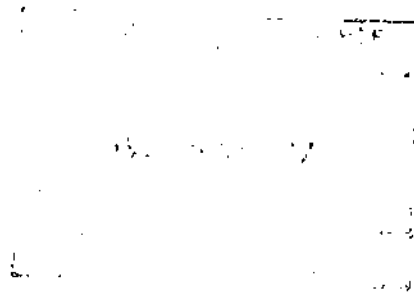


STANFORD MENE 1st Appellant

BUTLER TUNGATA 2nd Appellant

and

THE STATE Respondent



IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

STANFORD MENE

1st Appellant

BUTLER TUNGATA

2nd Appellant

and

THE STATE

Respondent

CORAM: HOEXTER, SMALBERGER et STEYN, JJA

HEARD: 11 March 1988

DELIVERED: 27 May 1988

J U D G M E N T

HOEXTER, JA

HOEXTER, JA,

This is a criminal appeal. During the morning of 23 July 1985 three policeman armed with shotguns entered the grounds of the Phakamisa Junior Secondary School ("the school") at Zwide, Port Elizabeth. On the school premises various shots were fired and in the result two male pupils, Thozamile Manga and Ntobeli Mancam, were fatally wounded; while four other persons (two male pupils and two male teachers) received gunshot wounds. The two teachers were respectively Mr S L Tulela and Mr De V Miza. In addition one of the policemen seized and knocked to the ground a male teacher, Mr T Sapuka.

The sequel to the above events was a trial of the three policemen concerned on various criminal charges in the South East Cape Local Division before a Court consisting of SOLOMON, AJ and two assessors. To the three policemen reference will be made collectively as "the accused".

The

The accused consisted of the two appellants (who at the trial were respectively accused nos 1 and 2) and one Qayiso, to whom I shall refer as "accused no 3". The accused faced the following charges. In respect of the deaths of Manga and Mancam they were jointly charged (counts 1 and 2) with murder. In respect of each of the four wounded persons they were jointly charged (counts 3, 4, 5 and 6) with attempted murder. In respect of counts 1 to 6 inclusive the State alleged that the accused had acted with common purpose. Count 7 was laid against accused no 3 alone, charging him with assault upon the complainant Sapuka. Count 8 was laid against the two appellants only, jointly charging them with an attempt to defeat the ends of justice.

The accused pleaded not guilty. They were represented by counsel at the trial, and at the close of the State case each testified in his own defence. In respect of counts 1 to 6 the trial Court found that no common

purpose

purpose between the accused had been established. On each of the first six counts accused no 3 was acquitted. The first appellant was acquitted on each of counts 3, 4, 5 and 6; but on each of counts 1 and 2 he was found guilty of murder with extenuating circumstances. On each of these two counts the first appellant was sentenced to imprisonment for ten years, such sentences to run concurrently. The second appellant was acquitted on each of counts 1, 2, 3 and 4; but on each of counts 5 and 6 (involving the complainants Tulela and Miza respectively) he was convicted of assault with intent to do grievous bodily harm. On each of these two counts the second appellant was sentenced to imprisonment for three years, such sentences to run concurrently. On count 7 accused no 3 was found guilty of common assault and he was cautioned and discharged. On count 8 both appellants were found guilty of an attempt to defeat the ends of justice. On this count each appellant was sentenced to imprisonment

for

for three years whereof two years was ordered to be served concurrently with his sentences aforementioned. With leave of the trial Judge each appellant appeals against both his convictions and sentences.

The two appellants were members of the Security Branch of the South African Police and they were stationed at Port Elizabeth. At the time of the trial each was 33 years old. The first appellant was a detective warrant-officer. The second appellant was a detective-sergeant. Accused no 3 was a detective constable stationed at Pretoria who had been sent to Port Elizabeth on 20 July 1985. During July 1985 a number of policemen had assembled at Port Elizabeth for special duties in connection with the unrest then prevailing in the Port Elizabeth area. On the morning of 23 July 1985 the accused and two other policemen reported to Captain I P du Plessis of the Murder and Robbery Unit of the SAP at Korsten. The two other policemen were

detective-sergeant

detective-sergeant Gumede and detective-constable Zwane, both of whom were ordinarily stationed at Pinetown, in Natal. These five policemen were provided with a police vehicle, a Datsun E20 mini-bus ("the kombi") and they were instructed to patrol the Black Townships in order to look for and to arrest certain persons suspected of criminal activities.

Before considering the effect of so much of the evidence as is material to the appeal, it is useful to give a synopsis of the case which the State set out to prove; to indicate in what manner the two appellants were alleged to have attempted to defeat the ends of justice; and to describe the school grounds and the buildings thereon which were the scene of the shooting and the assault.

The summary of Substantial Facts appended to the indictment is in the following terms:-

"1. The accused were members of the S A Police on the 23rd July 1985 and, together with certain other members, patrolled certain

Port Elizabeth

Port Elizabeth Townships (in a mini-bus) to enforce the newly-promulgated emergency regulations on that day.

2. During the course of the morning the pupils at the Phakamisa Junior Secondary School in Katyu Street, Zwide, who had been boycotting classes since the end of 1984, met at the school to discuss certain matters and to sing certain songs.
3. The vehicle which accused no 1 was driving stopped just beyond the school's boundary fence and the three accused alighted. They were each armed with a shotgun.
4. When they found the gate locked their request for the keys was answered by a reply that the scholars kept same.
5. The three accused thereupon scaled the gates and approached the complainant in count no 7 (a teacher), again asking for the keys. When the latter could not assist he was held on the shoulder and slapped on the left ear by accused no 3 - whereupon he fell down before running away.
6. When the accused approached the scholars and teachers who were present they ran away in various directions.
7. The accused fired a number of shots at approximately this time, whereafter it was discovered that the two deceased had been fatally injured, whilst the complainants in counts 3 - 6 had been injured by shotgun pellets.

8. According

8. According to the post mortem reports deceased Manga died as the result of multiple gunshot wounds of the lungs, heart, pancreas, stomach, liver and spine, whereas deceased Mancam died of gunshot wounds of the head.
9. The first two accused then off-loaded the other members who had been with them before damaging the vehicle in which they had travelled and making the false reports which have been referred to in count 8."

In count 8 of the indictment it is alleged that on 23 July 1985 and at Port Elizabeth the appellants, with the intent to defeat the ends of justice, did -

- "(i) damage and/or cause to be damaged a Datsun E20 mini-bus the property of the S A Police; and/or
- (ii) inform Captain I P du Plessis at Korsten that the above-mentioned vehicle had been attacked and damaged by a group of youths throwing stones and petrol bombs, that they had then followed these youths into a school where they had shot the youths when trying to arrest them;
- and/or
- (iii) at or near Kwazakele they caused a Police Docket (Crime Register No 348/7/85) to be opened on a charge of public violence

ostensibly

ostensibly against those persons who had allegedly damaged the abovementioned vehicle;

Whereas this information was to the accused's knowledge false inasmuch as -

- (a) they themselves had caused the said damage to the abovementioned vehicle;
- and
- (b) there was indeed no factual basis for the reports pertaining to the alleged public violence and that the deceased and complainants (in counts no 1 - 6) amongst others were shot when an attempt to arrest them (sic) for the aforementioned public violence, but that these acts and/or reports were perpetrated in an attempt to prevent the acts charged in counts numbers 1 - 6 above from being discovered and/or to prepare a veil for their obviously unlawful actions."

At the trial a sketch-plan of the school buildings, the school grounds, and the streets bounding the latter to the east and north was handed in as exh "D2". A copy of exh "D2" is appended to this judgment as Annexure "A". This sketch-plan is further elucidated by the following description of the whole terrain given in the judgment of the Court

below:-

below:-

"This school consists of a block of class-rooms, a caretaker's cottage and two toilet blocks. The complex is housed on a reasonably large piece of ground, bounded on the east by the gravel extension of Maya Street, on the east by a tarred road, Katyu Street, on the north by the grounds of an adjoining school, and on the west by open ground. The school grounds are enclosed by a security fence with a motor-gate opposite the eastern end of the southern wing of the school block, a large gate opposite the front of the caretaker's house and a pedestrian gate at the far north-western corner of the school grounds behind the tennis-courts. The main complex is in the form of a square, surrounding a quadrangle. Each wing of the block is separated from the next by a passage allowing access to or exit from the quadrangle and all the rooms in each wing open into the quadrangle. Each wing has a verandah around the quadrangle. Immediately behind the southern wing of the school is a new block of four class-rooms, also with a verandah in front of them. This block faces north. Between the southern wing and the southern boundary fence is a paved basketball-court, and to the west of that, in the south-western corner of the school grounds, is a block of two tennis-courts surrounded by a mesh fence of the usual type. The northern wing of the school is divided, reading from east to west, into a laboratory, a homecraft-room and a library. The eastern wing,

reading

reading from north to south, is divided into a staff-room, the school-hall, the principal's office and a book-store. The other wings and the new block consist of 17 class-rooms, numbered 1 - 4 in the new block, 5 - 11 in the south wing, and 12 - 17 in the west wing."

For the sake of completeness mention should be made of a prominent feature of the school grounds to which reference is made in the evidence. Immediately in front of the principal's office in the eastern wing of the school buildings (at point "E" on exh "D2") there stands a very tall lamp-post.

At this juncture it is also convenient to indicate, with reference to exh "D2", those places on the school premises at which, after the shooting, the bodies of Manga (count 1) and Mancam (count 2) were respectively found lying; and at which, during the shooting, the complainants Tulela (count 5) and Miza (count 6) respectively were when they sustained their gunshot wounds. It is common cause (as will later emerge) that Manga's body was found lying

at

at point "K" (on the verandah which runs from east to west on the southern side of the northern wing of the school), and that Mancam's body was found lying close by at point "J" (in the flower-bed immediately adjacent to the said verandah). The trial Court accepted the evidence of Mr Miza that he was wounded while he was running from north to south in front of the eastern wing of the school from the area of the staff-room (point "B") towards classroom no 5 in the southern wing (point "F"); and it likewise accepted the evidence of Mr Tulela that he was wounded in the vicinity of point "F". The correctness of these findings by the trial Court were not challenged in argument before us.

Much evidence was led at the trial. Mention has already been made of the fact that each of the accused himself testified. Det Sgt Gumede and Det Const Zwane gave evidence for the State. A number of other police officers were also called as witnesses for the prosecution.

Other

Other witnesses for the State included various medical practitioners, the principal of the school, the school caretaker, and the complainants on counts 3 to 7. The trial Court's efforts to get to the truth of the matter were hampered by the distinctly unsatisfactory nature of much of the evidence adduced. In the course of his judgment the learned Judge was constrained to say:-

"A feature of this case was the quality of the evidence which was given by the numerous witnesses who were called by the State, to say nothing of the evidence of accused nos 1 and 2. We exclude from this criticism the evidence of the witness Detective-Sergeant Gumede and the evidence of accused no 3.

The quality of the evidence of the State witnesses, both scholars and teachers, made it extremely difficult to establish what had actually happened. Of the quality of the evidence of accused nos 1 and 2, the less said the better. Both these accused acknowledged that they had blatantly lied throughout the investigation, and when they did not actually admit their lies, other evidence established them. Furthermore, both accused no 1 and accused no 2 were not above falsely implicating others in the events which occurred, and in the investigation which followed."

At

At the beginning of the trial each appellant made a statement in terms of sec 115 of Act 51 of 1977 to indicate the basis of his defence. In regard to count 1 to 6 the first appellant admitted that on 23 July 1985 and at or near the school he had fired a number of shots with a shotgun loaded with SSG ammunition but said that he had so fired in legitimate self-defence. In regard to these counts the second appellant denied that he had fired any shots at the scene of the alleged incident or that he had wounded or killed any person thereat. In regard to count 8 both appellants (1) denied that they had caused or permitted to be caused any damage to the kombi (2) admitted that they had given Capt du Plessis a factually correct account of the incident; but denied that they reported serious damage to the kombi or an attack upon the kombi with petrol bombs.

I shall deal first with the convictions on counts 1 to 6 and thereafter with the conviction of both appellants on count 8.

On

On the morning of 23 July 1985 the five policemen aforementioned, each armed with, inter alia, a shotgun, duly set forth in the kombi which was driven by the first appellant. In the course of their patrolling they arrested and placed in the rear of the kombi a number of youths. In due course the kombi approached the school. In the judgment of the Court below the conviction of the first appellant on counts 1 and 2 and the conviction of the second appellant on counts 5 and 6 hinge largely on certain findings, and inferences therefrom, based upon an examination of the evidence of Gumede, accused no 3, and that of the two appellants themselves, in relation to the events immediately preceding the arrival of the kombi at the school and the events following thereon until the time of the kombi's departure from the school. At this stage it is necessary broadly to survey the evidence of these four witnesses in relation to such events.

