THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA CASE NO: 316\96

In the matter between:

DEVAN WILLIAMS

1st Appellant

NORMAN MCHUNU

2nd

Appellant

KRIEMENTHREN MAISTRY 3rd Appellant

and

THE STATE Respondent

Coram: Eksteen, JA, Melunsky et Farlam, AJJA

Heard: 12 May 1998

Delivered: 1 June 1998

JUDGMENT

MELUNSKY, AJA:

The three appellants and two other accused were charged in the Natal Provincial Division with eleven offences, including one count of arson and four of murder. They pleaded not guilty to all charges. After a lengthy trial all of the accused were convicted on certain counts and were sentenced to substantial periods of imprisonment.

With the leave of the learned judge a quo the appellants appeal against their convictions only on the counts on which they were found guilty as accessories after the fact. These are:

The first appellant: (accused no 1 in the court a quo): count 1 (arson) and counts 10 and 11 (both murder);

The second appellant: (accused no 4 in the court a quo): count 5 (murder);

The third appellant: (accused no 5 in the court a quo): counts 5 and 8 (both murder).

The State not only opposed the appeals but contended that the first and third appellants should have been convicted of murder on counts 10 and 5 respectively and that this Court should alter the verdicts accordingly in terms of section 322 (1) (b) of the Criminal Procedure Act 51 of 1977, as applied in this court in S v September 1996 (1) SACK 325 (A) at 329i to 330i.

At the time of the commission of the offences all of the accused were members of the South African Police, whose functions and duties were prescribed in the Police Act, 7 of 1958 (since replaced by the South African Police Service Act, 68 of 1995). The first and third appellants and a certain Anilraj Singh (accused no 2 in the court a quo) were constables, the second

appellant was an assistant constable, while Praveen Ramdas (accused no 3 in the court a quo) was a warrant officer. They were all stationed at the Mountain Rise Police Station, Pietermaritzburg, but the first and the second appellants and Ramdas were seconded to Imbali in the same district.

It seems to be quite clear from the evidence that, save for count 2, all of the offences were committed at the instigation of Singh and/or Ramdas.

Incredible as it may seem at least three of these offences - counts 1, 5 and 10 - were committed simply because the victim laid criminal charges or instituted civil claims against some of the accused. It is not quite clear why the deceased on count 8 was killed but there is an indication that his wife had allegedly asked Ramdas to have him eliminated. The deceased on count II, Captain Durugiah, had been a member of the South African Police

and it would seem that he was murdered because he had blocked Ramdas' advancement in the force. What is more, it is almost beyond belief that members of the police, including the appellants and two state witnesses, Mandlenkosi Ndaba and Adrian Aiyer, could so easily have been led by Ramdas and Singh into participating in criminal conduct. It is quite obvious - and this was conceded by the appellants' counsel - that Ramdas and Singh regarded the appellants and Ndaba as persons who could be relied upon not to reveal anything about the crimes that were committed. This is evident from the fact that on some occasions certain of the appellants accompanied the main perpetrators to the scenes of the crimes for no ostensible reason. As the appeals are directed against the appellants' convictions as accessories after the fact, it is necessary to say something about this branch of the law which, fortunately, appears to be reasonably settled. In considering the issues raised in this appeal I shall accept, for the purposes of this judgment,

that the obiter remarks in S v Morgan and Others 1993 (2) SACK 134 (A)

at 174 a-e are a correct reflection of our law. According to this judgment the narrower approach to the definition of an accessory - a person who assists the perpetrator to evade justice - is to be preferred to the wider approach, according to which it is sufficient if the accessory associates himself in a broad sense with the offence.

Counsel were also agreed that it was essential for the State to establish that the appellants, as accessories, intended to help the perpetrators evade justice. This concession was correctly made by the State, for the intention to assist the main offenders in evading detection is an important ingredient for accessorial liability (see Burchell: "South African Criminal Law and Procedure", Vol 1,3rd Ed 332 and 338; Snyman: "Criminal Law", 3rd Ed 264).

