

lib.

41/89

Case no 147/88
/MC.

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

Between:

<u>DUMA ERIC JAMA</u>		First Appellant
<u>JULOLO NOGALA</u>		Second Appellant
<u>MXOLISI MALGAS</u>		Third Appellant
<u>MICHAEL MAMBUKWE</u>		Fourth Appellant
<u>LULAMILE ANA MANELI</u>		Fifth Appellant
<u>MYUYU NDAME</u>		Sixth Appellant
<u>LUNGILE BACELA</u>		Seventh Appellant
<u>DIZA NKOHLA</u>		Eighth Appellant
<u>NKOSINATHI KAWA</u>		Ninth Appellant
<u>HENRY PIEDT</u>		Tenth Appellant

- and -

<u>THE STATE</u>		Respondent
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CORAM: BOTHA, HEFER et VIVIER JJA.

HEARD: 14 March 1989.

DELIVERED: 30 March 1989.

J U D G M E N T

VIVIER JA /.....

VIVIER JA:-

During the night of 23 December 1985 a crowd of about 100 Blacks proceeded to the house of Nobanzi Yaze in Kubusi Township near Stutterheim. Asleep inside the house were Nobanzi, her daughter Nosisi Yaze, the latter's three children Nobelungu, Mziwabantu and Zamekaya, and another grandchild, Linda, the daughter of Nonceba Yaze. Members of the mob forced their way into the house, severely assaulted Nobanzi and finally poured petrol over her and her two daughters Nonceba (who had in the meantime been fetched from her own home by other members of the mob) and Nosisi and set them alight. Nobanzi's house was also set alight. All three women later died in hospital as a result of their burns.

Following upon these events the ten appellants (to

whom / ...

whom I shall individually refer as accused no's 1, 3, 4, 5, 9, 10, 11, 12, 13 and 14 respectively) together with six others (to whom I shall refer as accused no's 2, 6, 7, 8, 15 and 16 respectively) appeared in the King William's Town Circuit Local Division before BECKLEY J and assessors on three counts of murder and one count of arson. Despite their pleas of not guilty all the appellants were found guilty on all four counts. Accused no's 2, 6, 7, 8, 15 and 16 were found not guilty on all counts.

In respect of the convictions of accused no's 4, 5 and 9 on the three counts of murder, the Court a quo found that there were no extenuating circumstances. Consequently each of these accused was sentenced to death on each of the three counts of murder. In respect of the convictions of

accused / ...

accused no's 1, 3, 10, 11, 12, 13 and 14 on the three counts of murder the trial Court found that there were extenuating circumstances, and accused no's 1, 3, and 13 were each sentenced to 10 years' imprisonment on each count; accused no's 12 and 14 were each sentenced to 12 years' imprisonment on each count and accused no's 10 and 11 were each sentenced to 14 years' imprisonment on each count. In the case of all these accused the sentences of imprisonment imposed on the three counts of murder were ordered to run concurrently. On the count of arson the appellants were each sentenced to 18 months' imprisonment which, in the case of accused no's 1, 3, 10, 11, 12, 13 and 14, was ordered to run concurrently with the sentences on the murder charges.

With the leave of the Court a quo all the appellants

appeal/...

appeal to this Court against their convictions on all the charges and accused no's 4, 5 and 9 also appeal against the findings that there were no extenuating circumstances and the sentences of death which were in consequence imposed upon them.

At the trial five eye-witnesses testified on behalf of the state: Nobelungu Yaze and Linda Yaze, who were in Nobanzi's house at the time of the attack on the house, and Mandisa Stungu, Ntombizanele Kawa and Nomakuthweni Jacob, who were members of the mob and who were warned by the trial Judge as accomplices. For convenience I shall refer to the first-mentioned two witnesses as well as to the three deceased by their Christian names and to the last-mentioned three witnesses by their surnames. The appellants all

testified / ...

testified in their own defence and they all denied that they were present at the scene or at a meeting which, according to Stungu and Kawa, was held just before the attack on Nobanzi's house. According to Stungu and Kawa it was said at the meeting that Nobanzi and her two daughters had to be burnt since Nobanzi was a witch.