Although

Although the accounts given by Gumede and accused no 3, on the one hand, and the accounts of the two appellants on the other, are markedly different, certain matters would appear to be either common cause or, at any rate, not in serious dispute. For example, although there is a conflict as to precisely where the kombi was parked (Gumede and accused no 3 said it was parked near the caretaker's gate at point "A" on exh "D2", whereas the appellants contended that it was parked at point "Q") it is clear that the kombi was parked in the immediate vicinity of the school. The following matters may be taken to be common cause:

(1) that while the kombi was parked at the school Gumede throughout remained sitting in the kombi with the youths who had been arrested along the way; (2) that there alighted from the parked kombi the two appellants, accused no 3 and Zwane; and that, although each of the four policemen who so alighted had shotgun cartridges in his possession, the

cartridges

cartridges carried by the first appellant, accused no 3 and Zwane contained "SSG" shot or pellets of a large and heavy type (buckshot) while the cartridges carried by the second appellant contained "BB" shot or pellets of a smaller and lighter sort (birdshot); (4) that Zwane never entered the school premises and that instead he proceeded in a westerly direction by walking along the fence adjacent to the gravel extension of Maya Street which runs on the northern side of the school; (5) that although all the school gates were locked the two appellants and accused no 3 gained access to the school grounds; (6) that accused no 3 got inside at point "A" (the caretaker's gate) on exh "D2", and that the second appellant got inside through a hole in the fence at a point south of "A"; (7) that within the school grounds the first appellant and accused no 3 each fired several shots; and that Zwane also fired several shots from outside the school grounds; (8) that after the shooting Manga's body was seen lying at point "K" and Mancam's body was seen lying at point "J";

"J"; and (9) that when the party of five policemen returned to Korsten after the shooting at the school the kombi was essentially in the same condition in which it had been when they set out earlier that morning.

According to the evidence of Gumede no stones or petrol bombs were thrown at the kombi at or near the school. As the kombi approached the school, however, the first appellant remarked that there were children inside the school; and that possibly they were holding a meeting. When the kombi stopped at the caretaker's gate (point "A" on exh "D2") Gumede saw teachers standing near the caretaker's gate. After his four companions had alighted from the kombi Gumede saw the second appellant move along the fence in Katyu Street in the direction of the main entrance to the school (point "G" on exh "D2") while Zwane went in the opposite direction towards point "Q" (the north-eastern corner of the school grounds). Gumede testified that the

first

first appellant and accused no 3 went to the caretaker's gate and got into the caretaker's yard by climbing over the fence at that point. When these two reached the place at which the teachers were standing, accused no 3 stood in front of the teachers but the first appellant went a little further into the school premises; and at that stage children started running out of the classrooms. The children ran from east to west along the verandah flanking the northern side of the quadrangle. At that stage the first appellant fired. Thereafter accused no 3 joined the first appellant and they both fired in the direction of the fleeing children who had their backs to the gunmen. While the first appellant and accused no 3 were firing in this direction the teachers also scattered. At that juncture, so Gumedé said in his evidence, he saw the second appellant creeping into the school grounds under the school fence at point "R" (in front of the caretaker's house). Children came from the area at point "F" (the north-eastern tip of the southern

southern wing of the school buildings). Gumede said that he saw the second appellant fire in the direction of these children, whereafter the second appellant disappeared "in between the classrooms". After the second appellant had disappeared from view, so testified Gumede, he saw someone falling in the area of point "F". This person was big and he wore black trousers. He appeared to Gumede to be one of the teachers. Having fallen, this person got up again and he disappeared on the other side of the school. After this, so said Gumede, he heard more shots being fired, but the gunmen concerned were out of his sight. According to Gumede he did not notice any provocation being offered to the police either by the scholars or the teachers. After the children had fled the first appellant and accused no 3 reappeared; and they left the school grounds by climbing over the caretaker's gate. The second appellant also left the school grounds by creeping under the fence at the same spot as before. When the accused got back to the kombi they

they had to wait for Zwane to rejoin them. Shortly after the kombi had returned to Korsten, so testified Gumede, the two appellants went off again in the kombi. When Gumede saw the kombi again later in the day he observed that the windows of the kombi next to the seats occupied by passengers had been damaged, as if from stone-throwing; and the bodywork of the kombi also bore signs of damage consistent with stone-throwing. Gumede said that at the stage when the second appellant crawled into the school premises under the fence the first appellant and accused no 3 were no longer within his field of vision. According to Gumede the first appellant did not fire into the air; but he was unable to say positively whether accused no 3 had fired at or above the fleeing children. Gumede said that he had not seen any of the children falling.

During cross-examination Gumede was asked by Mr Jansen (who represented the two appellants both at the trial and in appeal before this Court) whether he had seen the

the first appellant either pointing his firearm at or actually firing it in the direction of any teacher. To this question Gumedede answered in the negative. This negative answer by Gumedede was, however, directly contrary to what Gumedede had said in a written statement made by him ("Gumedede's proof") to the prosecution for the purposes of the trial. Para 28 of Gumedede's proof was in the following terms -

"The teachers ran in different directions and I saw Mene" (the first appellant) "firing several shots in the direction in which the teachers ran. He fired more or less in the direction of the big lamp-post as he was near the small gate of the caretaker's house. I saw one of the teachers dressed in dark coloured trousers fall down twice while running and then disappeared around the building."

Both at the trial and in this Court counsel for the State was Mr Kingsley. During the stage of argument at the trial Mr Kingsley called attention to the fact of the serious discrepancy between para 28 of Gumedede's proof and his evidence on oath at the trial. Mr Kingsley informed us that

the

the said discrepancy was thus belatedly exposed at the trial for the reason that it was only at the stage of argument that he had noticed it. Having then noticed it, he at once brought it to the attention of the Court and counsel for the accused. In my view this material and significant disclosure by counsel for the State to the trial Court rendered it necessary for the learned trial Judge at that stage of the proceedings to interrupt argument and to recall Gumede to the witness-stand in order that the discrepancy might be explored with the witness. It seems to me, with respect, that such a course was required both in the interests of justice and in fairness to Gumede himself. Gumede was not, however, recalled as a witness, and there the whole matter of the discrepancy appears to have been left.

According to the first appellant's evidence the kombi in the course of its approach to the school was stoned on two occasions by groups of youths. The kombi pursued these youths. Some ran up Katyu Street and others along

the

the gravel extension of Maya Street. He said that some of the youths concerned went into the grounds of the school. The first appellant testified that after the kombi had parked at the school he made his way from it to the extension of Maya Street and stood at a point east of point "Q" on exh "D2". From this point he saw a group of teachers standing on the northern side of the laboratory; and accused no 3 standing in front of the door of the caretaker's house. He saw accused no 3 striking somebody there. The first appellant's account of what happened thereafter and until the kombi departed from the school is conveniently and accurately summarised in the following passages of the judgment of the trial Court:-

"Accused no 1 told the Court that his instructions were not to enter school grounds and that he had not done so in this case because the school children might have thrown stones at him if he did. However, immediately thereafter he ^{said that he} decided to go to accused no 3 in the caretaker's ground, and tell him not to go further

into

into the school as if he did they would have trouble. He then climbed through the fence and ran past the west side of the toilets. As he did so the persons who had been standing outside the northern block (adults and children) ran away to the south and turned between the buildings towards point J He then heard shots from the direction of accused no 3. He ran to the small gate in the caretaker's fence and he was joined by accused no 3 who came from inside the caretaker's property

At the stage when he was joined by accused no 3, he said that there was nobody in the area to the east of the eastern wing of the school along the whole area between the eastern block and the school fence. Then he said as he entered the small gate of the caretaker's property, stones fell in front of him. He turned and saw a group of people, between the staff-room and the laboratory, coming towards him from the direction of point J, which is immediately inside the quadrangle. He described how the whole area was filled with groups of people. That is the whole area between the staffroom and the laboratory. These people were throwing stones - stones which he described to the Court as being as big as tennis-balls and bigger. Many stones were thrown both at him and at accused no 3, he said.

Accused no 1 said he then fired two shots into
 the

the air, but the crowd continued throwing stones, so he fired two shots at them. Accused no 3 came and stood beside him and he too fired two shots at the people. The stone-throwing, however, continued, and accused no 1 re-loaded and fired two more shots at the people, who then turned away. Some fell, others jumped over them and ran away. When they had all gone, accused no 1 said to accused no 3 that the two of them should turn and run away. The two of them then turned, went back over the gate to the vehicle, which, according to him was still at point "Q".

I turn to the evidence of the second appellant. He said that in Maya Street people (some of whom appeared to be school children) threw stones at the kombi. The kombi pursued the stone-throwers and the latter ran off, some running along Katyu Street and others along Maya Street. After the kombi had stopped at point "Q" and the accused and Zwane had alighted accused no 3 proceeded southwards in Katyu Street. He (the second appellant) went in pursuit of three people in the same direction and passed accused no 3. The second appellant testified that he saw no people

people within the school grounds. As he passed the main entrance gate to the school (at point "G") he heard shots being fired. As he approached the fence on the southern boundary of the school he realised that he would not catch the persons fleeing and he turned back. He then noticed a hole in the fence on the eastern side of the school, south of point "G", and here it was that he crawled into the school grounds. He still saw no scholars or other persons on the school grounds. Walking past point "F" he entered the quadrangle whereafter he proceeded northwards in the direction of point "J". In the quadrangle not a soul was in sight. Having walked two-thirds of the way down the quadrangle he saw one youth lying at point "J" and another lying in the adjacent flower-bed. Not finding any of his colleagues he retraced his steps to the fence where he found a motor car parked at the gate at point "G". The driver of this vehicle (established by other evidence to be the school principal) drove through the gate. According to the second appellant he then left the school grounds

grounds by the same gate. The second appellant strenuously denied that from the area in front of the staff-room he had fired in the direction of point "F". Indeed, he denied that he had fired any shots whatever on the school grounds. After the kombi had departed from the school, so testified the second appellant, and while it was travelling west of the school, the kombi was pelted with stones. The kombi then stopped, whereupon he (the second appellant) fired three shots into the air through the window of the kombi.

Accused no 3 told the trial Court that on its way to the school, stones had been thrown at the kombi, but that none of them had struck the kombi. When the kombi reached point "W" (north of the school) in Maya Street, the occupants of the kombi noticed the presence of children in the laboratory of the school. The first appellant then mentioned the possibility that they might be holding a meeting. The kombi parked at point "A" (the caretaker's gate). Leaving Gurnede in the kombi the other four policemen

alighted

alighted and took up a position at the gate. People were standing in front of the staff-room and the first appellant asked them for the key of the gate. One of these persons responded by saying that the key was in the possession of the children. According to accused no 3, Zwane then moved off in the direction of point "Q" and the second appellant proceeded southwards in Katyu Street. He (accused no 3) climbed over the gate and the first appellant followed suit. They proceeded towards the caretaker's house, in front of which accused no 3 encountered the complainant Sapuka. An exchange of words between Sapuka and accused no 3 followed, during which the first appellant passed accused no 3 and walked in the direction of the passage between the staff-room and the laboratory. Accused no 3 wished to join the first appellant but was hampered by Sapuka. Accused no 3 seized Sapuka by the left shoulder and pushed him away. This caused Sapuka to fall. At that juncture, so testified

accused

accused no 3, the first appellant fired a shot. The first appellant was then standing at point "D" (midway through the passage between the staff-room and the laboratory) and the

barrel of his shotgun was pointing upwards. Accused no 3

moved in the direction of the first appellant and then

noticed that teachers were running in front of the eastern

wing of the school from the area of the staff-room in the

direction of point "A" (the principal's office); and that

scholars were running from the laboratory along the verandah

in the direction of point "T" (classroom no 16). Accused

no 3, who was still behind the first appellant, then fired

two shots into the air. He said that he fired because he

appreciated that if he shouted at the children to stop they

would not hear him. He fired from point "D". He said

that he had experience in the handling of shotguns and that

the shots fired by him could not have hit the fleeing

children. He then fired a second shot in the air whereafter

he

he ran down the verandah in a westerly direction towards point "T" (classroom 16). When he reached point "T" he saw some of the children running southwards in the direction of classrooms 11 and 12 while others ran in the direction of point "L". Accused no 3 told the Court that he followed the latter group of scholars. Realising that he could not overtake them, he stopped in his tracks and fired two further shots in the air. Thereafter he retraced his steps and reloaded his shotgun when he noticed the scholars running in his direction. He was then at point "L". He shouted to them to stop but, although they were milling about him, he tried in vain to catch hold of any of them. He then fired two further shots into the air. Thereafter he walked back in the direction of point "T" and eastwards along the verandah of the northern wing. He saw nobody in the quadrangle save two prostrate children: one on the verandah next to the homecraft classroom and the other in the flower-bed. Both appeared to be dead. According to accused no 3 he then

walked

walked back to the caretaker's house and clambered over the gate. When he got back to the parked kombi he found the first appellant already there. He was adamant that at no time had stones been thrown at the kombi in the vicinity of the school. When they got back to Korsten the kombi was in the same condition as before; and later in the day he was surprised to see that the windows of the kombi had been shattered and its bodywork dented.

