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CASE NUMBER: 315/88

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

STANFORD LELEMPE

Appellant no 1

RODNEY MOLOI

Appellant no 2

and

THE STATE

Respondent

CORAM: JOUBERT, STEYN, JJA., et F H GROSSKOPF, AJA.

HEARD: 16 MARCH 1989

DELIVERED: 30 MARCH 1989

J U D G M E N T

STEYN, JA.

Appellants and four co-accused were arraigned before Le Grange, AJP. and two assessors in the Witwatersrand Local Division on a charge of murder and two charges of robbery. Appellants were accused no's 3 and 4 respectively. It was alleged that on the 28th June 1986 at Tembisa in the district of Kempton Park, they and their co accused:

- (i) murdered Tlou Jan Ramphela (the deceased),
- (ii) robbed the deceased of a 7,65 mm Walther pistol and R700,00 in cash under aggravating circumstances and
- (iii) robbed Fransina Malema of R50,00 in cash.

All pleaded not guilty and none of them indicated the basis of their defence. All were acquitted on the robbery charges. The appellants were convicted on the murder charge and their co-accused acquitted. Extenuating circumstances were found to have been present in the case of the first appellant but none in that of second appellant. Both were sentenced to death, and both

now appeal against their convictions. Second appellant also appeals against the finding that there were no extenuating circumstances in his case. Both also appeal against their sentences. First appellant's defence on the murder charge was compulsion and that of second appellant an alibi.

It is common cause that the deceased was assaulted and burnt to death in the street in front of first appellant's dwelling at no 325 in the Kopanong section of Tembisa at or shortly after 12 noon on Saturday, June 28, 1986. It is admitted by appellants that 90% of the deceased's body was covered with first and second degree burns, and that he had the following further injuries: swollen upper lip and right cheek, four lacerations spread over the inside of the lower lip, 2 cm jagged laceration on the tip of the chin with underlying fracture right across the mandible, and two upper left front teeth missing.

The prelude to the events culminating in the death of the deceased are not in issue. It is this. On the evening of Friday, June 27, 1986, first appellant, his girlfriend, Poppie, his brother Jacob and cousin Daniel Mafudi (Dan) had been to a night club in the Tsithama section of Tembisa. First appellant and Dan drank, but first appellant drank less than Dan and was not affected by the liquor. Between 22h00 and 23h00 they left in first appellant's Cortina motor car to go elsewhere, obviously to continue their merry-making. En route they came upon pedestrians in the street, blocking their way. First appellant, who was driving, hooted repeatedly but the pedestrians failed to give way. He was compelled to stop. He got out and standing next to his car, asked them to make way. Someone in the group fired a shot. Jacob, who had also alighted, was mortally wounded; something struck first appellant on the right eye and he fell down. Someone stripped him of his leather jacket.

The pedestrians then apparently departed. Jacob was put into the car and with first appellant driving they took him to the Tembisa police station about a kilometre away. On the instructions of the police they then took Jacob to the hospital. Whilst first appellant's injured eye was being attended to he was informed that Jacob had died. He immediately left for home taking Dan and Poppie with him. He drove again. He reported Jacob's death to his father and then retired to his room but could not sleep. Early next morning Robert Komane (who was accused no 1 at the trial and is referred to hereafter as Komane) took first appellant to hospital at his request and in his motor car for further treatment of his injured eye. Thereafter they again went to the Tembisa police station and reported the murder of Jacob and assault upon first appellant to a sgt Sithole who then accompanied them to the scene of the offences and took certain measurements there of points indicated by first appellant. He had not

recognised his assailant or anybody else in the group of pedestrians but Poppie had recognised one of them, a girl Fransina. Sithole requested first appellant to find Fransina and bring her to him at the police station. They then left to do so. A "certain young man" told them he had seen Fransina at a certain house. What happened thereafter was in certain material respects in issue at the trial.

