

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

HLUNGUHLANE NDLEBE XAKE

Appellant No. 1
(Acc 3 in Court a quo)

JULIUS MLAMBO

Appellant No. 2
(Acc 5 in Court a quo)

and

THE STATE

Respondent

CORAM: HOEXTER, BOTHA, JJA et NESTADT AJA

HEARD: 1 September 1986

DELIVERED: 18 September 1986

J U D G M E N T

HOEXTER, JA

HOEXTER, JA

This criminal appeal is a sequel to certain assaults and killings at or near the Thokoza men's hostel, Katlehong, in the district of Alberton, in August 1983. On the premises of the hostel there is a coal-shed which provided sleeping accommodation for five ill-fated occupants. One of them was a man called Godola. Another was Mathews Sibanyoni, to whom reference will hereafter be made as "the complainant." The precise identities of the remaining three men was never established, but they were known to the complainant as "Eric", "Shangise" and "Radebe" respectively. The same names will be used in this judgment, save that for the sake of brevity the three will be referred to collectively as "the deceased". The complainant is a Zulu-speaking Swazi. Godola was a member of the Bhaca tribe and the deceased were Xhosas.

On the morning of Monday 14 August 1983 the other occupants of the coal-shed found Godola lying dead in

his

his bed. Outwardly his body bore no visible injuries. It was the death of Godola which set in train the further events which culminated in the murder of the deceased and an attempt on the life of the complainant. On the evening of the same day the deceased and the complainant were assaulted in room No 3Q Block 4, of the Thokoza hostel. Wire taken from metal coat-hangers was used to bind together the wrists of each of the four men; and also to shackle the four men together at their wrists. Thus bound the four men were marched out of the hostel and into the veld adjoining the hostel. There they were set upon with sharp weapons and savagely assaulted until they appeared to be dead. Believing that all four victims had succumbed their assailants departed from the scene of the slaughter. The belief of the assailants that they had dispatched their victims was in part a mistaken one. Although Eric, Shangise and Radebe had in fact been done to death, the complainant was merely feigning death. Following the departure of the assailants the complainant managed to unshackle

unshackle himself from the corpses of his unfortunate companions and, with his own wrists still bound together, he went in search of and found help. Having received medical treatment in hospital for some weeks the complainant lived to tell the gruesome tale.

Some fourteen months later, in November 1984, seven male persons were brought to trial in the Witwatersrand Local Division. In respect of the death of the deceased the seven accused were jointly charged with murder (counts 1, 2 and 3 of the indictment). In respect of the assault on the complainant the seven accused were jointly charged (count 4) with attempted murder. The matter came before a Court consisting of ACKERMANN, J and two assessors. The seven accused, who were represented by counsel, pleaded not guilty. At the end of the State case accused no 3 testified in his own defence before closing his case. Each of the remaining six accused closed his case without calling any evidence

evidence at all. The result of the trial in the Court below was as follows. Accused nos 2, 6 and 7 were acquitted on all four counts, and discharged; on all four counts accused nos 1 and 4 were convicted of common assault; and accused nos 3 and 5 were each convicted of murder on the first three counts, and of attempted murder on count 4. In regard to the issue of possible extenuating circumstances affecting the convictions of accused nos 3 and 5 on the three murder counts, no evidence was adduced on behalf of either accused no 3 or accused no 5. On these three counts the unanimous finding of the trial Court was that no extenuating circumstances were present. Accordingly on each of counts one, two and three both accused nos 3 and 5 were sentenced to death. In respect of count 4 accused nos 3 and 5 were each sentenced to imprisonment for twelve years.

Accused nos 3 and 5 subsequently applied to the trial Judge for leave to appeal against their convictions

and

and sentences on all four counts. Accused no 3 was refused leave to appeal against any of his convictions. Accused no 5 was granted leave to appeal against his convictions on all four counts. Both accused nos 3 and 5 were granted leave to appeal (a) against the findings in respect of the three murder counts that there were no extenuating circumstances, and the death sentences imposed consequent thereon and (b) against the sentences in respect of count 4. Hence the present appeal to this Court in which accused no 3 is the first appellant and accused no 5 the second appellant. For the sake of convenience I shall in this judgment refer to the first appellant as "accused no 3" and to the second appellant as "accused no 5".

The trial was a protracted one involving the testimony of many witnesses. Inasmuch as the issues in the present appeal fall within a narrow compass a recapitulation of all the evidence adduced at the trial is here unnecessary.

I

I would add that at the trial several important elements in the State case were either common cause between the prosecution and the defence, or, at any rate, not the subject of serious challenge by the latter. Suffice it to say that all the evidence adduced at the trial was critically examined by the trial Court in a thorough judgment notable for a very careful appraisal of the probabilities in the case. I should add the appeal was argued by counsel other than the counsel who at the trial had appeared respectively for the prosecution and the defence. Before us Miss Sidwell appeared for accused no 3 and Mr Jordan for accused no 5. Mr du Toit argued the appeal on behalf of the State. The Court is indebted to all three counsel for the able arguments respectively advanced by them.

In the course of its judgment the trial Court recorded certain central facts which in its view had been established beyond dispute. These may be summarised as follows:-

(a)

(a) Following the death of Godola, the complainant and at least two of the deceased were on 14 August 1983 questioned by the police and then released.