The trial Court accepted the evidence of Stungu. She was found to be a more reliable witness than either Kawa or Jacob. The trial Court nevertheless accepted portions of the evidence of the last-mentioned two witnesses. The trial Court furthermore found that there were certain discrepancies in the evidence of the other two eye-witnesses, Nobelungu and Linda, but, because they supported each other in regard to the general outline of the events, certain portions

of their evidence could be accepted as reliable. The trial Court rejected the evidence of the appellants, who all said that they were at home at the relevant time. They were all found to be unimpressive and evasive witnesses.

It is convenient to set out first the evidence of Stungu, Kawa and Jacob. All three these witnesses testified that on the night in question they were fetched from their respective homes after they had already gone to bed and that they were forced to accompany the mob by those who fetched them. According to Stungu and Kawa they were first taken to the meeting and from there to Nobanzi's house, whereas Jacob's evidence was that she went with the crowd directly from her house to Nobanzi's house. (All three witnesses were subsequently / ...

subsequently detained and were still in detention at the time they gave evidence at the trial.)

Stungu, an 18-year old girl, testified that she was fetched from her home just after eight o' clock that evening by three men, Andile Mlatu, Yekanje Kali and Teni Kawa and taken to the meeting which was held near the local shop. About 100 people attended the meeting, which lasted for two and a half hours. It was said at the meeting that Nobanzi must be burnt as she was a witch and that she had killed one of the comrades. The crowd then proceeded to Nobanzi's home. One person among the crowd carried a container with petrol.

Stungu identified the people she saw at the meeting as well as the man who carried the petrol by mentioning their

names/...

names. Thus she mentioned the names of accused no's 1, 4, 5, 9 and 10 as people she saw at the meeting; the names of accused no's 4 and 5 as those who said that Nobanzi must be burnt and the name of accused no 10 (Myuyu) as the man who carried the petrol. When the prosecutor, however, asked her to point Myuyu out in Court she was not certain whether he was accused no 10 or accused no 15 and said that she was uncertain of Myuyu's face. She was then asked to point out the accused whom she saw at the meeting but whose names she did not know. Amongst those she pointed out was accused no 10. Shortly thereafter she re-affirmed that she was uncertain whether the person whose name was Myuyu, and whom she had seen at the meeting and also carrying petrol at Nobanzi's house, was accused no 10 or accused no 15. From subsequent evidence it became clear that in appearance accused no 15 did not resemble accused no 10 at all. In cross-examination she became certain that accused no 10 was the man she saw carrying the petrol but, to compound the uncertainty, later on said that it was not accused no 10, but indeed accused no 9 whom she saw carrying the petrol.

Stungu testified that when the mob arrived at

Nobanzi's/....

Nobanzi's house accused no 9 knocked on the front door, which was then opened. Accused no's 5, 9 and 10 were amongst those who entered the house. Teni Kawa and Yekanja Kali, carrying whips, also entered. Stungu was standing in front of the crowd about 10 paces away from the front door and had a clear view of the house from where she was standing.

Ntombizanele Kawa was standing next to her. Stungu said that initially only Nobanzi and Nosisi were present in the house. Some members of the mob then went to fetch Nonceba and brought her to the house. Nobelungu, Linda and the smaller children were then forced out of the house; they came out crying and ran away, and at the same time Stungu saw accused no 10 pouring petrol over Nobanzi, Nosisi and .

Nonceba /

Nonceba and setting them and the interior of the house

alight. Stungu then ran home. It was then between

midnight and one o' clock. Stungu said that she was

arrested three days later and released after two days.

She was re-detained on 12 March 1986.

Stungu was cross-examined at length about a letter and a note, both written by her while in detention. The letter, which was handed in as an exhibit at the trial, is headed "Viva Comrades" and Stungu said that it was written in reply to a letter which she received from one of the accused. She intended it to be addressed to all the accused. In the letter Stungu wrote that although she knew nothing about the case she had been told by Oates, the investigating

officer /

officer, that if she wanted to be released she would have

to give evidence for the state implicating the accused.