A third point upon which all counsel were in agreement was that a policeman who had knowledge of the commission of the offence and the identity of the perpetrator would ordinarily be liable as an accessory after the fact if he deliberately failed to report the crime with the intention of assisting the perpetrator to evade justice. Despite the concessions by counsel for the appellants in this respect it is desirable to deal in more detail with this aspect because this court has not, as far as I am aware, decided that an accessory's liability can properly be based upon an omission in the circumstances which I have mentioned. It should be emphasised that the views expressed in this regard are confined to the criminal responsibility of an accessory after the fact and not to the wider question of whether, or under what circumstances, a person may incur criminal liability for failing to avert harm, a question that was raised but left open in this court in S v A en 'n Ander 1993(1) SACK 600 (A) at 606e - 607a. In the circumstances it is not necessary to consider

all of the problems relating to criminal responsibility for omissions that have arisen in other jurisdictions. Some of these have been discussed by George Fletcher: "Rethinking Criminal Law" at 585 - 634 and "Criminal

703. (See also Andrew Ashworth: "The Scope of Criminal Liability for Omissions" (1989) 105 LQR 424 and Glanville Williams: "Criminal Omissions" (1991) 107 LQR 86).

Reverting then to the question of whether criminal liability may arise out of the failure to report a crime, it would seem to be clear that such liability cannot be present in the absence of a duty to act. But where the duty is placed upon a person in terms which suggest active conduct the further question that has to be considered is whether liability <u>should</u> be imposed for failing to act. (See Glanville Williams: "Textbook of Criminal Law ", 2nd

Ed 149). This depends on considerations of policy or, as it is called, the legal convictions of the community.

There is no doubt that a police officer has a duty to report a crime. It arises, inter alia, from the provisions of statute which, at the relevant time, was section 5 of the Police Act, 1958. In terms of this section one of the functions of the police is to investigate crimes. What remains for decision is whether the failure to carry out the duty results in criminal responsibility if the other requirements of accessorial liability are present. I have no difficulty in holding that it does. Any other answer would give rise to surprise and even indignation. More than forty years ago the Privy Council held that a headman in Basutoland, who failed to arrest murderers on his arrival on the scene of the murder or to report the murder, had assisted the murderers by giving them an opportunity to escape. He was therefore liable

as an accessory after the fact to the murder (see Majara v The Queen [1954] AC 235 (PC)). Although the court applied the wider definition of an accessory and assumed that Roman-Dutch law did not distinguish between assistance by remaining inactive and assistance by acting positively, the conclusion arrived at was undoubtedly correct. In S v Barnes Another 1990 (2) SACK 485 (N) a full court held that a member of the police was guilty as an accessory after the fact where he failed to report the crime or to make an entry in the occurrence book about it or to disclose the identity of the perpetrators. Booysen J said at 493 e-f:

> "This conduct was clearly intended to assist the perpetrator of the crime of culpable homicide to escape conviction and punishment. Although mere failure to report the crime to the authorities would not render a member of the public guilty of being an accessory after the fact of that crime (see in this

11 regard R v Munango and Another 1956 (1) SA 438 (SWA)), a police officer is in a different position as it is his legal duty to bring criminals to book."

It is unnecessary for me to express any view on the broad proposition that a failure to report a crime by a member of the public would not, under any circumstances, render him or her guilty of being an accessory after the fact of that crime, and I refrain from doing so. The decision to hold a police officer liable, however, is clearly in accordance with the legal convictions of the community. Two other dicta that point in the same direction are contained in S v Gaba 1981 (3) SA 745 (O) at 751H and in S v Binta 1993 (2) SACR 553 (C) at 561 d-h. In both cases the court accepted that the crime of obstructing or defeating the course of justice (which would generally be equated to the liability of an accessory after the fact) can be committed by an omission provided that there was a legal duty to act.

Counsel for the appellants, while accepting the propositions stated above, referred to the following remarks of Thirion J in S v Madlala and Others 1992 (1) SACR 473 (N) at 476 a-b;

> "The failure on the part of a policeman to discharge his legal duty to report the commission of a crime can never, as a matter of law, be equated with an intention on his part to assist the criminal to evade justice. The failure to discharge a legal duty ordinarily connotes negligence and not intent."

I doubt whether the mere failure to discharge a legal duty connotes either negligence or intent. It seems to be clear, however, that all that the learned judge intended to convey was that a person cannot be liable as an accessory after the fact for failing to report a crime unless he or she has the intention to assist the perpetrator to escape conviction (see his remarks at 476 G-H). This is a matter which I have already dealt with. Counsel for the appellants

contended that this requirement was overlooked by the court a quo and that, in any event, the State failed to prove that the appellants had the requisite intention to assist the main offenders to evade detection. These are matters which will be considered when I come to deal with the individual counts.