(b) Thereafter, and during the afternoon of the same day, the complainant and at least two of the deceased were at the Thokoza beer-hall where they were questioned in an aggressive fashion by certain people who were dismayed by Godola's death and the fact that the police had released the surviving occupants of the coal-shed.

(c) The interrogators marched the complainant and at least two of the deceased to room 30 where, at a later stage, all three deceased were present.

(d) In room 30 the complainant and the three deceased were questioned in connection with

Godola's

Godola's death; and they themselves were threatened with death.

(e) In room 30 an assault "of some nature" was committed on the complainant and the three deceased.

(f) Some of the persons present in room 30 decided to avenge Godola's death by killing the complainant and the deceased; and to this end they tied them up, marched them to the veld behind the hostel, where with sharp instruments they killed the deceased (two of whom had their throats cut almost from ear to ear) and they tried to kill the complainant by stabbing him.

(g) Although some or all of the persons responsible for the assault in the veld upon the deceased and the complainant might have consumed sorghum beer before shepherding

their

their victims from room 30, there was no evidence to suggest that the faculties of any one of them had been sufficiently clouded to prevent him from forming an intention to kill.

- (h) The persons who marched the deceased and the complainant into the veld shared a common purpose to kill their captives and it was immaterial to their guilt which of them did the actual stabbing of their victims.

The correctness of the above findings by the trial Court was not attacked in argument before us. In addition counsel for accused no 5 conceded that the issues had been correctly formulated by the learned Judge in the following extract from his judgment:-

"The

"The only substantial issue in this case, insofar as the convictions on the charges of murder and the charge of attempted murder on Count 4, are concerned, is the identity of those persons who joined in the march to the veld. We limit the issue in this fashion because we are of the view that it cannot be found beyond reasonable doubt that the persons who questioned, and even assaulted, the victims in the room, necessarily had the fixed and settled intention and common purpose to kill them. They might never have shared such an intention, or if they did they might have changed that intention and disassociated themselves from contributing to the ultimate chain of events which led to the deceaseds' death and Sibanyoni's subsequent injuries."

In regard to the events in room 30 two witnesses were called on behalf of the State: the complainant and a man called Ngqongo who was 65 years old. Ngqongo was a sanitary cleaner in the employ of the Alberton Municipality and he lived in the hostel. His bed was in room 30. As to what befell the victims after they were marched out of room 30 the sole State witness was the complainant. It has already been mentioned

mentioned that the only defence witness was accused no 3. He was present at the assault in room 30, during the march of the victims therefrom and out of the hostel precincts; and he was also present at the assault upon the victims in the veld behind the hostel. It is necessary at this juncture to indicate the gist of the evidence of each of these three eye-witnesses.

Of the seven accused arraigned at the trial only two had been known to the complainant before 14 August 1983. These were accused nos 3 and 4. Accused no 3 has only one ear and according to the complainant he is known also by the nickname "Ndlebe", the latter being the Zulu word for "ear". After he and Eric and Shangise had been questioned at the beer-hall by certain of the accused, so testified the complainant, they were marched to a room in the hostel which the witness believed to be the room in which Ngqongo lived. According to the complainant Ngqongo followed them thither and

and also entered the room. In the room five of the accused, including accused nos 3 and 5, questioned the complainant, Eric and Shangise. While this questioning was in progress the remaining two accused brought Radebe into the room. Ngqongo was also present during the questioning. The accused wanted to know who had killed Godola. The four victims were forced to sit upon a bed whereafter all the accused struck them with sticks and iron pipes. Accused no 3 played the leading role in the interrogation and he told the victims that they were going to tell the truth. To this accused no 5 added that they should die. A sorghum beer container stood on the floor and accused nos 2, 3 and 5 refreshed themselves from it. Accused nos 3, 4 and 5 required the victims to hand over their identity books, explaining that in the event of their death their identities would be unknown. Accused no 4 straightened out wire hangers and used the wire to the shackle the victims in the manner already indicated. Thereupon five or six of the accused, including accused nos 3 and

and 5, produced clasp knives which they proceeded to sharpen. Accused no 4 gave the order for the removal of the victims whereafter six of the accused marched the four victims from the room. Initially in his evidence the witness said that it was accused no 1 who stayed behind in the room. Later he said that the accused person who remained in the room was accused no 7. The main gate to the hostel is manned by municipal policemen. The four victims were removed from the precincts of the hostel through a hole in the wall surrounding the hostel. Once in the veld the procession was called to a halt by accused no 3 who started hitting the victims with an iron pipe. The victims fell to the ground and their assailants proceeded to stab them with the knives sharpened earlier in the room. The complainant was stabbed in the back and on both shoulders by an unidentified assailant. Accused no 3 cut Eric's throat. Accused no 5 struck Radebe on the side of his head with an home-made axe which had been in the possession of accused no 5 when they left the room in the

the hostel. Thereafter the complainant heard the assailants pronounce all four victims dead. Pretending death the complainant lay motionless. When the accused had gone the complainant untied himself from Eric and returned to the hostel at the gate of which his wrists were freed by a municipal policeman who conveyed him to hospital. The municipal policeman in question (Jeremiah Maduna) was called as a State witness. Upon his discharge from hospital the complainant attended an identification parade at the Modderbee Prison where he pointed out four of the accused (including accused nos 3 and 5) as members of the group which had assaulted him.