The defence version, as testified to by Komane and first appellant, was that the two of them found Fransina in the house hiding inside a wardrobe, took her to the car and drove off, intending to take her to the police station. On the way first appellant changed his mind and decided that she should first be taken to his home to explain to his relatives "what had happened the previous night". They did so. On arrival there Komane parked first appellant's car and went home. He lived across the street. His car was parked in the driveway. It was a

brown Cortina and first appellant's a white one. First appellant's version of what then happened is the following: He and Fransina entered his house. He could not remember whether Komane remained with them or departed. There were many people inside the house but apart from his uncle first appellant could not recall who they were. He was still dizzy from his injuries and could not see well through his swollen eyes. Fransina told them her husband had shot first appellant and Jacob. He could not remember what else she told them. After Fransina had completed her report, he left with her, intending to take her to the police station. But outside he found "a lot of people" who stopped them and compelled him to take some of them and Fransina in his car to the person who had shot Jacob. He did not know any of the group and did not know whether or not they were "Comrades". At that time he was unaware of such an organisation and only heard of "The Comrades" for the

first time at the police station after his arrest. He drove off with Fransina and members of the group, following their directions where to go. He noticed en route that he was being followed by Komane's motor car. Deceased was ultimately found in a shebeen where Fransina pointed him out. Members of the group apprehended him and brought him to first appellant's car. They compelled him to open the boot of the car and put deceased therein. At their command first appellant then closed the lid and drove off with deceased inside the boot and Fransina inside the car. The group compelled him to drive back to his home and stop in the street in front of it. At their command he again opened the lid of the boot. They removed the deceased. First appellant then got back into his car, reversed into his yard, parked the car there, entered the house and went to sleep because his injuries were still painful and he felt bad. He did not see deceased being assaulted after being removed from the

boot and was unaware of what happened to him. Komane added the following. When they arrived with Fransina at first appellant's dwelling there were "a lot of people" outside. Shortly after returning home he was approached by "six or seven people". He told them the car in the driveway was his. He was then asked to help them "transport certain people" but refused to do so whereupon he was threatened by them saying to him "If you do not give us a ride in this car, we will burn the car and we will also burn you". He believed they were capable of doing so and capitulated; the car was push-started by them, he was then ordered to follow first appellant's car. Some of the group rode with him. They in fact "hi-jacked" him and took control over him. They were looking for somebody. This person was ultimately found at a place which appeared to be a shebeen. He was caught by members of the group and put in the boot of first appellant's car which had stopped behind him. It

was full of people. First appellant's car then drove off followed by Komane. At a three-way stop he was instructed to take another route. Ultimately he arrived back at first appellant's house. What then happened he described as follows. "When I got to that place it was full my Lord; it was so full that I had to blow my hooter, people opened the way, I then saw the deceased lying down there, on his back, my Lord. I went past and I got into my home. I parked the car and then stood on the stoep. After a few minutes I saw two people, they ran inside that crowd of people. One of them was carrying spirits. When these people got into the crowd the other people started dispersing and running and then I saw a flame, my Lord. Then I realised this person was set alight. And I did not see what happened further than this and I have forgotten some of the things." He later added that when the people made way for him he saw the person on the ground being assaulted and that one of the

two persons who thereafter ran "inside the crowd" had "two spirits" with him. He did not know who it was.

Fransina is a young Black woman who was 25 at the time of the trial. Her version was broadly similar in certain respects but significantly different in others to that of Komane and first appellant. She said that "the comrades" found her at home sitting in her kitchen. Amongst them were "Buti" (the name by which Komane was commonly known) and first appellant. They said to her "you come along with us, we want you to produce your husband because you people killed people last night". They drove off with her in a white motor car driven by Komane and took her to first appellant's dwelling. She had to tell his parents what had happened the previous night. Komane accompanied them into the house. As she was about to speak first appellant grabbed her in front by her clothes and accused her of telling lies. She then recounted what had happened (she was never asked whilst

testifying to repeat the terms of her report or to say what had in fact happened the previous night). Whilst she was speaking Komane went out and fetched his brown car. He lived directly opposite first appellant. Looking through a window she saw him fetching his car. After completing her report she and first appellant left the house. Komane was waiting in his brown car. Many of the group involved got into Komane's car. She and first appellant entered his car. Others of the group also got in. She sat in front and first appellant was the driver. Second Appellant was seated with others at the back. They drove off in both cars. On the way first appellant and others said to her "If you do not produce your husband we will burn you". She was terrified. Ultimately they went to the shebeen where she and the deceased had been the previous night. The deceased was seated inside, next to the door. The two appellants, Komane and others of the group alighted and entered the

shebeen. First appellant said "here, this is the fool", indicating the deceased. They grabbed hold of him, dragged him to first appellant's car, put him in the boot and drove off. On the way first appellant said, referring to her, "this dog must also be put in the boot, it cannot travel with us here in the body of the car". He then stopped, she was also put in the boot and they drove off again. Just before stopping again both cars blew their horns. They stopped in the street at first appellant's place. The boot was opened. The street was full of people, who "emerged from everywhere" and were moving towards the scene. The deceased was removed from the boot but she was left inside. He was thrown to the ground and assaulted. First appellant started the assault. She then jumped out and fled for her life down the street in the direction of her home. Looking back whilst running she saw the deceased being assaulted with bricks and picks by persons in the crowd including first

appellant. She did not then see second appellant but noticed Komane driving off in his brown car and parking it in his yard directly opposite that of first appellant. She did not see the deceased being burnt.

