Case Nos: 574/92
582/92
590/92
608/92

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE

DIVISION

In the matter between:

STHEMBISO GOODENOUGH NTULI	First	Appellant
PHILANI ZONDO	Second	Appellant
MFANA HILLARIUS DLAMINI	Third	Appellant
THULANI WELCOME KHUMALO	Fourth	Appellant
MPOPOZI ELLIS NTULI	Fifth	Appellant

and

THE STATE Respondent

CORAM: HEFER, EKSTEEN et HOWIE JJA

HEARD: 21 February 1994

DELIVERED: 25 March 1994

J U D G M E N T

HOWIE, JA.....

HOWIE JA,

The five appellants stood trial in the Natal Provincial Division (Levinsohn J and assessors) with two other men (accused nos 6 and 7) on one count each of murder and robbery with aggravating circumstances. On both counts accused no 6 was acquitted and accused no 7 was convicted as an accessory after the fact. Appellants were all convicted as charged. They were sentenced to death for the murder and to 15 years' imprisonment for the robbery.

The appeal is brought in terms of s 316A of the Criminal Procedure Act, 51 of 1977. All the appellants appeal against the death sentence and fourth and fifth appellants also noted an appeal against their convictions for the murder. Counsel for fourth appellant did not pursue the matter of his client's murder conviction, however.

The offences were committed when an armed gang robbed the Kingscliffe Spar Store at Appelsbosch in the New Hanover district in the early evening of Friday 30 August 1991. In the course of the robbery the manager of the store, Peter Hailstones, was fatally shot.

The plea tendered by first appellant was one of guilty to the robbery but not guilty to the murder. Second appellant pleaded guilty on both counts. Their co-appellants and erstwhile co-accused all pleaded not guilty on both charges.

As regards the relevant facts, one may begin with the evidence which was not in dispute, the evidence which was established beyond reasonable doubt and defence evidence which was reasonably possibly true.

Accused no 6 was a herbalist. His kraal was at Appelsbosch about 5 kilometres from the store. He ministered to his patients there and at Umlazi among other

places. Appellants and accused no 7 were residents of Umlazi. First appellant was stationed there as a detective constable in the Kwazulu Police. Second appellant was employed in Durban. Third and fourth appellants were out of work at the time. Fifth appellant operated a taxi business. Accused no 7, the youngest accused, was then 20 years old and still at school.

On Thursday 29 August 1991 accused no 6 had been treating patients at the house of fifth appellant, his close friend. Afterwards he and his wife were given a lift by fifth appellant from Umlazi to Appelsbosch. Also in the car were third and fourth appellants. They all slept overnight at the kraal of accused no 6. During the following afternoon first appellant arrived in a van belonging to the Kwazulu Police. He was accompanied by second appellant and accused no 7. First appellant, who had brought his 9 mm service pistol with him was already

armed. Second, third and fourth appellants were respectively provided with a Star 9 mm pistol, a 6,35 mm pistol and a 7,65 mm pistol.

All but accused no 6 set off at dusk in the police van bound for the store. After some reconnoitring the van was parked some hundreds of metres from the premises. By this time the store was closed. Fifth appellant, who was a well-known customer of the store (as was accused no 6) remained at the van with accused no 7.

The first four appellants proceeded to the house adjoining the store where the deceased lived with his wife and children. On their imminent entry into the kitchen Mrs Hailstones saw them at the door and raised the alarm. The deceased came into the kitchen from inside the house and rushed towards the men. As he did so he was shot dead. Some of the gang then forced Mrs Hailstones at gunpoint to take them to the store, demanding money.

One corner of the store consisted of a partitioned office. In it was a locked safe. They told her to open it. She said she did not have the safe key and that only the deceased had known the number of the combination lock. She also said that the only available money was in the various tills positioned about the store. Some of the four appellants in question started searching various drawers for money. Others looked unsuccessfully for the safe key. In this process Mrs Hailstones was heavily slapped several times by second appellant in order to make her open the tills and reveal the whereabouts of the safe key. She eventually said that the woman shop assistant who lived in the servants' quarters alongside the store would know where the key was. She was then forced to lead some of her assailants to the assistant's room. There, the latter was woken, assaulted and marched to the office. She was also unable to produce the key or

to operate the lock. However, she could and did open the tills, which were then rifled.