The witness Nggongo told the trial Court that he shared room 30 with six other men of whom three were accused nos 5, 6 and 7. At 12.30 pm on 14 November 1983 Nggongo bought a four-litre can of sorghum beer and took it to room 30. By 5.30 pm he had consumed two litres of the beer. He placed the half-empty can on the floor and went to sleep. He was roused from his slumber at about 8.30 pm

by

by the noise of fighting in the room. When he woke up he was under the influence of the drink earlier consumed by him, but he said that he was not drunk. Numbers of people, many of whom lived in other rooms of the hostel, were milling about in room 30. The electric light in the room was on and he saw the complainant and three other males being assaulted while they sat on a bed some three or four metres from his own bed. One of the assailants was accused no 3. Ngqongo explained that although he had not seen accused no 3 before he had heard of a man to whom reference was made as "Ndlebe"; and upon observing the missing ear on accused no 3 he realised that this was "Ndlebe". In the assault upon the victims sitting on the bed accused no 3 used a length of hosepipe folded double. This hosepipe was the property of Ngqongo and was used by him daily in the cleaning of lavatories. Also taking part in the assault was accused no 5 who was wielding a long and rigid sjambok; and accused no 1 who was using a short sjambok. According to Ngqongo accused nos 6 and 7 were

were also present in room 30 at the time. Accused no 7 did not take part in the assault but accused no 6 had a knife which he sharpened on a grindstone. During the assault the four victims were questioned by their assailants who asked them what had killed Godola. The victims replied that they did not know. According to Ngqongo he remonstrated with the assailants whereupon accused no 5 said to him "Old man, go to sleep" and the assault continued. Ngqongo then went to sleep again. He saw nothing further of the four victims. When he woke up on the next morning accused no 7 was in room 30. According to Ngqongo he did not see any of the accused entering room 30 before the assault started or leaving it after the assault. He saw no drinking taking place during the assault.

I deal next with the version given by accused no 3 in his evidence. He was not an official resident of the hostel and he lived in an abandoned Combi motor vehicle

standing

standing in the yard of the hostel. Accused no 3 knew the complainant and the deceased well, and during the early morning of 14 November 1983 these four people had informed him of Godola's death. According to accused no 3 he went with these four people to report Godola's death to the Municipal Police. The latter detained the said four persons but not accused no 3. During the afternoon of the same day accused no 3 was in the beer-hall when accused no 5 informed the said four persons and accused no 3 that an explanation for Godola's death was required of them. Thereafter all five of them (the complainant, the deceased and accused no 3) voluntarily accompanied accused nos 1, 4 and 5 to room 30. There they found some six or seven other persons, namely Ngqongo, accused nos 6 and 7 and other men to accused no 3 unknown. Ngqongo was sitting on one of the beds and accused no 5 ordered the complainant, the deceased and accused no 3 to sit down on the beds. Accused no 3 sat upon one unoccupied bed and

and the complainant and the deceased upon another. Accused no 5 asked Eric how Godola had died, and accused no 6 wanted to know for what reason they had killed Godola. Thereafter accused no 6 slapped Radebe on the face and accused no 4 did likewise to Eric. According to accused no 3 he enquired why these people were being struck to which accused no 5 replied that they should know how Godola died; and that they would suffer a like fate. Offering the complainant, the deceased and accused no 3 a scale of beer accused no 6 ordered them to drink for the last time. Ngqongo was also drinking, but he was not drunk. Accused no 5 took travel documents from Eric and Radebe. Accused nos 1 and 4 fetched wire with which they and accused no 6 tied up the complainant and the deceased. According to accused no 3 he saw accused no 5 fetch an axe and a sword from underneath a bed. After sunset accused nos 1, 4, 5, 6 and 7 and the four unknown men whom they had encountered in room 30 marched the complainant, the deceased and accused no 3 into the veld behind the hostel. Accused

no 3

no 3 said that he was frightened and that he had no opportunity to run away. As they were walking he heard Eric scream and he saw accused no 1 pull a knife out of Eric's stomach.

Accused no 4 stabbed Radebe with a knife. The complainant and the deceased fell to the ground. Accused no 5 was armed with an axe with which he struck accused no 3 on the head.

Having warded off a further blow accused 3 fell to the ground whereupon accused no 5 struck him again with the axe, injuring his right hand between the thumb and forefinger. Two of the unknown men remonstrated with accused no 5, pointing out that accused no 3 had not stayed with Godola; and they stopped accused no 5 from further assaulting accused no 3. His protectors were armed with Okapi knives and they stood guard over accused no 3. Accused no 5 told accused no 3 that he would not be allowed to sleep in his room because he might report the matter to others; and he was escorted back to room 30 by accused nos 1, 4, 5, 6 and 7 and by the four

unknown

unknown men. Upon their return to room 30 Ngqongo was found to be awake. He was drinking with others. Accused nos 1, 4, 5, 6 and 7 and the four unknown men washed the blood off accused no 3 and cleaned their knives. They warned accused no 3 that if he betrayed them he too would have his throat cut. Drink was then consumed by all, including accused no 3, and he fell asleep. On the following morning accused nos 1, 4, 5 and two of the unknown men took accused no 3 to a house in the location where they drank beer. Later in the morning accused nos 1, 3, 4 and 5 went to the beer-hall. There accused no 3 pleaded hunger and he left the party to return to his own place.