It should be noted, in relation to the facts of the case, that only the first and third appellants gave evidence in their defence. The other accused closed their respective cases without calling any witnesses. Most of the trial court's factual findings are not in issue and the general circumstances relating to the commission of each offence are not disputed. For these reasons it will not be necessary to set out more than a relatively brief outline of the facts on each count. Count 1 The complainant on count 1, Mrs Thaver, owned a shop in Pansy Road,

4 Northdale, Pietermaritzburg. There was evidently a feud between her and

some of the accused, notably Singh and the first and third appellants who, she claimed, had preferred false charges against her. For her part, she had laid various complaints against some of the accused, the nature of which do not have to be dealt with. It is not disputed that Singh and the second appellant (and, possibly, Ndaba) set fire to her shop during the night of 27 September 1992. The first appellant's version of the events, which formed the factual basis for his conviction, was that he was fetched at his home by Ramdas, Singh, the second appellant, Ndaba and a constable Peters. Ramdas was driving the official vehicle of a captain Pillay. The first appellant said that he agreed to accompany them in the vehicle because Ramdas had asked him to do so. There were two containers, both of which held petrol, in the vehicle at the time and although the first appellant said that he did not see them, he admitted smelling petrol when he entered the car.

In a statement which he made to a magistrate in May 1993, he said that Ramdas told him that they were going to "sort a shop out". He conceded in evidence that this might have meant that they were going to teach someone a lesson. After the vehicle stopped in the vicinity of Pansy Road, Singh, the second appellant and Ndaba, according to the first appellant, alighted from the car and went to the back of Mrs Thaver's shop. Singh had two litres of petrol with him and a box of matches. The three of them went to the back of the shop where Singh broke the window with a brick and poured the petrol inside. He lit the petrol and threw the match inside. The first appellant, who remained in the vehicle throughout, saw the fire burning in the shop. Singh, the second appellant and Ndaba returned to the car which sped off. The first appellant was taken to his home where Ramdas told him that he must not tell anybody what had happened. When asked by counsel for Singh and Ramdas why he had not reported the incident, he

6 responded that he had no reason for not doing so. He made no mention of

the incident until May 1993, after the police investigations had already shown his complicity in other offences. It remains to state that the evidence on count 1 established that one of the window panes at the back of the shop had been broken, that flammable liquid had been poured into the shop and that a fire had broken out. That no substantial damage was caused to the building or its contents might had been due to the arrival of the fire brigade shortly after the fire started.

The trial court held that the evidence fell short of proving that the first appellant was guilty of arson on the grounds of common purpose but that he was nevertheless guilty as an accessory after the fact. The first appellant, according to the judgment

7 "was aware of all of the details of the crime which was performed while he was present, he knew the parties who took part and he did nothing to report it as he was obliged to do. His conduct was clearly intended to assist the perpetrators and he, as a police officer, was under a duty which he failed to carry out, is in our view guilty as an accessory after the fact."

Counsel for the first appellant attacked this finding on the grounds that the trial court, had merely applied the dictum in S v Barnes and therefore assumed that the mere failure on the part of a policeman to report a crime results in his guilt as an accessory after the fact to the crime. He submitted that the court had failed to consider whether the failure to perform that duty was a deliberate failure with the intention that it should assist the principal offender to evade justice. He argued, moreover, that it was not reasonably possible to draw the inference that the first appellant intended to assist the actual perpetrators to evade detection. An equally plausible reason for the

first appellant's failure to report, according to this submission, was that he wished to protect himself rather than to assist the others to evade justice.

It is clear from the extract from the judgment which I have quoted above that the trial judge was aware of the need to establish that an accessory had the intention to help a perpetrator escape justice. Indeed he found, as I understand the judgment, that the first appellant's conduct showed that this was his intention. Nor is there any ground for accepting the submission that the first appellant might have had the intention of protecting himself. He did not offer this explanation when specifically asked why he had failed to report the crime and, moreover, on his version (which was accepted by the trial court), he did not participate in the offence. As a police officer he obviously realised that he would be obstructing the course of justice and would benefit the perpetrators by deliberately failing to comply with his duty. Allied to

this, of course, is the fact that Ramdas asked him to say nothing about the attack on Mrs Thaver's shop and, as I have mentioned earlier, Ramdas and Singh considered that the appellants were reliable members of their group who would not report what had occurred to the authorities. The result is that I am satisfied that the trial judge was correct in drawing the inference which he did and that the first appellant's appeal on count 1 cannot succeed.