In the meanwhile the nightwatchman and a young male shop assistant had been brought into the office and forced to lie on the floor. At a stage when Mrs Hailstones and the woman assistant had served their usefulness and were also being held at gunpoint in the office while the money search continued, the former precipitated the end of the raid. She located a nearby spray container of teargas with which her police reservist husband had been supplied. She lunged towards second appellant who,with third appellant, was keeping them captive, and discharged the gas at him. The two appellants immediately responded by firing their pistols before retreating out of the office and into the store. They were speedily joined by the other two and the foursome then fled the premises and made for the van

carrying between R6 000 and R7 000 in cash and sundry cheques.

Having rejoined fifth appellant and accused no 7 at the police van, the six men set off for Umlazi. There, after dividing the money and burning the cheques they dispersed.

Members of the South African Police were summoned to the store the same evening. In their investigations that night and the next morning they found 3 empty 9 mm shells and one spent 7,65 mm bullet on the kitchen floor. Three empty shells, 2 of 9 mm and one of 6,35 mm, were found in the store. All 5 9 mm shells were ballistically proved to have been fired in the Star pistol carried by second appellant.

The police also found 3 bullet marks in the office. Two were on a bookshelf in front of which Mrs Hailstones had been standing just before the teargas

incident. The other was on a cabinet very close to where the woman assistant had stood at that same time. There was also a hole in the cement floor of the kitchen apparently made by a bullet. The hole did not coincide with the spot where the deceased had lain.

Acting on information received, one of the investigating officers arrested appellants and their co-accused during the week following the killing. In the process he recovered all 4 firearms. Soon after his arrest each of the first four appellants made a statement to a magistrate in which he described the robbery and confessed his participation in its commission. The admissibility of their statements was not in issue.

The autopsy conducted on the deceased's body revealed that he had been struck by 5 bullets. Three of the shots were in the fatal category. One to the chest caused the most damage. The marks surrounding its

entrance wound indicated that it was discharged probably within a metre of the victim. The bullet which caused it was recovered from the body. So was another. They were both of 9 mm calibre.

Turning to the contested evidence, Mrs Hailstones testified that she was not only assaulted by second appellant but also by third appellant. They were then in the store and the safe key was being sought. She said that he came up and said he was looking for the key of the Hailstones' car which was parked alongside the store. She told him the key was in the kitchen. He grabbed her by the arm and forced her outside with his pistol at her back. There, in very aggressive fashion, he ordered her to undress. When she refused he swore at her repeatedly and attempted to wrench off her skirt. She resisted and he pulled even harder. She pleaded with him to desist but to no avail. She then

protestated that she was menstruating. He simply disbelieved her and went on at her. She produced her sanitary pad and pushed it into his face. This enraged him. He put away his pistol, took out a knife and tried to stab her, saying he would kill her. However, she succeeded in pushing his hand away and he was only diverted by the appearance of second appellant who came up demanding the key of the safe. It was at that juncture that she told her assailants that the woman assistant might know where the safe key was and the action then switched to the servants' quarters.

Mrs Hailstones clearly conveyed in her description of the events that all four appellants who went to her house entered the kitchen. The assertion was put to her a number of times on behalf of first appellant that he had not gone into the kitchen. This she adamantly refuted. She also denied the allegation put to

her in cross-examination that the deceased was shot only when he had got right up to the intruders. She said that he was still well short of them when he finally fell.

The police officer who arrested appellants said he searched the house of fifth appellant and found two plastic bank bags containing R25 worth of coins hidden between the headboard of his bed and the adjacent wall.

All the appellants gave evidence in their defence except second appellant. He only testified in mitigation of sentence.

First appellant said he was short of money at the time and therefore surrendered to fifth appellant's persuasion to take part in the robbery. He also agreed to use a police van for the purpose. It was envisaged that a police vehicle would not arouse suspicion in the vicinity of the store and would facilitate their getaway.

He testified that he knew such crimes usually involved violence but was encouraged by fifth appellant's assurance that they would be provided with "muthi" to aid in the execution of the project. The arrangement was that first appellant would take second appellant and accused no 7 to the kraal of accused no 6 on the Friday in question where everybody would assemble prior to the raid.

Neither fifth appellant nor accused no 6 was there when first appellant and his passengers arrived. Despite that, the remaining participants discussed the robbery with the aid of a sketch plan of the store premises which third appellant had in his possession. Time passed without any sign of fifth appellant and accused no 6. Apprehensive that the store would close without the opportunity to stage the proposed hold-up, the first four appellants and accused no 7 decided to get on with it by themselves. They climbed into the police van

and left. On the way they met fifth appellant and accused no 6 in the former's car, driving towards the kraal. The two vehicles stopped. Fifth appellant said it was still too early and that in any event he wanted accused no 6 to give them "muthi". Accordingly they all proceeded to the kraal. There, "muthi" was administered by accused no 6 to the first four appellants and also applied to their firearems. In due course everyone except accused no 6 went off in the police van with fifth appellant driving.

