on any view of the true juridical basis of the **Schreiner** rule, the element of retrospectivity, alien to our principles of criminal responsibility, remains ineluctable.

For the reasons aforegoing I conclude that the **Schreiner** rule does not form part of our criminal law; and that on the facts accepted in the minority judgments in the **Khoza** case the appropriate verdict was one of attempted murder and not one of murder. For the same reasons I now consider that the **obiter** views ventured by me in the **Khoza** case (at 1044H - 1045A) were wrong.

In the light of the above conclusion I return to the facts of the instant case. In the judgment of the court below, and following upon a discussion of the minority judgments in the **Khoza** case, HARTZENBERG, J expressed a predilection for views stated in the judgment of BOTHA, AJA. The learned judge recorded that he had directed his assessors that in regard to the joining-in issue the law as stated by BOTHA, AJA was to be applied. It follows that in so directing his assessors the learned trial judge erred. It further follows that, even on the assumption that all the trial court's findings of fact and credibility were correctly made, the nine appellants should

not have been found guilty of murder. On the court a quo's view of the facts the appropriate verdict in the case of each appellant should have been one of attempted murder.

It remains to consider the correctness or otherwise of the trial court's finding of facts and credibility. It is convenient to deal at the outset with the position of accused nos 3 and 8. Accused no 3 admitted that he had applied force to the person of the deceased; but he denied that he had assaulted her. He said that his foot had landed upon the deceased quite unintentionally. Due to a push from the jostling crowd, so he testified, he lost his balance. In an attempt to regain it he stretched out his leg, and in so doing his foot landed on the deceased' shoulder and moved across her body. In its judgment the trial court criticised the evidence of accused no 3 in various fairly minor respects, and then proceeded to say that upon a screening of the

video film:-

> "...dit klinkklaar duidelik is eerstens dat beskuldigde 3 nie weens die gedruk van die skare nie maar doelbewus na die oorledene skop, en tweedens dat hy nie poog om die mense te keer om die oorledene aan te rand nie, maar dat hy inderdaad tevredenheid betuig met die aanval op die oorledene. Sy gebare en uitdrukkings spreek daarvan."

In the video film accused is seen gesticulating on two occasions. On the first occasion he makes violent gestures with his right arm which might well be indicative of an act of encouragement to the crowd to strike further blows. On the second occasion he again gesticulates in what appears to be an aggressive fashion. In the light of these actions the evidence of accused no 3 that he was actually trying to curb further assaults by the crowd is not very convincing. Upon a careful viewing of the relevant portion of the video film, however, I consider that the version of accused no 3 that his foot landed upon the deceased inadvertently may reasonably possibly be true.

I disagree, with respect, with the impression formed by the trial court that what is shown is a deliberate kick by accused no 3 at the deceased. Although the gesticulations in which he indulged excite suspicion against accused no 3, it would, in my opinion, be dangerous to rely upon such gestures alone. Viewed as a whole the evidence does not, in my judgment, provide proof beyond reasonable doubt that accused no 3 in fact assaulted the deceased. In my opinion accused no 3 was not shown to have committed any crime whatever, and he should have been acquitted.

In regard to accused no 8 the trial court said in its judgment:-

> "....dat die videoband duidelik aantoon dat hy opsetlik op die oorledene trap...."

Upon a close scrutiny of the relevant portion of the video film I am not satisfied that accused no 8 trampled upon the deceased. He admits that he deliberately placed his foot upon the buttocks of the deceased and he says that his

motive in so doing was to pose for a camera-man. The video film does not show that he placed his foot on the deceased in a violent fashion; and in my opinion his evidence also may reasonably possibly be true. As with accused no 3, so too in the case of accused no 8 the latter's gestures portrayed in the video film cast doubt on the truth of his claim that he was trying to restrain rather than to incite the attackers. On the other hand some credence is lent to the version of accused no 8 by his testimony (in this respect accepted by the trial court) that he went to the trouble of picking up the deceased's skirt and placing it upon her to cover up her nakedness. In my view the evidence as a whole does not establish beyond reasonable doubt that accused no 8 harboured any intention either to injure or to kill the deceased.

