

**IN THE SUPREME COURT OF SOUTH AFRICA  
(APPELLATE DIVISION)**

In the matter between:

SELVIN GANISH NAIR ..... FIRST APPELLANT

POOBLAN NAYNIE GOVENDER .....SECOND APPELLANT

and

THE STATE ..... RESPONDENT

CORAM: NESTADT, NIENABER JJA et NICHOLAS AJA

DATE HEARD: 10 NOVEMBER 1992

DATE DELIVERED: 19 FEBRUARY 1993

**JUDGMENT**

NESTADT, JA;

I agree with NICHOLAS AJA's treatment of the first appellant's appeal. I am, however, constrained to differ from my Colleague's approach to the second appellant's appeal. In my opinion, it should be dismissed in respect not only of count 1 but also count 2.

The complainant's evidence was that the first appellant did not strike the deceased. The trial court did not prefer Manuel's evidence to the contrary and there is no warrant for us to do so. Accordingly, and in the absence of proof that the first appellant was a party to a common purpose, (with the second appellant) to assault the deceased in this way, his guilt depends on his conduct in throwing the deceased into the bay, I agree that it is a reasonable possibility that at this stage the deceased was already dead. This being so, the first appellant having acted with the intention of killing the deceased and believing him to be still alive, is guilty of attempted murder (see *S va Ndlovu* 1984(3) SA 23(A)).

As regards the second appellant, however, the position is different. The fact that the complainant and Manuel gave conflicting versions as to precisely how and by whom the deceased was assaulted before he was thrown into the bay does not matter. According to the complainant, it was the second appellant alone who hit the deceased (with the iron pipe). According to Manuel, the second appellant participated in a joint attack on the deceased; in particular he stabbed the deceased with a knife. It is unnecessary to choose which of these two versions is correct. On both, it is clear that the second appellant assaulted the deceased. On the evidence of the complainant he rendered, him unconscious and, on the supposition that the deceased was no longer alive when he was thrown into the bay, caused his death. And having regard to the nature of the attack, the only reasonable inference is that it was carried out with the intent to kill (at least in the form of *dolus eventualis*). On the evidence of Manuel, the second appellant was obviously a party to a common purpose to seriously injure the deceased. Here too, the necessary *mens rea* was present. The second appellant must have foreseen that the deceased might die as a result. On the hypothesis that the deceased was dead when his body was disposed of, this is what happened. In either event, therefore, the second appellant was guilty of murder. The same, of course, applies if the deceased was still alive when he was thrown into the water.

In the result:

- (1) The appeal of the first appellant -
  - against his conviction and sentence on count 1 is dismissed;
  - against his conviction and sentence on count 2 is upheld. Such conviction and sentence are set aside. He is instead convicted of attempted murder and sentenced to five years imprisonment of which three years is to run concurrently

with the sentence on count 1. His effective sentence will therefore be seven years imprisonment,

(2) The appeal of the second appellant is dismissed.

NESTADT. JA

NIENABER, JA - CONCURS

NICHOLAS A J A:

The appellants are Selvin Nair and Pooblan Govender. They were indicted in the Durban and Coast Local Division before a court composed of SHEARER J and two assessors on two counts: (1) attempted murder and (2) murder. They pleaded not guilty but were found guilty on both counts, and each of them was sentenced to undergo concurrent terms of imprisonment of 5 years on count (1) and 12 years on count (2).

The events which gave rise to the charges had their setting on the south pier of Durban harbour. This is the haunt of fishermen. It is a concrete structure, some 900 m long, which forms the southern side of the harbour entrance. On the seaward side it is bounded by a massive wall on which there have been painted at intervals of 30 m prominent vertical red and white stripes and a large white number. No 30, which is at the end of the pier, is the highest number. The pier has no lights except for a green flashing beacon at its end. The time was between 4 p m on 12 July and the early hours of 13 July 1989.