Count 5

The deceased on this count, Solomon Dlamini, was employed as a taxi driver. As a result of an incident which occurred in July 1992 the deceased had laid a charge of malicious injury to property against the third appellant and other persons. The complaint arose out of damage caused to a taxi driven by the deceased and owned by Mohamed Aboobaker. The third appellant had agreed to pay Aboobaker an amount of R340,00 in respect of

the damages to the vehicle but failed to comply with his undertaking. As a result, a summons for malicious injury to property was served on the third appellant on 19 November 1992, the day of the deceased's murder. In addition the deceased was thought to have been the complainant in an assault charge laid against Singh.

On the night of 19 November 1992 all of the accused and Ndaba, travelling in a police van, drove to Bombay Road, Northdale, where the deceased lived. His home was pointed out by the third appellant. The first and second appellants and Ndaba asked the deceased to accompany them to the police station on the pretence that he was required to sign a statement. He reluctantly agreed to go with them. The vehicle drove along the N3 highway. Ramdas was the driver and his passengers in front were Singh and the third appellant. The others, including the deceased, were in the

back of the van. The vehicle stopped in the vicinity of a bridge in the Shongweni area. The deceased was forcibly taken out of the van. He was then shot and thrown over the edge of the bridge which, according to the evidence, was "very, very high". His body was recovered some 5 days later with the aid of a helicopter. According to the post mortem report he died as a result of multiple bullet wounds to his chest. He also sustained a depressed fracture to the skull and multiple rib fractures.

The trial court found that Singh and Ramdas were the ringleaders and instigators of this crime, that the deceased was shot by the first appellant and Singh, that it was Ramdas who suggested that the deceased should be thrown over the bridge and that the first appellant was one of the people who assisted in doing this. Singh, Ramdas and the first appellant were all found guilty of murder. What is in issue in this appeal is the part played by the

second and third appellants in the commission of the offence and the subsequent events. The court a quo held that there was

> "No evidence that accused 4 and 5 (the second and third appellants) were parties to a common purpose to kill the deceased before they arrived at Shongweni."

When the vehicle stopped at the bridge the second appellant, according to Ndaba's evidence (which was accepted by the trial court in this respect) took no further part in the activities. He remained behind the van, did not help when called upon to do so and had nothing to do with the shooting of the deceased or throwing him off the bridge. He was, however, found guilty as an accessory after the fact because of his failure, as a policeman, to report the commission of the crime of which he was aware. It may also be noted that the third appellant, on 29 June 1993, made a statement to a magistrate

in which he said that after the police vehicle was driven back to Singh's home, Ramdas, ordered

> "the black members to wipe off some blood that was on the back of the door while he (Ramdas) tried to repair the back door."

The "black members" referred to were Ndaba and the second appellant. It may be noted that the back door of the van was damaged during the deceased's desperate attempt to avoid being pulled out and blood was obviously spilled during the course of the struggle. In his evidence the third appellant confirmed the whole of his statement save for parts which are not relevant to this appeal.

I do not have to repeat what I have said in relation to the liability of a police

officer who fails to report a crime. However counsel for the second appellant adopted a similar argument to that employed by counsel for the first appellant on the first count. He submitted that there was no evidence to establish that the second appellant, while failing to report the incident, had intended to help the perpetrators evade justice. This requirement was not adverted to by the trial judge but his failure to do so does not mean that he did not take it into account. The second appellant did not give evidence and in his statement to the magistrate there is no explanation for his failure to report the crime. The onus, however, remains on the State to prove that the appellant's omission to report was accompanied by an intention to assist the perpetrators. The question that has to be decided, therefore, is whether this is the only reasonable inference that can be drawn from the proved facts.

The second appellant's counsel referred to him as "a lackey" of Ramdas and

Singh. This might have been over-stating the position but there is no doubt that he was clearly under the influence of the main perpetrators and that he carried out their orders and instructions to the letter. It is to be expected that he would have wanted to protect them and to conceal their unlawful activities. He had not played any part in the assault on the deceased at Shongweni bridge and he therefore had nothing to hide. In the absence of any other explanation, therefore, it seems to me that the only reasonable inference to be drawn from his failure to report the crime was that he intended to protect his fellow police officers to escape the consequences of their unlawful actions. Quite apart from the omission to report, there is also the second appellant's action in cleaning the blood from the back door of the police van. The presence of the blood may well have resulted in questions being asked and the second appellant must have realized this. It is beyond question, in my view, that he removed traces of the blood from the back door

in order to avoid a possible investigation by other police officers which may have led to the eventual detection of the perpetrators. The result is that the second appellant's appeal on count 5 cannot succeed.