The deceased was, however, seen burning by Annetjie Themole, a girl who was then 15 years old. She was also a state witness. On that Saturday afternoon she was at a shop near by. She noticed a large crowd congregated in the street in front of first appellant's house (as pointed out by her on the street plan, exhibit D1, when recalled by the Court). She ran closer to see what was happening and saw first appellant, whom she knew well, removing a person from the boot of a brown car and placing him on the ground. He was then assaulted in the street behind the car by members of the crowd. They kicked him and hit him with bricks. Second appellant (whom she called "Boxer" and also knew well) was one of those who did so. She saw him jump upon deceased and

kick him. Whilst the deceased was being so assaulted she also noticed the following. Masopo (accused no 2) ran from the shops to the crowd with two blue containers of "spirits" which he poured over the deceased where he lay in the street. Jahman (accused no 6) arrived with a tyre and paraffin. He put the tyre "over" the deceased and poured the paraffin on to him. Mabeka (accused no 5) set the deceased alight. (Accused no's 2, 5 and 6 were also well-known to her.) (She indicated in Court that she was 25-30 metres from deceased whilst all that was being done to him.) She also saw first appellant remove his car from the scene and drive into certain premises. She was adamant that it was a brown car (indicating the colour by way of reference to the armrest of a chair in the court room, which was a "very, very light brown" or yellow colour). She did not see a white car and in fact saw only one car. She also did not see Fransina emerge from the boot of the car and running away. Whilst the

deceased was still burning the police arrived and she and the crowd ran away. Whilst testifying Annetjie often looked down. When asked in cross-examination why she did so she replied that she was scared, and when later asked by an assessor what she was afraid of she said of being burned. When pressed during cross-examination with accused no 2's denial that he had been present, she replied "well, I could have seen somebody that looks like him, because I know him". Thereafter, on being questioned by the Court she however reiterated that it was accused no 2 she saw coming from the shops with the spirits. When pressed likewise during cross-examination on behalf of accused no 6, and on it being put to her that he also denied having been present, she replied "I thought he looked like the person who did this".

Constable Andries van Heerden and W.O. Josef Pretorius, both of the South African Police, also testified on behalf of the State. Van Heerden arrived on

the scene whilst the deceased was still burning in the street in front of first appellant's dwelling. A large crowd, estimated by him at 200, was gathered in a halfmoon formation around deceased. They were jubilantly dancing and singing, but dispersed immediately upon his arrival. The deceased was still alive and was screaming continually. A number of stones and a burning tyre was on top of him. Next to him were two partially burnt methylated spirits containers. Van Heerden removed the tyre from the deceased and pulled him off the fire. It is admitted that deceased died later that day of the extensive burns he sustained. Van Heerden made no mention of any motor cars being on the scene when he arrived and it is obvious that there were none. Pretorius arrived on the scene at about 15h00 that afternoon. Van Heerden was still on the scene. Pretorius confirmed the presence of the stones and the burnt tyre and spirits containers at a burn mark

(brandkol) on the street surface in front of first appellant's house.

Komane and first appellant made statements to capt. Ueckermann of the South African Police. Komane made two statements, exhibits G1 and G2 respectively, on the 7th and 15th July 1986. First appellant made only one statement, exhibit I, on the 17th July 1986. Komane's first statement was admitted in evidence by consent, but the admissibility of his second statement and that of first appellant was contested and became the subject of a so-called trial-within-a-trial. Both statements were ruled admissible. First appellant does not appeal against that decision. In paragraphs 11-17 of exhibit I first appellant said the following:

"11.

Ek en Buti wou weer ry om Fransina na Sersant Sithole te neem, maar voor ons kon ry het Albert en Jahman daar opgedaag. Hulle het vir Buti geroep en gesê dat hy sy kar moet bring. Daar het toe nog ander mense wat soldaatklere aan daar opgedaag. Die mense is almal Comrades en hulle dra soldaat

klere.