Here it is necessary to allude briefly to two matters canvassed with accused no 3 during cross-examination. The first arose during cross-examination by Mr Jansen, and in the following way. Pursuing a reference, volunteered by accused no 3 himself, as to something he had said in a portion of his written statement to warrant-officer Strydom, the investigating officer in the case, Mr Jansen sought to cross-examine the witness on the contents of that statement. Following an objection by counsel for accused no 3 as to the propriety of such cross-examination the learned Judge, having

having heard argument thereon, permitted such cross-examination for the purpose of testing the credibility of the witness. In the course of the ensuing cross-examination counsel for the appellants explored with accused no 3 the concluding sentences in para 33 of his statement to the investigating officer, from which paragraph I quote hereunder:-

"Ek het agter die persone aangehardloop en om die hoek by die biblioteek en na die agterkant van die skool by die tennisbane se kant. Toe ek daar kom, het ek gesien baie van die jeugdige oor die draad klim na buite, ongeveer 100 treë weg van my. Ek het toe weer vier skote met die haelgeweer in hulle rigting geskiet. Ek het net een gesien val, opgespring en weggehardloop. Ek weet nie of hy getref is nie."

When it was pointed out to the witness that this part of his statement was irreconcilable with his evidence in chief, his initial response was to say that he had in fact so deposed in his statement; but that the last three sentences were untrue. When further pressed he said:-

"U

"U Edele, die moeilikheid daar was dat ek persoonlik het nie hierdie verklaring opgeskryf nie en ek het nie spontaan gepraat nie. Vrae was gevra en ek moes net antwoord."

The second matter relates to an answer given by accused no 3 during his cross-examination by Mr Kingsley. The witness was asked whether, when he ran from point "D" (between the staff-room and the laboratory) westwards down the verandah, any scholars had been hit by the shots fired by the witness or by the first appellant. To this question accused no 3 gave the following answer: "Nee, niemand was daar getref nie."

Against the background of the evidence sketched above I turn to an examination of the trial Court's main findings in regard to the first appellant. As to the events immediately preceding the parking of the kombi at the school and the reasons for the entry of the accused into the school grounds the trial Court concluded that the account given by the first appellant was quite untrue. In his judgment the

learned

learned Judge observed:-

"We are satisfied on the totality of the evidence placed before us, that although there may have been one or two minor incidents prior to the combi's reaching the school, the statements made by accused no 1 were false in almost every respectWe are satisfied that accused no 1 entered into the school premises not in pursuit of a group of youngsters who had stoned the combi, but in order to investigate a meeting which was apparently being held."

The trial Court further found as a fact that the first appellant and accused no 3 entered the caretaker's yard "either over the gate or over the fence immediately adjacent thereto." With regard to the first appellant's evidence that as he entered the caretaker's yard he was stoned by a group of people advancing upon him from the area between the staff-room and the laboratory, and his claim that he fired in self-defence, the trial Court rejected the first appellant's version out of hand. That version, so remarked the learned Judge:-

".....is

".....is in direct conflict with all the other evidence in the case, and it is in direct conflict with the evidence of accused no 3 which we accept. It is in direct conflict with the evidence of Detective-Sergeant Gumede which corroborates in all material respects the evidence of accused no 3 In our view he "(the first appellant) "is a deliberate liar, and in relation to this and to other events that day his evidence must be rejected."

And again later in the judgment -

"He claimed that he fired at them" (the scholars) "because they were stoning him and accused no 3. We find nothing in the evidence to suggest that there was any stoning of accused no 1, accused no 3, or anybody else. On the other hand there is absolute clarity in the evidence of accused no 3 and Detective-Sergeant Gumede that the children ran from the laboratory along the verandah of the northern block towards point T when accused no 1 fired."

Counsel for the appellants' first argument was that in regard to the events here in issue the account given by the first appellant was to some extent supported by the probabilities; that there existed a reasonable possibility

that

that it might be true; that the first appellant was wrongly disbelieved by the trial Court; and hence that he should have been acquitted on counts 1 and 2. It is unnecessary to dwell on this argument. Apart from the fact that each appellant is a self-confessed liar the record as a whole amply demonstrates that both appellants were thoroughly dishonest witnesses whose testimony is entitled to very little credence. Not only is the version of the first appellant contradicted by all the other eye-witness evidence in the case but it is also, in my view, a distinctly improbable one. It is necessary here to mention only one of the improbabilities. As pointed out in the judgment of the Court below, it is remarkable that neither the first appellant nor accused no 3 was struck by a single one of the large stones which, on the first appellant's version, were being hurled at them by a mob closing in on them. In my opinion the trial Court was entirely right in rejecting that part of the first

appellant's

appellant's story here under consideration. It is palpably false.

Having reviewed the medical evidence adduced at the trial as to the nature and situation of the fatal wounds respectively sustained by Manga and Mancam, the trial Court correctly concluded that such evidence was consistent with the two deceased having been struck by shots fired from their rear. Since the first appellant on his own admission fired directly at the scholars who were running away from him down the verandah flanking the northern side of the quadrangle, it follows that it is by no means improbable that the shots which fatally wounded Manga and Mancam came from the barrel of the first appellant's shotgun. Indeed, that is a distinct likelihood. It remains to consider, however, whether the Court below was correct in its further finding that this had been established beyond reasonable doubt.

Such finding by the trial Court appears to have
been

been based on the cumulative effect of the following:

(a) the first appellant's aforementioned admission, supported by the testimony of Gumede; (b) the inference from the medical evidence stated above; (c) the trial Court's favourable assessment of the merits of accused no 3 as a witness; (d) an unqualified acceptance of the oft-repeated assertions in the evidence of accused no 3 (i) that he was well-acquainted with his shotgun (ii) that he had no intention of striking any of the scholars and (iii) that he had aimed his shots sufficiently in the air to exclude any possibility that the scholars would be hit.

The very considerable reliance placed by the trial Court on the version given by accused no 3 in the witness-stand emerges from the following remarks made by the learned Judge in the course of his judgment:-

"We found accused no 3 to be a convincing witness. He at no time attempted to deny that he fired shots in the school grounds, but we are persuaded that he knew exactly

what

what he was doing and that he had no intention of firing at the children. He followed them through the quadrangle and between the buildings at point T and he fired again from the area at point L.

We are satisfied that it has not been established beyond reasonable doubt that any shot fired by accused no 3 struck any of the persons who were injured on 23 July 1985 or that he intended to fire at or injure any person in the school grounds.

In the circumstances we are satisfied that the State has not proved his guilt on counts 1, 2, 3, 4, 5 and 6."

Immediately thereafter the learned Judge proceeded to say:-

"On the other hand we are satisfied that the two persons referred to in counts 1 and 2 were struck by shots fired by accused no 1, who, on his own admission fired directly at the children."

There can be no quarrel, I think, with the finding of the trial Court quoted above to the effect that the evidence did not establish beyond reasonable doubt either that accused no 3 had deliberately aimed at anybody or that

any

any of the shots fired by him had struck anybody. In my view, however, the trial Court failed to give sufficient consideration to the further and important question whether the totality of the evidence excluded as a reasonable possibility that one or more of the shots fired by accused no 3 had killed either Manga or Mancam or both of them.

Even if it were entirely safe to accept the protestations of accused no 3 that he always fired above the heads of the scholars I am disposed to doubt whether the possibility to which I refer is to be discarded as an unreasonable one. It must be steadily borne in mind that accused no 3 and the first appellant were firing not with rifles but with shotguns; and that the target (at which the first appellant was firing and above which accused no 3 was trying to fire) was not a static one within very close range but a fleeing and scattering group of people. Having regard to these circumstances alone counsel for the State was

was constrained to concede, both in his heads of argument and again in his argument before this Court, that on counts 1 and 2 there was not proof beyond reasonable doubt that the first appellant had fired the shots that killed Manga and Mancam. It is not necessary, I consider, to say much more on counts 1 and 2 for the reason that in any event it would be unsafe to accept as entirely reliable the evidence of accused no 3 as to the manner in which he fired and his assurances that nobody was struck by his shots. That this is so is demonstrated by the unsatisfactory answers given by accused no 3 during that part of his cross-examination by Mr Jansen to which reference has earlier been made. In my view further doubt is cast upon the reliability of accused no 3 as a witness by his evidence that as he moved westwards down the verandah from point "D" nobody was hit by the shots fired either by him or by the first appellant. Whether the fatal shots were fired by the first appellant or by accused no 3, the evidence as a whole clearly points to the conclusion that

that Manga and Mancam were killed while a crowd of scholars was running down the verandah in question, and on the version of accused no 3 it is difficult to understand how he could have failed to see that either Manga or Mancam had been hit.

While the evidence against the first appellant inevitably excites strong suspicion that he caused the deaths of Manga and Mancam, it fails, in my judgment, to provide proof beyond a reasonable doubt that he did so. That one or indeed both the fatal shots could have been fired by accused no 3 cannot, I consider, be excluded as a reasonable possibility. It follows that on counts 1 and 2 the first appellant was wrongly convicted of murder. On the other hand the evidence clearly supports a conviction of attempted murder on both counts. The first appellant fired four shots directly at the scholars. It is obvious that when he so fired he appreciated that there was a distinct

distinct risk to life involved; and he fired reckless as to whether or not he killed any of the scholars. Accordingly the first appellant should have been found guilty of attempted murder on counts 1 and 2.

I turn to the convictions of the second appellant on counts 5 and 6. The second appellant's case was that he had fired no shots whatever at the school. Following the return of the kombi to Korsten after the shooting at the school an entry in the Occurrence Book at Algoa Park was made at 14h10 on the same day. The entry was dictated by Capt du Plessis, and it is in the following terms:-

"14h10 Skietvoorval : Volgens S/A/O Mene (the first appellant) het hulle om 10h50 te Mayastraat, Zwede naby die Phakamisa skool gery met 'n E20 bussie SAP.55189P toe hulle aangeval was deur 'n groep van ongeveer 150/200 Swartes. Hulle het stilgehou en uitgespring. Die Swartes het oor die skool heining gespring. Hulle was agtervolg en daar was op hulle geskiet. Die volgende lede skiet:

- 1) Nr S161393M S/A/O Mene 8 S.S.G
- 2) Nr S162552N S/Sers B Tungate (the second appellant) 3 donshael

3)

- 3) Nr S160613B S/Kst M M Zwane 2 S.S.G
- 4) Nr S172925T S/Kst V S Qayiso (accused no 3)
6 S.S.G.

Skade aan voertuig a g v klipgooi - Regter
agterkant ruit gebreek. Waarde R100,00.
Twee bottelnekke van vermoedelik brandbomme
op toneel gevind. Berig deur Kapt Du
Plessis."

According to Capt du Plessis each of the four persons mentioned in the entry personally reported to him the details of the shots fired by him. It will be remembered, moreover, that the evidence by the second appellant to the effect that he had fired shots from the kombi after the kombi had driven away from the school, was disputed by Gumede and accused no 3. In considering who could have fired the shots which injured the complainants on counts 5 and 6 the trial Court disbelieved the story of the second appellant that he had fired three shots subsequent to the shooting at the school, and it rejected as false his denial that he had fired any shots at the school. Upon a review of all the evidence relevant to the matter the trial Court likewise resolved
against

against the second appellant the dispute as to where in the fence on the eastern side of the school the second appellant had gained access to the school grounds through a hole in the fence. It found as a fact that the second appellant had gone through a hole in the fence near the caretaker's gate.