The main characters were the following; Gonasagren Soobramoney, (nicknamed "Sagren"), the complainant referred to in count (1) of the indictment. He was 29 years of age. He is a person apparently of low intelligence and virtually no education - he did not go beyond Std 1 at school; Subramoney Mgonsamy, (nicknamed "Sonny"), his father. He was about 50 years of age and was the deceased referred to in count 2 of the indictment. Selvin Nair (nicknamed "Docks"), the first accused; Pooblan Govender (nicknamed "Lenzo"), the second accused; Sagren Kistan (nicknamed "Jones"); Emanuel Gianchand (called "Manuel" for short); and Rajendra Chetty (called "Rajen" for short). (All the foregoing, who lived at Chatsworth, a suburb of Durban, were frequent fishermen on the south pier. It will be convenient to refer to them for the most part by their nicknames or short names).

In addition there were a number of minor characters, including Dr Ganas Perumal, a medical practitioner; Lieut Harry, of the South African Police; and other members of the police force. Fishermen normally travelled by train from Chatsworth to Clairwood station and then changed to a train which took them to Wests, a railway siding near the south pier. From there they walked with their fishing rods and tackle to the pier which they mounted near No 9 and then proceeded to station themselves at various positions along the pier.

Sagren and Sonny arrived at about 4pm on 12 July 1989 and took up a position between Nos 15 and 16. There Sonny proceeded to build and light a fire, using coal which he had brought with him, and made preparations to fish. Jones was a member of group of fishermen consisting of himself, Docks (the first accused) Lenao (the second accused) and two other men named Waheed and Bones, who established a position between Nos 20 and 21. They seem to have been a convivial group, drinking vodka on the train, and continuing to drink "Smirnoff" and Coca Cola on the pier, and also smoking dagga. According to Jones, the effect on some of them was that "they weren't so interested in fishing". Manuel took up his fishing station at No 17. Eajen fished with three friends at a place called Slopey Rocks, situated between Nos 24 and 25.

The first stage of the events of 12/13 July took place near No 20 at about 10 a m. Sagren spoke in his evidence of how he had at one stage left his father and moved up towards the end of the pier. The fishing there was poor and he started to return. When he reached a point between Nos 20 and 21, he heard his name called by Jones, and went and sat down near him. Docks, who was standing nearby, made a remark to the effect that Sagren had stolen his friend's fish. (This apparently related to an incident which had occurred on the previous Friday night, when Sagren, his brother and his father had been

fishing on the pier. At 4 a.m. on the following day, as they were packing up to go home, "some guys passed a remark that the fish was stolen". Nothing came of this incident at the time). Lenzo, who was also there, told Sagren to put his head torch on. When he did not do so, Lenzo ran to his kitbag and came back with a bush knife. Docks held Sagren by his fishing bucket (apparently a piece of equipment which is worn strapped round the waist and carries a leather cup in which the fishing rod is rested), and Lenzo "chopped" him a number of times on the head with the blunt side of the bush knife, causing considerable bleeding, while this was going on, neither Docks nor Lenzo said anything. Sagren was screaming, but none of the bystanders did anything until Jones intervened and Sagren picked up his fishing rod and got away. He went and reported to Sonny that Lenzo had "chopped" him, while Docks had held him by his fishing bucket. Sonny went to where Jones was fishing and asked where Docks was. He was told that he had gone to catch crayfish. Sagren told his father to forget it, and the two of them returned to their fire. There Sonny wiped the blood from Sagren's head, gave him a cup of coffee and made him sit by the fire.

Evidence in regard to this stage of the events was also given by Jones - he said that he knew both the accused. Docks, whom he had known for about 10 years, lived in the same street as he did in Chatsworth. He had known Lenzo for one-and-a-half to two years having frequently met on the pier. He knew Sagren and his father: they lived in the same district in Chatsworth as he did while he was cutting some bait near No 2D, Jones saw Sagren approaching him from the end of the pier. They greeted one another and Sagren sat down. Jones resumed fishing. He then heard an "argument about some fish". (He understood that fish had been stolen from one Hussain a few nights previously.). He turned round and heard Sagren screaming. Docks was punching Sagren. Lenzo ran to his kitbag and took out a knife and started "slapping" Sagren with the blunt side of it. Jones reeled in his line and came to intervene. Sagren was then on the ground and Docks was holding his hands. Jones pulled them apart and Sagren seized his chance to escape. Jones said that he had been about 6 to 8 metres away from where Docks and Lenzo were assaulting Sagren. There were no lights at that place. It was dark, "but the eyes get used to the darkness". After a time, when Jones had resumed fishing, Sonny (who was followed by Sagren) came up to him and asked where Docks was. Jones told him that he had gone to catch crayfish. Sonny asked, "How can they harm a useless chap like Sagren?" and after some talk about fish being stolen, Sonny shook his head and went away.