First appellant denied entering the kitchen at any time or firing his pistol. However, he did peer into the kitchen and saw the deceased being shot when he set upon third appellant. His own contribution was confined to taking cash from the tills. Having done so, he waited for his companions outside the store. When the spoils were divided back in Umlazi, appellants each

received about R600 to R800 while Accused no 7 received far less. It was agreed that accused no 6 would receive R100 per person for the "muthi" he had supplied.

Under cross-examination by second appellant's counsel, first appellant immediately agreed with the proposition that when they set off from the kraal before fifth appellant's return they were going not to the store but home to Umlazi. It was also under cross-examination that first appellant came up with the allegation, not made by him in evidence before or in his confession, chat he believed that the "muthi" would render their victims so passive and compliant that no violence would occur.

The defence advanced by third appellant was that he took part in the robbery under compulsion. Having gone with fifth appellant to Appelsbosch just for the ride, the latter told him after they had got there that he wanted him to go with first appellant to rob the store,

failing which he (fifth appellant) would shoot him. In addition, accused no 6 said that he would administer "muthi" to them and that anyone unwilling to participate would be bewitched and go mad. "Muthi" was duly applied to them and their firearms to fortify their resolve. When they drove to the store fifth appellant was at the wheel and it was he who gave the orders.

Third appellant admitted that he was in possession of the 6,35 mm pistol when he entered the kitchen but said that it was in his pocket. He said the deceased came up and pushed him. As a result he fell. The deceased was then shot by one or more of the other appellants. He denied assaulting Mrs Hailstones but admitted slapping the woman assistant. When the teargas incident took place he said he drew his firearm and "shot into space." He could not give any reason for doing so. He, too, alleged that when they left the kraal prior to

the return of fifth appellant and accused no 6 it was for the purpose of going to Umlazi, not to commit robbery.

During cross-examination third appellant was confronted with his confession in which he admitted pointing his pistol at the deceased's wife. He could not deny that he had either said that or in fact done it.

It was also pointed out to him that his statement contained no allegation of compulsion of any kind. His only explanation was that when he made the statement he had no legal representation and that the magistrate's interpreter told him to limit himself to what happened at the shop. Asked why he slapped the woman assistant, he said the "muthi" influenced him to do so and he did not realise it was wrong.

Fourth appellant said that some days prior to 30 August fifth appellant told him he wanted him to take part in an armed robbery. This was repeated on 29 August.

When fourth appellant said he was unwilling to do so, fifth appellant threatened that he would shoot him. This intimidated fourth appellant and he agreed.

On the afternoon in question "muthi" was administered by accused no 6 to the participants which it was said would cause thunder to occur when they met up with the deceased. Like the previous two appellants, he said fifth appellant drove the van to Kingscliffe and was the leader of the expedition.

Referring to his role at the scene itself, fourth appellant said that what he did was done out of fear not only of fifth appellant but also of first appellant seeing that the latter "could have executed his duties as a policeman in the process." He said that from his knowledge he maintained that he did not shoot inside the house. Asked what this meant, he said it was a denial. He went on to say that he was in the office when

the teargas was released. It affected his vision. As he staggered about he heard his firearm go off but could not say in which direction the shot went.

Under cross-examination he admitted saying nothing in his confession about compulsion. His explanation was that he had been frightened when he made that statement. Asked whether he had fired a shot in the kitchen, he said he could not deny it, but maintained that where he fired a shot was outside, after the teargas incident. He might, he said, even have been outside the gate when he fired it.

Fifth appellant denied all the incriminating allegations made against him by the other appellants. His evidence was that he was on his way to take accused no 6 back to Appelsbosch on the Thursday preceding the robbery when he happened to call in at the house of third appellant to look for the latter's sister. Third

appellant, who was at home in the company of fourth appellant, said they had nothing to do and wondered if they could go along for the drive. Fifth appellant in any case intended returning to Umlazi the same day, and therefore agreed. However, on the way to Appelsbosch the car's radiator gave trouble and they were all forced to spend the night at the kraal of accused no 6.