It will be recalled that according to the evidence of the complainants on count 5 and 6 Mr Miza was wounded while he was running from north to south in front of the eastern wing of the school from the area of point "B" towards point "F"; and Mr Tulela was wounded in the vicinity of point "F". The conviction of the second appellant on counts 5 and 6 is in the main based upon a process of elimination which in turn is founded upon the version put forward by Gumede in his evidence in chief. The reasoning of the trial Court is reflected in the following passage of the judgment:-

"According to

"According to the evidence, no persons other than the three accused fired shots at that place at that time on that day. We have excluded accused nos 1 and 3 from the firing of the shots which struck the complainants in count 5 and 6. That logically leaves only accused no 2."

In regard to Gumede's evidence on this part of the case the learned Judge said the following:-

".....Mr Tulela was clearly the man whom Sergeant Gumede saw falling. Sergeant Gumede said that accused no 2 fired towards the area of point F ... and that he saw a person who appeared to be a teacher falling, getting up and disappearing round the building. Mr Tulela said that when he was struck he fell, he stood up, fell down again, stood up and ran to class-room no 1. To reach class-room 1 he would have had to run round the end of the southern block. Sergeant Gumede's evidence was entirely consistent with this."

In taking the above view of the matter the trial Court appears to have overlooked the serious discrepancy between Gumede's evidence and what is contained in para 28 of Gumede's proof. It will be recalled that according to the

the latter Gumede saw the first appellant fire several shots in the direction of the fleeing teachers "more or less in the direction of the big lamp-post"; and Gumede further saw "one of the teachers dressed in dark coloured trousers fall down twice while running" before the teacher disappeared around the building. Had Gumede been recalled as a witness after the discrepancy between his proof and his evidence had been pointed out to the trial Court, it is no doubt possible that Gumede may have been able to advance a satisfactory explanation for the apparent contradiction. But he was not afforded that opportunity, and one is left with what on the face of it is a glaring inconsistency on an essential point in the case. At lowest the effect of the inconsistency is at once to raise as a reasonable possibility that it may have been the first appellant who wounded Mr Miza and Mr Tulela. For this reason alone the convictions of the second appellant on counts 5 and 6 cannot be sustained. This conclusion renders it unnecessary to deal with the further arguments

arguments forcibly addressed to us by counsel in regard to the correctness of the convictions. It follows that in respect of counts 5 and 6 the second appellant should have been acquitted.

I deal next with count 8 on which the appellants were convicted of an attempt to defeat the ends of justice. The first leg on which the charge in count 8 rests is an allegation that the two appellants damaged the kombi or caused it to be damaged. This allegation was denied by each appellant in his own evidence. There was no direct evidence in support of the State's allegation and such evidence circumstantial as was adduced to sustain it was unsatisfactory and inconclusive. That evidence need not be examined here. Suffice it to say that the trial Court properly found that this particular allegation against the two appellants had not been established beyond reasonable doubt. It remains to consider whether the allegations against the appellants on

on which the second and third legs to count 8 rest were proved and, if so, to what extent they justify the conviction.

The machinery of the criminal law is set in motion by the first information of a crime which is noted in the Occurrence Book ("the OB") at a police station and on which a police case docket is opened. The first information of a crime may be the result of a report by a member of the public, but of course it may also be the result of a report by a policeman who has witnessed a crime. Reference has already been made to the entry made by Capt du Plessis in the OB at Algoa Park on 23 July 1985. At the trial a copy of the page in the OB bearing the relevant entry was handed in as exh "E". It is common cause that on 24 July 1985, and at the Kwazakele police station in Port Elizabeth, the first appellant opened a South African Police docket (exh "T"). The cover of exh "T" reflects the name of the first appellant as the complainant in respect of

of acts of violence alleged to have been committed on 23 July 1985 in Katyu Street, Zwile, in the course of which public violence stones and petrol bombs were used and a police vehicle was damaged. It is further common cause that on the same date each appellant wrote out, signed and filed in the said case docket a statement in support and amplification of the complaint detailed on the cover of exh "T". The relevant portion of the docket statement by the first appellant reads thus:-

"I was the driver of the said vehicle. At about 10h00 while we were travelling along Maya Street Zwile which is running between the shaks area and cement houses we came across a group of youth, consist of males and females in muftie and some in something like school uniform.

They started to stone our vehicle. There was no way of reversing then. We tried to run forward still on the vehicle. They started to run to the direction of Phakamisa Secondary School while some run between the houses and surrounding shaks.

I stop the vehicle at the corner of Maya and Katyu Streets. We then alighted and give chase the four of us as one had to remain

behind

behind guarding the vehicle, most of these youths run in side the school yard of Phakamisa. The shooting took place as we have started to chase these youth. I then run along the school yard to the direction of Soweto and Veeplaas trying to arrest some of these youth who were stoning us, but most of them run into the school yard. Jumping throw the school fence. And I discover that there is no chance to catch them. I turn back to the vehicle as I turn back I noticed that the other three members were at the same direction. I was that is the gravel road between the school fence and the shaks. We then go back to the vehicle. On our arrival in the vehicle meet Sgt Tungata and the other member we travel along the gravel road between the shaks and the school fence. While at about 20 to 25 meters from where we were stopping the car was stoned again from the direction of the shaks. D/Sgt Tungata fired a shot but no one was injured. We then left the area.

The vehicle was damaged. The body was having stones marks, two windows were broken on the righten side from that stoning of Maya Street. We also found two petrol bombs while we were inspecting the car. The other one was broken and the smell of petrol had filled the car.

We then left the area in order to report the matter in our office."

The relevant portion of the docket statement by the second

appellant

appellant reads as follows:-

"W/O Mene was the driver of the said vehicle. At about 10h00 while we were travelling at Maya Street Zwide which is running between the shaks and the cement houses we came to a group of youth, consist of males and females in muftie some in something like school uniform.

They started to stone our vehicle, there was no way of reversing then we tried to run forward still on the vehicle. They started to run to the direction of the Phakamisa Secondary School while some run between the houses and surrounding shaks.

Our vehicle went to stop at a corner of Maya and Katyu Street. We then alighted and give chase the four of us as one had to remain guarding the vehicle. Most of these youths run in side the school yard of Phakamisa.

Then the shooting took place as we have started to chase these youth. I then run to the direction of Katyu Street trying to arrest some of the stone throwers but they run inside the school yard, while other members run on the righten direction along the school yard which is a gravel road continuing from Maya Street.

As these youth had scattered in the school on the side of Katyu street there was no chance on me to catch them. I then moved back wards. Near the gate I discovered that it was locked and also the motor-car gate was locked. I then went back to the vehicle at this stage the shooting had stopped.

We

We then all climbed in the vehicle and left the gravel road which is the continuation of Maya Street. While at about 20 metres from where we were stopping the car was stoned again from the direction of the shaks. I then fired three shots but no one was hit. We then left the area. The vehicle was damaged, the body was having stone marks, two windows were broken on the righten side from that stoning of Maya Street. We also found two petrol bombs while we were inspecting the car. The other one was broken and the smell of petrol had filled the car.

We left the area in order to report the incidence in our office."

Capt du Plessis told the trial Court that his entry in the OB on 23 July 1985 was based on a report made to him by the first appellant after the kombi had returned to Korsten from the townships. In cross-examination by counsel for the appellants it was put to du Plessis,

inter alia:-

(a) that in the report made to him by the first appellant

the latter had made no mention whatever of petrol

bombs;

(b) that in reporting to du Plessis the first appellant had

described

described the attacking group as numbering no more than 17 or 20 persons and not "n groep van 150/200 Swartes" as stated in exh "E";

- (c) that after the return of the five policemen to Korsten the kombi had been damaged by someone on the instructions of du Plessis himself;
- (d) that in distorting and exaggerating, in his entry in the OB, what the first appellant had reported to him, and in causing the kombi to be damaged, du Plessis had been actuated by a misguided sense of loyalty to the two appellants;
- (e) that du Plessis had instructed the two appellants to make false statements consistent with the distortions and exaggerations aforesaid, and consistent with the damage to the kombi which, pursuant to his own instructions, had been done to the kombi.

All the above suggestions to him were repudiated by

du Plessis.

du Plessis. Before dealing with the evidence of the appellants on the second and third limbs of count 8, brief mention should be made of certain aspects of the evidence of the investigating officer in the case, Det Warrant-Officer Strydom. He told the trial Court that he had received his instruction to investigate the matter on 29 July 1985. On 6 August 1985 he took a sworn statement (exh "Z") from the second appellant and on 7 August 1985 he took a sworn statement (exh "Y") from the first appellant. Strydom saw the case docket, exh "T", for the very first time on 2 September 1985. He had been unaware of the existence of a case docket until he examined a police report dealing with the damage to the kombi. The latter report bore a case docket number which prompted Strydom to make inquiries at the Kwazakele police station. The latter forwarded exh "T" to Strydom.

According to the first appellant the report

which

which he made to Capt du Plessis when the kombi returned

Korsten was:-

"....dat die kinders het ons by die skool
gegooi en dat ons hulle geskiet het."

Later, so testified the first appellant, and after du Plessis had told him that the shooting at the school had resulted in deaths, du Plessis in the presence of Brigadier van Wyk said to him:-

"Mene, moenie bekommerd wees nie. Ons sal
hierdie ding regstel."

Still later on the same day du Plessis told the first appellant that accused no 3 had precipitated the attack on the police at the school, but that they should not leave accused no 3 in the lurch. He told the appellants to say that:-

".....die motor is daar by die skool
geslaan"

and he further instructed the first appellant:-

"....dat ek 'n dossier moet gaan oopmaak

daar

daar by Kwazakele op 'n aanklag van openbare geweld en daarop beweer dat die motor met klippe en petrolbomme gegooi was dat ons moet nie sê ons was binne-in die perseel van die skool gewees nie en dat ons van buite geskiet het."

Capt du Plessis also told him, so testified the first appellant, to bring the case docket to du Plessis for the latter's inspection. According to the first appellant he carried out du Plessis's instructions with reference to the opening of the case docket and the contents of his docket statement. Apart from filing the two docket statements he did nothing further in relation to the case docket. The case docket remained in his possession until 19 September 1985 when he was suspended from duty.

Affecting the second and third limbs of count 8 the version given by the second appellant in his evidence followed the broad pattern of the first appellant's account. The second appellant told the trial Court that immediately upon the return of the kombi to Korsten the

first

first appellant reported to du Plessis:-

"....dat ons het geskiet daar op die skool
Phakamisa".

Shortly afterwards, and when Brig van Wyk was also present,
the first appellant reported to du Plessis:-

"....dat ons gegooi was deur kinders te
Phakamisa".

Du Plessis asked them whether they were unaware of the fact
that two children had died, and that other persons had been
injured. Thereafter du Plessis took particulars from each
of the accused and Zwane of the shots fired by each. Some
minutes later du Plessis got the two appellants alone and
told them that the first appellant had no cause for concern
"en dat hulle die ding sou regmaak." Du Plessis further
instructed them as follows:-

"Hy het gesê ons moet 'n saak loop oopmaak
daar te Kwazakele en verklarings maak
Hy het gesê ons moet in die verklarings
sê dat ons met klippe gegooi was daar by
die skool deur die skoolkinders, dat as

gevolg

gevolg daarvan is die kombi beskadig, die vensters en die bakwerk en ons moet ook sê dat ons met petrolbomme gegooi was deur die kinders."

The second appellant further testified that du Plessis had been insistent that the first appellant should entrust the case docket to nobody else and that he should bring it to du Plessis.

So much for the evidence. The trial Court concluded that it was clear:-

".....that the second leg of the charge..... (that they falsely informed Capt du Plessis about the stoning and the petrol bombs) had been established."

The learned Judge proceeded to say further -

"However that is not all. The opening of the Police docket is not disputed by the accused and they admit that the statements which they filed therein were false in almost every material respect There can be no doubt that the preparation of this docket and the false statement by accused nos 1 and 2 therein were intended to impede or prevent a proper investigation of the events which occurred on 23 July.

Any

Any tampering with evidence which is to be used in a Court of law is interference with the course of justice, and one of the most serious manifestations of this offence is concocting evidence"

Mention has already been made of the fact that the appellants were untruthful witnesses. For the sake of completeness it should be added that during cross-examination by counsel for accused no 3 each appellant was in turn cross-examined on his statement (exh "Y" in the case of the first appellant and exh "Z" in the case of the second appellant) to the investigating officer. Each appellant admitted that his statement to the investigating officer was largely false. On behalf of the appellants it was nevertheless contended that in regard to the second and third legs of count 8 their version was reasonably possible. In particular it was urged that the admitted fact that after the docket statements had been filed the first appellant took no further steps in regard to the case docket pointed, on

on the probabilities, to the conclusion that in opening the docket the appellants were acting under instructions. It was further submitted that, on any version, the appellants had never harboured any intention to defeat the ends of justice.