Eajen also gave evidence regarding this stage of the events. He said that he did not know Sagren but he had got to know Docks and Lenzo from fishing at the south pier. He had had no trouble with either of them. On Wednesday 12 July 1989 he was fishing with three friends at Slopey Rocks, situated between Nos 24 and 25. Another man (whom he later identified as Sagren) arrived and fished there for about an hour without success, and then walked away back along the pier. A little while later Rajen heard screams. He took his line out of the water and walked in that direction. He arrived at a place called the "weigh block" which is near No 20. He saw the "boy" who had fished at Slopey Rocks in a sitting position. Docks was holding his hands from the front, and Lenzo was "chopping" him on his head with a bush knife. A lot of people stood watching. The "boy" managed to get away; he picked up his fishing rod and ran. Lenzo said loudly that "anybody else who tries to steal our fish" would be dealt with.

The second stage took place some time later.

Jones told how Docks and Lenzo left Ho 20 after the assault on Sagren. They came back some time later. They went to Wests to buy some beer, returned, and after some time left again. Later, while Jones was fishing he heard a scream coming from the direction where Sagren and Sonny were stationed. He saw a big fire where previously a small fire had been burning. Bones and Waheed left to investigate, but Jones stayed where he was, in order to keep an eye on the fishing rods and tackle. Sagren said that some time after he and his father had returned to No 15, Docks came up to him where he was sitting at the fire. He was unaccompanied. He asked him, apparently with reference to what had taken place between his father and Jones, how Sagren could accuse him of holding on to his fishing bucket. He kicked the burning coals of the fire in the direction of where Sagren was sitting. Sonny then "got very, very mad ... very angry and caught hold of Docks by the collar", and wanted to hit him with his fists. Lenzo then rushed up and hit Sonny with an iron pipe, which was about a metre long and 3/4 inch in diameter. He struck him on the legs, and Sonny fell to the ground and screamed. Lenzo then left Sonny and attacked Sagren with the iron pipe, striking him on the shoulder, the body and on the head, and fracturing his left arm and his jaw. After that Lenzo went back to the father once more hit him "all over the body" with the iron pipe. Docks was

unarmed and did nothing : he just stood on one side. Lenzo and Docks then went away, back to the place where they had been fishing, leaving Sagren and Sonny lying on the ground.

After an interval Docks and Lenzo returned. Sonny was then lying unconscious on the ground. They picked him up, one holding his arms and the other his legs, and threw him into the bay. Then they got hold of Sagren, one holding him by the left hand, and the other by the right, and having dragged him with his legs on the ground to the side of the pier (a distance of about two metres) they threw him into the bay also. He fell into shallow water. Manuel, who was fishing at No 17, saw Sonny and Sagren at No 16. After a while he saw Sagren take a walk towards the end of the pier and return after half an hour. Minutes later he saw father and son taking a walk in the direction in which Sagren had previously gone. They returned, and Manuel noticed the father fishing at his own spot : it was then in the early hours of the morning. Manuel saw Lenzo and Docks passing and going to the father and son. An argument started - "something about fish". Manuel noticed Lenzo open his kitbag and take out a bush knife and start striking the father, while Docks was assaulting the father all over his body with an iron pipe. Shouting to his son to run, the father fell to the ground. The son tried to run, but Lenzo and Docks caught hold of him and assaulted him, one with the bush knife, and the other with the iron pipe, and he too fell to the ground. Manuel said that he could see all this by the light of the fire. After that Benro and Docks both took hold of the father and threw him into the bay. They did the same to the son, and threw all their belongings into the fire. Lenzo and Dock turned to go back to their own fishing spot and, noticing Manuel, approached him. Lenzo said that if Manuel told the police anything, he would do to Manuel what he had done to the father and son, while Docks said that if Manuel should give information to the police, he would say that Manuel was in their company. In her argument on behalf of the first accused, Ms Thomas subjected the evidence of the eyewitnesses to a detailed analysis which revealed a number of conflicts and discrepancies. She said that these were of a serious nature and that because of them the trial court should have found their evidence to be untruthful or at the least unreliable. It is true that there were many differences on matters of detail between the eyewitnesses inter se. But that does not mean that their evidence was deliberately untruthful, or that it was necessarily unreliable in regard to the main outlines of the night's events. The conditions prevailing at the time were such as to create a climate for the proliferation of honest error.