The position of the third appellant on this count requires careful consideration, particularly in the light of the State's submission that this court should find that he was an accomplice to the murder of the deceased. According to the evidence, Singh, Ramdas and the first and third appellants had a discussion on the evening of 19 November 1992, the same day on which the third appellant was served with the summons. During the course of this discussion Singh suggested that they should "speak" to the deceased. Ramdas agreed and suggested that they should "sort the person out" and "teach him a lesson". The third appellant admitted that he understood this to mean that they should "most probably assault or intimidate him". The

third appellant pointed out the deceased's house. He testified that the deceased recognised and greeted him before getting into the van. This part of his evidence was apparently rejected by the trial court and in my view it is unacceptable. It is in fact obvious from the evidence of the first appellant that the deceased only recognised Singh and the third appellant after they alighted from the vehicle when it stopped on the Shongweni bridge, and that it was for this reason that he refused to get out. The deceased resisted strongly and considerable force was needed to drag him out of the van. The third appellant's evidence to the effect that the deceased was too tired to get out of the van is so far-fetched that it was rightly rejected by the trial court.

It is apparent from the third appellant's own evidence that he knew that there was a likelihood that the deceased would be assaulted by other members of the group. What is more he admitted that he assisted in pulling the

deceased out of the van and that he was present when the deceased was killed. Despite submissions to the contrary by counsel for the State, however, I am not at all persuaded that the State has proved beyond reasonable doubt that the third appellant knew that the deceased would be killed or even that he foresaw the possibility that this would occur. The third appellant in his evidence said that Ramdas told him while they were travelling that he was going to punish the deceased by leaving him on the highway. For this reason the judge a quo held there was no evidence that the third appellant was party to a common purpose to kill the deceased. He did not, however, consider the third appellant's evidence that he realised that the deceased would "most probably" be assaulted or intimidated.

The evidence falls short of establishing that the third appellant was guilty of murder on this count but he might have been convicted of assault. What

has to be decided, however, is whether the trial court was correct in convicting him as an accessory after the fact. The trial court's judgment was based on the third appellant's failure to report a crime. Apart from this the third appellant had forged a petrol register when asked to do so by Ramdas in order to mislead the authorities into believing that a constable Soogrin had used the vehicle in question on that night. The trial court did not expressly decide that the third appellant forged the register and failed to report the incident with the intention of assisting the perpetrators. I am quite satisfied, however, that this was his intention. That he might also have had the object of protecting himself because of his own participation, does not mean that he cannot be convicted as an accessory after the fact if he intended to assist the other perpetrators to escape the consequences of their acts (see R v Sikepe and Others 1946 AD 745 at 757).

It therefore follows that the third appellant was correctly convicted on this count.

Count 8

Only the third appellant's guilt is in issue on count 8. The deceased on this count, Mr Sathanathum Padayachee, lived at 51 Kadirvel Road, Northdale. On the night of 30 November 1992 the third appellant and all of the other accused, apart from the first appellant, accompanied by Ndaba and a police reservist, Afsul Mahomed, travelled to Kadirvel Road in Singh's motorcar. On the way Ramdas instructed the second appellant and Ndaba that they were to go to a house indicated by him with the ostensible purpose of obtaining accommodation for themselves. The real purpose was to kill the man who opened the door. He was to be shot with a pistol that Singh (or possibly Ramdas) gave to the second appellant. The vehicle stopped in

Kadirvel Road, the second appellant and Ndaba alighted and went to the deceased's house. The deceased came to the door and the second appellant fired three shots, one of which hit the deceased in the chest and caused his death. Ndaba and the second appellant ran back to the car and the occupants were then taken to their respective homes.

The third appellant explained in evidence that his presence in the car was due to the fact that he had asked Singh for a lift to Northdale. He was under the influence of alcohol to some extent at the time. He admitted that Ramdas had pointed out a house in Kadirvel Road where Ndaba and the second appellant were to shoot a man who opened the door. He recollected that Ndaba and the second appellant left the vehicle after it had stopped but said that at that stage he "must have dozed off" for he heard no shots. However he woke up when the second appellant and Ndaba returned to the

2 vehicle. He heard Ndaba confirming that he had shot the deceased.