In amplification of the above submissions various criticisms of the evidence of Capt du Plessis were advanced by counsel for the appellants. It is notable, I think, that the judgment of the Court below - in which a full and careful appraisal of the credibility of the appellants is to be found - is silent as to the merits or demerits of Capt du Plessis as a witness. I would add that a reading of the record reveals that the latter's memory of many of the events in question would seem not to be particularly vivid; and that his testimony is throughout characterised by a curious diffidence. However that may be, it is clear that in regard to the matters relevant to the second and third

third legs of count 8 the trial Court believed Capt du Plessis and disbelieved the appellants. Looking at the totality of the evidence I am inclined to doubt whether the trial Court wrongly so found. It seems to me to be unnecessary, however, to express any firm opinion on the acceptability or otherwise of the evidence of Capt du Plessis in relation to the second and third legs of count 8. Assuming for purposes of argument in favour of the appellants (a) that the report made by the appellants to du Plessis was a substantially correct one (b) that du Plessis deliberately distorted and exaggerated such report when he dictated the entry, exh "E", in the OB, and (c) that thereafter du Plessis instructed the appellants to open a false docket and file therein false statements, the conclusion seems to me to be inescapable that in opening the case docket and filing their statements therein the appellants were deliberately and fraudulently attempting to lay a false trail in order to mislead and impede any further police

police investigation into the shooting at the school on 23 July 1985. Both the appellants were non-commissioned officers and experienced policemen. Every newly-recruited member of the Police Force knows that when the commission of a crime is reported to the police it is the duty of the police to track down the offender, to bring the offender before a criminal court, and to produce to the latter all the available evidence. There can be no question but that the appellants knew perfectly well that any such instruction by a senior officer (as the one claimed by them to have been given by du Plessis) was manifestly illegal and unlawful. Indeed, their state of mind at the time when the false case docket was opened is sufficiently reflected in the following admissions made by the first appellant in the course of his cross-examination by counsel for the State -

"And there were also definitely no youths throwing petrol bombs at you that particular day (23 July 1985)? - - - That is right.

It is also true that when you shot you

were

were not trying to arrest the persons you were shooting at? - - - That is right.

And you also opened the false docket which is exhibit T before the Court? - - - That is right.

And you and Accused 2 agreed with one another to do this? - - - That is right.

And at the same time I take it you realised that you were attempting to defeat the ends of justice, opening this false docket and putting in the statements which are EXHIBITS T.1 and T.2? - - - Well I took those to be the instructions of the Captain and I could not do otherwise.

COURT: The question is - did you realise that in doing this you were attempting to defeat the ends of justice? - - - That is right."

There remains the final submission made by

Mr Jansen in regard to the convictions on count 8. Counsel argued that in any case, and at worst for the appellants, their conduct relevant to the second and third legs of count 8 amounted to no more than the laying of a false charge; and that on the authority of the decision of this

Court

Court in S v Sauerman 1978 (3) SA 761 (A) the laying of a false criminal charge, without more, is no longer an offence in our law. To a consideration of this submission I now turn.

For the sake of brevity I shall, in the remainder of this judgment refer, to the decision on which counsel relies as "the Sauerman AD case". I think that Mr Jansen is right in arguing that in the present appeal the conduct of the appellants amounted to no more than laying a false criminal charge against certain unidentified persons at a particular place on a particular date. In a passage in the judgment of the Court below quoted earlier the learned Judge makes specific mention, in relation to count 8, of "tampering with evidence" and "concocting evidence". Many examples of the two last-mentioned acts may be noticed in a number of the decided cases of our Courts to be detailed hereafter. Here a few examples will suffice : spiriting away a witness in a pending prosecution; receiving money with

with the intention of withholding testimony in a pending criminal case; trying to persuade a material witness to give false evidence in order to secure an acquittal; attempting by threats to induce a complainant to withdraw a complaint with a view to avoiding a prosecution; placing dagga in the huts of two innocent persons and thereafter giving the police information leading to the discovery of the dagga and the prosecution and conviction of the persons concerned; forging and transmitting incriminating documents to a person against whom false information had been laid with the police, and arranging that the person should be caught in possession of the documents. In the instant case, however, the first leg of count 8 having fallen away, the appellants cannot be said to have tampered with any evidence or to have concocted any evidence. If they made to Capt du Plessis the false report deposed to by him, then it is clear that they laid a false charge with the police. Similarly, the opening of the docket constitutes the laying of

of a false charge of public violence with the police. Can it be said, however, that in filing the false docket statements in the case docket the appellants were doing anything beyond laying a false charge? I think not. In filing the false docket statements the appellants were doing no more, so I consider, than particularising the false charge very tersely labelled on the cover of exh "T". It seems to me that the false docket statements are part and parcel of the false charge of public violence laid. It follows that if the Sauerman AD case correctly states the law, what the appellants were proved to have done was not the crime of attempting to defeat the ends of justice, and their convictions on count 8 cannot stand.

In my respectful opinion it is necessary for purposes of the present appeal to examine the correctness of the legal proposition stated in the Sauerman AD case. In order to do so it is convenient to see how, prior to the

Sauerman AD

Sauerman AD case, the crime of attempting to defeat the ends of justice was defined in this and in other Courts of our country.

A useful starting-point is provided by a decision of the former Court of Criminal Appeal more than a century ago. In Queen v Foye and Carlin (1886) Buch Appeal Cases vol 2, p 121, the accused were found guilty by a jury of the crime of defeating and obstructing the course of justice. A woman had been arrested upon a charge of contravening sec 3 of Act 48 of 1882 (C), and she had been summoned to appear before a Special Court at Kimberley. One Jonas was a necessary and material witness. The accused enticed Jonas away from Kimberley and the Crown was unable to proceed with the case against the woman. After conviction but before sentence the Court (JONES, J) reserved for the consideration of the Court of Appeal whether the indictment sufficiently disclosed a crime inasmuch as it

did

did not set forth that Jonas had been subpoenaed to give evidence. The point reserved was decided against the accused. Observing (at 125) that the means by which justice is defeated must vary with the facts of each particular case, DE VILLIERS, CJ said that the important questions in every case were:-

"Whether it was a necessary consequence of the prisoner's acts to prevent the due administration of justice, and whether the prisoner committed them knowingly and wilfully."

In his judgment BUCHANAN, JP remarked (at 125) that:-

"...the obstruction of justice did not begin with the summons, but at the fountain head."

In the case of Rex v Cowan and Davies 1903 TS 798

the accused had received money with the intent of withholding testimony in a pending criminal case and they were convicted of attempting to defeat the ends of justice. On a point of law reserved the case was argued before a full Bench consisting of INNES, CJ and SOLOMON

and

and MASON, JJ. The question reserved was answered in favour of the Crown. At p 801 INNES, CJ summed up the legal position in the following words:-

"The administration of justice requires that testimony should not be tampered with, and that it should be procured and should proceed on regular and legal lines. Any corrupt dealing with testimony, so as to pervert the ordinary and true course which it should take, does in my opinion amount to an attempt to defeat the ends of justice."

Later in his judgment INNES, CJ said (at 801/802) :-

"Now, in this case the accused agreed to accept money in order to withhold evidence - so the jury have found. They went to the trysting-place, and they received a portion of that money. It was impossible for them to conclude their contract to run away, because the police there and then arrested them. But they had given their promise, their meeting was at an end, and their acceptance of the money was an act sufficient to support an indictment for a contravention of the lex Cornelia de falsis. In effect it was argued by Mr Tindall that the attempt was one to defraud, and not to defeat the ends of justice, nor was it a contravention of the lex Cornelia de falsis. To my mind this branch of the crime, of attempting to

defeat

defeat the ends of justice, coincides exactly with a branch of the lex Cornelia de falsis. In so far as the lex Cornelia de falsis deals with the corruption of testimony, and in so far as attempting to defeat the ends of justice is carried out by corrupting testimony, to that extent the two laws overlap; and it does not matter whether one calls the offence which the accused committed a breach of the lex Cornelia or an attempt to defeat the ends of justice: in substance the two crimes are the same. Just as forgery is a branch of the crimen falsi, so attempting to defeat the ends of justice by corrupting testimony is, in my opinion, a branch of the lex Cornelia. Now it is perfectly clear that these men did contravene the lex Cornelia.

Dealing with the matter of nomenclature SOLOMON, J remarked in his judgment (at 803/4):-

"It is quite clear, without referring in detail to the Roman-Dutch authorities, that upon these facts the prisoners would have been properly convicted if they had been charged with the crime of contravening the provisions of the lex Cornelia de falsis
.....

The fact of the matter is that the practice in South Africa is not to indict prisoners with contravention of the lex Cornelia de falsis; but we have adopted the English phraseology in dealing with this case,

as

as we have in a great many other cases

It appears to me that the proper way of designating the offence is not defeating the ends of justice, but 'an attempt to defeat the ends of justice'; because I do feel that in the majority of cases - in almost every case - it would be very difficult, if not impossible, to prove that the ends of justice have been actually defeated."

In R v Zackon 1919AD 175 the appellant was convicted by a magistrate of attempting to defeat the ends of justice. Both his appeal to the Cape Provincial Division and his application to this Court for leave to appeal were dismissed. The appellant knew that G had been charged with allowing a child under 16 years to be in licensed premises; and that the mother of the child was a material Crown witness to prove the age of the child. Before G was summoned or charged the appellant tried to persuade the mother of the child to give evidence that her child was over the age of 16 years. The appeal was based on the facts rather than upon the law.

It

It should be noticed, however, that in the course of his judgment MAASDORP, JA said at 180:-

"No authority has been cited in support of the contention that the crime of attempting to defeat the ends of justice can only be committed where the legal proceedings in question have actually been instituted."

Having referred to the judgment of DE VILLIERS, CJ in Queen v Foye & Carlin (supra) and to the judgment of INNES, CJ in Rex v Cowan & Davies (supra) DE VILLIERS, AJA in his judgment proceeded to say (at 182):-

"And finally DE VILLIERS, CJ in the case of Fein & Cohen v Colonial Government (23 SC 750) summed up the law thus: 'The principle underlying these and other statements of the law made by Voet is this - that the public interest requires that no one shall be allowed with impunity to wilfully impede or obstruct or otherwise interfere with the due course of justice, or to bring the administration of justice into contempt.' Although differently stated it all comes to this that any tampering with evidence which is to be used before a court of law is an interference with the course of justice, and therefore an attempt to pervert or obstruct or defeat the

ends

ends of justice and as such punishable under the Lex Cornelia de falsis."

Rex v Zackon (supra) was followed by a full Bench of the Natal Provincial Division in Hattingh v Rex 1929 NPD 105. The appellant had been convicted by a magistrate of attempting to defeat the course of justice. The evidence established that the appellant, with a view to preventing a prosecution against M, had by threats solicited the complainant to withdraw his complaint against M. In delivering the judgment of the Court DOVE-WILSON, JP said at 107:-

".....in my opinion the essence of the crime consists in the wilful attempt to obstruct the due administration of justice coupled with an act calculated to further and done in furtherance of that intent; and if these elements are present it does not matter that what was done was done under a mistaken belief that it would have the effect intended. It is sufficient if it is done with intent to defeat or obstruct the course of justice and is calculated to have that effect, or, to adopt the words of DE VILLIERS, CJ, in Queen v Foye and Carlin (supra), if

its

its necessary tendency is to interfere with the due administration of justice."

In R v Adey and Hancock, 1938 (1) PH H75 the accused was in possession of a tin of oil which had been stolen from the Railways. He persuaded a friend to inform the police, in case they should approach him, that he (the friend) had given the oil to the accused. The friend informed the police accordingly. In a jury trial before CENTLIVRES, J the learned Judge's summing-up to the jury is thus condensed in the Prentice-Hall report:-

"When an investigation was being made into a suspected crime, and a person persuaded another person to make a false statement which tended to show that the suspected criminal was not guilty of the suspected crime, he was then interfering with the due course of justice It would be lamentable if the Court were to lay down that when the police were investigating a suspected crime anybody who tried to obstruct or thwart the administration of justice by persuading people to put false information before the police was not liable to be charged with the crime of attempting to defeat the due course of justice."