The night was dark and the pier was unlit except for the green flashing beacon at the end of the pier and the glow from Sonny's fire. The events to which the witnesses deposed covered several hours. There was evidence of alcoholic consumption and the smoking of dagga. Witnesses observed events from varying distances and different positions. As SHEARER J observed in the judgment of the trial court, in the circumstances of this case it would be surprising if there were not conflicts. So far from supporting any theory of deliberate fabrication and thus a conspiracy between the eyewitnesses, the discrepancies point rather to honest and independent observation and recollection. A conspiracy theory is in any event inherently unlikely. Jones, Manuel and Rajen were friends of the two accused and no reason was offered why they should have conspired with Sagren to falsely implicate them.

The trial court made the following credibility findings in regard to the eyewitnesses:

The complainant (Sagren) appeared to be a person of limited intelligence, with virtually no education. One must take into account that he was seriously injured in the events which have given rise to these charges. He appeared to be genuinely shocked as to the events of that night, and confusion resulting from the nightmare events is understandable. Sagren Kistan (Jones) gave a confident account, his demeanour was impressive, and he certainly gave the impression throughout his evidence that he was telling the truth. Emanuel Gianchand (Manuel) also made a good impression. There is some suggestion that he participated in the liquor that was consumed that evening, but that was denied by him. Rajendra Chetty gave what appeared to be a responsible and coherent account of what he saw. Ultimately the decision of this case falls within a limited area. It is not disputed that Sonny and Sagren ended up in the bay. A basic question relates to the identity of the persons who were responsible. Another concerns the assaults which occurred during the second stage. Before I come to a consideration of those matters, however, it is necessary to refer to the evidence given by the accused in their own defence.

In his evidence in chief the first accused said that he left Chatsworth together with Jones, who was his neighbour. On the train he saw other people he knew :

Manuel, Rajen, Lenzo, Bones and Waheed. He drank about half a nip of vodka on the train. He left the train at Wests and went along to the south pier to No 20. On the way he saw Sonny at No 15. At No 20 he put down his kitbag and his rods. There

were then present Jones, Manuel, Rajen, Lenzo, Waheed and Bones. They drank vodka and beer and also smoked a pipe of dagga. He saw Sagren walking towards them from the direction of No 22. He knew Sagren very well and had known his father for over 20 years. There was no trouble between himself and either of them. When Sagren came near, the accused asked him how he could steal the fish. Sagren got angry and tried to grab the accused and to hit him. The accused just pushed him, and Sagren fell to the ground. The accused ran away and stayed at No 24 for some time. He then went back to No 20 where Jones was standing fishing, and he himself went and sat fishing at a place between Nos 18 and 19. Sagren came from behind and tried to kick him, and took out a knife from his fishing bucket. Before Sagren could strike him with the knife, the accused stood up and hit him somewhere on the face with the butt of his rod. Sagren fell to the side of the pier. "Then when he tried to get up, I don't know what really happened, whether he tripped or whether he felt dizzy, I know he was down. He went over the side, between Nos 18 and 19". The accused then got scared. He went and told Jones what had happened. After that he slept next to the weigh block at No 20 until the next morning, when Jones "woke him up". He said that after he saw Sonny when he arrived at the pier, he did not see him again.