12.

Hulle het Buti se kar gestoot en toe dit vat het hulle gesê ons moet ry. Ek het my kar bestuur en Buti sy bruin Cortina. Ons moes almal geld gee om petrol in Buti se kar te gooi.

13.

Ons het toe begin soek na Jan, hy is die man wat doodgebrand is en wie vir my broer Jacob geskiet het. Fransina het ons gesê om na Temong seksie te ry om na Jan te soek.

14.

Later het ons vir Jan gekry by 'n shebeen. Die Comrades het hom gegryp en in my kar se kattedak gesit. Ons is toe terug na my huis waar hulle vir Jan uit die kattedak gehaal het. Hulle het hom baie geslaan. Die Mense wat hom geslaan het was Jahman en die ander kan ek nie onthou nie. Ekself het hom nie geslaan nie.

15.

Ek het gesien dat Masopo spiritus op die oorledene gooi wat toe op die grond gelê het en Mabeka het 'n vuurhoutjie getrek en op die oorledene gegooi. Die oorledene het begin brand.

16.

Die mense het toe weggehardloop en Jan het toe gebrand en is later deur die polisie en 'n ambulans verwyder en ek het later gehoor dat hy dood is.

17.

Ek is nie n Comrade nie en het niks met die dood van Jan te doen gehad nie. Ek wou nie saam met die mense gaan nie, maar was bang dat hulle my en my kar sal brand en het toe saam gegaan. Ek het nie geweet dat hulle vir Jan gaan doodmaak nie."

In his statement G2, which is mainly an amplification of his earlier statement, Komane said the following inter alia:

"6.

Ons het vir Fransina opgespoor en ek wou na die polisiestasie ry om haar aan Sers. Sithole te oorhandig. Stanford het egter gesê dat ek eers na sy huis moet ry sodat die vrou met die familie kan praat en vertel wat gebeur het.

7.

Ons het toe na Stanford se huis gery soos hy versoek het waar hulle met Stanford se familie gepraat het. Ek het sy kar by sy huis gelaat en na my huis gegaan. Stanford het my toe weer geroep en gesê ons moet die Comrades gaan soek. Ek het toe weer Stanford se kar bestuur en Stanford het gesê ons moet Jahman kry. Ek ken nie die Comrades nie, maar Stanford het gesê hulle sal help om vir Jan te soek en hom dan na Sers. Sithole te neem.

8.

Langs die pad het Stanford vir my gewys waar ek moet stop by huise en ook by mense in die straat. Stanford het die mense gevra waar Jabulani is. Jabulani is volgens Stanford, soos hy my vertel

het, 'n Comrade.

Ons het ook by Albert se huis gegaan, hy is 'n leier van die sokkerklub.

9.

Toe ons weer terugkom by die huis van Stanford het ek gesien dat daar nou baie mense is. Onder die mense wat buite die huis was, was Dan se broer, Oubaas en Mabina. Daar was ook baie mense met soldaat klere aan. Ek het toe gesien dat dit Comrades is. Ek het besef dat die mense moeilik en aggressief is en gehoor dat hulle vir Jan gaan soek en het besef dat hulle gaan moeilikheid maak. ...

17.

Toe ek by Stanford se huis kom het Stanford se kar in die pad voor sy huis gestaan. Daar was toe baie mense en hulle het reeds vir Jan uit die kattedak van die voertuig gehaal.

18.

Ek het gesien dat hulle besig is om vir Jan te slaan, te skop en met klippe geslaan. Die mense wat vir Jan geslaan het was Stanford, Boxer, Jahman en nog ander mense wat ek nie ken nie.

19.

Die man Jan het toe by die grond gelê. Ek het my kar toe gaan parkeer in my erf.

20.

Ek het toe gesien vanaf my huis dat Masopo daar opdaag met 2 (twee) bottels brandspiritus. Hy het toe die twee bottels spiritus oor Jan se liggaam uitgegooi. 'n Ander man met die naam van Mabeka het

toe 'n vuurhoutjie getrek en op Jan gegooi. Jan se liggaam het toe begin brand. Jahman het toe 'n kar buiteband bo-op Jan se liggaam gegooi en dit het ook begin brand.

21.

Almal het toe weggehardloop en kort daarna het die polisie opgedaag en 'n ambulans het Jan daar verwyder. Ek het later gehoor dat Jan dood is in die hospitaal.