Singh, Ramdas and the second appellant were found guilty of murder on this count. The trial court was sceptical about the third appellant's contention that he had fallen asleep at the crucial moment but concluded that the evidence did not establish that he had a common purpose with the perpetrators to kill the deceased. The third appellant, was however, convicted of being an accessory after the fact on the ground that he had a duty to report a crime but had failed to do so.

Counsel for the third appellant accepted that his client's omission to report the crime could give rise to criminal responsibility as an accessory after the fact. He submitted, however, as counsel for the other appellants had done on counts 1 and 5, that there was no evidence to establish that the third

appellant had intended to help the perpetrators avoid the consequences of their unlawful actions. On this count, too, there was no specific reference to the third appellant's intention by the trial court and it is accordingly necessary to decide, by inference from the proved facts, whether the State has established beyond reasonable doubt that the third appellant had the requisite intent.

The deceased was related to the third appellant's wife. Despite this the third appellant did not know him and he was, at first, unaware of the identity of the victim. He realised who the deceased was some days later when Ramdas warned him to say nothing about the incident and threatened that he and his wife would meet the same fate if he said anything about it.

Although the third appellant played no part in the death of the deceased, he

knew about the crime and the identity of the perpetrators. It is self-evident that he intended to assist the perpetrators by not reporting the crime. His counsel submitted that the threat uttered by Ramdas justified him in not carrying out his duty. In effect, therefore, he attempted raise the defence of necessity. This, in my view, cannot be sustained. The third appellant could and should have performed his duty despite the threats. He did not have to report the crime through the normal channels, as he claimed he would have had to do. He could have reported the matter to high ranking officers. In fact it may well have been appropriate for him to do so, having regard to the involvement of police officers in the offence.

For these reasons I am of the view that the trial court correctly convicted the third appellant as an accessory after the fact to the murder of the deceased on count 8.

Count 10

The first appellant was convicted on this count as an accessory after the fact to the murder of Sipho Zulu ("the deceased"). Counsel for the State submitted that the appropriate verdict should have been one of guilty of murder of the deceased, while counsel for the first appellant argued that his client should have been acquitted. The facts concerning this count, as brutal as they may be, can be set out briefly enough. The deceased had instituted a claim for damages against Singh and the second appellant, among others. During the afternoon of 3 December 1992 Singh, the second appellant and Ndaba saw the deceased while they were travelling in Singh's vehicle. Singh, who was driving, told the other two that the deceased was a suspect and that they should search him. This they did and on Singh's instruction, they then pulled him into the car. When they stopped at a garage for petrol the deceased recognised Singh, leapt out of the car and ran away. He was

recaptured. He made another desperate, but futile, attempt to escape by breaking the rear window of the car. He was then put on the back seat between Ndaba and the second appellant. Singh decided to fetch the first appellant and Ramdas. He found the first appellant at his home and the first appellant joined the others in the motor car. He was not able to find Ramdas and he drove to an area known as Claridge. He said that he was waiting for it to become dark. He eventually stopped the car close to a sugar cane plantation. After alighting he told the first appellant that he was going to shoot the deceased. The first appellant said that he tried to persuade Singh not to do so but, despite this, Ndaba and the second appellant then took the deceased out of the car on Singh's instructions. Singh then kicked the deceased causing him to fall to the ground, whereupon he drew his firearm and fired a number of shots at the deceased. It is clear that the deceased died at the scene. According to the post mortem report there

was a bullet

wound in his head and four bullet wounds to the chest.

After the shooting the deceased was left at the spot. Singh took the first appellant home and warned him not to tell anybody about what had happened. Surprisingly enough he returned a short while later and took the first appellant to Ramdas' house where, according to the first appellant, Ramdas advised Singh to bury the deceased's body. On the following day the body was buried by Singh, Mohamed, Aiyer, Ndaba and the second appellant. The first appellant took no part in this activity. On the basis of the facts mentioned above Singh and the second appellant were found guilty of murder of the deceased. The trial court was of the view that the evidence did not disclose that the first appellant had a common purpose with the others to kill the deceased but he was nevertheless found guilty as an accessory after the fact to the murder on the grounds that, as a policeman,

he was under a duty to report the crime which he did not do. It may be noted that Ndaba claimed that it was the first appellant who had pulled the deceased out of the motor car at the scene of the shooting and that thereafter the first appellant throttled the deceased until he became weak. This evidence was not accepted by the trial court and nothing further need be said about it.