In the morning the radiator problem was rectified but then accused no 6 asked to be taken to the Greytown area to see patients. Fifth appellant consented and he and accused no 6 departed. On the way back to Appelsbosch that afternoon they came across the police van driven by first appellant. It turned and followed them to the kraal. When they alighted there first appellant said he had come to fetch third and fourth appellants to take them back to Umlazi. By this stage fifth appellant was in a hurry to get home himself but wanted to leave

his car for the use of accused no 6 who was due to return to Umlazi later that evening. Fifth appellant therefore asked first appellant if he could travel back to Umlazi in the police van. First appellant agreed but said he wanted to go via the Kingscliffe store. In due course they left.

When the van stopped some time later the first four appellants got out and said they were going to walk to the store. Only then was fifth appellant aware that third and fourth appellants had all along been in the back of the van. As fifth appellant and accused no 7 were waiting for the other appellants to come back, accused no 6 drove up. He offered to drive fifth appellant to Umlazi but the offer was declined, fifth appellant saying he wanted to get home soon whereas accused no 6 would still be some while yet with his patients.

After a substantial time the first four appellants

returned carrying a cardboard box and some packets. When fifth appellant asked why they had been so long, first appellant said they had gone to rob the store and in the process the white man had been injured. Fifth appellant was then driven home to Umlazi. He had barely reached his house when accused no 6 arrived to stay overnight.

Fifth appellant denied having had anything at all to do with the planning or execution of the robbery or having received any of the stolen money. He contended that he had been falsely implicated by first, third and fourth appellants because he had told the police about them and thereby led to their arrest. He also denied the finding of money behind his bed.

Under cross-examination fifth appellant was unable satisfactorily to explain how first appellant could have known that third and fourth appellants were at Appelsbosch, why first appellant should have wanted to

make a special trip to take them back to Umlazi in a police vehicle, or what possible urgency made him (fifth appellant) want to travel home in the police van and not his own car. Fifth appellant was equally in difficulty in trying to explain the other remarkable, and obvious, coincidences and improbabilities in his story.

Accused nos 6 and 7 also testified. I have not detailed the incriminating evidence which first, third and fourth appellants gave against them because it is unnecessary for present purposes to do so. Suffice it to say that they denied that evidence. In particular, accused no 6 denied administering "muthi".

In its evaluation of the disputed evidence the trial Court found Mrs .Hailstones to be an entirely truthful and reliable witness.

As regards first, third and fourth appellants, strongly adverse findings were made in respect of those

portions of their evidence which conflicted with the testimony of Mrs Hailstones and those portions in which they sought to exculpate themselves or to minimise their respective roles.

The only evidence against accused nos 6 and 7 was that of those three appellants. The Court did not criticise the evidence of accused no 6 and was unable to find beyond reasonable doubt that he had given the robbers "muthi" or in any other respect been linked to crimes committed. He was therefore acquitted. Accused no 7 was convicted (albeit of lesser offences) solely on the strength of his own evidence.

When it came to the case of fifth appellant, however, the trial Court considered that he was in an entirely different position. Quite apart from the incriminating evidence given by his three co-appellants referred to (the shortcomings in whose evidence were, as I

have indicated, fully borne in mind by the Court a quo) he was found to have been a very bad witness. His evidence was found to have been vague, extremely improbable, in conflict with a statement he made to a magistrate soon after his arrest and, all in all, essentially untruthful. In the circumstances the damning evidence of his co-appellants was held to have been consistent with all the probabilities and to have been strengthened by his own mendacity. On that basis fifth appellant was, on the ground of common purpose, not only guilty of the robbery but he must, in the trial Court's opinion, have foreseen the possibility of a fatal shooting in the course of the robbery. He was therefore held to have been guilty in respect of the murder as well.

It is unnecessary to discuss the evidence relative to fifth appellant's murder conviction in any detail. In my view the trial Court has not been shown to

have misdirected itself in any respect relative to the case against him. In fact I am satisfied that the findings it made regarding his credibility, his role in the salient events and his consequent guilt were amply warranted.

Turning to the question of sentence, there is, firstly the matter of second appellant's evidence in mitigation. Leaving aside his personal details, which I shall deal with in due course, and focusing on his account of the incidents in issue, he said third and fifth appellants came to him one day saying that they had all to proceed to Appelsbosch to commit a robbery. When he said he did not agree with this, fifth appellant threatened him that if the robbery succeeded but it became known who had committed it, he would know that it was second appellant who had given the game away. Thus pressured, second appellant fell in with the plan. Just before the raid "muthi" was administered to him which he said made him so

fearless that he felt "like a lion". Despite that, he was in dread of fifth appellant the whole time and did just as the latter ordered. Spurred on by these two apparently paradoxical influences, he went ahead and in the course of the robbery shot at the deceased and later slapped the deceased's wife. He testified that he had since come to regret that conduct to such an extent that it pervaded his thinking and his attitude to life generally. As to the role of violence in the execution of the plan, he said that fifth appellant told them that if anything occurred which could possibly foil the mission they were to use their firearms. However, when asked why he fired when the teargas was used, he said he could not give any reason for doing so.

As regards the individual circumstances of the other appellants, their respective counsel advanced the relevant factual material by way of uncontested

submissions from the Bar.

The trial Court recorded the various mitigating and aggravating factors found by it and concluded, with reference to the passage in S v Shabalala and Others 1991(2) SACR 478 (A) at 483 c-e, that the death sentence was the only proper sentence in respect of each appellant. The mitigating and aggravating factors found will be referred to in what follows.

It was not seriously contended on appeal that in its comparative evaluation of the mitigating and aggravating factors the Court a quo had overlooked any relevant facts. The essence of each argument was that allegedly mitigating factors had been accorded insufficient weight and certain aggravating factors ought not to have been found.

In so far as mitigating factors are concerned there are certain considerations which are of general

application or apply to several of the appellants.

Firstly, the first four appellants had no previous convictions. Fifth appellant had two of a minor nature but he was, fairly and rightly, treated as a first offender for the purposes of this case. In the circumstances all of them were regarded as susceptible of rehabilitation.

Secondly, as regards those appellants who claimed to have been "doctored" by accused no 6, the Court found, notwithstanding his acquittal, that it was reasonably possible that he had administered "muthi" to the first four appellants and that they were naive or gullible enough to think that it would have some advantageous effect upon them and upon the outcome of their efforts. The trial Court held that this was not a mitigating factor and that the purpose of this ritual was to fortify the frontline participants so as to ensure the

success of the enterprise. This finding is unquestionably correct. The motive and the intention to rob (and if necessary to use violence) were not engendered by the effects of the "muthi". They were formed beforehand. The "muthi" was merely aimed at the successful attainment of the pre-conceived venture. Significantly, none of the first four appellants referred to the effect of "muthi" in their confessions and they were prepared to embark on the raid before the "muthi" was given.

Thirdly, it was suggested in argument that the appellants' belief in the effect of "muthi" pointed to the existence on their part of an extenuating ingenuousness and exploitable lack of intelligence. The evidence shows that at the time that the crimes were committed the ages of the appellants - taking them in numerical order - were respectively 24, 26, 24, 26 and 35.

First appellant, a matriculant, had been in the Kwazulu Police for 5 years. Second appellant, whose education had been cut short at the Standard 2 stage by his parents' impecuniosity, had for 6 years been in the employ of Gama Panel Switch Boards in Durban. Third appellant had been to school until Standard 7. He was not working at the time in question but had previously been employed in Umbilo and Umbogintwini. Fourth appellant left school after Standard 8 at a technical school. He had served his bricklayer's apprenticeship with the LTA company but had since been retrenched. Fifth appellant had a Standard 7 education and earned his living as a taxi operator. Although the trial Court was prepared to hold that second, third and fourth appellants were unsophisticated it does not follow, nor does it emerge from the evidence, that any of them can be labelled as ignorant rustics or unintelligent.

Although the first four appellants were, I accept, under fifth appellant's leadership, the evidence does not show that their submission to his command meant that they were unduly under his influence. Still less does it show that they acted under compulsion - there is not a word of that in their confessions. And even if they did believe in the beneficial properties of "muthi", the facts warrant the inference that they were, even before its administration, ready and willing not only to be treated with it, but also to carry out their criminal purpose.

In the fourth instance it was urged as a mitigating circumstance that - as found by the trial Court - all but second appellant acted with dolus eventualis. In this regard reliance was placed on the decision in S v Mthembu 1991(2) SACR 144(A). At147 d-f the following passage appears:

> "In determining whether, on a conviction of murder, an accused's conduct is so serious that the death sentence 'is imperatively called for' one must have regard primarily to the circumstances of the offence, the extent of actual participation therein and the form of intent present. Where a person by his own act, and with direct intent to kill (dolus directus), causes the death of another, then the greater
>
> the premeditation that preceded his conduct, the more base his motive, the more brutal, heinous or callous the crime, the greater will society's resultant indignation and revulsion be, and the more readily can the conclusion be reached that such person's deed 'is so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing' (S v Matthee 1971 (3) SA 769 (A) at 771D). However, when dealing with an accused convicted of murder who was not a perpetrator or co-perpetrator, and whose mens rea was not in the form of dolus directus, a sentence of death will rarely be imperatively called for. This is the situation which pertains in the present matter."

In that case the evidence established that the appellant and his accomplices were prepared, in the execution of a proposed robbery, to overcome resistance with murder. His own evidence suggested that this was

in fact agreed. The Court held, however, (147 h-148a) that death, even if anticipated as a strong possibility, was not a foregone conclusion; that the deceased in that case was shot when he was defenceless and before he offered any resistance; that the perpetrator's conduct therefore went further than the agreement; and that the appellant had not been proved to have acted with more than dolus eventualis.

In the present instance, however, as stressed by counsel for the State, the evidence goes further. The four appellants entrusted with the task of carrying out the attack were all armed. They had been instructed to shoot if anything occurred which looked as if it might frustrate their plan. They knew the deceased was at home. They went straight to his house. Conduct which they would have regarded as obstructive on his part must have been envisaged as inevitable - in defence either of

his family or the store. The chance of meek submission was sufficiently remote to warrant its being ignored: no appellant gave evidence (which was reasonably possibly true) that such submission was expected. The killing occurred at the very outset. The moment the deceased emerged he rushed towards the four intruders and was shot without further ado. No attempt was made to ascertain if he was armed or to overcome him by other means. There were, after all, four against one. The robbery then proceeded with every indication that the elimination of the deceased was expected.

Although the trial Court's conclusion as to mens rea was merely that the appellants concerned must have foreseen resistance and a resultant fatal shooting as a possibility the only reasonable inference, in my view, is that the deceased's death was in advance regarded by all the appellants as not only a possibility but a

substantial or virtual certainty.

Although this finding goes further than that of the trial Court, appellate substitution of the appropriate conclusion to be drawn from evidence at a trial is permissible where this does not involve completely overturning the trial Court's essential findings of fact, its assessment of credibility or its assessment of the basic probabilities: S v Morgan and Others 1993(2) SACR 134(A) at 162 d-g. In the present case the inference to be substituted is one founded upon the self-same facts as those on which the trial Court based its inference, having assessed credibility and the basic probabilities. A recent example of such a substitution is to be found in S v Khiba 1993(2) SACR 1 (A) at 3 e-g where the trial Court's finding of dolus eventualis was held to have been unwarranted on the evidence and was replaced by a finding of dolus directus. In the circumstances the case of the

appellants concerned must be decided on the basis that they foresaw death as a substantial or virtual certainty.

On that footing it could well have been

found that their mens rea amounted to a form of actual intent referred to in the textbooks as dolus indirectus (Burchell and Hunt, South African Criminal Law and Procedure, Vol I, 2nd ed. at 137), "opset by noodwendigheidsbewussyn" (de Wet en Swanepoel, Strafreg, 4th ed, at 138 and Snyman, Strafreg, 3rd ed at 189-190) or oblique intent (Glanville Williams, The Textbook of Criminal Law, 2nd ed, at 84-5). However, because this aspect was not argued in the Court below or on appeal, it is not appropriate to make a finding that this type of mens rea was indeed present. Nor is it necessary. It suffices for present purposes to say that the appellants concerned foresaw death as more than a strong possibility. This case is therefore distinguishable from that of

Mthembu on the facts.

In addition, whatever reconsideration the quoted dictum in Mthembu's case may in due course receive, it is plain from the context in which it appears that it was not the Court' s intention in that matter to lay down an approach applicable in all circumstances in which an accused's mens rea is not dolus directus.

My conclusion, therefore, is that Mthembu's case does not support the submission under consideration and that it is not a mitigating factor on these facts that some of the appellants did not act with dolus directus.

Turning to the considerations applicable to individual appellants, it was alleged from the Bar, and accepted by the prosecution, that first appellant was, according to his Branch Commander, very able, reliable and extremely conscientious in his police work; that he was highly rated and trusted by this officer; and that he had

given 5 years' unblemished service. This record clearly constitutes a mitigating factor and the trial Court found so.

On appeal, first appellant's counsel contended that the Court a quo should have found that his client played a lesser role than the others in that he did not enter the kitchen, fire a shot or commit any assaults. The evidence of Mrs Hailstones shows quite clearly that he indeed entered the kitchen. Not only were all four assailants inside before the shooting but after it occurred two went to the deceased and two went to her. Accepting that this appellant fired no shots, it was obviously neither practicable nor safe for the four men, standing close by one another, all to shoot. The fact that first appellant did not assault anyone is merely neutral. He knew full well what the plan was beforehand, he had seen the deceased killed at the very start of

proceedings and he thereafter participated - according to Mrs Hailstones - with as much apparent relish as his companions. His contribution of the vital conveyance, his role in the lead-up stages, and his possession of his service pistol show adequately enough in the overall picture that he was comprehensively committed. And the fact that he knew that armed robberies were generally accompanied by violence reveals a highly blameworthy state of mind.

In so far as it was stressed in argument presented to the trial Court that first appellant had confessed to the robbery soon after his arrest, that he had co-operated with the police and that he had pleaded guilty to the robbery charge, the Court accepted that these features demonstrated some remorse. One should remark that the appellant gave no evidence that he was remorseful. He merely said in his plea statement that he

was extremely sorry because of what happened and that he was foolish to have taken part. In my view it is not apparent to what extent, if any, his possible remorse pertained not to his crimes but rather his predicament in the dock. However, accepting the trial Court's finding that first appellant has shown some remorse, it is in his case a factor of extremely little weight.

Turning to second appellant, he did give evidence expressing his remorse and this was not challenged by the State. It is also in his favour that he pleaded guilty to both charges and did not take up the trial Court's time with a false defence. On the other hand the evidence which he gave in mitigation renders it doubtful whether he was in fact being frank and open. Like some of his colleagues, he sought refuge behind the already discredited allegations as to the effect of "muthi" and a vague sort of compulsion exercised by fifth

appellant. That the "muthi" he received eliminated all his fear but not his fear of fifth appellant, is specious. In the end result, therefore, his professed remorse is also of minimal worth.

On behalf of third appellant it was submitted that the deceased's conduct contributed to his being killed. The fact that, as I have said earlier, the deceased was shot the moment he appeared and rushed towards this appellant and his companions cannot possibly be a mitigating factor. His conduct was not only understandable but, by necessary inference, exactly what the appellants foresaw.

As regards fourth appellant, it was submitted by his counsel on appeal that he did not fire a shot in the kitchen. This, in my view, flies in the face of the police evidence that a spent 7,65 mm bullet head was found there. The trial Court did not consider, for the purposes

of its judgment on the merits, the significance of the calibre of this bullet, namely, that fourth appellant carried the 7,65 mm pistol. In its judgment on sentence, the Court said that it was not conclusively proved that anyone but second appellant fired a shot. That was in the context, however, of determining the nature of each appellant's mens rea, and there the question, no doubt, was whether anyone other than second appellant had shot the deceased. I agree that it was not conclusively proved that anyone other than he had shot the deceased but that does not mean that no one other than second appellant fired a shot in the kitchen. To find now that fourth appellant did fire such a shot (even if it did not strike the deceased and even if it was not aimed at him) would not, on a proper analysis, run counter to the trial Court's findings of fact or its assessment of credibility and the probabilities; it would merely supplement

those findings. But even if it were, properly construed,
a finding contrary to that of the trial Court, it is open
to this Court to make a contrary finding where to do so
would be to find upon undisputed evidence and/or on an

appellant's own evidence: see Morgan's case, supra,
loc.cit.

In the present case fourth appellant said that if it were proved that he fired a shot in the kitchen he would not deny it. In my view there was such proof. The submission that the extent of his role falls to be considered on the basis that he did not fire such a shot therefore cannot be accepted. As to his mens rea, however, there was inconclusive evidence of the direction or fate of his shot. It could, conceivably, have been the one that caused the hole in the kitchen floor. And fourth appellant's generally unsatisfactory evidence as to his own participation cannot really assist

the State to the extent that it can be found beyond reasonable doubt that he acted at any stage with dolus directus.

Before coming to the question of mitigation in the case of fifth appellant, it remains to say, as regards second, third and fourth appellants, that the trial Court considered that they had, prior to these offences, been productive members of society. There is no reason to differ from that finding.

Counsel for fifth appellant urged that his client had shown remorse by co-operating with the police in their investigations. In the light of his mendacious defence, however, the possibility of genuine remorse for his actions is not a reasonable one. Then, it was argued that it was a mitigating factor that he had not been present when the crimes were committed. That factor is worthless. He was well-known at the store and obviously

intended to avoid recognition.