SHEARER J said in the judgment of the trial court that the first accused was a most unimpressive witness. He was unconfident in demeanour. He contradicted things put in cross-examination to State witnesses on his instructions ; he contradicted his own evidence-in-chief; and in general he gave a very poor impression.

The first accused's evidence was inconsistent with what he told Lieut Harry on 17 July 1989 when he accompanied him to make a pointing out on the south pier. He pointed out "the places where the man and his son were burning the fire". (In his evidence Lieut Harry said that the remains of the fire were still to be seen). The accused pointed out a second spot: "the place where they assaulted them. He said that he held them while the other person chopped them with a bush knife". A third spot he pointed out as "the spot where they made the man and his son jump off into the water".

SHEARER J said that Lieut Harry gave his evidence clearly and emphatically. He appeared to be a responsible police officer, giving an honest account of what had happened in his presence.

I am satisfied that the evidence given at the trial by the first accused cannot reasonably be true. Apart from the criticisms by SHEARER J, his evidence is inherently improbable and carries no conviction. Len20 is not mentioned nor is there any reference to Sonny at the final stage when the first accused says he saw Sagren go over the side of the pier. His story does not fit at all into the pattern disclosed by the evidence of the witnesses for the State.

The second accused said in his evidence that he went fishing on the south pier on the evening of 12 July 1939. He was in a group consisting of Docks, Jones, Manuel, Rajen, Rajen, Bones and Waheed. He drank two doubles of vodka on the train. They got onto the pier and stopped at No 20, where he had another double of vodka and smoked from a dagga pipe. He picked up his fishing bag and his rod and went on towards No 24 to catch crayfish. At about 9.30 to 10 p m he heard screams from the directions of the bottom of the pier, but did not take notice because disturbances from drunks were frequent. He went home by train the next morning. He saw there the rest of the group: Docks, Jones, Manuel, Rajen, Waheed and Bones. He saw Sonny on the pier that night at No 15 when he passed there. He did not see Sagren. When it was put to him that no less than four people had told the court that they saw him involved in various scuffles with Sagren that night, he said he was not involved, and said, "Perhaps they may be mistaken with the identity ... because on the pier we all dress alike".

Under cross-examination, he said that he had known Docks for two to three years, Jones for about the same time, Rajen for about five years, and Manuel for about five years. He had never had any trouble with any of them. He did not know about the fish that had been stolen. He was not aware of any trouble that took place that night. Sagren must have been mistaken with the identity. As to Jones, perhaps he was also mistaken. He could not remember whether there was a fire burning at No 20. Rajen must be mistaken about his identity, and also Manuel. He went nowhere near the place where the deceased was fishing. The first time he was told about people being thrown into the bay was at the police station after his arrest on the following Saturday. Of the second accused as a witness SHEARER J said that he was confident in demeanour, but frequently took refuge in generalisation. He was at one stage emphatic that he had no beard on the night in question, then went on to say that he was unable to say whether he had ever had a beard, but conceded the possibility that some beard may have been protruding and visible on the night in question.

I do not think that there is any possibility of mistaken identification in regard to the second accused. He was well known to the eyewitnesses, some of whom were his friends. He was a member of the same group of fishermen as Jones. Manuel said that the second accused threatened him after Sagren and Sonny had been thrown into the bay, and he also gave evidence that on the following day in Chatsworth the second accused came to his house and said that Manuel must come to court and give evidence

for him and say "that we were both fishing at the front of the pier". And Rajen said in his evidence that he met Lenzo in Chatsworth after the occurrence, and Lenzo said that he must not "komba" them (meaning, "get them into trouble").

In my opinion the trial court was clearly right in rejecting the evidence of the two accused and accepting in its main features that of the eyewitnesses. There can be no reasonable doubt that it was the two accused who, acting in concert, threw Sagren and Sonny into the bay.

It is necessary to return now to Sagren, who in the foregoing account of the night's events was left lying in the water next to the pier after he had been thrown into the bay by the accused.