Against the background of the above brief summary of the testimony of Ngqongo, the complainant and accused no 3, it is convenient here to notice what impressions the trial Court formed as to the credibility and reliability of each of these three eye-witnesses. The trial Court was
favourably

favourably impressed with Ngqongo. He struck the trial Court as being quite impartial and it considered that there was nothing in Ngqongo's evidence to suggest that he was trying to implicate any of the accused falsely or that he was given to exaggeration. An argument advanced by defending counsel at the trial to the effect that Ngqongo had been too drunk to make reliable observations was, in my opinion quite rightly, rejected by the trial Court. In this connection the learned Judge called attention to the fact that during the cross-examination of Ngqongo it was put to him by counsel appearing for accused no 5 that he had in fact not been drunk at the time, to which proposition the witness assented by saying that he had been "not drunk, just under the influence". In regard to Ngqongo's sobriety or otherwise and the possible impairment of his powers of observation the trial Court recorded the following finding:-

"It

"It seems that, whatever his state of intoxication may have been at 5.30 pm that afternoon, the worst of it must have worn off by 7.30 that evening. In our view there is no basis for finding that Ngqongo was so under the influence that his testimony is rendered unreliable on that ground alone."

On the other hand the trial Court considered that accused no 3 was quite unworthy of credence. In its opinion accused no 3 was in several material respects an unsatisfactory witness whose whole version was riddled with improbabilities. In regard to his testimony the trial Court concluded that:-

".....no reliance can be placed on the evidence of accused no 3 to implicate the other accused."

For the sake of completeness I should here mention that, having been refused leave to appeal against his convictions by the trial Judge, accused no 3 petitioned this Court for leave so to appeal. That application was refused by this Court.

The complainant was an uneducated man and in the estimation of the trial Court he was not particularly intelligent. Throughout his evidence the complainant maintained that accused nos 3, 4 and 5 marched the victims

from

from the beer-hall to room 30; and that accused nos 2, 3, 4, 5 and 6 were members of the party who marched the victims from room 30 to the veld behind the hostel. But in a large number of other respects the evidence of the complainant was somewhat inconsistent, confused and contradictory. The chief defects in his evidence are fully catalogued in the judgment of the trial Court. They relate to matters such as (a) what persons accompanied him to the beer-hall on 14 November 1983; (b) which of the accused were encountered by the complainant in the beer-hall; (c) at what juncture the complainant saw accused nos 1, 2, 6 and 7 for the first time; (d) whether accused nos 1 and 7 were members of the party who marched the victims from room 30 to the veld; (e) whether any of the accused left the group on the way to the veld; (f) the exact sequence of the stabbings and throat-cuttings in the veld; and (g) which of the accused the complainant pointed out at the identification parade at the Modderbee prison.

A

A further criticism of the complainant's evidence made by the Court below was that the complainant's description of the weapons used during the assault upon the four men in room 30 (as, for example, iron pipes) was inconsistent with the marks found upon the bodies of the deceased at the post-mortem examinations conducted upon them. In this connection the trial Court expressed the opinion that in his evidence the complainant had deliberately exaggerated the severity of the said assault.

In assessing the complainant's trustworthiness as a witness the trial Court also took into account apparent contradictions which emerged upon a comparison of his testimony at the trial with the contents of a document embodying a statement ("the prior statement") taken from the complainant by a police officer, Major Dlamini, on 16 November 1983. During the cross-examination of the complainant counsel for the State made copies of the prior statement available both to

defending

defending counsel and the trial Court; and thereafter the complainant was cross-examined thereon. To the matter of the evidential worth of the prior statement in all the circumstances of the present case and to the question to what extent its contents reflect adversely upon the credibility and reliability of the complainant as a witness, I shall later allude in considering the argument advanced in this Court on behalf of accused no 5. Suffice it to say at this stage that the apparent contradictions between the evidence of the complainant and the contents of the prior statement are likewise fully detailed in the judgment of the Court below.

Having found that the evidence of the complainant was "unsatisfactory in many material respects" the learned Judge nevertheless went on to say:-

"Yet his evidence cannot, and ought not to be rejected in its entirety. It is unquestionably true in very many respects either because it was not challenged in those respects, or because it is strongly

supported

supported by the probabilities or because it is corroborated."

The judgment then cites examples of portions of the complainant's evidence which were either unchallenged in cross-examination or were corroborated by other acceptable testimony. Thus the complainant's evidence to the effect that he and the deceased had been interrogated in the room by Black men about Godola's death, and that he and the deceased had themselves been threatened with death by their interrogators, was not questioned in cross-examination. The complainant's evidence to the effect that his hands had been tied together with wire and that he had sustained knife-wounds on his upper body was corroborated by Jeremiah Maduna; and the complainant's evidence that the hands of the three deceased had been similarly bound was corroborated by the three police witnesses who saw the bodies in the veld on the next morning. Again, the complainant's evidence that at least one of the three deceased had

had had his throat cut was corroborated by a police witness and likewise by the results of the post-mortem examinations.

But although the trial Court did not entirely reject the evidence of the complainant it treated it with much wariness. In the course of his judgment the learned Judge remarked:-

"I do not thinkit matters much whether the discrepancies and unsatisfactory features in his evidence are all ascribed to bona fide confusion or whether some are due to dishonest exaggeration. They all relate to unreliability, particularly regarding the presence and actions of the accused.

It is tempting to argue that because Sibanyoni tells a fairly consistent story regarding the central role played by accused 3, 4 and 5 from the beer hall to the room and then to the veld, in particular in identifying them with specific words and acts in the veld, that his evidence is reliable in this respect. This would, however, be an extremely dangerous approach because it is clear that he has been confused in many respects, even regarding particular aspects of participation by accused 3, 4 and 5."