When she refused, the police offered her money and also

assaulted her. She assured the accused in the letter that

she would not testify against them. Stungu used the word

"Comrades" three times in the letter to refer to the accused,

yet in her evidence at the trial she said that she did not

know what it meant and only used it because it appeared in

a letter she had received from one Raster, a fellow inmate

at the prison where she was detained. She said that what

she wrote in the letter was false and that she had written

it merely to keep the conversation going. She gave a

similar explanation for the note, which she wrote on a piece

of toilet paper to Raster. In the note she wrote that her body was painful as a result of being assaulted by the police.

Kawa, who is a 16-year old girl, testified that on the evening in question she was already in bed at her house in Kubusi when accused no's 10 and 11 arrived to call her to a meeting. In her evidence-in-chief she said that upon leaving her house she saw accused no's 4 and 5 outside but in cross-examination she said that she saw no one outside her house and that she first saw accused no's 4 and 5 at the meeting.

Kawa said that she recognised all the accused at the meeting. The speakers at the meeting were accused no's 4, 5, 7, 9 and 10 and they all said that Nobanzi must be

burnt /

burnt because she had killed one Msokoli. From there the crowd proceeded to Nobanzi's house and the witness, who was at the back of the crowd, went with them because accused no 1 and Teni Kawa said that no one was to leave the group.

At Nobanzi's house Kawa remained standing at a point behind the house from where, the trial Court found, it was impossible for her to have seen what happened at the front door of the house. The trial Court, accordingly, rejected her evidence of what happened there, but still accepted her evidence of the events up to the arrival of the crowd at Nobanzi's house. Her evidence of the events at Nobanzi's house was that accused no 9 knocked on the front door, and when the door was opened a number of people, including /

including accused no's 4, 8, 9, 10 and 12 entered the house.

Accused no 9 was carrying a container with petrol. Shortly

afterwards Nobanzi was brought out of the house, held by

accused no's 4 and 12. The small children of the house

also came out and ran away. She did not see Nosisi,

Nonceba, Nobelungu or Linda. Once Nobanzi was outside,

accused no 9 poured petrol over her and accused no 12 set her

alight. Kawa then ran away. She was arrested a few days

later, released and then re-arrested on 12 March 1986.

Jacob, a 15-year old girl, testified that she was

taken directly from her own house to Nobanzi's house by

Teni Kawa and accused no's 3, 9 and 14. Outside her house

she saw nine other people, including accused no's 10, 11, 12

and /

and 13. On their way to Nobanzi's house they were joined by another group of people. At Nobanzi's house she stood in front of the house next to Stungu and Ntombizanele Kawa. She saw Teni Kawa and accused No's 9, 10 and 11 knocking on the door. The door was opened and Nobanzi was dragged outside by Teni Kawa and accused No's 10 and 11. Accused no 10 poured petrol over her from a container and accused no 11 struck a match and set her alight. Accused No's 10 and 11 thereupon entered the house and when they came out it was on fire. The witness ran home. At no stage did she see any of Nobanzi's children or grandchildren. She only heard them crying.

At a late stage in her evidence-in-chief, Jacob

said /

said that accused no 4 was in the group which fetched her.

Counsel for the state thereupon informed the trial Court that she had not mentioned accused no 4 in her statement to the police. The trial Court did not accept Jacob's evidence on this aspect.

I come now to the evidence of Nobelungu and Linda who were asleep inside Nobanzi's house when the mob arrived there. According to Nobelungu, who is a 14-year old girl, she was awakened at about one o'clock in the morning when Nobanzi screamed. She saw the front door open and many people at the door. Linda was busy lighting the lamp. She heard people outside calling Nobanzi a witch and that she should come outside. Three boys, wearing balaclavas

which /

which covered their faces, entered the house and started assaulting Nobanzi with whips. She heard a bottle being shaken outside and someone, whom she identified as accused no 9, said that the way to get Nobanzi out of the house was to pour petrol over her. Petrol was then poured over the bed and the bed set alight. At some stage Nobelungu saw accused no 9 at the door. After the bed was set alight Nosisi, followed by the four children, ran away. Outside the house petrol was thrown over Nosisi, her night clothes caught fire and she ran away in the direction of an outside toilet.