22.

Dit is Stanford wat die Comrades gekry het om vir Jan te seek. Ek kan nie sê wat hy wou doen nie. Ek self is gedwing deur die Comrades om my kar te bestuur en verder was ek bang vir hulle, want hulle brand jou ook as jy 'n sellout is."

This statement is inadmissible against first appellant but is of cardinal importance in judging Komane's credibility.

Second appellant denied any complicity in the murder. He admitted that he is known as "Boxer". The gist of his evidence was that on the Saturday morning in question he was sitting on his stoep between 09h00 and 10h00 polishing his shoes when he noticed a motor car full of people moving away from first appellant's house.

It was first appellant's car. It was followed by Komane's car which was likewise filled with people. He had heard of "The Comrades", adding "You see, in the Transvaal in every Township they talked about the Comrades. This thing is full in every township". But he could not say whether the persons in the two motor cars were Comrades or not because he could not see if they were wearing uniforms. After the cars had left he went inside to wash himself and left home at "something past 11h00 to 12h00" to attend a small child's birthday party in the Moreting section of Tembisa to which his girl friend had been invited by the child's father and to which he accompanied her at her invitation. He remained there for the rest of the day and only returned home at 23h00. He could not, however, remember the child's or father's names nor the address at which the party had been held. He claimed to be in possession of a photo taken at the party, and at the conclusion of his evidence

requested the Court to give him an opportunity of calling the person or persons who gave the party, to confirm that he had in fact been present. His request was granted and Spoelstra, J. requested the prosecutor to arrange that the investigating officer assist him to do so. For that purpose the trial was adjourned until the following day. But on that day second appellant's case was closed without the photograph being handed in or any further evidence having been led, and without any explanation why that was done.

Komane's evidence as to compulsion and ignorance of the identity of deceased's assailants other than first appellant, was rejected by the Court in these terms:

"The statements accused 1 made to Captain Ueckermann are both of an exculpatory nature. The second statement, exhibit G2, which was made on 15 July, 1986 is a more detailed statement than the first one, G1 which was made on 7 July, 1986. Exhibit G2 names certain persons and connects them with certain conduct.

In court accused 1 stated that apart from accused 3 he knew none of the other accused or the names of any of the persons who forced him to drive his car when they were looking for the deceased. This evidence is in our view an obvious attempt to protect his co-accused. We do not believe this. We also reject his fanciful explanation that he drove his car under duress and under the orders of what was referred to as the comrades. We find that he willingly made his car available to facilitate the search for the deceased."

He was acquitted on grounds which need not be traversed.

The Court adopted the following approach to Annetjie's evidence:

"When Annetjie testified she very seldom looked in the accuseds' direction. She glanced in their direction only when it was necessary to do so. We formed the impression that she gave her evidence under great strain and that she was afraid of some or all of the accused. When one reads her evidence, a number of unsatisfactory aspects present themselves. It is for instance not clear whether she was at the shops or at Julia's house when the cars arrived with the deceased. It was also not clear exactly where she was standing when she made her observations, nor did her description of the assault on the deceased always tally. Also she did not give a consistent version on whether or not her view had been clear and

unobstructed. There are also other perhaps lesser criticisms of her evidence. I do not propose to deal with each possible defect.

We are satisfied that she does not qualify as a witness who is satisfactory in every material respect. Although we are satisfied that she was not lying deliberately we approach her evidence with some circumspection."

For these reasons, *inter alia*, her identification of accused no's 2, 5 and 6 was not accepted as proven beyond reasonable doubt and they were therefore acquitted.

Fransina's evidence was, however, accepted and that of first appellant rejected for the following reasons (I quote from the judgment):

"I shall now deal with accused 3. There is no doubt whatsoever that accused 3 was present at all times. We reject his evidence that he acted under any form of compulsion at any stage. He had a reason to look for the deceased. He had a motive to assault the deceased. We accept Fransina's statement that he threatened her with burning if she failed to lead them to the deceased. He took the deceased from the boot of his car after he had decided not to take the deceased to the police station, if this had ever been his intention. His story that after he had offloaded the

deceased, he parked his car in the yard and went into the house, and did not return is so improbable that it deserves no consideration.