This last conclusion does not mean that accused no 8 was entitled to an acquittal. On his own evidence he

intentionally and unlawfully applied some degree of force to the body of the deceased. He should therefore have been found guilty by the trial court of the crime of common assault. I should add that although the force applied by accused no 8 in placing his foot on the deceased may have been insignificant, the assault in my opinion was not a technical and inconsequential one. It was aggravated by the deplorable circumstances in which it was committed. Here was an assault perpetrated upon a helpless woman who had, to the knowledge of accused no 8, been prostrated by a sustained and vicious attack upon her. Despite the reasonable possibility that no real physical injury to the deceased may have been intended, the assault was a contumelious and contemptible one. For purposes of sentence it must, I consider, be viewed in a serious light.

Next it is necessary to refer to the finding by the trial court that at the time of the rock-dropping

incident the deceased was still alive. This finding was a prerequisite to the trial court's verdict that accused no 4 was guilty of murder. Since, as I have already indicated, accused no 4 was wrongly convicted of murder, the next inquiry is whether he was not guilty of the crime of attempted murder. Such guilt may be established if it is shown that at the time of the rock-dropping incident accused no 4 subjectively believed that the deceased was still alive, irrespective of whether his subjective belief was right or wrong. For the reasons which follow I am satisfied that the evidence establishes beyond reasonable doubt that at the time of the rock-dropping incident accused no 4 subjectively entertained such a belief; and that his evidence to the contrary is to be rejected as false. Accordingly it is unnecessary to consider whether the trial court's finding that the deceased was still alive at that stage of events was correctly made.

The trial court disbelieved accused no 4. In the course of his judgment the learned judge remarked:-

> "Beskuldigde nr 4 het in ons oordeel homself as 'n leuenaar bewys. Ons is van mening dat hy sy dronkenskap aansienlik oordryf het. Hy het getuig dat hy so onder die invloed van drank was dat hy nie wou dans nie omdat hy bang was dat hy sou omval. Die manier soos uitgebeeld op die videoband waarop hy met die groot klip aangehardloop kom, is net nie te versoen met so 'n dronk persoon nie. Indien hy so vreeslik dronk was, is dit ook moeilik te begryp hoe hy sal onthou dat hy vir vier of vyf minute gestaan en kyk het en gehoor het toe gesê word 'Dit is klaar met Maki', en dat hy dan boonop gaan ondersoek instel om te kyk of die oorledene dood is. Vir 'n man wat graag op televisie wou verskyn het hy eienaardig opgetree. Hy het nooit werklik sy gesig na die kamera gedraai nie."

I agree with the trial Court's assessment that accused no 4 was a lying witness. Apart from the cogent reasons upon which the trial Court's finding rests, I would add that I agree with the submissions advanced by Mr **Bredenkamp**, who led for the respondent, that the utter mendacity of accused no 4 is further revealed by his evidence in relation to the

number of times that the rock was dropped by him on the deceased. The trial court correctly found it proved beyond reasonable doubt that accused no 4 dropped the rock upon the deceased more than twice. The tenor of accused no 4's evidence in regard to this issue has already been explored. It is tolerably clear, I consider, how accused no 4 became entangled in falsehoods. With an eye to the video film, but overlooking the incriminating evidence provided by the still photographs, accused no 4 initially tried to tailor his evidence by providing an explanation for having dropped the rock upon the deceased twice only. In so doing he already experienced some difficulty in clarifying why he had decided to drop the rock on the second occasion. To justify a third dropping of the rock upon what he said was a corpse would have been even more awkward for him; and he tried falsely to suppress the fact of the third dropping. Confronted later with the

irrefutable evidence of the third occasion he pretended that he could not remember it. In the light of the detailed and circumstantial account which he was able to give in regard to the first two occasions, his evidence that he was quite unable to recall the third incident is obviously false. Also plainly untrue was the evidence of accused no 4 that his jocular reference to the burning of Joel's cake, which drew laughs from the crowd, was to be dismissed as meaningless twaddle. Having regard to the belief generally held that the deceased and det sgt Msibi had been lovers this utterance is readily explicable. It was clearly intended by accused no 4 (and was so understood by the mob) as a crude reference to the deceased's genitalia.

No credence whatever can be given to the testimony of accused no 4. The rock used by him was a very large and heavy object. To pick it up and to carry it required much physical exertion. It represented a

formidable and deadly weapon. In my opinion it is thoroughly improbable that the rock-dropping incident was intended by accused no 4 simply as an empty charade in which a lifeless body was used as a stage prop. Taken as a whole, so I consider, the evidence establishes beyond reasonable doubt that accused no 4 dropped the rock upon the deceased because he thought that she was still alive and because he wanted to finish her off. The rock-dropping incident affords the clearest overt act of association by accused no 4 with the mob's intention to kill the deceased. It follows that accused no 4 should have been found guilty by the trial court of the crime of attempted murder.

It remains to consider whether on the doctrine of common purpose any of the remaining appellants (accused nos 1, 2, 5, 9, 10 and 11) should have been found guilty of attempted murder. Before dealing with the case against

these six appellants a few general observations may not be out of place. For example, in seeking to draw inferences in the sort of situation presented by the facts in the instant case, the following common-sense precept at once suggests itself. Its first part is this. The more inherently dangerous to life or limb the assault committed upon the deceased by a particular attacker, and the longer the duration of such assault, the stronger will be the evidence that he or she shared the mob's common purpose to destroy the deceased; and the readier will the court be to infer the existence of the **mens rea** requisite for murder. Its plain counterpart is that the less intrinsically harmful to life or limb the assault committed upon the deceased by a particular attacker, and the shorter its duration, the weaker will be the evidence that he or she shared the mob's common purpose

to kill the deceased; and the more reluctant and wary the court will be to infer the existence of the **mens rea** requisite for murder.

It has already been mentioned that for a proper grasp of the facts of the case it is essential to study the video film. In the following respect, however, a viewing of the film may conduce to an unfair assessment of the state of mind of a particular attacker. Mr **Soggot**, who led for the appellants, correctly reminded us that whereas an armchair viewer of the film gains the advantage of a conspectus of the whole of that part of the attack which was recorded by the cameras, not all the appellants were present at every stage of the recorded attack. Accordingly it is necessary for the court to remind itself that while it enjoys the benefit of what counsel termed an "over-view" of the events leading up to the deceased's death, in the case of at least some of the appellants the

observations made and the perceptions formed by them at the scene of the crime might have been more fragmentary and sketchy. In reviewing the position of each of the accused nos 1, 2, 5, 9, 10 and 11, I bear this in mind.

This is a convenient stage to deal shortly with a contention advanced by their counsel on behalf of the appellants generally. It was submitted, albeit somewhat tentatively, that in the present case the deceased had been the victim not so much of any concerted attack by a group of attackers, but rather that there had been perpetrated upon her a series of discrete and unrelated acts of aggression, each of which should really be viewed in isolation. In my opinion that argument is quite untenable. Any possible doubt upon the subject is dispelled at once when one looks at and listens to the film. The grim evidence provided by the video film affords a classic example of concerted and joint violence

by an enraged and bloodthirsty mob. The suggestion that in assaulting the deceased each of accused nos 1, 2, 5, 9, 10 and 11 was engaged upon an independent frolic of his or her own, entirely divorced from the general attack upon the deceased, is devoid of merit.

Earlier in this judgment the evidence of each of the nine appellants has been analysed. On the merits of the appeal against the trial court's convictions the cases of accused nos 3 and 8 have been dealt with. At this juncture it is necessary to say something on the subject of the credibility and reliability of the remaining appellants. Accused no 4's demerits as a witness have already been detailed. He was plainly a lying and untrustworthy witness. It has also been pointed out that accused nos 10 and 11 were highly evasive and unsatisfactory witnesses. Looking broadly at the testimony of accused nos 1, 2, 5, 9, 10 and 11, it is

unnecessary for purposes of the present appeal to say any more than that on two cardinal issues in the case the evidence of each of them does not bear scrutiny and it was rightly rejected by the trial court as untrue. A common theme which runs through their testimony is that when they assaulted the deceased they appreciated (a) neither with what intention the mob was attacking the deceased (b) nor that the death of the deceased might result from the mob attack. I have already indicated my unqualified agreement with the following finding of the trial court:-

> "In ons oordeel kon geen mens geglo het dat daardie aanval sou eindig voordat die oorledene dood was nie."

I have also pointed out that it clearly emerges from the video film that the mood of the crowd was ferocious, ruthless and savage. The acceptability or otherwise of the defence evidence on the two crucial points (a) and (b) above has to be tested against the finding of the trial

court just quoted, while further bearing in mind that the mood of the crowd signalled its clear intention to destroy the deceased. In my judgment the evidence of each of accused nos 1, 2, 5, 9, 10 and 11 in respect of the two critical issues (a) and (b) is thoroughly implausible and quite unworthy of belief.

For the sake of convenience I repeat here a further passage from the judgment of the trial court quoted earlier by me:-

> "Elkeen van die nege beskuldigdes het gemeensaak gemaak met die moordbende en het deur hulle optrede bygedra tot die verhoging in felheid van die aanval op die oorledene.
>
> Ons verwerp derhalwe al die beskuldigdes se getuienis dat hulle bloot die oorledene wou laat pyn voel het en dat hulle nie met die groepe aanranders gemeensaak gemaak het nie."

In my opinion the trial court rightly rejected as false the evidence of accused nos 1, 2, 5, 9, 10 and 11 that they intended no more than that the deceased should experience

pain. Furthermore, as far as accused nos 2, 5, 9, 10 and 11 are concerned it is obvious, in my opinion, that each of them acceded to the mob's common purpose to kill the deceased. Each had the **mens rea** required for the crime of murder. Their sharing of the common purpose is demonstrated by their respective overt acts in assaulting the deceased in the fashion already described. The case against them is, in my opinion, quite clear and requires no further discussion. It follows, in my view, that the trial court should have convicted accused nos 2, 4, 5, 9, 10 and 11 of attempted murder.

What merits separate consideration is whether there is sufficient evidence to sustain, as the only reasonable inference, that accused no 1 likewise acceded to the mob's common purpose to kill the deceased. I say this for the reason that her assault upon the deceased was brief in duration and intrinsically less violent than the

assaults perpetrated by accused nos 2, 4, 5, 9, 10 and 11. The assault of accused no 1 consisted of a single kick.

The question which immediately suggests itself is this. What did accused no 1 see when she pushed her way through to the inner circle of people surrounding the deceased? On accused no 1's own version the deceased was then lying on the ground and her torso had been stripped of clothing. People were hitting the deceased with sticks, and they were kicking her on the body, legs and buttocks. Accused no 1 joined in the assault (see para (23) of exh "X") at a time when the attack upon the deceased, as recorded by the cameras, had reached a fairly advanced stage. It is apparent (see paras (1) to (22) of exh "X") that when accused no 1 joined in the assault the deceased had already been subjected to a sustained and merciless battering; and a serious and concerted assault upon her was continuing in the presence and full view of accused

no 1. The piteous appearance and the desperate plight of the deceased at the very stage when accused no 1 joined in is chillingly portrayed in the video film. Despite the fact that accused no 1's own assault was considerably less violent and briefer than the assaults perpetrated by others, the circumstances surrounding her joining in appear to me to point inescapably to the conclusion that accused no 1 likewise acceded to the mob's common purpose to kill the deceased. She too had the **mens rea** required for the crime of murder. It follows that the trial court should also have convicted accused no 1 of attempted murder.

To sum up so far. In my view accused no 3 should have been acquitted; accused no 8 should have been convicted of common assault; and each of the remaining seven appellants (accused nos 1, 2, 4, 5, 9, 10 and 11) should have been convicted of attempted murder.

Having regard to the aforegoing I turn to the

matter of sentence. One begins by considering what sentences the trial court might fittingly have imposed on accused no 8 in respect of common assault and on each of accused nos 1, 2, 4, 5, 9, 10 and 11 in respect of the crime of attempted murder.

In his judgment on sentence the learned trial judge reviewed the personal circumstances of each of the appellants. His exposition of them will not be repeated here, but they will be taken into account. I would add only that in weighing the moral (as opposed to the legal) culpability of the eight appellants concerned, the evidence of Professor Diener is directly relevant and helpful. Accused nos 1, 4, 5, 9 and 10 were first offenders. Accused nos 2, 8 and 11 had previous convictions. In the case of accused no 2 the trial judge properly decided that her single previous conviction was such as to be irrelevant for purposes of sentence in the

present case.

It is convenient to deal first with accused no 8. A fitting punishment for the common assault committed by him would, so I consider, have been a sentence of imprisonment for six months, the entire period of imprisonment being conditionally suspended.

For the trial court's finding that accused nos 1, 2, 4, 5, 9, 10 and 11 were guilty of murder with extenuating circumstances there will have to be substituted, in the case of each of the aforesaid six appellants, a verdict of guilty of the lesser crime of attempted murder. This, in turn, will require modification of and a reduction in the sentences respectively imposed upon them by the trial court.

In the court below accused nos 2, 4 and 10 were each sentenced to life imprisonment. I share the view of the trial judge that these three appellants merit equal severity in punishment. The conduct of each was characterised by the same degree of bestiality. Accepting that such conduct amounted in law to no more than attempted murder, it seems to me that an appropriate sentence in the case of each of accused nos 2, 4 and 10 would have been imprisonment for ten years.