Nobelungu testified that she and Linda ran to Nonceba's house to tell her what had happened. As they came to the

house /

house they met accused no 15. There were many people at Nonceba's house. Accused no 15 hit her with a whip and she heard him say that he and the others still had to go and fetch Nonceba. She and Linda thereupon ran to the river and much later they went to Nonceba's house. Shortly thereafter Nobanzi, Nosisi and Nonceba arrived. All three of them were badly burnt. Linda went to call an ambulance and the three women were later taken to hospital.

Nobelungu's evidence thus far was accepted as reliable by the trial Court, despite the fact that two further portions of her evidence, directly implicating accused no's 2, 10 and 11, were rejected. The first portion related to a conversation in the house of the mother of accused no 11 which Nobelungu said

she / ...

she overheard that afternoon from outside the adjoining house of Nonceba. She said that she heard accused no's 10 and 11 telling the latter's mother that Nobanzi and her daughters were to be burnt. She testified that she told Nonceba what she had overheard and that Nonceba and her husband then went to tell Nobanzi. Linda was present when they told Nobanzi about the conversation. Linda, however, testified that she knew nothing about the alleged conversation and added that at the time Nonceba's husband was away in Johannesburg.

The second portion of Nobelungu's evidence which was not accepted by the trial Court also related to an incident which took place that afternoon. She testified that /

that accused no 2 came to Nobanzi's house and asked her (Nobelungu) to attend a meeting. She left with Linda to go to the meeting but on their way they met a woman called Nobini who said that girls were not allowed at the meeting, so they turned back and went home. Linda's evidence on this aspect, which was also rejected by the trial Court, was that shortly after five o' clock that afternoon accused no 2 approached her at Nobanzi's house and told her that she was being called to a meeting. Nobelungu did not accompany her. On the way she met Nobini and returned home when the latter said that girls were not allowed at the meeting. In his judgment, rejecting the evidence of Nobelungu and Linda on this aspect, the trial judge said that it was

unlikely/....

unlikely that the two girls would have been asked to attend a meeting where the burning of their mothers and grandmother was to be discussed.

Linda, a 17-year old girl, testified that she was woken on the night in question by Nobanzi who told her to open the door as someone had knocked. She opened the top half of the door and saw a crowd of more than 100 people standing outside. Accused no 1 was standing in front of the door. She was shocked and closed the door but it was kicked down. About eight persons, including accused no 1, entered the house and started assaulting Nobanzi and Nosisi with whips. The intruders were not wearing balaclavas as Nobelungu had said. They later

left /...

left the house and immediately afterwards a fire started near the door. She then ran out and in doing so, sustained burns to her left shoulder and hand. She identified accused no's 2, 10 and 11 as members of the mob whom she saw standing in front of the house. She saw Nosisi near the outside toilet. She was aflame. She ran with Nobelungu to Nonceba's house and on the way they came across another group armed with whips. Accused no 15, who was among the group, assaulted Nobelungu with a whip. They ran to the river where they waited for a while before going to Nonceba's house. Linda's evidence of the events of that night was accepted by the trial Court.

The Court a quo found that all the appellants

attended/....

attended the meeting described by Stungu and Kawa. The Court further found that a unanimous decision was taken at the meeting to burn Nobanzi, Nosisi and Nonceba, and that all the appellants then accompanied the crowd to Nobanzi's house and were present there in the furtherance of this common purpose. (In the case of accused no's 2, 6, 7, 8, 15 and 16 the trial Court held that, although they attended the meeting, there was no evidence that they were present at Nobanzi's house and that they should accordingly be found not guilty.)

In view of these findings the Court did not determine the extent of any of the appellants' participation in the meeting or in the events at Nobanzi's house for, as BECKLEY J said in the/....

the judgment:-

"(we) find on the authority of R v Dladla, 1962(1) SA 307 (A), and the other authorities cited and referred to in BURCHELL & HUNT 'South African Criminal Law and Procedure' Volume 1, at 434 and following, that the mere presence at the meeting and accompanying the crowd to Momhlambo's house, well knowing what the purpose of the journey to her house was, and what had been said at the meeting, is sufficient to establish participation in the common purpose."

In my view there are obvious flaws in the Court's findings. Firstly, there is no evidence of a decision actually being taken at the meeting. It is true that Stungu testified that accused no's 4 and 5 spoke at the meeting and said that Nobanzi and her daughters must be burnt, and that Kawa testified that accused no's 4, 5, 7, 9 and 10 addressed

the / ...

the meeting to similar effect. But even if this evidence were to be accepted (its reliability will be considered later), there is nothing to show that any decision was taken at the meeting. Admittedly, on Stungu and Kawa's evidence, no one present at the meeting voiced an objection to what accused no's 4, 5, 7, 9 and 10 allegedly said but, as will presently appear, this does not justify an inference that their declamations met with general approval. Secondly, assuming that every member of the crowd knew what was about to happen when the meeting broke up and the journey to Nobanzi's house commenced, the inference is again not justified that every one of them was in agreement with or approved of the crimes which were about to be committed, or that every one who set out on the journey thereby manifested his association with its criminal purpose. This is illustrated by the fact that the three state witnesses Stungu, Kawa and

Jacob, were forced against their will to attend the meeting (in the case of the former two) and to accompany the crowd to the scene of the murders (in the case of all three). According to their evidence they did not agree with what was being said at the meeting and did not associate themselves with the crowd, yet found themselves among the crowd at the scene of the crimes. There can be no suggestion that they were liable for what happened at Nobanzi's house. The requirements for holding an accused liable for the acts of a crowd on the basis of a common purpose shared with the crowd, were fully dealt with in two recent decisions of this Court. See S v Safatsa and Others 1988(1) SA 868(A) at 893-901 and S v Mgedezi and Others 1989(1) SA 687(A).

In /.....

In Mgedezi's case BOTHJA JA said the following

at pp 705 I - 706 B :-

"In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in S v Safatsa and Others 1988(1) SA 868(A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have

intended / .)...

intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

All these requirements had to be proved beyond a reasonable doubt in the case of each accused. Assuming the sufficiency and reliability of the evidence relating to the first two (a question which will be considered later) it is, for the reasons previously stated, abundantly clear that the third and fourth requirements could, in the circumstances of the present case, not be established by proof merely of the appellants' presence at the meeting and later at Nobanzi's house, even though they might have gone to the house with the rest of the crowd knowing full well of the crimes which were about to be perpetrated there. It is only by positive

proof/....

proof of the acts of each individual appellant, either at the meeting or at the house, that the third and fourth requirements could be established. It was therefore necessary for the trial Court to examine the evidence against each individual accused. This the trial Court did not do and it is accordingly necessary for this Court to consider the reliability of the evidence against each individual appellant in order to determine his liability for the crimes.

The trial Court rejected portions of the evidence

of/....

of four of the five eye-witnesses who testified for the state, not merely because it was considered unsafe to rely thereon, but because the evidence was not believed. So, for example, the evidence of Nobelungu and Linda that accused no 2 called them to a meeting that afternoon, was not believed. Their irreconcilable versions of what was supposed to have happened, show, in my view, that they were not being truthful. Nobelungu's evidence concerning the conversation she overheard that afternoon was similarly not believed. The trial Court disbelieved Kawa's evidence concerning the events at Nobanzi's front door because the Court held that from where she stood behind the house she could not see the front of the house. The trial Court seems to have

lost/...

lost sight of the fact that, if Kawa stood behind the house, the evidence of Stungu and Jacob that Kawa stood next to them in front of the house and a few paces away from the front door, could not be correct. The trial Court also disbelieved Jacob's evidence that accused no 4 was in the group which came to fetch her at her home.

The evidence of Nobelungu and Linda was accepted, despite the fact that they were partially disbelieved, because the trial Court found that they supported each other in regard to the general outline of the events. I fail to see how their agreement on the general scheme of the events could be a safeguard for their reliability in implicating individual accused. Moreover, there is an irreconcilable conflict/....

conflict between their version and that of Stungu regarding the sequence of events. According to the latter, Nonceba was brought to Nobanzi's house by members of the mob and the three woman were then set alight together. According to the version of Nobelungu and Linda, however, Nosisi was already aflame when they ran away at a stage before Nonceba had been brought to Nobanzi's house. It is not possible to say which of these versions is correct, so that a serious doubt is necessarily raised about the reliability of all three these witnesses.

There are other weaknesses in the evidence of Nobelungu, Linda, Jacob and Kawa, apart from the fact that portions of their evidence were rejected by the trial Court. I mention only a few.

The /

The trial Court based the conviction of accused no 1 on Linda's evidence that she saw him standing outside the front door of Nobanzi's house and that he entered the house with about seven others who assaulted Nobanzi and Nosisi with whips. She was the only one of the State witnesses who saw accused no 1 at the scene. Her evidence that the faces of this group were uncovered, conflicted with that of Nobelungu who said that the faces of the group who came into the house and assaulted Nobanzi with whips were covered with balaclavas. The trial Court appears to have avoided this conflict by relying on Linda's evidence that she saw accused no 1 standing outside the front door. Linda, however, also identified accused no 2 as one of the

men/...

men she saw outside Nobanzi's house. She saw accused no's 1 and 2 at the same time. Accused no 2 was acquitted, no doubt because the trial Court did not regard Linda's identification of him as sufficiently reliable. For the same reason her identification of accused no 1 must also be suspect, particularly if regard is had to the circumstances under which it was made and the absence of any corroboration for her identification.

Accused no's 3, 12, 13 and 14 were found guilty on Jacob's evidence. Apart from Kawa's evidence that she saw accused no 12, which was rejected by the trial Court, there was no direct evidence that any of these accused were at Nobanzi's house. Jacob never said that she saw them there.

Her /

Her evidence, it will be recalled, was that Teni Kawa and accused no's 3, 9 and 14 fetched her from her home and that she saw accused no's 12 and 13 outside her house. She said that they all proceeded to Nobanzi's house, being joined on the way by another group of people. Whether accused no's 3, 12, 13 and 14 in fact arrived at Nobanzi's house is not clear.

Accused no 4 was not seen by any one of the state witnesses, except Kawa, at Nobanzi's house.

This brings me to Stungu's evidence that she saw accused no's 5, 9 and 10 at the scene of the crime. It will be recalled that initially she knew the name but not the face of accused no 10, and was, therefore, unable to point him out

in/.....

in Court, but that she nevertheless pointed out accused no 10 as one of the persons she saw at the meeting. This, in my view, is destructive of her reliability as far as the identification of accused no 10 is concerned. She first said that accused no 10 was the man who carried the petrol but later changed her evidence and said that it was accused no 9 and not accused no 10 who had the petrol. Her identification of accused no 9 is thus also doubtful. When this evidence is considered against the background of the letter in which she stated that she knew nothing about the case and her obviously untruthful evidence regarding her use of the word "comrades" in the letter, it is quite clear that the trial Court erred in regarding her as a reliable witness.

For these reasons I am of the view that the State evidence identifying the individual appellants as members of

the /

the mob present at the scene where the crimes were being committed, was so thoroughly unreliable that it should have been rejected in toto by the trial Court. For the same reason Stungu and Kawa's evidence relating to the conduct of accused no's 4, 5, 7, 9 and 10 at the meeting should not have been accepted. It will be recalled that, according to both these witnesses, accused no's 4 and 5 (and, according to Kawa accused no's 7, 9 and 10 also) told the meeting that Nobanzi and her daughters had to be killed. In view of the unreliability of the only two state witnesses to the events at the meeting it is not necessary to determine the liability of the accused in question arising from what they allegedly said.

In /

In my view the trial Court further erred in its approach to the evidence of the appellants. The trial Judge in his judgment, after having summarised first the evidence given by each of the State witnesses and then the evidence given by and on behalf of each of the accused, commenced his reasoning by saying that a prior meeting must necessarily have been held where the events were planned, despite the fact that the accused denied all knowledge of it. The learned Judge then dealt with the evidence of the accused as follows :-

"We also find that the evidence of all the accused regarding their alibis must be rejected. Apart from the fact that all the accused failed to impress the

Court /

Court as honest witnesses, and apart from the fact that we found them all to be extremely evasive. Except in the case of accused no 2, no alibi was disclosed before the respective accused was called as a witness and cross-examined. Despite the fact that there were many opportunities to do so, namely firstly for the first incident when they were arrested, thereafter when they were asked to plead in the magistrate's court; and also when the bail application was brought in the Magistrate's Court in Stutterheim.

It is also significant to note that nothing was put in cross-examination to Sergeant Oates, the Investigating Officer, regarding the disclosure of their alibis, or some indication as to where they had spent the night of 23 December. We find it extremely unlikely that with the exception of accused no 2, all the accused would have spent the entire night at home and that although there is no onus on any of the accused to prove their alibi, that not a single member of any family of any of the accused was called to corroborate his version in this court."

Although the learned Judge went on to express brief criticism in respect of the individual accused, it is quite clear that the reasoning in the passage quoted above formed

the basis for the trial Court's rejection of the evidence of each individual accused. To adopt such a global view of the totality of the defence cases in order to reject the evidence of an individual accused, is not permissible and constitutes a serious misdirection. In Mgedezi's case BOTHA JA, dealing with a similar approach adopted by the trial Court in that case, said the following at p 703 B-F:-

"A view of the totality of the defence cases cannot legitimately be used as a brush with which to tar each accused individually, nor as a means of rejecting the defence versions en masse. The global view taken by the trial Court of the defence cases led it to draw two inferences: (a) that each accused was present at the scene and participated in the execution of the threat against the mpimpi's; and (b) that the defences of all of them were false beyond reasonable doubt. With respect, as a matter of simple logic I consider both inferences to be wholly insupportable. First as to (b):

an explanation given in evidence by an individual accused for his unawareness of the relevant events in the compound whilst these were taking place cannot logically be rejected on the grounds that all the other accused professed similar unawareness for different reasons and that it is unlikely that all of them could in fact have been so unaware; The trial Court erred by precluding itself from performing its duty to consider the evidence of each accused separately and individually, to weigh up that evidence against the particular evidence of the individual State witness or witnesses who implicated that accused, and upon that basis then to assess the question whether that accused's evidence could reasonably possibly be true."

Mr Redpath, who appeared on behalf of the State, finally submitted that the conviction of accused no 1 should be upheld on the basis of a letter which he had caused to be written to the trial Court and in which he admitted his guilt. The letter was written after accused no 1 had been convicted and during the enquiry into the question of extenuating circumstances/....

circumstances. Accused no 1 did not give evidence in extenuation and the letter was handed in by counsel who appeared for him at the trial. In the letter accused no 1 said that he had assisted a certain business rival of Nobanzi in perpetrating the crimes and that none of the other accused had anything to do with it. Since accused no 1 did not give evidence in extenuation the letter could not be tested, and I doubt whether any weight could be attached to it. It may well be that accused no 1 took all the blame upon himself in order to exculpate the other accused. In my view it would be dangerous to base a conviction on the letter.

For these reasons I am of the view that all the appellants were wrongly convicted on all four counts. The

appeals / ...

appeals of all the appellants against the convictions and sentences on three counts of murder and one count of arson are accordingly allowed. The convictions and sentences of all the appellants are set aside.

W. VIVIER JA.

BOTHA JA)

HEFER JA)

Concur.