We are satisfied that he assaulted the deceased as testified to by Fransina. In this regard we bear in mind that Annetjie stated that he only took the deceased from the boot of the car. We accept Fransina's evidence without hesitation, although we have considered that she may bear a grudge against accused 3. She was in our view not only a satisfactory witness with a good recollection of the events, but her evidence is also corroborated in almost all material respects by the evidence of accused 1 and accused 3, and that of Annetjie. Such discrepancies as can be found are in our view insufficient to reject her evidence. She was in a far better position than Annetjie to observe what happened when the assault commenced. We therefore give preference to her evidence in this regard.

The assault was a continuous and prolonged affair. There is not an inkling of acceptable evidence indicating that accused 3 disassociated himself from it at any stage. He is in our view a co-principal offender and should be convicted as such."

The Court also rejected second appellant's alibi and convicted him. The reasons for doing so are set out as follows in the judgment:

"Accused 4 put forward an alibi as his defence. This alibi was not put at any stage of the proceedings. It was raised for the first time when accused 4 testified. It clearly surprised counsel appearing for him.

He was afforded an opportunity to put more evidence on his alibi before the court. He could not do so. His alibi is clearly false. He was also a very unsatisfactory witness. His explanation of a lack of interest in the occurrence in the street which drew a large crowd does not convince. Even more fanciful is his version of accompanying his girlfriend to the birthday party of a small child at the house of a person or persons whose names he cannot recall and whose identity he did not bother to establish for purposes of this trial.

He was identified not only by Annetjie but also by Fransina. It is clear from the latter's evidence that he took an active part in capturing the deceased. He was also with her in accused 3's car. Notwithstanding the apparent contradictions in Annetjie's evidence on exactly what he did we find Annetjie's evidence on the identification of accused 4 corroborated by Fransina's evidence and his fabricated alibi. In this regard we do not lose sight of the fact that a person like the accused may be inclined to give a false explanation when confronted with a serious charge like the present one, or that he may think that the truth would appear less acceptable than his concocted defence.

We therefore find that accused 4's participation in the assault and a common purpose on his part have been established by the required degree of proof. He must also be held liable as a co-principal offender."

During the investigation as to the existence or otherwise of extenuating circumstances both appellants testified again and persisted with their respective defences of compulsion and an alibi. First appellant's cousin Dan, his father, Solomon Lelempe, second appellant's mother, Pauline Moloi and aunt, Miriam Mishabane, and a psychiatrist, Dr Kevin Solomons, also testified, Dr Solomons on behalf of both appellants. The Court again disbelieved first appellant on cardinal aspects and viewed his evidence as a whole with "a great deal of scepticism" as is clear from the following passages in the judgment:

"I shall first deal with accused 3's case on extenuation. Let me say at the outset that accused 3 has once again failed to impress us as a witness. It took a good deal of prompting

and a considerable number of leading questions to place what counsel obviously wanted on record. Apart from this he again told a number of obvious lies. ... His claim that his health suffered after Jacob's death is unacceptable in the absence of any specific complaint. He certainly does not look ill or frail. On the contrary he appears to be a person of good health.

His complaint that he started to drink too much is also just a vague generalisation which was not substantiated by facts. His statement that he assisted to put Jacob in the car after he had been shot is not only contradicted by Dan but highly improbable were he in the condition he wants us to believe. Either way he is not telling the truth. His allegation that his father was angry with him and blamed him for Jacob's death is clearly false. What he told in court does not coincide with what he told Dr Solomons.

He is contradicted on a number of aspects by Dan. One should perhaps not make too much of this for reasons which will appear later. He persisted in the untruth that he drove his car under duress when they were looking for the deceased. He professed to have had a very close relationship with Jacob and his declared sadness about Jacob's demise, are also described in very vague and general terms. The instances he mentioned which would prove that, do not impress us as being any different from any other normal relationship between brothers.

... Once again we view his evidence with a great deal of scepticism."

The Court was likewise very unimpressed with Dan's evidence. This is adequately demonstrated by the following remarks in the judgment:

"He obviously exaggerated his own importance and the role he played during the course of the evening. On his evidence one has grave misgivings about his state of sobriety. His description of accused 3's condition is clearly an exaggeration. ... Either he fabricated his story or he has a very cloudy recollection of the events. We do not believe that much reliance can be placed on his evidence."

