

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CRI)04/2019

In the matter between

TEBELLO MOTHOB

1ST APPELLANT

MOEKETSI MOTHEPU

2ND APPELLANT

MOTEBANG SEHLABAKA

3RD APPELLANT

LETELE RAMOTSEOA

4TH APPELLANT

LETHOLA MOTHOB

5TH

APPELLANT

TSEPO MAROLE

6TH APPELLANT

FANI MAPHASA

7TH APPELLANT

RAMAFIKENG MOTSI

8TH

APPELLANT

KARABO MASTER NYAKANE

9TH APPELLANT

TEBOGO SHELANE

10TH

APPELLANT

and

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

CORAM: P T DAMASEB AJA

P MUSONDA AJA

M H CHINHENGO AJA

HEARD: 11 APRIL 2022

DELIVERED: 13 MAY 2020

SUMMARY

High Court convicted appellants of assault with intent to cause grievous bodily harm where victim of assault died as a result of injuries from the assault; Court sentenced each appellant to fifteen years imprisonment;

Appellants initially appealed against sentence only; After Crown cross-appealed against verdict and asked Court to find appellants guilty of murder, appellants then appealed against conviction and sought acquittal of appellants;

Held the proper verdict was murder with constructive intent founded on the doctrine of common purpose; verdict accordingly altered;

Extenuating circumstances found to exist and after considering mitigating factors sentence reduced from fifteen years to ten years for each of the appellant

CHINHENGO AJA

Introduction

[1] The appellants are fellow villagers of Lithabaneng. In that village one businessman nick-named White was killed and goods allegedly stolen from his shop. The killer was not accounted for. There was a general suspicion in the village that the killer was Simon Maqela Mashapha (“Simon”) a friend or acquaintance of the said White, as well as business associate. Simon was arrested by the police in connection with the death

of White but released without being charged. The learned trial Judge confirms this in the judgment where she states that Simon “had once been arrested by the police for the death of White, he was never been prosecuted but was let to go scot free.”¹ On the face of it therefore, the police were satisfied that Simon was not the culprit.

[2] The appellants and others, who were part of a group, were not satisfied with how the police had handled the killing of White and believed, so they said, that they, as a group, should find Simon, apprehend him and take him to the police for him to be dealt with according to law. This seems to me to be quite illogical and an unlikely reason for the apprehension of Simon because the police had investigated the matter and came to its conclusion. The appellants held meetings at which they agreed on their intended course. They executed their plan. They picked Simon from his residence on 17 September 2009 and drove away with him. They severally assaulted him first at what is referred to as Dam 1 and then at another place referred to as Dam 2, until he died. They then threw his body into Phuthiatsana river, from a bridge thereon. They did not take him to the police.

[3] The appellants were indicted before the High Court for murder. The trial commenced on 21 February 2012 and was completed 9 years later on 20 March 2019, when judgment was handed down. The judge found them guilty of assault with

¹ Para 8 of judgment

intent to cause grievous bodily harm and sentenced each of them to 15 years imprisonment.

The Appeal

[4] The appellants initially noted this appeal challenging only the sentence of imprisonment. The challenge was based on the contention that the sentence of fifteen years imposed for a conviction of assault with intent to cause grievous bodily harm induced a sense of shock. The Crown cross-appealed seeking the alteration of the verdict from assault with intent to cause grievous bodily harm to murder. The appellants must have been taken aback by this development. In reaction thereto, they filed, a few weeks before the hearing of the appeal, additional grounds of appeal challenging the conviction and seeking the acquittal of the appellants. They purported that they were filing supplementary grounds of appeal when in fact the grounds were new, at best additional, and inconsistent with those first filed.

[5] The appeal against sentence was predicated, as it always must, on an acceptance of the conviction as unassailable. Coming as it did after the Crown had counter-appealed against the verdict, the appeal against conviction was a remarkable *volte-face* on the part of the appellants and smacked of an opportunistic change of direction. The appellants should have

challenged the conviction up front and, only in the event that the conviction was upheld, would they have challenged the sentence in the alternative.

Appellants' initial grounds of appeal

[6] Appellants' initial grounds of appeal, not elegantly drafted, were filed on 12 April 2019. They read -

“1. The learned Judge having judicially exercised her mind and having correctly arrived at the correct verdict of assault, sentenced the Appellants to a term of fifteen (15) years imprisonment without an option of a fine. We submit that the sentence is not quite in consonant with the verdict.

2. A sentence of fifteen (15) years without the option of a fine induced a sense of shock to the appellants.

3. We further submit that the appellants being first offenders were entitled to an option of a fine.

4. The court is invited to take judicial notice of the fact that since the Court of Appeal session will not take place for the April sitting of 2019 coupled with

the usual delays to prepare the record of proceedings, the appellants be afforded justice to be granted bail pending appeal, especially when the 2018-2019 financial years will operate under the worst financial constraint ever.

5. We reserve the right to file further grounds of appeal later.”

[7] It is apparent from the first ground of appeal, which in substance is the only ground of appeal, that the appellants accepted that the judge *a quo* “correctly arrived at the correct verdict of assault”. The error here is that the judge *a quo* did not find the appellants guilty of assault simpliciter, but of assault with intent to cause grievous bodily harm, which is a much more serious offence. What is clear however is that the appellants’ concern was just with the sentence. Their attack on the sentence was not, as may be presumed, motivated by the misconception about the verdict of the court. The second ground of appeal is that the sentence induced a sense of shock “to the appellants.” The standard formulation is that a sentence induces a sense of shock not so much to the sentenced accused but to all right-thinking members of society.