Turning to the aggravating factors, and once again taking first the considerations that apply to all or several of the appellants, the trial Court rightly found it aggravating that the murder was committed in the execution of a crime of greed and gain; that the expedition was well-planned; that a police van and firearms were used; that the unfortunate deceased was gunned down in front of his wife, without warning, in the course of a violent invasion of the sanctity of his home; and that the killing in no way deterred the criminals concerned from persisting in their objective of raiding the store.

As regards the individual appellants, first appellant was sternly condemned for a particularly shocking breach of the public's trust in having used a police van and police firearm. In the trial Court's view

this overshadowed his work record. Of that view his counsel was critical. In my opinion the trial Court balanced these two features and concluded that the one comprehensively outweighed the other. I cannot fault that reasoning.

The obvious aggravating factors present in the case of second appellant consist in his having shot the deceased at very close range with dolus directus - no doubt the coup de grâce - and his repeated assaults upon Mrs Hailstones. In addition one must not lose sight of the implications inherent in the site of the bullet marks found in the office. Second appellant fired twice there. The direction of fire in respect of each of the three marks indicated the intention to fire either at or very near Mrs Hailstones and the woman assistant. It is difficult to avoid the conclusion that this appellant and third appellant, who also fired at that stage, intended at

the very least to harm the two women.

Third appellant persistently and violently molested Mrs Hailstones in a manner which compels the inference that he had it in mind to rape her. His thuggery and murderous threats were only stalled by second appellant's intervention in guest of the money.

Fourth appellant's counsel criticised the trial Court's finding that his client had played a prominent role in the execution of the plan and argued that such role had been minor. "Prominent" does not mean major; it means conspicuous. And all the appellants played conspicuous roles at one time or another. In this appellant's case he so acted when he used his firearm in the kitchen when in the vanguard.

The aggravation attaching to fifth appellant's complicity was rightly found to consist in his having planned and co-ordinated the operation. The evidence

shows that he first began mustering his forces some days before the event. Thereafter he organised the transport to and fro, the firearms, the application of the "muthi" and the attack itself. For the reason already stated, he could not risk entering the store premises.

Having weighed the competing mitigating and aggravating factors present in this case the conclusion is inescapable that the former are far outweighed by the latter. While it is trite that this does not by itself mean that the death sentence is the only proper sentence, it requires no emphasis that the prevalence of armed robberies involving the victim's death is now a crime of such alarmingly widespread occurrence in this country that deterrence and retribution must necessarily weigh extremely heavily in the assessment of a proper sentence.

Accordingly, in so far as counsel urged that the trial Court's reliance upon Shabalala's case, supra, was

misplaced, I do not agree. Whether the victim of a raid like the present is a recluse on an outlying farm or the occupant of an urban apartment, a suburban residence, or a township dwelling, it is a crime of the utmost gravity when a wantonly murderous, planned and unprovoked attack is launched upon anyone in the sanctity of his own home. The reasoning in Shabalala's case, and others like it, is to the effect that society's understandable feeling of outrage in response to that type of crime warrants a sentence with profoundly deterrent and retributive effect. As stated in S v Khiba, supra, at 4 h - i, the reasoning in Shabalala's case "is compelling and commends itself to any reasonable mind."

One is not justified in regarding murder in the course of a planned armed robbery as having fallen outside the category of crimes of extreme seriousness simply because it has become so commonplace. If anything, this

places it even more firmly within that category.

Giving anxious consideration, and attaching all due significance, to the mitigating factors, especially appellants' clean records and the fact that some were described by the trial Court as productive members of society, it nonetheless seems to me to be critically important to remember the degree of their commitment to the execution of their criminal purpose. This was not a plan conceived on the spur of the moment and executed forthwith in hot-headed impetuosity. The compelling inference is that all of them knew of the plot, and agreed to participate, by some time on the preceding Thursday at the latest. On their own say so, some knew much earlier than that. In all that time, with the raid and its attendant implications necessarily on his mind, each had ample opportunity to withdraw but chose to remain involved.

The facts of this matter are such that there is, in my assessment, no material distinction between appellants' respective individual cases, seen in the overall conspectus, such as warrants the imposition of a sentence on one which differs from the sentence on the others.

The deterrent and retributive elements of an appropriate punishment in the instant case so comprehensively overshadow the element of reformation that the death sentence is the only proper sentence in the case of all the appellants.

Fifth appellant's appeal against his conviction for murder and all the appellants' appeals against the death sentence are dismissed.

C T HOWIE____JA

Hefer JA,) Concur
Eksteen, JA)