The evidence of the father, Solomon Lelempe, did not, in the Court's estimation, "contribute anything worth mentioning". I can find no fault with these summaries and assessments. The finding of extenuation was based on the evidence of Dr Solomons. The ambit of and reasons for that finding, are set out by Spoelstra, J. in the following terms:

"The basis for extenuation set out earlier on in this judgment is derived from the evidence

of Dr Solomons. Our difficulty with Dr Solomons's evidence is that he obtained information from different sources. He accepted most of that information as facts. He interpreted those facts and he drew certain conclusions from them. Many of those facts have not been established. In our view this makes his conclusions invalid or at least suspect. Although we do not unqualifiedly accept Dr Solomons's evidence on the acute traumatic reaction and the acute grief reaction we accept, as Mr De Meillon on behalf of the state conceded we should, that the killing of his brother and the assault upon himself aroused in the accused's mind anger and a lust for revenge. This quite clearly had a bearing upon his mind in committing the murder of the deceased.

We have therefore unanimously concluded that in respect of accused 3 extenuating circumstances have been proved."

The "basis for extenuation" mentioned by the learned Judge, refers to the legal requirements.

Dealing with second appellant, Dr Solomons said he "was struck by the way in which both his mother and his aunt tended to put on the best possible image of the kind of person that he was. They specifically said he

was a very responsible sort of person". In his report, exhibit K, he also stated that second appellant "claims not to be easily influenced or dominated in relationships" and added "This is affirmed by both his mother and his aunt". Dr Solomons discounted these statements and came to the conclusion in his report, which he affirmed in his evidence, that whilst second appellant was not a psychopath he nevertheless "presents as an immature young man with little individual initiative who would seem to be reasonably easily influenced by groups". If he, therefore, found himself in a group the "group's behaviour would then influence his own behaviour even if it were uncharacteristic behaviour for him". The essence of his evidence as to extenuation in second appellant's case is, however, to be found in the following passage in his evidence in chief:

"This particular personality type which is characterised by having a very weakened sense of self, a difficulty taking responsibility for

his own actions, initiating actions, tends to be easily led by others, their own sense of self is relatively under-developed and they tend to be swayed by this. They seem to lack the inner confidence and reserves to bring their own judgments to bear on situations. It is a characteristic of this particular type of personality structure.

Is this just possibly or probably the case with no 4? -- He has not led any evidence or given me any evidence that this is in fact what happens, that he was influenced by the crowd, according to him he was not there when the crowd was there. So it is a possibility."

The finding that there were no extenuating circumstances in second appellant's case was as follows:

"As far as accused 4 is concerned we find that there is no evidence indicating that his inadequate personality as described by Dr Solomons is causally connected with the commission of the crime. There is no evidence that he was in any manner influenced by the crowd. These are matters of mere speculation. On the evidence the contrary rather seems the case, namely that he was one of the main leaders and instigators. In his case we find no extenuating circumstances."

Dr Solomons dealt extensively with first appellant's personal circumstances and with the effect of

Jacob's death upon him. In her address on mitigation of sentence first appellant's counsel, Miss Sidwell, stressed the facts that he did not participate in the actual burning of the deceased but only in the initial assault and did not continue therewith while the deceased was being burned. She also pertinently dealt with his personal circumstances. Mr de Meillon did not cross swords with her in his address and merely asked that first appellant be sentenced to a lengthy term of imprisonment. In passing sentence immediately thereafter the learned judge said the following:

"As far as accused 3 is concerned, his previous convictions will not play any role in the sentence which I propose to impose.

The facts in this case show a very gruesome killing. It was, to say the least, a horrible deed. One can hardly imagine that anything like this can occur in a civilised society. It is conduct which, in the mind of a man on the street, calls for exemplary punishment. This is not a case where there was immediate retaliation on provocation. It was the deliberate hunting-down of a man who may have

been innocent of what he was suspected to have done by a pack of bloodthirsty wild dogs. The manner in which the deed was accomplished was so brutal, so vicious and so callous that it outweighs any extenuation or personal circumstances relevant in this case.

I have considered all the facts surrounding accused 3 and find that were I to impose any sentence other than the death penalty I would be shirking my duty and responsibility towards the community."