In

In Rex v Port Shepstone Investments (Pty) Ltd. & Another 1950(4) SA 629 (A), the second appellant had been charged, inter alia, with attempting to defeat the ends of justice, or alternatively, with inciting to defeat the ends of justice. The evidence established that he knew that he would have to stand his trial on a charge of contravening a provision of the Usury Act; and he further knew that the evidence of J, if accepted, would lead to his conviction. The second appellant approached C, who agreed to try to obtain the signature of J to a document containing false statements which would be destructive of J's evidence. J informed C that the matter was out of his hands whereafter C did nothing further. The second appellant's conviction on the alternative charge of inciting was upheld on appeal to the Natal Provincial Division. On a further appeal to this Court it was held that the second appellant's conduct amounted to an attempt to defeat the ends of justice; and that he should have been convicted on the

main

main charge. The judgment of the Court was delivered by HOEXTER, JA who (at 636F/637E) dealt at some length with the nature of the offence of attempting to defeat or obstruct the ends of justice as defined by DE VILLIERS, AJA in Rex v Zackon (supra); and later (at 639A/F) he quoted with approval the definition of that offence given by DOVE-WILSON, JP in Hattingh v Rex (supra) at 105 to which reference has already been made.

In Naidoo v Regina 1953 PH (2) H138 the appellant was convicted by a magistrate of attempting to obstruct the due course of justice. Two motor cars had been involved in a collision on a public road and the appellant knew that X had been the driver of one of the cars. The indictment alleged that during the investigation by the police of an alleged contravention of section 52(1)(b) of Ord 10 of 1937(N) the appellant, well knowing that X was the driver of the car falsely and with intent to defeat or obstruct the due course of justice, and to prevent

prevent X from being dealt with according to law, informed members of the police that at the time of the collision he (the appellant) had been the driver of the car in question. An appeal against the conviction to the Natal Provincial Division failed. One of the grounds of appeal was that the evidence did not establish the commission of the offence. The Court (DE WET & HOLMES, JJ) pointed out that it was part of the duties of the police to investigate the cause of a collision on a public road. By appellant's action he had obstructed the police in the course of those investigations.

This brings me to R v Chipso and Others 1953(4) SA 573(A), a much-debated decision of this Court to which reference will hereafter be made as "the Chipso case". The conclusion at which the Court in the Sauerman AD case arrived was based upon its interpretation of the effect of the decision in the Chipso case. The facts of the Chipso case were the following. Four black juveniles were

convicted

convicted by a magistrate in Umtali, in what was then Southern Rhodesia, on a charge of criminal injuria.

Following argument on review before three Judges of the High Court the latter, by a majority decision, quashed the conviction. The Minister of Justice for Southern Rhodesia appealed to this Court which dismissed the appeal. The facts were these. The complainant in the magistrate's court was a white farmer and the accused were employed by him on his farm. The accused complained to the police that because they had grumbled at the conditions of their employment the complainant had fired a rifle at them. On investigation the police were satisfied that the allegations of the accused were false. The accused were then jointly tried and convicted of the crime of criminal injuria.

In the course of his judgment quashing the conviction MORTON, J described the charge against the

accused

accused (see 576 of this Court's judgment in the Chipo case) in the following words:-

"The substance of the charge was that they wrongfully and unlawfully made this complaint to the police with intent thereby to injure and insult their employer, whereas in truth and in fact they well knew that the complaint was false and thus the employer was injured and insulted;" (My emphasis.)

The judgment in the Chipo case (delivered by HOEXTER, JA in and concurred by CENTLIVRES, CJ, GREENBERG & VAN DEN HEEVER, JJA, and DE BEER AJA) having at the outset indicated the nature of the charge against the accused and the facts, stated (at 576 A/F) the following:-

"The charge proved against the respondents contains all the elements of an injuria as defined in the Roman-Dutch Law; their act was wrongful, it was intentional, and it violated the real rights related to personality, of the complainant. (See the judgment of INNES, CJ., in R v Umfaan, 1908 T.S. 62 at p 66). In that case it was pointed out that in the Roman-Dutch Law an injuria gave rise not only to a civil action but also to criminal proceedings. 'But' said the learned

CHIEF

CHIEF JUSTICE, 'I do not wish to be understood as saying that in all cases of injuria the courts nowadays would sanction criminal proceedings. Some of the jurists remark that it was unusual, even in their day, to prosecute for the lighter species of injuria; and I have no doubt there are many cases in which this Court would say that criminal proceedings have by our practice become obsolete'. (See also the judgment of DE VILLIERS, JP, in R v Terblanche, 1933 O P D 65 at p 69). One of the cases which readily comes to mind is that of adultery, which is also a species of injuria. (See Foulds v Smith, 1950(1) SA 1 (A D) and Viviers v Kilian, 1927 AD 449). Adultery in our law still gives rise to a civil action, but it is no longer regarded as a crime. (See Green v Fitzgerald and Others, 1914 A D 88.) I propose to consider, therefore, whether the charge against the respondents discloses an offence in our modern practice.

It seems to me that the charge against the respondents is in essence one of laying a false criminal charge. Conduct of that nature was clearly regarded as an offence both in the Roman and the Roman-Dutch Law. In fact the offence of laying a false criminal charge was specifically called calumnia."

Following upon the remarks quoted above the learned Judge

proceeded

proceeded to discuss (at 576F/577H) the concept of calumnia both in Roman Law with reference to D.48.16.1 and C. 9.46.10 and (as illuminated by writers such as Matthaeus, Damhouder, Boey and Voet) in the Roman-Dutch Law. In the light of the authorities cited by him the learned Judge observed (at 577H/578A):-

"It appears therefore that in the Roman and Roman-Dutch Law the malicious laying of a false criminal charge, although it might have been classed as a criminal injuria, was treated as a specific crime known as calumnia. But in our modern text-books of criminal law and in the law reports of Southern Rhodesia and the Union I can find no reference to the specific crime of calumnia. The obvious inference is that this crime has become obsolete."

The conclusion at which HOEXTER, JA arrived at the end of the judgment in the Chipo case (at 579D) was the following:-

"Many civil actions for malicious prosecution are to be found in the law reports of the Union and Southern Rhodesia, but one seeks in vain for the report of any

criminal

criminal conviction for malicious prosecution. The earliest reports of criminal cases in the Cape Colony go back for more than a century, and I cannot avoid the conclusion that the crime of calumnia is now obsolete. It follows that the High Court rightly quashed the convictions and sentences in the present case

The decision in the Chipo case was followed by R v Leballo 1954(2) SA 657 (O). In the magistrate's court the appellant was charged with and convicted of fraud in falsely accusing certain policemen of stealing money from him when they had searched him. On appeal to the OPD the conviction was set aside. Judgment was given by DE BEER, JP (who had been a member of the Court in the Chipo case) and concurred in by DE VILLIERS, J. Dealing with a submission by counsel for the State that the Chipo case was distinguishable from the facts of the appeal before him, DE BEER, JP said the following at 661 A/B:-

"It was urged that in fraud there is

virtually

virtually always in the background a claim affecting money or goods, whereas in the calumnia proper, as dealt with in Chipo's case, the gist of the offence is an imputation affecting the honour or dignity of the person. But I do not think this distinction is sound : a false accusation of murder or rape could be much more damaging to the person concerned than a false accusation of fraud, even though the latter always contains some element of tangible or real prejudice. Logically I see no reason for holding that, whereas the former class of case was decreed to be obsolete, in the latter the Courts would still sanction criminal proceedings."

The effect of the decision in the Leballo case (supra) was critically considered by two other Judges of the OPD in R v Tanoa 1955(2) SA 613(O). There the Court on appeal confirmed a conviction of obstructing the course of justice where the appellant had knowingly fabricated false evidence against two persons with the intention that they should be charged with a crime of which they were innocent. The appellant had placed dagga in their huts and then passed on information to the police

as

as a result whereof the dagga was found and the persons were charged and convicted. Both Judges who sat on the appeal delivered judgments. In the course of his judgment HORWITZ, J remarked at 615 E/F:-

"Na my mening, verskil die misdaad van calumnia hemelsbreed van die onderhawige. Calumnia, soos verklaar ook in Chipo se saak, supra, bestaan daaruit dat 'n persoon uit kwaadaardigheid 'n onskuldige persoon valslik 'n misdaad ten laste lê."

This view of the matter was shared by VAN BLERK, J who said at 617B/F:-

"Die bedrywigheid wat die beskuldigde in die onderhawige geval begaan het behels sekerlik ook calumnia maar in dié opsig is dit op gesag van Chipo se saak nie meer strafbaar nie, alhoewel dit tegelyk die verloop van die gereg mag verydel of dwarsboom en as dit die effek van die Leballo saak is dat die beskuldigde van dwarsboming van die gereg verontskuldig moet word omdat sy handeling as calumnia nie beregbaar is nie dan moet ek met eerbied daarvan verskil. Die uitspraak in Chipo se saak kan sekerlik nie so 'n uitwerking hê op die onderhawige geval nie; wat boonop te onderskei is van Chipo se

saak

saak afgesien van die feit dat die Hof hier werklik mislei is, omdat die beskuldigdes tereggestaan het op 'n aanklag van crimen injuria, wat 'n misdaad teen die eer, waardigheid en vryheid van die individu is en waarvan calumnia 'n verskyningsvorm is terwyl die misdaad die beskuldigde hier ten laste gelê in verband staan met die regspleging.

Volgens die beslissing in Rex v Armstrong, 1917 T P D 145, het crimen falsi gebaseer op die indiening van 'n valse klagte in elk geval nog nie in onbruik geraak nie. Dieselfde feite-kompleks kan meerdere misdade inhou, maar omdat bv owerspel ten opsigte van 'n besondere geslagsdaad as misdaad in onbruik geraak het beteken dit nie dat bloedskanie ten aansien van dieselfde daad nie meer strafbaar is nie."

And again at 618C/D:-

"Die kernfeit wat die betrokke misdaad ten grondslag lê is 'n handeling wat bereken is om die verloop van die gereg te dwarsboom : Rex v Port Shepstone Investments (Pty) Ltd & Another, 1950(4) SA 629 (A D); en as dit dwarsboming van die gereg is, soos dit sekerlik is, om die vrysprying van 'n veroordeling van 'n misdadiger met dié doel te bewerkstellig dan is die bewerkstelliging van die veroordeling van 'n onskuldige, soos in die onderhawige geval, ewe seer, indien
nie

nie in groter mate nie, h dwarsboming van die verloop van die gereg."

The case of S v Daniels 1963(4) SA 623(E)

represents authority for the proposition that a person who knowingly tries to mislead the police when they are investigating the commission of crime A in order to prevent the detection of crime B, which might otherwise be revealed, is guilty of an attempt to defeat the course of justice. While driving an unlicensed motor car which had not been insured under the Motor Vehicle Insurance Act ("the unlicensed car") the appellant had been involved in a collision with another vehicle in consequence whereof passengers in the latter vehicle were injured and one died. The appellant was also the owner of a car ("the second car") duly licensed and insured under the Motor Vehicle Insurance Act. Before the arrival of the police at the scene of the accident the appellant caused the number plates of the second car to be exchanged

exchanged with those of the unlicensed car. Later it was found that the licence disc of the second car had been attached to the windscreen of the unlicensed car and that the third party insurance disc of the second car had also been placed on the unlicensed car. Referring to R v Zackon (supra) and R v Adey and Hancock (supra) O'HAGAN, J (in whose judgment on appeal GRAHAM, AJ concurred) pointed out (at 625A) :-

".....that there is no narrow limit imposed on the character of the penal sanction aimed at conduct designed to interfere with the administration of justice."

And again at 625C/E:-

"In the present case the suspected offence under investigation according to the charge, was one of culpable homicide. Counsel argued that whether or not the suspected driver's vehicle was licensed and insured could have no bearing on the question whether the suspect was or was not guilty of an unlawful homicide. This, I consider, is beside the point. Police

investigation

investigation into deaths caused in road accidents embraces ... examination of the qualifications of the drivers concerned and the condition of their vehicles. Such examination may disclose the commission of offences not directly concerned with the death of a person, and it appears to me that anyone who knowingly endeavours to mislead the police in order to prevent detection of a crime that might otherwise be revealed is guilty of the offence of which the appellant was convicted."