Accordingly, ,.....

Accordingly, so reasoned the trial Court, it would be unsafe to rely upon the evidence of the complainant standing alone insofar as it implicated any accused. I quote again from the judgment of the Court below:-

"It is true that only accused No 3 testified in rebuttal of Sibanyoni's evidence. On the facts of this case I do not think that the mere silence of the other accused can convert the unsatisfactory evidence of Sibanyoni into satisfactory evidence against them. On many incidents involving the accused, incidents which fall outside the evidence and recollection of Ngqongo, Sibanyoni is a single witness. We are of the view that it would be unsafe to rely upon Sibanyoni's evidence regarding the specific implication of any particular accused with any particular event, unless such evidence is corroborated by other evidence or is supported by probability or has some other evidential safeguard of reliability."

It is convenient to consider first the appeal by accused no 5 against his convictions. The case against accused no 5 hinges not only on the evidence of Ngqongo and the complainant but together therewith the testimony of two

other

other State witnesses. These were Det Sgt Sabeka and Lieutenant Joubert, both of the South African Police. Sabeka was the investigating officer in the case and he was one of the three policemen who found the bodies of the deceased in the veld behind the hostel on the morning after the slayings. Between 1 and 2 pm on Tuesday 15 November 1983 Sabeka went to the room in the hostel in which the deceased and the complainant had been assaulted. He found accused no 5 in the room and told the latter that he was looking for Godola's relatives. Accused no 5 told Sabeka that he (accused no 5) had known Godola; and he referred to Godola as "my home boy". Accused no 5 further told Sabeka that Godola had been killed by his fellow-occupants of the coal-shed at the hostel. At the request of Sabeka accused no 5 pointed out his bed in the room. Sabeka searched the bed and under the pillow and blankets he found a knife which was handed in at the trial as exh 3. Sabeka forthwith examined exh 3 and found what appeared to be dried blood both on the blade of the knife

knife and in the groove of the haft into which the blade folded. Sabeka asked no 5 where the blood on the knife came from. Accused no 5 replied that he had bought some spleen and that in eating it he had used exhibit 3. Sabeka arrested accused no 5 whereafter, on the same day, accused no 5 pointed out to Sabeka accused nos 1 and 2. During the night of 14 November 1983, and on the hostel grounds, accused no 5 pointed out to Sabeka and another policeman the derelict Combi from which, on the orders of the police, there emerged accused no 3. Sabeka then arrested accused no. 3.

During December 1983 Det Sgt Sabeka handed to Lieutenant Joubert (a) blood samples taken from each of the bodies of the three deceased; (b) a blood sample taken from the complainant; and (c) the knife, exh 3. Joubert is a forensic microbiologist. He subjected the aforesaid four

blood

blood samples and exh. 3 to scientific tests. Joubert was able to determine that the substance on exh 3 was the blood of a primate, that is to say, that it was blood which came from a human or a member of the ape family. The further effect of Joubert's findings was that the blood on exh 3 could not have come from the bodies of Eric or Shangise; but that it could have come either from Radebe's body or that of the complainant.

When Det Sgt Sabeka was cross-examined on behalf of accused no 5 his counsel accepted that exh 3 was the knife of accused no 5. Sabeka's evidence as to the explanation given by accused no 5 to Sabeka in response to the latter's inquiry concerning the blood on the knife was in no way challenged during the cross-examination of Sabeka.

In its judgment the trial Court summed up the case against accused no 5 as follows:-

"In

"In the light of accused no 5's failure to testify, the evidence of Detective-Sergeant Sabeka must be accepted as true on this issue. This means that accused no 5 lied when he said that the blood stains came from cutting spleen. He says that he had bought this spleen. It is inconceivable that he could have bought the spleen of a primate and therefore his reference to spleen cannot reasonably possibly be a reference to the spleen of a primate.

If that were the case, he could quite simply have given evidence to say so. He did not give such evidence. The inference is unavoidable, that he cannot give an innocent explanation for the primate blood on the knife. He did not say to Sabeka, nor did he give such evidence, that someone had borrowed or taken his knife in the past 18 hours or so. The absence of any explanation which could reasonably possibly be true as to how primate blood came to be on the knife, gives rise to a strong inference that it was the blood of one of the victims that had been killed or knifed the previous evening, and that such blood came onto the knife as a result of accused no 5's use of such knife.

When this is taken in conjunction with Matthews Sibanyoni's evidence, and that of Ngqongo, together with the fact that accused did not testify, then the State has proved beyond reasonable doubt in our view that accused no 5 was one of the persons who accompanied Sibanyoni and his companions to the veld during the evening of 15 November, and was one of the persons who

inflicted

inflicted wounds on one or more of the victims with the intention of killing them.

On this evidence, it is clear in our view, that accused No 5 acted with common purpose and in concert with the other perpetrators to kill the victims."