The foregoing factual exposition speaks largely for itself. There is, to my mind, no justification for interfering with the convictions. The issue on the merits was decided by the trial Court mainly upon its findings of credibility. Those findings can likewise not be interfered with. The versions of Fransina and first appellant coincide to a large extent; as already mentioned. Where they differ, that of Fransina is, to my mind, clearly true. She stated that "the comrades" abducted her. She is supported therein by first appellant himself in his statement, exhibit I. She

is corroborated by Annetjie that first appellant did not merely open the boot of his car. Annetjie, in her turn, is remarkably corroborated by first appellant, in his said statement, that accused no 2 brought two containers of methylated spirits to the scene and poured the contents on to the deceased who was set alight by accused no 5. That statement was not admissible against those two accused but is of cardinal importance in judging the reliability of Annetjie's evidence against first appellant. The trial Court did not deal with this aspect and may have missed it. But it unquestionably strengthens Annetjie's evidence against first appellant most materially. It also strengthens her corroboration of Fransina in like measure. She is also corroborated by Komane that there were two containers of spirits. On the evidence of Fransina and Annetjie first appellant clearly played a leading role in the abduction of and assault upon the deceased. That makes nonsense of his claim to

have acted under compulsion. Of all the participants in the abduction he was the person who had the greatest interest in the deceased. His evidence that after having merely opened the boot he drove home and went to sleep without evincing any interest in or being aware of what was being done to the deceased is not only contradicted by his own statement, exhibit I, but is also, as remarked by Spoelstra, J., so far-fetched as to be unworthy of consideration. He and Komane obviously did remove their vehicles as stated by Fransina and Annetjie because there were no vehicles on the scene when const. Van Heerden arrived. It would have been most foolhardy to have left them in the proximity of the fire. But the removal of his motor car does not indicate that first appellant had dissociated himself from what was being done to the deceased. It is, to my mind, not strange under the prevailing circumstances that Annetjie was mistaken about the colour of first appellant's car and that she did not

also notice Komane's car or see Fransina emerging from the boot and running away. Her attention would obviously have been focussed on the deceased. Fransina and Annetjie were correct that objects (which they took to be bricks) were thrown at deceased. Stones were indeed found on the scene, some lying on top of the deceased. Annetjie was also correct as to the number of spirits containers involved and that a tyre was placed on the deceased and set alight. This indicates sharp and reliable observation by her. In view of second appellant's admission that "the Comrades" were generally known and discussed, and of first appellant's statement mentioning them, his alleged ignorance of such an organisation must be discounted as clearly untrue. Komane's evidence is so materially contradicted by his own statement, exhibit G2, that it can be of no assistance to first appellant. The trial court correctly rejected their evidence as to compulsion and correctly

found that they and the others involved purposefully hunted the deceased down and abducted him. The facts that he was brought to first appellant's home and that the vehicles' hooters were blown announcing their arrival, clearly indicate that they intended doing something spectacular to the deceased in public. That burning was in first appellant's mind is clearly demonstrated by the threat uttered to Fransina.

On the evidence of Fransina and Annetjie second appellant played a prominent and active role in apprehending and abducting the deceased and thereafter assaulting him at the scene of the murder. His obviously lying evidence concerning his purported alibi effectively reinforced their evidence. Both appellants were beyond any reasonable doubt actively involved in the common purpose of murdering the deceased and were correctly convicted.

The court's finding that there were no

extenuating circumstances in second appellant's case can, in my opinion, also not be disturbed. The afore-quoted passage in Dr Solomon's evidence-in-chief in effect disposed of the main contention on second appellant's behalf. No fault can be found with the trial court's reasoning as set out in the passage from its judgment on extenuation quoted above.

I now turn to the death sentence imposed upon first appellant. This Court will not lightly interfere in a discretionary sentence imposed by a trial judge. The crucial question in an appeal against the imposition of a discretionary death sentence is whether the trial judge could reasonably have imposed that sentence. If the answer to that question is in the affirmative, that is the end of the matter. S v PIETERS 1987 (3) SA 717 (AD) at 734 E-F and 735 H. It is clear that under the particular circumstances of this case there were only two sentences in issue - the death sentence or a long term of

imprisonment. In deciding upon the former, the learned judge did not, in his judgment on sentence, deal expressly with the latter or again mention the personal circumstances of first appellant. But that he must inevitably have had both in mind is clear from the fact, as mentioned above, that both those considerations were dealt with by counsel immediately before sentence was passed. The learned judge was, to my mind, correct in according great weight to the horrible nature of the crime and the judicial duty to protect the community from such barbarity. I agree with him that in this case the nature of the crime and the interests of the community outweigh the extenuation found and appellant's personal circumstances. The learned judge could therefore reasonably have sentenced first appellant to death.

The appeals of both appellants are dismissed.

JOUBERT, JA.)
F H GROSSKOPF, AJA.)

M. T. Steyn
M T STEYN, JA.