There must be examined next a decision in which the effect of the Chipo case was interpreted in the same way in which it ^{was} later interpreted in the Sauerman AD case. In S v Mdakani 1964(3) SA 311 (T) the appellant had in the regional court been charged with and convicted of attempting to defeat or obstruct the due course of justice. The evidence established (1) that the appellant had laid false charges against H and (2) that he had forged and transmitted to H documents which incriminated H, at the same time arranging for H to be found in possession thereof by

the

the police. An appeal against the conviction was dismissed in a judgment given by TROLLIP, J and concurred in by THERON, J. One of the submissions advanced in support of the appeal was that the appellant had done no more than to lay a false charge against H and that, in the light of the Chipo case, such conduct was no longer an offence at common law. TROLLIP, J disposed of that argument by pointing out that on the facts of the case before him Chipo's case was clearly distinguishable. At 318F/H he said:-

"In the present case the accused not merely laid false charges ^{against} the Hlatswayos but in addition he manufactured false evidence and documents in support of those charges, and maliciously arranged for the police to come into possession thereof. Those acts went far beyond mere calumnia, and in my view constituted an attempt to defeat or obstruct the due administration of justice. Chipo's case is, therefore, in my view distinguishable."

There can, with respect, be no quarrel with the learned

Judge's

learned Judge's conclusion above-quoted. More germane to the matter here under consideration, however, are observations made by TROLLIP, J earlier in the judgment affecting the scope of the decision in the Chipo case.

At 317D/G of the report TROLLIP, J expressed the view that the effect of the Chipo case was to preclude a court from finding that an accused who lays a false charge with the police that an offence has been committed by another (known by the accused to be innocent) is guilty of an attempt to defeat or obstruct the due administration of justice.

Going on to remark (at 317H) that the Chipo case "was followed in R v Leballo" the learned Judge then proceeded to say (at 318A/F):-

"In neither of those cases were the accused charged with an attempt to defeat or obstruct the course of justice. It appears, however, from the judgments that in each case the Court did not have regard to the label but to the substance of the offence, and I think therefore that even if the accused had been charged with an attempt to defeat or obstruct the course of justice, the

conclusion.....

conclusion would have been the same, because the Court would have regarded the gravamen of the offence in each case as still being the malicious laying of a false criminal charge. Chipo's and Leballo's cases cannot therefore be distinguished from the present case on that ground. But it seems to me, for reasons that follow, that those decisions must be strictly confined to the mere malicious laying of a false charge. It was that act which constituted calumnia of Roman and Roman-Dutch Law. In Roman Law the laying of a criminal charge was a formal procedure (see Digest 48.2., especially sec 3 thereof), which preceded and was quite separate and distinct from the judicial proceedings that followed thereon; the offence of calumnia was therefore treated separately and differently from those relating to the administration of justice; it was dealt with under the lex Remmia (see Digest 48.16.1; Code 9. 46; Chipo's case at 576 - 7), whereas the latter were dealt with under the lex Cornelia de falsis (see Digest 48.10.1) and perhaps too the Julian Law (Digest 48.6.10). In Roman-Dutch Law, although the procedure for laying complaints was different and less formal, the above distinction between the offences was maintained. (See the authorities quoted in Chipo's case at p 577; and Voet 48.10). Voet 48.10 shows, moreover, how appreciably the application of the Cornelian Law to offences relating to the administration of justice was developed and extended in Roman-Dutch Law. In our modern law, although the terminology of the

offence

offence of defeating or obstructing the course of justice is derived from the English law, its substance is still the Cornelian Law (see e g Cowan and Davies' and Zackon's cases), and the decisions of our Courts quoted above show that, although the Remmian Law relating to calumnia has now become obsolete the Cornelian Law is still flourishing most vigorously."

In S v Neethling 1965(2) 165 (O) the appellant, a police sergeant, was convicted in the magistrate's court of, inter alia, attempting to defeat the ends of justice. The appellant drove a police vehicle, in which T was a passenger, into a tree by the side of the road. The appellant extracted a promise from T to say nothing of the accident. Having parked the vehicle in front of the charge office the appellant threw away the keys, explaining to T that this would create an impression that the vehicle had been stolen. T testified that he had so conspired with the appellant in order to shield the latter from prosecution. An appeal against the conviction was dismissed.

ERASMUS, J

ERASMUS, J (in whose judgment SMIT, JP concurred) remarked
at 167D:-

"Dit is duidelik uit hierdie getuienis van Taljaard dat die appellant 'n poging aangewend het om die polisie op 'n valse wyse te mislei in hul ondersoek na die beweerde misdaad....."

and again at 168F:-

"Die appellant se optrede was daarop gemik om die polisie te beweeg om 'n diefstal wat nie bestaan het nie teen iemand onbekend te ondersoek in plaas daarvan dat hulle 'n saak teen hom instel."

A further and striking example of an accused seeking to create the illusion of the theft of a motor car in order to provide himself with an alibi as a shield against conviction of an entirely different offence is afforded by the facts in S v Burger 1975(2) SA 601(C). The evidence in that case established that at 11.20 pm at night the appellant in his motor car had run over a child. Subsequently the appellant made a false statement to

to the police to the effect that his car had been stolen at about 11 pm on the night in question. The appellant was convicted in the magistrate's court of an attempt to defeat or obstruct the course of justice. On appeal the conviction was upheld by a majority decision (VAN ZYL and BAKER, JJ). BURGER, J gave a dissenting judgment the burden of which ^{was} that the conviction represented an impermissible extension of the concept of defeating the course of justice. His conclusion (at 623B/C) was the following:-

"Na my mening was die vals verklaring deur die beskuldigde aan die polisie nie deel van die hofproses nie (dit kan lei tot 'n hofproses) en soos reeds hierbo aangedui is dit derhalwe nie 'n poging om met die regspleging in te meng nie."

In the majority judgment, delivered by BAKER, J, it was held that the course of justice could be defeated in many ways and that a false statement to the police containing allegations intended to lead them off the track of the real offender was but one of them.

The

The factual situation in Burger's case comes close to that of the present appeal. At 605 A/B BAKER, J put the problem thus:-

"In baie van die gevalle van poging tot dwarsboming of belemmering van die verloop van die gereg of regsverrydeling het die gewraakte handeling neergekom op die aanpresentering van valse getuienis in 'n hof deur vriende van die beskuldigde; weerhouding van essensiële getuienis van die hof; fabrisering van dokumente; omkoperij van getuies om valse getuienis af te lê; ensovoorts. Hier het ons 'n geval van fabrisering van 'n belangrike stuk informasie, buite 'n hof, voor die hofverrigtinge begin het, en selfs voor 'n klagte teen appellant gemaak is."

The judgment of BAKER, J in Burger's case contains a comprehensive review (at 605 G/611C) of the Roman and Roman-Dutch Law, which led the learned Judge to the following conclusion (at 611 C/G):-

"Die betoog dat appellant se optrede nie 'n voorbeeld van calumnia is nie, is gegrond. Dit is duidelik dat om jou aan calumnia skuldig te maak moes jy 'n genoemde of identifiseerbare persoon van 'n misdaad

beskuldig

beskuldig het. Daar was 'n element van injuria aanwesig. Die misdaad word breedvoerig behandel in D. 48.16.1.1 ('to calumniate is to bring false accusations'; Scott, bande 9-11, bl 90) en C. 9.46.10. ('Anyone who brings a criminal accusationif it should prove false.....(is) guilty of calumny'). Damhouder omskryf die misdaad:

'Calomnieren naer rechte is wetenlik ymant accuseren van crime dat niet geschieten is

(Prac. in Crim. Saken). Kyk ook Voet, 3.6.1; Matthaeus, De Criminibus, bl 813; Timon Boey, Woorden Tolk (1773), bl 122:

'Calumniateur is imant die uit kwaadaardigheid een onschuldige een misdaad te lasten legt....';

R v Chipo and Others, 1953(4) SA 573 (A A) te bl 576; R v Tanoa, 1955(2) SA 613(O) te bl 615. In verband met die element van injuria sien in besonder Damhouder, op cit, bl 544, 553; en Voet, 47.10.7. Die valse beskuldiging moet gerig wees teen 'n onskuldige persoon, want slegs dan sal daar regverdiging wees vir die klassifisering van calumnia as 'n strafregtelike injuria (R v Chipo and Others, supra te bl 578). Dit is myns insiens duidelik dat ons nie in die onderhawige geval met calumnia bemoeid is nie, en derhalwe is Chipo se saak nie van toepassing nie."

I

I pause here to say that I find myself in entire agreement with the reasoning upon which BAKER, J based his conclusion that in Burger's case the conduct of the appellant did not constitute the injuria of calumnia. By parity of reasoning the appellants in the instant case were likewise innocent of calumnia. Where there is no identifiable complainant who has been calumniated there is no room for this particular injuria.

Having reached the above conclusion in his judgment, . BAKER, J undertook an exhaustive survey of the concept of defeating or obstructing the course of justice in modern South African Law. An examination of our case-law impelled the learned Judge to the following further conclusions (at 616E/617B):-

"Dit is dus, myns insiens, duidelik dat die misdaad waaraan die appellant skuldig bevind is nie noodwendig in 'n hof gepleeg moet word nie; dit staan nie noodwendig in verband met hofverrigtinge nie; dit behels nie noodwendig die fabrisering van

valse

valse (mondelikse) getuienis of dokumente nie; dit behels nie noodwendig 'n geknoei met getuies of die afkoop van getuies nie; die verloop van die gereg kan, soos deur SCHREINER, AR, gesê is, 'be defeated in many ways' (R v Bekker, 1956 (2) SA 279 (A A) op bl 281E); en na my mening is 'n valse verklaring aan die polisie, bevattende bewerings wat bedoel is om hulle van die spoor van die ware misdadiger af te bring, maar een daarvan

Die gereg groei en ontwikkel met die verloop van tyd; hy staan nie stil nie. Sedert die tyd van die Romeins-Hollandse skrywers het daar groot ontwikkelinge plaasgevind op die gebied van die strafreg. Een van die belangrikste ontwikkelings op hierdie gebied is dat daar vandag Staatsamptenare aangestel is wie die plig opgelê is om verdagte misdaad te ondersoek; en om te sorg dat hulle daar in die openbaar behoorlik verhoor word. Die ondersoek van verdagte misdaad word deur die polisie uitgevoer; die dossier word voor die Prokureur-generaal gelê; hy besluit of daar vervolg sal word al dan nie. Dit is net so ernstig om te verhoed dat 'n ondersoek plaasvind as ^{te probeer} om die ondersoek te beïnvloed nadat dit eers 'n aanvang geneem het, of om die verloop van die verhoor te probeer beïnvloed ten einde die vryspreek van die beskuldigde te bewerkstellig. In wese is aldrie tipes van optrede 'n ondermyning van die gereg. Eerste gemelde optrede, die voorkoming van 'n ondersoek deur die polisie, is 'n geval waar

die

die regspleging ab initio gefnuik word.
As dit gevind word dat 'n poging tot die
voorkoming van die ondersoek van 'n misdaad
gemaak is, sal die howe onder geen
omstandighede ledig bly staan nie. Dit
is in die openbare belang dat alle
verdagte misdade onmiddellik ondersoek word;
en enige persoon wat sodanige ondersoek
probeer voorkom, maak hom aan poging tot
regsverydeling skuldig."

The way has now been cleared for a considera=
tion of the correctness or otherwise of the decision of
this Court in the Sauerman AD case. This was a case in
which, as in Chipo's case, the false charge laid was aimed
at a specific and identified person. The facts were these.
The appellant made a statement to the police in which he
falsely alleged that B had stolen his watch. On the strength
of such false statement the appellant laid a false charge
of theft against B. In consequence B was arrested by the
police and detained in custody for one day, whereafter he
was released and the charge against him was withdrawn. In
the Pinetown magistrate's court the appellant was convicted
on

on a charge of attempting to defeat or obstruct the course of justice. He appealed to the NPD against his conviction and sentence. His appeal was dismissed by a Court consisting of KUMLEBEN, J and THIRION, AJ, the latter delivering the judgment of the Court. To this judgment (reported in 1978(1) SA 1073(N)) reference will hereafter be made as "the Sauerman NPD case".

In the Sauerman NPD case THIRION, AJ described the issue in the appeal (at 1076H) as follows:-

"On the facts of the present case the question arises whether a person can be said to attempt to obstruct or defeat the administration of justice if he lays a false criminal charge against another and makes a false statement, knowing it to be false, in support of such a charge with the object of having that other person falsely prosecuted and convicted of a crime which he knows has not been committed by that person."