In challenging the correctness of the trial Court's finding on the guilt of accused no 5, Mr Jordan advanced two main submissions. The first was that the evidence pertaining to the blood found on exh 3 did not sustain, as the only reasonable inference, that accused no 5 was one of the persons who accompanied the victims from room 30 of the hostel to the veld and there took part in the execution of the common design to massacre them. It was pointed out that accused no 5 had been only one of seven persons for whom room 30 served as a dormitory; and, in any event, that on the night in question several strangers had been present. In this sort of situation, so it was said, it was reasonably possible that some person other than accused no 5 might have taken possession

possession of the knife of accused no 5 and have used it in the stabbing of some of the victims; and it was further reasonably possible that accused might have used his knife to eat a spleen before someone else had so misappropriated the knife. Accordingly, so ran the argument, it could not be said that the falsity of the explanation given by accused no 5 to Det. Sgt Sabeka had been satisfactorily demonstrated. That argument must, I think, be rejected. Exhibit 3 was the property of accused no 5 and it was found, only eighteen hours after the stabbings, in the bed of accused no 5. The particular place in the bed in which it was found points to deliberate concealment on the part of the person who put it there. There is moreover nothing whatever in the evidence to suggest that when the knife was discovered by Sabeka accused no 5 evinced surprise at its concealment under his bedding. In these circumstances the suggestion that someone other than accused no 5 might have used it in the stabbing of the victims stands to be dismissed as fanciful speculation entirely

entirely unsupported by any tangible evidence.

Mr Jordan's second argument was based on a sentence which occurs in the prior statement, to which sentence he sought to assign a particular meaning in the light of an answer given by the complainant during his cross-examination. The prior statement mentions seven men as having taken part in the interrogation of and the assault upon the four victims. Of these seven men the prior statement refers to two only by name, and accused no 5 is not one of the two so mentioned by name. The prior statement does, however, describe one of the five unnamed men by reference to the clothes worn by him at the time. There are in the prior statement five separate references to a man clad in a red overall. In paragraph 4 of the prior statement the deponent is recorded as having said:-

"One of the Black maleswho was wearing a red overall said we must all be murdered because Godola was dead."

In

In paragraph 5 thereof the deponent is recorded as having said:-

"The Black male who was wearing a red overall, and who had said we must be murdered also hit us with a sjambok."

In paragraph 6 thereof the deponent is recorded as having said:-

"Mzimkulu" - this being a reference to accused no 4 - "and the Black male in a red overall went away and after a short while came back having wire coat hangers."

In paragraph 14 thereof the deponent is recorded to having said:-

"Mzimkulu was wearing a knitted wool hat - red in colour on the head, brownish lumber jacket
.....I cannot remember or describe what the others were wearing, except the one who was wearing a red overall. He is employed by the Municipality. I do not know the job he does there."

And lastly, in paragraph 18 of the prior statement the deponent is recorded as having said:-

"The

"The Black male in a red overall remained in room 3 (sic) with others when we were taken to the murder scene."

Mr Jordan's argument was directed towards showing that the reference to the man in the red overall in paragraph 18 of the prior statement was intended by the deponent as a reference to accused no 5; and in order to do so Mr Jordan relied on a portion of the complainant's actual evidence at the trial. Before dealing with the latter it is useful to see in what way the cross-examination of the complainant with reference to the contents of the prior statement unfolded at the trial.

At the trial the seven accused were represented by counsel as follows: Miss Laurent appeared for accused nos 1, 4 and 5; Mr Jones appeared for accused nos 2, 6 and 7; and Miss French appeared for accused no 3. The prior statement was made available to counsel for the defence at a stage when Miss Laurent had already completed her

her cross-examination of the complainant and when Mr Jones was about to embark upon his cross-examination. After Mr Jones and Miss French had respectively cross-examined the complainant the trial Court very properly afforded Miss Laurent a further opportunity of cross-examining the complainant inasmuch as she had undertaken her earlier cross-examination of the witness without having seen the prior statement. Miss Laurent's further cross-examination of the witness was brief, but at the outset thereof there came the answer from the witness on which Mr Jordan's argument depends. I quote from the record the opening portion of the further cross-examination by Miss Laurent:-

"MISS LAURENT: My Lord, Miss French has taken the witness over most of the points that I was going to make. There may be one point which I just feel on behalf of number 5 I should put

COURT: Yes, you are at liberty to cross-examine on any matters that you feel that you wish to.

FURTHER CROSS-EXAMINATION BY MISS LAURENT:

Mr Sibanyoni

Mr Sibanyoni, in your statement you spoke about a man in a red overall?.....It is accused number 5.

Mr Sibanyoni, on behalf of number 5, he will deny that he was wearing an overall, a red overall? ----- He was wearing a red overall."

The thrust of Mr Jordan's argument is this. He seeks to impeach the credit of the complainant by contending that whereas in his evidence before the trial Court the witness testified that accused no 5 was a member of the party which marched the four victims from the room to the veld, paragraph 18 of the prior statement - as elucidated by the witness himself - represents a previous inconsistent statement to the clear effect that accused no 5 remained behind in the room. I proceed to consider the validity of this argument.

At the outset it should be borne in mind that when in the course of investigation of a crime a statement is taken from a witness by the police there is an immanent risk of

of inaccurate reproduction in the statement as recorded by the police of what the witness has in fact told the police. The extent of the risk of distortion obviously depends upon the circumstances in any given case; and to the particular circumstances attendant upon the present case I shall shortly return. But a useful reminder that this risk is ever-present is to be found in the decision by this Court in R v Steyn 1954(1) SA 324 (A). In delivering the unanimous judgment of the Court GREENBERG JA remarked at 335 F/H):-

"It must be remembered that there is a substantial difference between the record of the evidence given at a preparatory examination and the statements made by witnesses to the police in the course of investigation of a crime and preparation for a prosecution, even when these are statements made by witnesses who are called at the trial. At the preparatory examination the evidence, when given in a language other than one of the official languages, is interpreted by a qualified interpreter; it is elicited by the prosecutor under the supervision of a magistrate, in the presence of the accused who is entitled to cross-examine, is carefully recorded

and

and read over to the witness so that errors may be corrected. These precautions conduce to an accurate representation of what the witnesses wish to say, but there is a serious possibility that statements made to the police, which are made in entirely different circumstances, may be far from constituting this accurate representation and through inaccuracies may be a target for cross-examination which, instead of revealing the truth, may obscure it."