I deal next with accused no 1. Her moral culpability seems to me to be appreciably less than that of the other appellants who were guilty of attempted murder. In her case an appropriate sentence would have been one of imprisonment for five years, two years thereof being conditionally suspended. In the case of accused no 5, whose assault upon the deceased was more sustained and more violent than that of accused no 1, a fitting punishment for

attempted murder would have been a sentence of imprisonment for six years, two years thereof being conditionally suspended.

Lastly the position of the two youthful offenders, accused nos 9 and 11, must be considered. Accused no 9 is sturdily built for her age; and her brutish assault upon the deceased began with a kick to the head. Accused no 9 was, however, barely fourteen years old. In my opinion a suitable sentence for her crime of attempted murder would have been imprisonment for three years, half of which being conditionally suspended. Accused no 11 was fifteen years old at the time of the assault. He was a severely underprivileged child and he spent only one year at school. What goes into the scales against him is the fact that he had four previous convictions for housebreaking with intent to steal, and theft; and one previous conviction for assault involving

the use of a knife. His role in the assault upon the deceased was prominent, prolonged and violent. The video film reveals accused no 11 as the personification of a vicious depravity against which the community requires protection. I consider that in his case a fitting sentence for his crime of attempted murder would have been imprisonment for eight years.

After the date (24 June 1987) on which they were sentenced the appellants began serving their respective periods of imprisonment; and they were still in custody when the appeal was heard. Subsequent to the hearing of the appeal this Court ordered the release of accused nos 3 and 8. The order stated that the reasons therefor would be given later. Those reasons are stated in this judgment.

In regard to the sentences to be imposed on the eight appellants whose convictions have to be altered there

arises in the present appeal the same problem which confronted this court in **S v Mgedezi and Others** (supra) at 716F - 717B : in terms of sec 282 of the Criminal Procedure Act, 51 of 1977, a sentence of imprisonment imposed by this court for an offence other than the offence for which the accused was sentenced by the trial court cannot be antedated to the date of which the trial court passed sentence. In order to do justice in the matter of sentence I propose to resort to the same device to which the court was driven in **Mgedezi's** case. I shall make allowance for the period of imprisonment already served by the appellants by abating those sentences which in my opinion would have been appropriate had they been imposed on 24 June 1987.

In the result the following orders are made:-

(1) The appeal of **accused no 3** (Solomon Motsoagae) succeeds and his conviction and sentence are set aside.

(2) The appeal of **accused no 8** (Phineas Maseko) succeeds to the extent that his conviction for murder with extenuating circumstances is reduced to one of common assault. His sentence is altered to read:-

"Imprisonment for three months wholly suspended for three years on condition that he is not convicted of any offence involving violence upon a person, committed during the period of suspension, for which he is sentenced to imprisonment without the option of a fine."

(3) The appeals of accused nos 1, 2, 4, 5, 9, 10 and 11 succeed to the following extent. In each case

the conviction for murder with extenuating circumstances is altered to a conviction for attempted murder. For the sentences imposed by the trial court the following sentences will be substituted:-

(a) **Accused no 1** (Matlakala Elizabeth Motaung) -

"A sentence of imprisonment for two years wholly suspended for a period of three years on condition that she is not convicted of any offence involving violence upon a person, committed during the period of suspension, for which she is sentenced to imprisonment without the option of a fine."

(b) **Accused no 5** (Lorraine Zanele Sobuzi)

"A sentence of imprisonment for three

years of which two years are suspended for a period of three years on condition that she is not convicted of any offence involving violence upon a person, committed during the period of suspension, for which she is sentenced to imprisonment without the option of a fine."

(c) **Accused nos 2** (Sanna Twala) and **4** (Linda Alaxandra Hlophe) and **10** (Daniel Mbokwane)

"A sentence of imprisonment for seven years."

(d) **Accused no 9** (Priscilla Nthabiseng Moreme)

"A sentence of imprisonment for one year wholly suspended for a period of

three years on condition that she is not convicted of any offence involving violence upon a person, committed during the period of suspension, for which she is sentenced to imprisonment without the option of a fine.

(e) **Accused no 11** (Siphiwe Goodboy Msipha)

"A sentence of imprisonment for five years."

G G HOEXTER, JA

SMALBERGER, JA)
MILNE, JA)
FRIEDMAN, AJA) Concur
NIENABER, AJA)