Cross-appeal

[8] The respondent’s grounds of cross-appeal were filed on 29 April 2019. They are:

“1. The learned Judge erred in finding the appellants in the cross-appeal guilty of assault with intent to cause grievous bodily harm instead of murder regard being had to the overwhelming evidence showing how the deceased was killed.

2 The learned Judge erred in believing the accused’s story that their intention was not to kill but to fetch the stolen property despite the evidence of the eyewitness who showed that upon arrival at the place of residence of the deceased, the accused never inquired about the stolen property.

3. The learned Judge erred in believing that there was some stolen items which were found in the possession of the deceased regard being had to the evidence of PW1 and PW3.

4. The appellant in the cross-appeal reserves the right to furnish further grounds of appeal.”

[9] The cross-appeal not only challenges the verdict of the court but it also challenges two factual findings of the court – that in seeking out Simon the appellants’ intention was merely to recover stolen property from him and not to kill him, and that stolen property was actually recovered from Simon’s possession. In my view, these issues of fact have a bearing on the verdict because they tend to indicate what the intention of

the appellants was when they apprehended Simon and later caused his death.

Appellants' "supplementary" grounds of appeal

[10] In March 2022, just a few weeks before the hearing of the appeal, the appellants filed what they described as "supplementary" grounds of appeal, thereby creating the impression that those grounds were intended to enhance the grounds of appeal already filed. When the grounds are examined, it becomes quite clear that they do not supplement the first grounds. They are, in fact new grounds and inconsistent with the earlier ones. At best they are belated grounds of appeal. I prefer the term belated because there was no application to amend the earlier grounds. Whilst the first grounds are founded on an acceptance of the conviction as correct, the "supplementary" grounds are founded on a rejection of the correctness of the conviction. Had the appellants been aggrieved by the conviction from the start, they would have set out the grounds upon which they challenged the conviction and sought an acquittal first, and only in the event that this Court found that the conviction was sound, would they have argued the issue of sentence in the alternative. It is now unclear whether they maintain the challenge against sentence on the stated basis. In fairness to them I proceed on the basis that the appeal against sentence is in the alternative. In argument before this Court, it was submitted:

“The defence is still mindful of the fact that one of the grounds of appeal was that the trial judge correctly arrived at the verdict of assault. That position was a compromise by the appellants regard being had to the fact that the trial had prolonged too long. They were hoping for an alternative of a fine however now that the Crown has cross-appealed, the appellants are now moving this Court for an acquittal. The Crown is inviting this Court not to interfere with the sentence. It is the defence submission that no authority will be found showing a sentence of fifteen (15) years in a case of assault herein Lesotho.”

[11] This explanation for the *volte-face* is unintelligible. What compromise was counsel referring to and at whose instance was the compromise made? Did the court below accept it as such compromise? Was it the basis of the verdict? I need not answer these questions. They serve only to highlight the meaninglessness of counsel’s argument on this score.

[12] The “supplementary” grounds of appeal, again not properly formulated, are these:

“1. The record of proceedings is unsatisfactory in a number of respects. It has omitted the evidence of four police officers which was admitted in the court *a quo*.

2. The trial court erred in making a finding that the appellants acted in common purpose despite the Crown's failure to prove the existence of such common purpose.

3. The trial court erred in failing to realise that there was insufficient evidence to convict.

4. The Honourable Judge in the court *a quo* should have realized that the Crown was wrong in declaring PW1 an accomplice witness since PW1 was the perpetrator of the said crime.

5. The Court *a quo* failed to realise that police investigating was botched in that –

(a) Police did not have exhibits to link the appellants with the crime.

(b) There was no forensic evidence to link the appellants with the crime.

6. The sentence of (15) fifteen years was shocking regard being had to the fact that the trial judge failed to consider the number of years taken to finalise the trial.

7. We pray that the appellants be acquitted with immediate effect. They are not guilty of murder or assault.”

The charge

[13] The appellants were charged with murder “in that upon or about the 17th day of September, 2009, and at or near Phuthiatsana Bridge Ha Teko in Maseru, the said accused, one, the other or all of them, did unlawfully and intentionally kill one Simon Maqela Mashapha.” No detailed particulars of the charge are attached to the indictment. What the indictment alleges is that the victim, who I refer to simply as “Simon” or “the deceased”, was intentionally and unlawfully killed by either one or more or all the accused persons.

[14] The post mortem report, which was by the appellants accepted without demur, shows that Simon died as a result of “haemorrhagic shock secondary to multiple stab wounds and fractures.” It further shows that he suffered “multiple bruises and lacerations on the skull and face; conjunctival pallor, multiple stab wounds on the back and anterior chest, laceration left lateral aspect of the left knee, laceration of both arms and hands, fracture of the mandible, fracture of the left parietal skull and laceration on the mouth.”

[15] The evidence generally shows that a number of persons, exceeding twelve in number, were involved in the killing of

Simon but only twelve were charged with the offence. One died before he was charged and another absconded. It being the case that a number of persons were charged together with the killing, it became necessary for the Crown to prove the participation of each one of the appellants, that is to say, to produce evidence of what each of them did to bring about Simon's death.

Trial court's findings of fact

[16] The facts which the trial court found as established by the evidence can easily be summarised. Initially twelve persons were charged with the murder of Simon. The 9th accused died before the trial commenced and the 11th accused was discharged at the close of the prosecution case. Although Simon's body was found floating in Phuthiatsana river, the medical evidence established beyond a reasonable doubt that he met his death at the hands of the appellants² and not due to drowning. Beyond these facts, the judgment of the court does not clearly show which other facts it found proved to justify the conclusion that all the appellants fatally assaulted Simon and caused his death. I turn to examine the evidence alongside the judgment to decipher other findings of fact made by the judge for a clearer understanding of how and for what reasons the judge reached her conclusion.

The evidence

² