

CG

CASE NUMBER: 412/88

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PHINE MICHAEL MABASO

Appellant no 1

MVAYISA SIPHAMANDLA SITHOLE

Appellant no 2

BHEKISITHA NZUZA

Appellant no 3

MFILUSWA BHACILE ZUMA

Appellant no 4

and

THE STATE

Respondent

CORAM: JOUBERT, VAN HEERDEN, VIVIER, STEYN, JJA.
et NICHOLAS, AJA.

HEARD: 5 MAY 1989

DELIVERED: 24 MAY 1989

J U D G M E N T

STEYN, JA.

The appellants and John Benghu were convicted of murder by Law, J. and assessors in the Zululand Circuit Local Division. Appellants were respectively accused no's 1, 2, 3 and 5. Benghu was accused no 4. In Benghu's case extenuating circumstances were found to have existed and he was sentenced to 7 years' imprisonment. None were found in respect of appellants and they were all sentenced to death. Law, J. gave appellants 1, 2, and 4 leave to appeal against their convictions and all four appellants leave to appeal against the aforementioned finding and death sentences. The appellants were also convicted of having been in unlawful possession of a 7,65 mm Llama pistol and .38 Special Astra revolver and sentenced to imprisonment for 18 months, but there is no appeal against these convictions and sentences.

The appeals of appellants 1 and 2 against their convictions were abandoned by Mr Suhr who appeared on

their behalf. He was correct in doing so. Those appeals had no merit.

Initially all the accused pleaded not guilty on both counts. First and second appellants pleaded duress. At the close of the State's case third appellant changed his plea on the murder count to one of guilty. He did not testify on the merits. Neither did the fourth accused, Bhengu. The others did so. First appellant admitted that he was present when the deceased was shot and that he was then armed with a pistol but denied shooting the deceased. Second appellant admitted shooting the deceased with a revolver but said that he was coerced by 1st, 3rd and 4th appellants to do so. Appellants 1 and 2 denied that they had been paid to kill the deceased. The Court rejected their allegations of duress and found, *inter alia* on the evidence of passengers in the bus, that first appellant had also fired at the deceased. The other evidence accepted by the trial Court proved that at least

three shots had been fired in the bus, one with a 7,65 pistol and two with a .38 revolver. The deceased had three wounds, the fatal one being a head wound. The Court further found that first and second appellants had been paid to kill the deceased and that they were in fact hired assassins.

Fourth appellant denied having had anything to do with the murder and maintained that he was neither present at nor in any way involved in its preparation or commission. In effect his defence was akin to an alibi. Except in certain respects pertaining to his conviction, which will be dealt with later, the facts relevant on the merits to the commission of the murder, as found by the trial Court, are consequently no longer in issue in this appeal. They are briefly as follows.

The deceased was Simon Mthembu, a bus driver in the service of the Washesha Bus Company at the time of his death. He was shot and killed in the bus he was

driving by appellants 1 and 2 on the 8th October 1987 near the bus stop in the Mangete Reserve north of the Tugela river in Natal. They had been recruited, *inter alios* by third appellant, to murder the deceased for gain. At the time of the murder appellants 1 and 2 were "taxi touts" employed at the taxi rank near the Durban railway station. Appellants 3 and 4 were owners of taxis operating from that rank. For an appreciable period before June 1987 taxis belonging to third appellant had been operating on the route between Durban and Eshowe. The Washesha Bus Company was formed during June 1987 and commenced operating on the same route during July at a fare of R6,00 per passenger. The taxi fare was R10,00 per person. Third appellant's taxis lost custom. This distressed him. A few days after the bus service commenced on that route a bus conductor in service of the company, Velaphi Mhlongo, was confronted by third appellant who was accompanied by a group of people.

Third appellant addressed Mholongo, objected to the bus service and told him to inform his employer that the employees of the bus company would be killed if the buses continued operating on that route. Whilst speaking to Mholongo third appellant grabbed his jacket collar, shook him and repeatedly tapped him lightly on the side of his head with an object which Mholongo took to be a firearm. As a result of this incident Mholongo refused to work again on the Eshowe route but the bus company persisted with its service. The deceased was a bus driver on that route. On the 26th August 1987 he was in his bus which was parked at the Berea Road railway station in Durban. He was approached by a group of about 12 people, all armed with sticks. Third appellant was their leader and spokesman. They forced the conductor and passengers to leave the bus. Fourth appellant was also a member of the group. They attempted to assault the deceased but he successfully repelled their onslaught by standing in the

narrow entrance of the bus and parrying their blows with the lifting-rod of a jack. During the fracas third appellant swore at the deceased and said to him that although he thought he was a formidable fighter they would be the eventual winners. One member of the group wore a balaclava cap which covered his face. During the course of the assault the deceased sustained an injury to his right eyebrow and shin. Both injuries bled slightly. The bus was also damaged; one of the door windows was broken.

On the day of the murder third appellant took first and second appellants to the Mangete bus stop area in his red "Skyline" motor car and indicated to them that the deceased had to be shot there. He then returned with them to Durban and took them to the terminus from where the bus driven by the deceased was waiting to depart for Eshowe. (The Court found on evidence admissible only against accused no 4, Bhengu, including a confession by

him, that at third appellant's request he had recruited appellants 1 and 2 at Estcourt for the purpose of killing the deceased and had taken them to third Appellant at the Durban railway station.) First and second appellants boarded the bus and travelled in it to the pre-determined killing area, followed by third appellant in his aforementioned motor car. On arrival at the Mangete Reserve they requested the deceased to stop so that they could alight. He did so. Whilst leaving the bus both of them fired at the deceased and then made off and escaped in third appellant's car which had stopped some distance behind the bus. Third appellant returned with them to Durban. The firearms were returned to him and first and second appellants paid. (As already stated, the Court rejected their evidence that they had been compelled by third and fourth appellants under threats of death, to kill the deceased. First appellant's evidence that he had merely to see to it that second appellant killed the

deceased and to shoot him should he refuse to do so and that he could not recall having also fired a shot, was likewise rejected. So also their denials that they were paid for the killing.)

On October 10, 1987, police came to the taxi rank in Durban and enquired from one of the taxi owners, Mbongeni Ntuli, after the driver of a red "Skyline" motor car, giving a description of the person they were looking for. Before 8 October third appellant had told Ntuli of the contemplated murder and of the reason therefor. On the 9th October he told Ntuli what had happened on the previous day. Ntuli realised that it was third appellant the police were looking for and warned him thereof on the same day. That same afternoon third appellant handed Ntuli four firearms including the two used in the killing and told Ntuli he was leaving for Eshowe. Ntuli hid the firearms together with two of his own in a cushion cover at his home where they were found

11 pm on the 16th October 1987 after Ntuli's dwelling had been pointed out to them by third appellant who had been arrested earlier that day.

I turn now to the evidence implicating fourth appellant. He admitted having been a member of the armed group which confronted the deceased on August 26, 1987, as aforesaid, and that he then also had a stick which, so he said, he merely carried because of the Zulu custom to do so. He said that he and the other members of the group had been hectored by third appellant into accompanying him to the deceased, that a "stupid mob spirit" moved them to do so and that he was unaware of the purpose of or reason for the confrontation with the deceased. He did not hear what third appellant said to the deceased but admitted gaining the impression that third appellant tried to intimidate him.

Ntuli was a state witness who was warned as an accomplice by Law, J. in terms of sec 204(1) of the

Criminal Procedure Act, no 51 of 1977, at the request of the State. He denied having in way been party to the murder but was on his own admission at least an accessory after the fact to the murder. His evidence was correctly summed up as follows by Law, J. in the judgment on the merits:

"His evidence was, in summary, as follows. By occupation he is a taxi-operator working from a rank at the Durban Railway Station. He was on friendly terms with accused no's 3 and 5 who both operated taxis from the same rank, plying the route between Durban and Eshowe. After the Washesha Bus Company started operating on the same route both accused no's 3 and 5 complained to him that as a result of the introduction of the bus service they had lost many passengers. He too operated one of his four taxis on the same route and also experienced a loss of business. He was not too perturbed about this because he was able to transfer his taxi to one of his other routes. The reason for the decline in business was that the bus fare was R6,00 whereas the fare charged by the taxis was R10,00. Shortly after the inception of the bus service accused no's 3 and 5 informed him that they had spoken to the driver of the Washesha bus and told him that the bus should not take on passengers in Durban for transportation to Eshowe because that would kill the taxi

drivers' business. Accused no's 3 and 5 complained that the bus driver had not heeded their warning.

It appeared from Ntuli's evidence that he was charged with the task of supervising the rank from which his taxis and those of accused no's 3 and 5 operated. Early in September 1987 accused no's 3 and 5 again complained to him about the effect of the bus service on their businesses. Accused no 3 told him that despite having assaulted the bus driver with a stick he still would not listen to them. Later accused no 3 informed him that he and accused no 5 had decided to hire people to kill the bus driver. Accused no 5 confirmed what accused no 3 had said and assured him that their intentions were serious. Accused no 3 informed him that they had already hired people to do the job, they would supply the people with firearms and the driver would be killed the following day.

On the following day Ntuli travelled to Ladysmith to attend a meeting of taxi operators, returning to Durban later the same day. He did not see accused no's 3 and 5 again until about 9.00 am on the day after his return from Ladysmith. Accused no 3 informed him that everything had gone well and accused no 5 said that they would be able to work well now, there would be a lot of work for them. He inquired whether they had really killed the driver and no 5 confirmed that they had. They all moved away from the spot where they had been standing to a more private place. Accused no 3 then

related that he and accused no 5 had taken the people who were going to do the deed to the bus stop where the hirelings had boarded the bus. They then followed the bus in accused no 3's red Skyline motor-car. After the bus crossed the Tugela it stopped. When the hirelings were alighting they heard reports of the guns. They then ran to the motor-car, got in and accused no 3 drove back to Durban. Accused no 5 told him that the people they had hired were from Estcourt and that they were each to be paid R600,00. ...

Under cross-examination by counsel for accused no 5 Ntuli said that accused no's 3 and 5 had told him of the plan to kill the deceased because they were good friends and wanted his advice. Despite his warning that they would be arrested they did not heed his advice and persisted with their intentions. He said that they came and reported that the deceased had been killed because he was their friend and they trusted him. He explained that he had agreed to keep the firearms on behalf of accused no 3 because they were friends and he wanted to help accused no 3. It was put to Ntuli that he was falsely implicating accused no 5 because in September 1987 he had accused no 5 of having a relationship with his wife. He brushed this suggestion aside as ridiculous and challenged accused no 5 to tell him what his wife's name is."

Appellants 1 and 2 testified as follows. They

were approached at the taxi rank in Durban on the morning of 8 October by third appellant who was driving his red Skyline motor car. Fourth appellant was with him in the car. Third appellant told them to get into the car. They did so. He then asked them to shoot the driver of the bus plying between Durban and Eshowe and offered them R1 200,00 to do so. They were to share the money equally between them. They were unwilling to do so. Fourth appellant, who was armed with a "big gun" (rifle), then threatened to kill them should they refuse. They were cowed into submission by this threat and agreed to do the killing. Fourth appellant then instructed third appellant to drive off and show them the bus stop where the bus driver was to be killed. The four of them drove to the Mangote reserve where they were shown the bus stop. They then returned to Durban where the bus in question was pointed out to them. On fourth appellant's instructions first appellant was given the pistol and

second appellant the revolver by third appellant. Fourth appellant then told appellant no 1 to shoot the driver and appellant no 2 to shoot and kill first appellant should he refuse to do so and threatened to kill first appellant should he refuse to obey those instructions. They were then given the bus fare by third appellant and boarded the bus. After the deceased had been shot they fled the scene in the red Skyline driven by third appellant. Fourth appellant was also in the car. Back at Durban they waited at the station while third and fourth appellants went off to hide the firearm. They were then taken back to Estcourt in the Skyline. On the way they were threatened by appellants 3 and 4 that they would be killed should they divulge to anybody what had happened. Because they feared being killed they told no one.

In testifying, fourth appellant denied that the bus service had caused him to lose any custom on his

taxis and maintained that he was unaware of any dissatisfaction or resentment amongst the taxi operators caused by the introduction of that service. He also maintained that first and second appellants falsely implicated him because he had refused to give them a free lift from Estcourt to Durban on October 5, 1987 and they had then threatened to take revenge, saying "we will get you one day. You will come back to Estcourt". When it was put to fourth appellant during cross-examination on behalf of third appellant that he (appellant no 4), had played the leading role in organising the murder of the deceased, he replied that third appellant was attempting to implicate him falsely due to an enmity between the two tribal factions to which they respectively belonged and also because of friction between them which was caused when he insisted, whilst third appellant was still operating pirate taxis, that he had priority above him in picking up passengers at the taxi rank. He admitted,

however, that third appellant's brother was one of his taxi drivers. He also admitted that he went to Johannesburg on October 12 and only returned on November 25 when he surrendered himself to the police after consulting his attorney. He alleged that he remained in Transvaal with relatives for "about two weeks" and that on his way back to Durban he was stranded "at a certain place" en route for longer than his Transvaal visit due to "motor car trouble". He could not, however, remember the name of that place. And he could not say what the name of Ntuli's wife was.

Ntuli made several statements to the police after his arrest but his main statement as a witness was only made after the case against him had been withdrawn. In his initial statement, exhibit M, which he made on October 17, he denied all knowledge of the murder and gave a false account of his possession of the aforementioned firearms. He also gave conflicting

accounts regarding the number of statements he had made.

The trial Court warned itself of the dangers inherent in accomplice evidence, approached Ntuli's version pertaining to appellants on that basis and accepted it. The Court dealt with him as follows:

"The major criticism which was levelled at Ntuli by counsel for accused no 5 was that he had given a totally false explanation for his possession of the firearms in his statement of the 17th October and had falsely denied any knowledge of or involvement in the murder of the deceased. This is a valid criticism and it indicates that Ntuli is prepared to lie when it suits him to do so. However, Ntuli had been arrested on the charge of murder and was in possession of firearms which he knew had been used in the murder. He was an accessory after the fact to murder as he was assisting accused no 3 to avoid detection. This is a more serious offence than unlawful possession of firearms. In the circumstances we find it understandable that his first reaction would be to make a statement dissociating himself from the actions of accused no's 3 and 5.

Ntuli's evidence concerning the number of statements he had made to the police and the stage at which he had involved accused no's 3 and 5 is confused and not very satisfactory, but he eventually conceded that it was not

until some days later that he involved no's 3 and 5 in an oral statement to Lieutenant Engelbrecht and not until the charges against him had been withdrawn that he had made a written statement implicating them. The version upon which he finally settled was materially corroborated by the evidence of Lieutenant Engelbrecht.

Lieutenant Engelbrecht testified that no inducement had been offered to Ntuli to make a statement implicating accused no's 3 and 5 and that the case against him had been withdrawn before he was asked and agreed to make a written statement. In the circumstances Ntuli had nothing to gain by implicating accused no's 3 and 5. We unreservedly accept the evidence of Lieutenant Engelbrecht in this regard.

While Ntuli's evidence concerning the statements was not completely satisfactory, his evidence concerning his dealings with accused no's 3 and 5 before and after the killing of the deceased was of a totally different calibre. This evidence was lucid and coherent and in agreement with other proved facts, such as the confrontation with the deceased on the 26th August and the earlier warning to the bus driver, the fact that people other than accused no's 3 and 5 had killed the deceased and the sequence of events which occurred on the day in question. Despite searching cross-examination by counsel for accused no 5 this aspect of Ntuli's evidence was not shaken in any material respect. It was not suggested, even by accused

no 5, that it was Ntuli who accompanied accused no 3 when the bus was followed. In this regard it is significant that accused no 5 agreed that Ntuli had in fact been in Ladysmith on the day that the deceased was killed. There is no apparent reason for Ntuli to have falsely implicated accused no's 3 and 5 in the commission of the offence. The reason advanced by accused no 5 is plainly disingenuous. It must also be borne in mind that Ntuli's statement implicating accused no's 3 and 5 was made before accused no 5 was arrested.

A factor which lends credence to Ntuli's evidence is that no other explanation was ever suggested as to how he could have obtained knowledge of the commission of the offence if accused no's 3 and 5 had not told him. There is no suggestion that he knew accused no's 1 and 2 before his arrest and it is clear from the evidence that he was not brought into sufficient contact with accused no's 1, 2 or 3 before he made his oral and written statements to Lieutenant Engelbrecht to enable him to concoct a story with them.

A safeguard which reduces a wrong conviction of accused no's 3 and 5 on the evidence of Ntuli is provided by the corroboration afforded by the evidence of accused no's 1 and 2. Proof that their evidence in this regard is not a recent fabrication is provided by the confession of accused no 1 and the statements made by both at the Section 119 Proceedings, all of which were made before the arrest of

accused no 5 and very shortly after their own arrest. On all the evidence of accused no 5 accused no's 1 and 2 did not know him except by sight and accordingly there was no reason for them to falsely implicate him and accused no 3. Here again accused no 5's explanation as to why they should implicate him is clearly disingenuous. Although accused no's 1 and 2 were clearly untruthful concerning the question of duress there is no basis on which to suspect that they had any personal motive to kill the deceased. They were clearly not alone in the execution of the killing of the deceased.

I can find no fault with this approach or evaluation.

The Court did not believe fourth appellant. In rejecting his evidence and convicting him Law, J. had this to say:

"Accused no 5 was a totally unsatisfactory and unreliable witness. He was patently ill at ease on the witness stand and answered questions put to him in cross-examination obliquely and evasively. Apart from his naive reasons for his implication by Ntuli and accused no's 1 and 2 he was untruthful in his denial that he was unconcerned about the introduction of the bus service. This is demonstrated by his counsel's suggestion to Ntuli that most of the taxi operators were unhappy about the bus service and by his presence in the group which confronted the deceased on the 26th August. His explanation for his presence on that occasion was totally

unconvincing.

The reasons advanced by accused no 5 for his departure and long absence from Durban shortly after the police started asking questions at the taxi rank are specious, and his evidence about spending more than two weeks at a place he could not identify after his car had allegedly broken down is patently untrue. These circumstances give rise to the strong suspicion that accused no 5's departure from Durban was occasioned by a guilty mind in relation to the death of the deceased.

In our view sufficient safeguards against wrong convictions of accused no's 3 and 5 based on the evidence of the accomplice Ntuli are provided by the corroborating evidence of accused no's 1 and 2, the failure of accused no 3 to give evidence coupled with his admissions and by accused no 5's mendacity as a witness. We are satisfied that the evidence of Ntuli concerning his dealings with accused no's 3 and 5 is the truth and we accept it, together with the evidence of accused no's 1 and 2, that accused no's 3 and 5 were in the motor-car which transported them to the scene of the murder on the morning of the 8th October and which transported them away from the scene after the deceased had been killed.

We are accordingly satisfied on a conspectus of the evidence as a whole, viewed against the background of the surrounding probabilities, that the State has proved beyond reasonable

doubt that accused no's 3 and 5 engaged the services of accused no's 1 and 2 to kill the deceased. Their intention was clearly that the deceased should be killed and there was no lawful justification therefor."

I am satisfied that the trial Court's evaluation and rejection of fourth appellant's evidence is sound and that he was rightly convicted. The appeal against his conviction must consequently fail.

I now turn to consider the question of extenuation.

The following persons gave evidence during the investigation regarding extenuating circumstances: Appellants 1, 2 and 3; a middle-aged female faith healer, Lefina Mzimela who testified on third appellant's behalf; a practising psychiatrist, Dr Berthold Lind of Pietermaritzburg, who also testified on behalf of third appellant; and two further psychiatrists, Dr Adriana Loen, who is in service of the State and a member of the staff of Weskoppies Mental Hospital, Pretoria; and Dr

J P Verster, who is in private practice. Both of them were called by the State.

Appellants 1 and 2 in essence merely repeated the evidence they had given on the merits and reproached the Court for its rejection thereof. There was nevertheless an investigation by the Court regarding any factors which might have had an extenuating effect in their cases. None were found. Law, J. said the following in announcing that finding:

"Although accused no's 1 and 2 did enter the witness stand after the verdict of the Court was pronounced they did not give evidence bearing on the question of extenuation. Such evidence as they gave was merely to reiterate their innocence and to question the Court's findings in regard to their guilt.

Mr Suhr, who appeared for both accused no's 1 and 2, advanced five circumstances which he submitted constituted extenuating circumstances. They were:

1. Both accused are relatively young, accused no 1 being twenty-four years old and accused no 2 twenty-five years old.
2. They are both products of a rural environment.

3. They are both ill-educated.
4. Both were employed in the humble status of taxi touts earning low wages.
5. Accused no's 3 and 5 are both considerably older and more affluent and influential than accused no's 1 and 2 and were in a position to bring influence to bear upon accused no's 1 and 2. Accused no's 3 and 5 were the masterminds and accused no's 1 and 2 were their mere catspaws.

We did not get the impression during the course of hearing their evidence that these two accused were immature. Although they come from a rural environment they were, at the time of their recruitment to kill the deceased, working in Durban in the competitive taxi business. There is no suggestion in the acceptable evidence before the Court that any degree of persuasion was required to secure their agreement to murder the deceased. Accused no's 3 and 5 were known to them only by sight and were not in any position of authority over them which enabled any improper influence to be exercised.

There is no evidence before the Court which goes anywhere along the road to establishing that any of the factors advanced by Mr Suhr probably influenced their participation in the murder of the deceased. On the contrary the evidence points overwhelmingly to the conclusion that their participation in this coldblooded and callous murder was procured

solely by the promise of financial reward.

We are satisfied that accused no's 1 and 2 have not established the existence of extenuating circumstances."

It is unnecessary for me to add anything thereto. It is clearly correct.

Third appellant testified at length. His evidence was to the following effect. He is suffering from a long-standing condition of anxiety which becomes acute at times. He received periodic treatment therefor from the faith healer, Lephina Mzimela, inter alia with "Isiwasho" (holy water), and from several medical doctors - all to no avail as the condition persisted and the acute attacks kept recurring about three times a year. The last such attack prior to the murder was during July 1987 when he was again treated by Lephina Mzimela. (She corroborated his evidence as to his condition and her treatment of him and confirmed that he had had a very acute anxiety attack during July 1987, which caused him

to tremble and sweat profusely and to fall down in a fainting fit. His condition was so serious that he had to remain in her kraal overnight. She did not see him again before the 8th October.) Third appellant alleged that this attack had been brought on by a second attempt by the deceased to run him down with the bus. Both attempts were made during 1987: the first when he was returning home in one of his taxis and the second whilst he was driving home with his family "nearing July or so".

On October 22, 1987, appellants 1-3, Ntuli and Benghu appeared before the magistrate at Mtunzini on the charge of murder, as accused no's 1-5 respectively, in terms of sec 119 of the Criminal Procedure Act, no 51 of 1977. The charge against Ntuli was then withdrawn. The rest were asked to plead to the charge. Third appellant pleaded guilty. When asked whether he had been influenced by anyone to plead guilty he answered that he had been assaulted by the police but that he was aware of

the charge against him and that he was pleading guilty of his own free will. In elucidation of his plea an exchange between him and the presiding magistrate then followed, *inter alia* in these terms:

"COURT Now accused, please tell the Court in your own words what gave rise to this charge against you to which you plead guilty today?

ACCUSED NO 3 This is how it happened that led to me facing this charge, I fought with Simon Mthembu, the deceased. After we had fought, on a certain day I was riding in my motor vehicle going home he then drove the bus towards me. That is when it occurred in my mind that this person wanted to kill me. I then went and spoke to these two men ...

INTERPRETER Accused no 3 is referring to accused no 1 and 2.

ACCUSED NO 3 ... and spoke to them that the person wanted to kill me. I asked them whether they could not shoot him for me - they then said they could shoot him.

COURT Is this now accused 1 and 2 you're referring to?

ACCUSED NO 3 Accused no 1 and 2.

COURT Yes?

ACCUSED NO 3 After they shot him, I took them with the motor vehicle and we all went back to Durban. If I had let him live I would not be safe because he had brought the bus towards my motor vehicle. My motor car is smaller than the bus. He would have collided with my motor

car and I would have died. I have also witnesses who are also Kombi drivers to whom this Mthembu did the same thing as he did to me.

COURT Anything else?

ACCUSED NO 3 That is what occurred in my mind that I should say to these men, accused no 1 and 2, in order that Simon Mthembu be killed, because they would kill me and my children, my children are innocent, they did not know anything between us. Those are the reasons which caused me to be tempted and to go and buy some people to kill him.

COURT Did you hire accused 1 and 2 to go and kill the deceased Simon ...

ACCUSED NO 3 Yes.

COURT ... Mthembu.

ACCUSED NO 3 Yes.

COURT Were you present at the killing of Simon Mthembu on the 8th of October?

ACCUSED NO 3 I was not inside the bus. I was a distance away from the bus stop where accused no 1 and 2 alighted.

COURT Did you instruct accused 1 and 2 to go and kill the deceased in this matter?

ACCUSED NO 3 Yes, I'm the one who spoke to them.

COURT Did you provide them with an arm, or arms or weapons?

ACCUSED NO 3 Yes, they took the weapon from me.

COURT Did you provide them with the weapon?

ACCUSED NO 3 Yes.

COURT And did you instruct them to go and kill Simon Mthembu?

ACCUSED NO 3 Yes.

COURT Was it your intention to instruct and to hire accused 1 and 2 to go and kill Simon Mthembu?

ACCUSED NO 3 Yes.

COURT Did you point out the deceased to accused 1 and 2?

ACCUSED NO 3 I did not point him out, I said they were going to see the bus driver who drives the bus.

COURT And what did you tell them, what must they go and do?

ACCUSED NO 3 I said the bus driver would be the person, they should then shoot him.

COURT What type of weapons did you provide accused no 1 and 2 with?

ACCUSED NO 3 I gave them firearms.

COURT What kind of firearms?

ACCUSED NO 3 They were a certain make firearms.

COURT But pistols, revolvers, rifles or what?

ACCUSED NO 3 There were two firearms, the one a revolver, the one a pistol.

COURT Did you provide accused 1 and 2 with the firearms?

ACCUSED NO 3 Yes.

COURT It is correct that this was your idea of hiring accused 1 and 2 to go and kill the deceased in this matter, Simon Mthembu?

ACCUSED NO 3 Yes."

When testifying in extenuation third appellant however maintained that Ntuli and fourth appellant had planned

the murder, and initially alleged that he became aware of the plot only on the day of the killing and in the following manner (I quote from his evidence-in-chief):

"Whilst I was at the rank cleaning my motor vehicle, accused no 5 and Mr Ntuli came to me and stated that we should go to the bus.

Yes? --- Thereafter accused no 5 and Ntuli talked to each other, planning the killing of the deceased."

Fourth appellant then brought appellants 1 and 2 to him, introduced them as the persons who were going to shoot the deceased and instructed him to take them to Mangete in his car, which he did. Fourth appellant also went along and explained the plot to him on the way. When they returned to Durban third appellant supplied appellants 1 and 2 with the firearms on the instructions of fourth appellant. He also initially maintained that he was "at no stage" aware that appellants 1 and 2 were paid for the murder and that he never gave them any money. He did lend fourth appellant R700,00 but was not

(

told by him why he wanted the money. Later, however, he admitted that fourth appellant had in fact told him that appellants 1 and 2 were to be paid R1 000,00 each for killing the deceased but added that he "did not witness the paying out". Thereafter, whilst under cross-examination by counsel for the State, he admitted that he had himself paid appellants 1 and 2 R400,00 each on the instructions of fourth appellant, from whom he had received the money. He also admitted that on the day before the murder, a Monday, fourth appellant had introduced appellants 1 and 2 to him and had then told him about the contemplated killing. He added, however, that he "did not believe that this thing was going to materialise". Third appellant also maintained, in answer to questions by Law, J., that he was obliged to obey fourth appellant because he was an Induna in the area where their taxis were operating. The further exchange between them then proceeded as follows:

"Did you comply with that because he told you to? Did you break the law because he told you to do so? --- Certainly so. Because I did comply with what he said there, and the very person whom he said must be hit or shot, that person was my enemy.

Will you tell me something? Was the reason that you went along with what no 5 was saying, what was your reason for agreeing that the deceased should be killed? --- It was because the deceased also wanted to bring about my death, so I could not try and rescue such a person. If he came across me in the road he would not leave me alive, he would kill me. That is why I did not disobey the instructions.

Any other reason? --- And also that we had lost quite a lot of work or business. But if he did not come to me and instructed me as I have already stated, perhaps I would not have done anything about losing business."

During cross-examination by counsel for fourth appellant he explained that his failure to implicate appellant no 4 in his statement to the magistrate during the sec 119 proceedings was due to a confused state of mind caused by an acute attack of anxiety which he then experienced. (The presiding magistrate, the

investigating officer, lieut. Engelbrecht, and the Court interpreter were later called by the State with consent of the Court to testify about that incident. Their evidence was that third appellant appeared to be very nervous and sat down after pleading. The Court adjourned for a short period to enable him to recover. He drank a glass of water and recovered quickly. When he gave his aforementioned explanation of plea, i.e. by way of questions from the bench, he was normal. The magistrate presiding was a senior magistrate with 35 years' service.) Third appellant also alleged during cross-examination by prosecuting counsel that his sec 119 statement was untrue in many respects. Parts of it were what lieut Engelbrecht had told him to say and certain others he simply invented. He did so through fear of further assaults by the police. He added that he told the magistrate that lieut Engelbrecht had threatened to take him to the bush and to "assault or kill" him there,

to which the magistrate had replied "yes, he ought to take you there and hit you". (The magistrate denied this incident. The court interpreter supported him.) Third appellant admitted that, as stated by him to the magistrate, he had handed the firearms to appellants 1 and 2 and added that he had done so on the morning of the murder on the instructions of Ntuli who had given him the firearms that morning "when he was on his way to Ladysmith". Ntuli did not, however, tell him why he was giving him the weapons.

The Court did not believe third appellant.

Law, J., dealt with his evidence as follows:

"A reading of accused no 3's evidence makes it apparent that he was in most important aspects an abject liar. He was evasive, fabricated evidence to suit his case and gave the impression of a scheming and dishonest witness who was eventually caught in the web of his own deceit. To catalogue all the lies, improbabilities and contradictions in his evidence will serve little purpose but I mention a few glaring examples:

(i) The evidence that Ntuli left the two

firearms with him on the morning before the murder without telling him what they were to be used for, is not only highly improbable but clearly false.

- (ii) His evidence that he handed the firearms to accused no's 1 and 2 only because he was instructed by accused no 5 without knowing what they were to be used for and did so only because he had to obey accused no 5 because he was an older man and in charge of the taxi operations is clearly false, especially in view of his later evidence that accused no's 1 and 2 were already introduced to him as the killers of the deceased on the preceding Monday.
- (iii) His evidence that he first learned about the plot to kill the deceased en route to Mangete in the motor-car is flatly contradicted by his later evidence that accused no's 1 and 2 were introduced to him as the killers on the preceding Monday.
- (iv) His evidence that he did not know that accused no's 1 and 2 were to be paid for killing the deceased is flatly contradicted by the statement that he made in the proceedings in the Magistrate's Court when he admitted that they were to be paid R1 000,00. His evidence that he gave accused no 5 R700,00 but only as a loan is clearly a fabrication. His evidence that he gave accused no's 1 and 2 R400,00 on instructions of accused no 5 without knowing what it was for is also clearly false, as is his evidence that

they were paid R400,00 each when dropped off at Estcourt by himself and accused no 5 without his knowing what was being handed over.

- (v) His evidence that his statement to the Magistrate at Mtunzini was induced by assaults on him by Lieutenant Engelbrecht and encouraged by the Magistrate himself is an obvious and patent untruth. It was never suggested in cross-examination to Lieutenant Engelbrecht that such assaults had taken place and the record of the proceedings before the Magistrate went in with the consent of accused no 3's counsel.

There are numerous other aspects of his evidence which are not only contradicted by acceptable, unquestioned evidence of the State witnesses, but are also self-contradictory and in clear conflict with instructions given to his counsel. We have no hesitation in rejecting the evidence of accused no 3 as false, except possibly to the extent that it may be corroborated by other reliable witnesses. In particular we reject as a deliberate fabrication this accused's evidence that the deceased made two attempts on his life by attempting to run him down with his bus."

The evidence relating to third appellant's state of health must now be considered. I have already dealt sufficiently with Lefina Mzimela. Dr Lind was of

the opinion that third appellant suffered from an underlying state of anxiety with recurring episodes of acute anxiety which could be described as episodes of "a panic type of disorder", during which he would be in a state of diminished responsibility. Such acute episodes would be precipitated by stressful conditions. During the periods between such acute episodes third appellant would, however, to all intents and purposes be normal. Drs Loen and Verster, who had kept third appellant under observation for considerably longer periods than Dr Lind, did not agree with him. They were of the opinion that third appellant suffered only from a neurotic condition which could periodically result in phases of hysteria, which was the condition described by the faith healer, Lefina Mzimela. There were, however, no indications of such a condition at the time of the murder, and their joint conclusion was that third appellant was not then in a state of diminished responsibility. It is not

necessary to decide between these conflicting views. Dr Lind conceded that if third appellant was in an acute state of anxiety he would have been incapable of driving his car to and from Mangete as he admittedly did twice on the day of the murder. He conceded that third appellant must then have been in a normal state and consequently not suffering from any diminished responsibility. This is what the Court also in fact found, as is apparent from the following passages in the judgment on extenuation:

"Even if we were to have found on a balance of probability that the accused suffered from the mental illness described by Doctor Lind, it would not in our view have been established on a balance of probabilities that such condition influenced his participation in the murder of the deceased. It will be recalled that Doctor Lind's opinion was that the accused's condition was one of acute recurrences from time to time without a chronic underlying disorder, and that it was only during one of the acute phases that the condition would cause a diminished capacity to resist impulses.

The accused's evidence was that he had his last acute attack in August, some two months before the murder of the deceased. There is no

evidence to suggest that his condition was in an acute phase at the time when the murder was planned and executed. Doctor Lind also expressed the opinion that the accused could not have driven the getaway vehicle if he had been in an acute state of anxiety at the time.

On Doctor Lind's own diagnosis, therefore, it is unlikely that the accused's anxiety state could have influenced his participation in the crime."

The Court found that it had not been proved that there were any extenuating circumstances in the case of third appellant. I agree with that finding. The facts sadly speak for themselves.

Fourth appellant did not testify in extenuation. The position in his case was summed up as follows by Law, J.:

"Accepting the validity of the points made by Mr Roberts the evidence nevertheless discloses that the role played by accused no 5 was by no means an insignificant one. On the contrary it was on a par with that of accused no 3. He was present when the group of taxi people attempted to assault the deceased. He was present on each of the occasions when accused no 3 complained to Ntuli and also when their plans

and the result of their deeds were reported to Ntuli. Although it may have been accused no 3 who spoke first on each occasion, he confirmed what no 3 said and in no way disassociated himself or displayed any reluctance to go along with accused no 3. He also accompanied no 3 on the day the deceased was murdered, both to show accused no's 1 and 2 what was to be done and to spirit them from the scene after their task was accomplished. There is no evidence on record which suggests that accused no 5 was anything but a willing participant in the murder or that any coercion was brought to bear upon him to participate. The only evidence which accused no 5 placed before the Court was an untruthful denial of any participation in the murder.

On the probabilities it is unlikely that accused no 5 would have been influenced by accused no 3 to participate against his will. He is an older, more mature man and our impression was that he is probably a stronger character than accused no 3.

The evidence as a whole points to the conclusion that accused no 5's sole motivation for the murder was the elimination of lawful competition. We are satisfied that it has not been shown that there are any extenuating circumstances present which reduce the moral culpability of accused no 5."

I agree with this finding and have nothing to add.

The result is that fourth appellant was rightly

convicted and that the trial Court correctly found that there were no extenuating circumstances in his case or in respect of any of the other appellants.

The appeals of all the appellants are dismissed.

JOUBERT,	JA.)
VAN HEERDEN,	JA.)
VIVIER,	JA.)
NICHOLAS,	JA.)

M. T. Steyn
M T STEYN. JA.