Sagren recounted how he got out of the water. On the pier he met "a white man". This was Mr Terence Rode who said in his evidence that he was fishing near Wests when he was approached by an Asiatic man who was very wet and appeared to have been badly assaulted. He appeared to be shocked. He was bleeding from the mouth and one eye was closed; his feet were bare and he was walking in a bent position. He asked repeatedly that Rode help him look for his father who was in the water. Rode took him to a shunter's cabin at Wests.

During that night Cst Van Zyl was directed by radio to go to the shunter's cabin at Wests. There he found a man lying on the floor. He had been injured and was confused. Van Zyl said that he had been informed by radio that there had been a fight on the pier and that a body had been thrown into the water. He went to the scene between 3 and 4 am. He found no fire but he saw bloodspots "net langs die kaai, op die sement". Torches were shone into the water which was four to five feet below. He did not see a body.

On Tuesday 18 July 1989 a headless body was found lying among stones at the foot of the south pier, near to the jetty of the old whaling station. It was taken to the mortuary, where, notwithstanding the absence of the head, it was positively identified as that of Subramoney Moonsamy by reason of its clothing and a shortened index finger on the left hand.

Dr G Perumal conducted a post mortem examination on the body. He described it as that of an adult Asian male, the head of which was missing. It was decomposing. He found the atlas on the right side of the spinal column to have been irregularly broken off- The spinal cord above the first cervical vertebra was missing. He was unable to find a specific anatomical cause of death. In his opinion the decapitation was possibly caused by a blunt instrument, e.g. the propellor of a passing boat.

The question then is whether on the proved facts the accused were guilty on both counts as found by the trial court.

There can in my opinion be no doubt that when the accused threw first Sonny and then Sagren into the bay they had the intention to kill. It is clear that their purpose in going to No 15 for the second time was to carry out a cleaning-up operation and to get rid of the victims.

The question was argued whether the state had proved that Sonny was alive at the time when he was thrown into the bay. It was submitted that it was reasonably possible that he was then already dead as a result of the injuries which had been inflicted upon him in the preceding assault.

The evidence of Dr Perumal was that there were no injuries to the deceased's heart and pericardium or to the pleura and lungs. He said that he did not carry out tests to exclude drowning as a cause of death, because of the decomposition the body had undergone. No one would be able to say from a post mortem examination whether the deceased was alive when he went into the water.

Sagren said in his evidence that when the two accused came back for the final phase, "My father was on the floor ... He was completely unconscious." Asked whether he was in a position to tell the court whether his father was alive or dead when he was thrown into the bay, he answered, "I don't know whether my - my father, he made some - he made a funny noise ... Before they throw him into the bay. He was - he was like moaning."

In his evidence Manuel said that Docks struck Sonny "all over the body". He could not say whether the father was or was not dead because he could not see movement or hear sound. The following is an extract from the record of his evidence:

"You told the Court that Lenzo, that is accused No 2, struck the father whilst Docks had an iron pipe in his hand. Do you remember telling us that? Yes. Now where did the blows land on the father,

the deceased? I do not understand your point.

I beg yours? I cannot understand your point.

SHEARER J: where did he hit him, hit Sonny? I could say all round.

All over? Yes.

Body and head? Yes.

MS STEYN: And where did the blows land that Docks, that is accused No 1, struck? Almost the same.

The same? That is all over the body? Yes."

Before the assault Sonny was alive. The question is whether he continued living until he was thrown into the bay or whether death supervened before that as a result of the injuries inflicted upon him.

In Phipson on Evidence, 24th ed, it is said at p 360:

States of mind, persons, or things at a given time may in some cases be proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. This sort of inference is sometimes called the presumption of continuance. While it is preferable to characterise this as a presumption of fact and not a presumption of law (that is, a true presumption) it is more sensible and more accurate to regard it as a type of ordinary reasoning which applies in circumstances of the utmost frequency and diversity.