An examination of the relevant authorities (at 1077A/1078D) led the learned Judge to conclude (at 1078 D/E):-

"...that

"....that, in so far as the crime of defeating the ends of justice is based on fraudulent conduct, it is but a species of fraud with an additional requirement, namely that the fraudulent conduct must be aimed at perverting the administration of justice."

In support of the appellant's appeal to the NPD his counsel pointed out that the facts were indistinguishable from those of Chipo's case; and he sought to found his argument upon the dicta of TROLLIP, J at p 318 of Mdakani's case (supra) and the decision in Leballo's case (supra). This argument did not find favour with THIRION, J who (at 1079E/G) made the following observations on the aforementioned two decisions:-

"With all due respect it would seem to me that in these two judgments too much was read into Chipo's case. Though there are several passages in the judgment of HOEXTER, JA in Chipo's case which are couched in general terms, I am nevertheless of the opinion that a careful reading of the judgment shows that HOEXTER, JA made his remarks in the context of, and with reference to, the crime he was considering, namely criminal injuria.

At

At the outset HOEXTER, JA said in his judgment at p 576:

'The charge proved against the respondents contains all the elements of an injuria as defined in Roman-Dutch law.'

Then follows a quotation from R v Umfaan 1908 TS 62 at 66. Reference is made in the passage quoted from R v Umfaan to the fact that criminal proceedings for certain species of injuria have become obsolete."

For a number of reasons (which will be mentioned later in this judgment) THIRION, J concluded (at 1081E):-

".....that the ratio of Chipo's case has to be confined to the charge dealt with in that case, namely criminal injuria."

With leave to the NPD Sauerman further appealed against his conviction and sentence to this Court. The appeal succeeded and the conviction and sentence were set aside. According to the report of the Sauerman AD case the judgments in Burger's case (supra) were not cited in argument; and no mention of them is made in the judgment.

(For)

(For a critical discussion of the Sauerman AD case see C R Snyman, "Laying a False Criminal Charge", 1978 SALJ 454-458). The judgment of this Court was delivered by KLOPPER, AJA, in whose judgment WESSELS, ACJ and MULLER, JA concurred. Dealing with the conclusion at which THIRION, AJ had arrived in the Court below, KLOPPER, AJA said at 764 F/G:-

"Ek kan nie akkoord gaan met die stelling dat die uitspraak in Chipo se saak beperk moet word slegs tot die aanhangigmaking van 'n valse klag waar die aanklag een is van strafregtelike injuria nie. Wanneer bedoelde uitspraak in sy geheel gelees word, dan blyk dit myns insiens, dat dit die bedoeling van die Hof was dat die blote aanhangigmaking van 'n valse klag geen misdryf in ons reg meer is nie, wat ookal die naam van die misdaad is waarvan die beskuldigde aangekla is."

In support of his interpretation of the intention of the Court in the Chipo case KLOPPER, AJA invoked the Leballo case (supra) and the Mdakani case (supra). As to the former decision the learned Judge remarked (at 766C):-

"Aangesien

"Aangesien DE BEER, RP ook lid was van die Hof wat uitspraak in Chipo se saak gelewer het, kan dit nouliks aanvaar word dat hy hom gemelde uitlatings sou laat ontval het, as die bedoeling in Chipo se saak was dat daardie beslissing uitsluitlik op 'n geval van strafregtelike injuria van toepassing sou wees."

The conclusion at which the learned Judge arrived (at 767B) was the following:-

"Soos in Mdakani se saak daarop gewys is, kan die misdryf van dwarsboming of poging tot dwarsboming van die gereg, op verskeie wyse gepleeg word. Dit vereis egter iets meer as slegs die blote aanhangigmaking van 'n valse klag, voor dit in ons reg strafbaar is."

Insofar as the reference in the Sauerman AD case to the remarks of DE BEER, JP in the Leballo case (supra) is concerned, I think the following should be borne in mind. It is, of course, not uncommon for a Court which ponders the true intent of an earlier judicial decision to seek guidance by examining later judicial utterances affecting such earlier judicial decision by a Judge who was a party to

to such earlier decision. However, the effect of a judgment of a Court is to be determined in the first place by having recourse to the language actually found therein viewed in the light of the issue before that Court. So approaching the matter one begins by noticing what the issue in the Chipo case was. The issue confronting this Court in the Chipo case - and it was the sole issue - is plain enough. What the Court was required to do, and what it in fact set out to do (see 576E in the Chipo case) was to consider whether the charge of criminal injuria laid in the charge-sheet disclosed an offence in our modern practice. The judgment in the Chipo case identified the offence set forth in the charge-sheet as the offence known in Roman and Roman-Dutch law as calumnia; and it concluded that with us calumnia had fallen into obsolescence.

A finding to the effect that the laying of a

false

false charge with the intention of perverting the course of justice does not constitute a crime in our law is a finding which would have important practical implications. Such a finding - as pointed out in more than one of the many decisions cited in the course of this judgment - would be fraught with serious consequences for the due administration of criminal justice in this country. (See eg the remarks of CENTLIVRES, J in R v Adey and Hancock (supra).) Had it been the intention of the Court in the Chipo case to make such a finding, one imagines that the Court's intention would have been stated in direct and explicit language. I am unable to find any direct statement to that effect in Chipo's case. Nor, in my opinion, is anything said in the Chipo case which conveys, as a necessary implication, that such a finding was intended. It will be recalled that in Mdakani's case (at 318 A/B) TROLLIP, J referred to the fact that in the Chipo and Leballo cases:-

"....the

"...the Court did not have regard to the label but to the substance of the offence."

However, the substance of an offence must be assessed by looking not merely at the overt act involved in its commission but by reference also to the accompanying intention which the law may prescribe as an essential ingredient of that offence. In Chipo's case the substance of the offence with which the Court was concerned was the laying of a false criminal charge in the wrongful and intentional violation of the complainant's personality rights.

It seems to me therefore, with all due respect, that THIRION, AJ was entirely right in concluding in the Sauerman NPD case (at 1079E) that in the cases of Lehallo and Mdakani too much was read into Chipo's case. At the very highest, so I consider, it may be said that in Chipo's case the question (not before the Court) whether

the

the laying of a false criminal charge, if prosecuted not as a criminal injuria but as an attempt, with the necessary intent, to defeat or obstruct the course of justice, is a crime in our law, was a question left open in the judgment of HOEXTER, JA.

At this juncture it is convenient to examine the reasons which in the Sauerman NPD case induced THIRION, AJ to reject the argument on behalf of the appellant that Chipo's case precluded the appellant's conviction. At 1080 C/D the learned Judge remarked:-

"The principle underlying injuria (or those species of it which are still recognised as crimes) is the protection of individuals against the impairment of their person, dignity or reputation, by the unlawful conduct of others. Defeating the course of justice is constituted a crime not to safeguard the interests of the individual but to restrain conduct tending to subvert the administration of justice."

and at 1080 G/H:-

"Even

"Even if the laying of a false criminal charge by itself is no longer a crime, then it is still difficult to see why the making of a false statement with the intention to defraud, or with the intention of subverting the due administration of justice, should not be punishable as a crime merely because it is made in the course of laying a false criminal charge or in support of such a charge. The fact that it was so made seems to me to increase rather than lessen the need to restrain and punish such conduct."

and at 1081 B/C:-

"Furthermore it seems to me to be illogical to hold that, while a false statement made with intent to pervert the administration of justice is punishable when made in support of a false charge laid by someone else, the same statement when made in support of a false charge laid by the person who made the statement is not punishable merely because it was made in the course of laying a false charge."

Suffice it to say that in my judgment the arguments marshalled by THIRION, AJ in the Sauerman NPD case in support of the conclusion reached by him are cogent and compelling. I also think that his conclusion was correct.

It

It is important that the rules of our criminal law should, so far as may be consistent with the fundamental principles of Roman-Dutch Law, be in conformity with the needs of modern society. In this connection the following comments of Snyman loc. cit. at 458 seem to me to be instructive:-

"The court (i e in the Sauerman Ad case), by merely relying on Chipo's case, which in turn merely dealt with calumnia or the formal laying of a charge, failed to take into consideration that in Roman society, where calumnia originated, there was no organized police force as we know it today. The police force today is an indispensable ingredient of the administration of justice. As the organization of the administration of justice expanded in the course of centuries, inter alia by the introduction of a police force, with the task of investigating crime, so the scope of the crimes against the administration of justice had to be increased (cf the remarks in S v Burger (supra) at 616 - 17). The laying of a false criminal charge with the police, which they follow up and in respect of which they may waste valuable time and energy, obstructs the administration of justice as much as, and in some conceivable cases even more than, the conduct now admitted by the courts to

constitute

constitute the crime of defeating or obstructing the course of justice.

In England the laying of a false criminal charge is punishable as 'perversion of the course of justice' or an attempt to pervert it. See Halsbury's Laws of England 4 ed XI (1976) § 955; R v Rowell (1978) 1 All ER 665 (CA). It is also a crime in Germany (§ 164 of the Penal Code), the Netherlands (§ 188 of the Penal Code) and Scotland (G H Gordon The Criminal Law of Scotland 2 ed (1978) (1074), and a crime in terms of § 241.5 of the American ^{Model} Penal Code.

The result of Sauerman's case is that there is now a gap in our criminal law which only the legislature can close. This unfortunate gap would have been avoided had the Appellate Division properly applied the principles of our common law, as well as the principles underlying the crime of defeating or obstructing the course of justice."

For all the foregoing reasons I conclude, with great respect, that the decision in the Sauerman AD case was clearly wrong. I am keenly aware that the principle of stare decisis should be applied more rigidly in this Court than elsewhere. I nevertheless entertain the

the firm opinion that in the Sauerman AD case the Court was palpably mistaken in interpreting Chipo's case as it did; and that it is the duty of this Court not to abide by that decision but to overrule it.

Having reached that result I am free to find, and I do find, that on count 8 both appellants were rightly convicted by the trial Court of the crime of attempting to defeat the ends of justice. There is an appeal against the sentences on count 8. On that count the learned Judge sentenced each appellant to three years imprisonment but he ordered that in each case two years of the sentence should be served concurrently with the sentences already imposed on counts 1 and 2 (in the case of the first appellant) and on counts 5 and 6 (in the case of the second appellant). The crime of attempting to defeat the ends of justice is a serious one and in the present case the fact that the appellants were experienced policemen is

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an aggravating factor. In my view it cannot be said that the sentences imposed by the trial Judge were too heavy. It is clear, I think, that the trial Judge considered that for purposes of sentence on this count there was no reason for differentiating between the respective moral culpabilities of the two appellants. In my opinion the learned Judge rightly so viewed the matter. Inasmuch as the second appellant's appeal against his conviction on counts 5 and 6 succeeds, however, some variation of the sentence on count 8 is now necessary in order to preserve equality of treatment between the two appellants. The effect of the sentences on count 8 was that each appellant would undergo actual imprisonment for one year. It seems to me that justice will be done by retaining the sentence of three years imprisonment on count 8 but by substituting for the order that two years are to run concurrently with other sentences, an order for the conditional suspension of two years.

The

The partial success of the appeal of the first appellant on counts 1 and 2 necessarily requires a revision and a reduction of his sentences on those counts. Having given anxious consideration to all the circumstances of the case I am of the opinion that a proper sentence would be one of imprisonment for five (5) years on each of counts 1 and 2; such sentences to be served concurrently.

The sentences imposed by the trial Court on the first appellant in respect of counts 1 and 2 and on both appellants in respect of count 8 will be ^{adjusted} accordingly.

For all the foregoing reasons the following orders are made:-

(a) The appeal of the first appellant succeeds to the limited extent that his convictions on counts 1 and 2 are in each case reduced from murder with extenuating circumstances to attempted murder.

(b)

- (b) The appeal of the second appellant on counts 5 and 6
and sentences
succeeds and those convictions are quashed.
- (c) The appeals of both appellants against their convictions
on count 8 fail .
- (d) In respect of his convictions (as altered by this Court)
on counts 1 and 2 the first appellant is sentenced on
each count to five (5) years imprisonment; such
sentences to be served concurrently.
- (e) In respect of their convictions on count 8 the sentence
imposed by the trial Court on each appellant is varied
to read as follows:-

"Imprisonment for three years whereof
a period of two years is suspended for
five years on condition that he is not
convicted of the offence either of defea=
ting the ends of justice or of attempting
to defeat the ends of justice committed
during the period of suspension."

G G HOEXTER, JA

SMALBERGER, JA)
STEYN, JA) Concur

PHAKAMISA SKOOL.

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