Counsel for the State submitted that the first appellant should have been found guilty of murder because of his failure to prevent the second appellant from shooting the deceased. He submitted further that the first appellant had deliberately and intentionally elected not to come to the deceased's assistance in order to save his life; that but for this failure the deceased would not have died; and that despite his legal duty as a police officer to prevent injury to the deceased, he failed to do so and thereby he unlawfully

and intentionally caused the deceased's death.

In support of the aforesaid submissions, counsel for the State relied upon the following facts: that the first appellant knew that Singh intended to kill the deceased; that the first appellant was a body builder and was physically stronger than Singh; that he was armed with his service pistol and that he had the opportunity and the ability to prevent Singh from shooting the deceased. Reliance was placed, inter alia on an admission by the first appellant under cross-examination to the effect that he knew that he had "all the powers" to prevent the murder and that he elected to do nothing.

Earlier in this judgment I alluded to the fact that it was not necessary for this court to consider the problems that may arise when it is sought to hold a person liable for an omission to avert harm. And despite counsel's

arguments to the contrary, it is neither necessary nor appropriate for this matter to be decided in the present appeal. Counsel for the State conceded that it was essential to establish a causal connection between the omission and the deceased's death. In this regard he contended that the facts established that but for the first appellant's failure to act, the deceased would not have been killed. This argument was based on the first appellant's aforesaid concession under cross-examination that he had it within his power to prevent Singh from shooting the deceased. The guilt of the first appellant should, however, be based on the objective facts and not only on his admission which may possibly have been an ill-considered response. It is true that the first appellant might have been able to overpower Singh but it was not established beyond reasonable doubt that he would have succeeded in doing so. Moreover, both Ndaba and the second appellant were present. They had earlier apprehended the deceased and had prevented his escape on

two occasions. They were parties to a common purpose to kill him. They were under Singh's influence and assisted him at the scene of the shooting. And the second appellant had been sued by the deceased and had a motive to harm him. One cannot speculate how they would have reacted had the first appellant attempted to intervene but it is at least reasonably possible that they might have prevented him from taking any effective steps to save the deceased's life. These material matters were not explored in the court a quo. It would therefore be wrong, in my view, to hold the first appellant legally liable for the death of the deceased on the strength of his answer to a question in cross-examination and without having regard to the prevailing circumstances. For this reason counsel for the State's submission in this court cannot succeed.

The first appellant's appeal on this count can, in my view, be disposed of

briefly. He was, on all the evidence, a mere spectator to the events. It has not been shown that he had a common purpose to bring about the deceased's death. Indeed, according to his evidence, he tried to dissuade Singh from shooting the deceased. His failure to carry out his duty to report a crime is explicable only on the basis that he intended thereby to assist his friends and colleagues to evade conviction. Even if I were to accept the submission by the first appellant's counsel that Singh and Ramdas had a hold over the appellants and that they were able to manipulate them and use them, I am unable to agree with his further argument that the first appellant was afraid to report the crime and that, to this extent, it was reasonably possible that his failure to tell the authorities about the death of the deceased might have been attributable to a desire to protect himself from Singh's vengeance. There is little substance in this point. The first appellant became friendly with Singh at the police college during the first half of 1991. He remained on a

friendly footing with Singh thereafter and it seems to be quite obvious that his intention was to protect his friend and colleague and not himself.

In the circumstances, the first appellant was correctly convicted on this count.

Count 11

The only question that arises on this count is whether the first appellant was correctly convicted as an accessory after the fact to the murder of captain Durugiah.

The deceased, captain Durugiah, a retired captain in the South African Police, lived in Umkomaas. During the evening of 21 April 1993 the first appellant and the other accused (apart from the third appellant) and Adrian

Aiyer drove to Durban in captain Pillay's official vehicle. They went to the house of Nilesh Singh, a cousin of Anilraj Singh (accused no 2). From there they proceeded to Umkomaas in two vehicles - Ramdas and Singh in captain Pillay's car and the others driven by Nilesh Singh in his own car. The two vehicles stopped together near the beach front in Umkomaas. There Ramdas changed the number plates on captain Pillay's car, took a shotgun out of this vehicle, loaded it and asked the first appellant for his service pistol. The first appellant declined to give it to him. Ramdas cocked the shotgun and pointed it towards the first appellant. Singh then took the first appellant's pistol out of his holster and handed it to Ramdas who changed the barrel and loaded a cartridge into the chamber of the pistol.