In the instant case it is important to notice the following facts. The prior statement is a discursive one running into 26 manuscript pages. The deponent was an illiterate person whose language was Zulu. There is no evidence that he understood English, in which language the prior statement is penned. It is unknown by whom the deponent's narrative was interpreted from Zulu to English. The prior statement concludes with a certificate under the illegible signature of a person whose rank is designated as "Major". Presumably this was the signature of Major Dlamini. The certificate is in the following terms:-

"I

"I certify that the deponent has acknowledged that he knows and understands the contents of this declaration which was sworn to/affirmed before me and the deponent's signature Thumb print/mark was placed thereon in my presence."

During his cross-examination the complainant insisted that the police officer who took his statement did not thereafter read it over to him. He further testified:-

"They did not administer the oath. They just asked me questions."

An obvious question which suggests itself is whether on 16 November 1983 the deponent, who two days before had sustained such serious stab-wounds that his assailants had left him for dead, was sound in body and mind when the prior statement was taken. As to that the complainant said that at the time he "was not feeling well" and that he was "sore all over his body."

Having regard to these disquieting features it is, I consider, open to grave doubt whether the circumstances in

which

which the prior statement was taken were conducive to an accurate representation of the complainant's actual version to the police. However that may be, it seems to me that Mr Jordan's argument must fail on the following simple grounds. That a document alleged to embody what was said by a deponent to the scribe who recorded it in fact constitutes an accurate representation of the deponent's actual narrative is a matter which requires proper proof. There must be acceptable evidence that the scribe correctly recorded what the deponent said and, if the statement is recorded in a language other than that used by deponent, there must further be proof that what the deponent said was correctly interpreted by an interpreter qualified in both languages involved. In the instant case proof of such matters is entirely lacking. It is true, of course, that in the course of cross-examination the correctness of certain portions of the prior statement was admitted by the complainant. But it is no less clear that his reliability and credibility cannot be tested by

reference

reference to other portions of the prior statement not canvassed in cross-examination and as to the correctness whereof no admissions were made by the complainant. And while the complainant in response to a question by Miss Laurent told the trial Court that on the night in question the man dressed in a red overall was accused no 5, the critical passage in paragraph 18 of the prior statement on which Mr Jordan seeks to rely was nowhere in the cross-examination of the complainant canvassed with the witness nor adopted by him. What he would have said if this passage in the prior statement had been explored with him is a matter of complete uncertainty. It is interesting to notice, however, that when the complainant was questioned by the Court in regard to what is recorded in paragraph 6 of the prior statement in relation to the man in the red overall, the complainant repudiated the correctness thereof: I quote the relevant passage from the record:-

".....in

"....in your statement as I read it, you say here

'Mzimkulu and the Black male in a red overall went away and after a short while came back, having coat hangers?-----' Mzimkulu went to fetch thecoat hangers. What about the person in the red overall? ----- The one in the red overall was sharpening the knife and was doing the hitting.

COURT: So, did he not go and fetch the wire? -----No, My Lord, the wires were fetched by Mzimkulu."

For the above reasons what is contained in paragraph 18 of the prior statement cannot, in my view, be used to confute the evidence given by the complainant at the trial to the effect that accused no 5 was one of the persons who marched the four victims from room 30 to the veld where the stabbings took place.

To sum up: here was evidence directly implicating accused no 5 in the commission of all four crimes. That evidence was given by a single witness whose testimony in many material respects was unsatisfactory, but this fact was

fully

fully appreciated by the trial Court; and the evidence of the single witness implicating accused no 5 was corroborated significantly by other credible evidence and supported by the probabilities. By the end of the State case the prosecution had made out a strong prima facie case against accused no 5 and in my view the trial Court was fully entitled to draw an inference adverse to accused no 5 from his failure to take the witness stand. Far from being persuaded that any error of reasoning underlies the conviction of accused no 5 the totality of the evidence in my opinion points to the clear conclusion that the trial Court reached the correct verdict. It follows that the convictions of accused no 5 cannot be disturbed.

It remains to deal with the appeals against the trial Court's finding that in respect of counts one, two and three there were no extenuating circumstances; and against the sentence of twelve years imprisonment imposed

in

in respect of count 4. At the time of the trial accused no 3 was 43 years old and accused no 5 was 25 years old. According to the complainant Godola, accused no 3 and accused no 5 were all fellow-members of the Bhaca tribe. At the time of the killings accused no 3 had but recently left the Transkei. He had come to live in the Thokoza hostel only a fortnight before.