And at p 361:

The presumption from previous existence has been held to apply to human life, it having been held that, though there was no presumption of law as to the continuance of life, an inference of fact might legitimately be drawn that a person alive and in health at a certain time was alive a short time later. (The emphasis is in the original text). The so-called presumption of continuance was considered by this court in *Rex v Fourie & Another* 1937 AD 31, in which DE VILLIERS JA said at p 42, "It may now be taken that by the law of England, though the point was formerly doubtful, it is now settled that the well-known presumption of continuance is one of fact and not of law, and that it should therefore be applied in such a sense by the Courts of this country, too. It is therefore a mere statement of probability, derived from the common experience of mankind. Its scope and intent is that from the existence of a state of things at a given time, it may be inferred that that state continued to exist for a reasonable time thereafter, according to the circumstances and the nature of the thing. A Court of law may therefore draw such an inference if it thinks proper, in any given case, but it is not bound to do so. The rule of law is clear. "

In *Van den Bergh v Parity Insurance Co Ltd and Another* 1966 (2) SA 621 (W) BEKKER J was not prepared to find that a man, who had been thrown onto the road as a result of a collision between two motor cars, continued living until he or his body was run over by a third car approaching at a high speed- He said that the "presumption of continuance" did not apply in a case "where the proved facts show a sharp interruption of the deceased's normal peaceful existence". In *Van den Bergh's* case there was expert evidence that the deceased might have been dead when run over by the second car.

In the present case there was also a sharp interruption of Sonny's normal existence : after a vicious assault he was left lying unconscious on the ground. There was here no evidence from an expert on the question whether Sonny could have been dead or alive when his body was committed to the water, without such evidence, a court is not in a position to reach a safe conclusion on the matter. As a result, it must be held that the prosecution did not discharge the onus of proving that Sonny was alive at the critical stage.

The question arises whether either of the accused can be convicted of murder on the basis of the preceding assault.

The only two witnesses to the crucial events were Sagren and Manuel, and their versions of what took place differed in material respects. Sagren said that Docks came there unaccompanied and kicked coals from the fire towards him, whereupon Sonny caught hold of Docks by the lapel of his jacket. Lenzo then came on the scene and rushed at Sonny and struck him with an iron pipe. Docks, who was unarmed, did not participate in this assault - he stood watching. Manuel said that Docks and Lenzo arrived together and both were armed, Docks with an iron pipe and Lenzo with a bush knife. Both of them assaulted Sonny.

These accounts cannot be reconciled with each other. They cannot both be true : at least one of them must be false. Both the witnesses made a good impression on the trial court, and there is no basis for preferring the evidence of one to that of the other. In consequence it is impossible to make findings that Docks was carrying a weapon or participated in the assault in any way; or that Lenzo assaulted Sonny with an iron pipe, or with a bush knife.

In my opinion it would not be a legitimate approach to say that on either version Lenzo assaulted Sonny with intent to kill him. Implicit in that approach is an assumption for which there is no logical justification, namely, that one or other of the versions is true. It cannot validly be inferred from the proposition that P and Q cannot both be true that either P or Q is true; both may be false. (There is some discussion on these matters, based on Wigmore on Evidence, in my judgment in *S v Oosthuizen* 1982(3) SA 571 (T) at 576 and in my article, "Credibility of Witnesses," (1985) 102 SALJ 32 at 35-361.)

In my opinion therefore the conviction of the accused can rest only on their proven conduct in throwing Sonny into the bay, together with recognition of the fact that there was no proof that he was alive at the time. On that basis they are guilty of attempted murder. (cf. *S v Ndlovu* 1984 (3) SA 15 (A).) Consequently the appeals against the convictions and sentences on count 2 should be allowed in part. In regard to the appeals against sentence, there is no ground for interfering with the sentences of 5 years imprisonment in respect of count 1. In respect of count 2, the alteration of the verdict should bring with it a different sentence.

I would make the following order :

- The appeals against the convictions and sentences in respect of count 1 are dismissed,
- The appeals against the convictions in respect of count 2 are allowed. The convictions and sentences are set aside and there is substituted therefore the following:

“Each accused is guilty on count 2 of attempted murder, and is sentenced to 5 years imprisonment. The sentences on counts 1 and 2 are to run concurrently to the extent that the effective sentence to be served is one of 7 years imprisonment.”

HC NICHOLAS AJA