Ramdas then gave instructions for the murder of the deceased. He and Singh were to travel ahead in captain Pillay's vehicle while the others were

to follow in Nilesh Singh's car. Ramdas told them that he would depress his brake pedal three times causing the brake lights to light up at the house where the shooting was to take place. Aiyer and the second appellant were to do the shooting, the former with the shotgun and the latter with the first appellant's service pistol, now fitted with a different barrel. They were to knock on the door of the house and shoot the person who came out. Ramdas' scheme was put into operation. The second appellant and Aiyer got out of Nilesh Singh's car at the house indicated by Ramdas, the second appellant knocked on the door and when the deceased came out he was shot by both assailants. The post mortem report shows that he was killed as a result of a shotgun wound to the chest and bullet wounds to the abdomen and neck.

The first appellant remained in Nilesh Singh's vehicle while the shooting

took place. The second appellant and Aiyer returned to the vehicle. Nilesh Singh was left in Durban and the others travelled back to Pietermaritzburg in captain Pillay's car after the correct number plates were fitted to it. The first appellant replaced the barrel of his pistol with the original barrel that had remained in his possession.

The trial court convicted Singh, Ramdas and the second appellant of murder. Aiyer, who gave evidence for the State, had previously been convicted and sentenced for his participation in the crime. The trial court held that the first appellant did not have a common purpose to kill the deceased. He was convicted as an accessory after the fact to the murder because, in breach of his duties as a police officer, he made a false statement to members of the Port Shepstone murder and robbery unit as to where he and Ramdas had been on the night of the murder and because he attended a meeting at Lotus

Park where he had allegedly asked other members of the police to assist him by telling anyone who enquired that he had been working with them.

It is important to note that the first appellant and Ramdas should have been on duty that night in the operational room at Trust Bank Building, Pietermaritzburg. It was only some time after midnight, after their return from Umkomaas, that they arrived at the operational room. They told sergeant Chettiar that they had been out with two women. Later the same evening Ramdas told sergeant Haskins on the telephone that he had not been in captain Pillay's car that evening. The first appellant overheard this conversation.

In the early hours of the following morning the first appellant told warrant officer Myburgh, who was investigating the murder, that he was in the

company of Singh. He did not disclose that he was at Umkomaas with the perpetrators but, on the contrary, said that Ramdas had been in the operational room during the night.

It should be noted that the first appellant had filled in the petrol book at the Mountain Rise police station before the group set off for Umkomaas. Subsequent to his arrest he told lieutenant Swart, who was also involved in the investigation of the death of the deceased, that Singh had given him a lift to work on the night in question and that he had filled in the petrol book on his way to the operational room. The first appellant, moreover, supported Singh's false alibi that he (Singh) had been out with the first appellant's sister on the night of the murder.

It is not necessary to have regard to what occurred at the Lotus Park

meeting. It is sufficient to say that the evidence of some of the witnesses who testified about that occasion may be open to some doubt. It is quite clear that the first appellant initially presented the police, who were investigating the deceased's murder, with false information about the movements of Singh and Ramdas. Counsel for the first appellant correctly pointed out that the first appellant, shortly after giving the false information to Swart, apologised for lying and told him that it was on Ramdas' instructions that he had said that Ramdas was at the operational room at all relevant times during the night of the murder. Even at that stage, however, the first appellant concealed that Ramdas had, in truth, been at Umkomaas with the other perpetrators.

It only remains to consider whether the first appellant acted as he did with the intention of assisting Singh and Ramdas, two of the main perpetrators.

He may have been motivated, to some extent, by a desire to protect himself because of his failure to remain on duty in the operational room for the major part of the night. This argument is not without substance but it is important not to overlook the fact that the false information which the first appellant conveyed to Myburgh and Swart was in response to direct questions relating to the possible involvement of Singh and Ramdas in the death of the deceased. While the first appellant may have been concerned with his own position, he can hardly claim that he did not intend to help both Singh and Ramdas by providing them with false alibis (see R v Sikepe and Others, supra).

There was also a suggestion that the first appellant failed to reveal the true position because he had parted with the possession of his service fire-arm, in contravention of police standing orders. That incident could hardly have

played any part in the first appellant's cover-up of the crime. He did not voluntarily hand over his pistol. The undisputed facts show that Singh removed the fire-arm from its holster after the first appellant had been threatened by Ramdas.

For these reasons the first appellant's appeal against his conviction on count 11 cannot succeed.

In the result the appeals are dismissed.

L S MELUNSKY

EKSTEEN JA) FARLAM
AJA) concur