Counsel for both accused nos 3 and 5 urged upon us that, when viewed cumulatively, the following three factors pointed to the existence of extenuating circumstances in relation to the murder of the deceased by their respective clients: (a) the liquor consumed by them; (b) the provocation to which they were subjected; and (c) their considerable perturbation of mind induced by the sudden death of their kinsman Godola. As to (b), the provocation relied upon was said to derive from the repeated denials of the four victims that they had killed

Godola

Godola. Whether persistent protestations of innocence by someone suspected by his accuser of having killed another amounts to provocation of the accuser is a question which may admit of some doubt. The trial Court seems to have accepted that in this respect there was a measure of provocation; and I shall deal with the case on the same footing.

Somewhat similar arguments on the issue of extenuation were addressed to the trial Court. Concerning the possible role played by liquor the trial Court made the following findings -

".....I think it must be accepted in favour of accused No 3 and 5 that they had consumed some liquor either at the Thokoza beer hall or in room 30 itself, or possibly in both places. Sibonyani says, however, in regard to the accused that they were not drunk, they were just under the influence In our unanimous view, whatever liquor was consumed by accused 3 and 5 on that day did not influence the accused's state of mind in doing what they did, and even if there was some influence it was minimal and certainly

insufficient

insufficient in our view, to reduce the moral blameworthiness of the accused."

In regard to the motive which impelled the killers of the deceased the trial Court observed:-

"It seems clear on the evidence that this killing was a revenge killing, in the sense that 3 and 5 and the other assailants were dissatisfied with the fact that the deceased and Sibanyoni had been released by the police. They were clearly of the view that retribution had to be exacted for the death of Godola
We do not know whether there was any particular relationship by virtue of family ties or friendship between accused Nos 3 and 5 and Godola, save that they may possibly have belonged to the same tribe."

Having considered the consumption of liquor by accused nos 3 and 5 in conjunction with the fact that Godola had been "an acquaintance or friend, of some sort" and in conjunction further with the matter of provocation, and having weighed these factors not singly but collectively, the trial Court unanimously concluded that in the case neither of accused no 3 nor of accused no 5 were there any extenuating circumstances.

Miss

Miss Sidwell submitted that the trial Court had erred by underemphasising the probable effects upon the mind and inhibitions of accused no 3 of the alcohol consumed by him. She called attention to the fact that in its judgment on extenuation the trial Court had made specific reference to the evidence of accused no 3 to the effect that at the relevant time his head had been perfectly clear. Since the trial Court had found accused no 3 to be a witness quite unworthy of credence, so the argument proceeded, the trial Court should have looked in this connection merely to the evidence of the State witnesses; and that evidence, it was submitted, sufficiently established the probability that alcohol had blurred the faculties of accused no 3. I am not at all persuaded that the trial Court erred in the respect here suggested. In my view it is clear that despite the evidence of accused no 3 given on the merits of the case, the trial Court accepted that both he and accused no 5 were to some extent under the influence of liquor;

and

and it correctly pointed out that:-

"....neither of the accused favoured the Court with their evidence, which would have been of value in this enquiry, as to whether they were intoxicated and what the extent of their intoxication was."

However, the factor on which both counsel chiefly relied as diminishing the moral guilt of accused nos 3 and 5 was their subjective state of mind - a condition described by Miss Sidwell as one of "profound emotional involvement" - flowing from their kinship with Godola. It was said that such emotional involvement was sufficiently proclaimed by the essential facts of the case; and that despite the silence of accused nos 3 and 5 it was a matter of almost necessary inference. I am unable to accept this submission. In my view the problem was properly approached in the course of the judgment of extenuation. In this connection the learned Judge remarked:-

"No authority has been cited to us for the proposition that a desire for revenge constitutes, per se, extenuating circumstances. There may well

be

be circumstances where the preceding events have influenced the accused's mind or mental faculties to such an extent that extenuation can be found to exist. The extenuation would then be present, presumably, because of the extent to which the accused's mind or mental faculties have been influenced by the preceding events, and not merely because the murder was one of revenge."

(And see further in this regard: S v Mkhonza 1981(1)

SA 959 (A); S v Ndwalane 1985(3) 213 (A).) In the instant case such evidence as there was affecting the nature of the ties and the depth of the bonds between Godola on the one hand and accused nos 3 and 5 on the other, was of the scantiest. Inasmuch as the accused preferred in this regard not to take the Court into their confidence, the trial Court was left merely to speculate as to the actual nature of their subjective feelings about the death of Godola and the extent to which their criminal conduct was governed thereby.

A further argument advanced by Mr Jordan was that the moral culpability of accused no 5 was less than that

of

of accused no 3 because, so it was suggested, the former's role in the killings was subordinate to that of the latter. Suffice it to say that there is nothing in the evidence which bears out this suggestion.

This Court has no jurisdiction to interfere with a trial Court's finding that no extenuating circumstances have been established unless such finding is vitiated by some misdirection or irregularity; or is one which no reasonable Court could have made. In the instant case there was no misdirection or irregularity. Having given careful consideration to the submissions advanced by Miss Sidwell and Mr Jordan I am quite unable to hold that no reasonable Court could have concluded that there were no extenuating circumstances.

In regard to the sentence imposed on count 4 both counsel advanced the argument that it represented a sentence so severe as to induce a sense of shock. I am unable to

agree

agree. In my view the sentence imposed, though a heavy one, was in no way inappropriate or manifestly disproportionate to the gravity of a very serious crime.

For all the aforementioned reasons the appeals of the first appellant (Hlunguhlane Ndlebe Xake) and of the second appellant (Julius Mlambo) are dismissed.

G G HOEXTER, JA

BOTHA, JA)
NESTADT, AJA) Concur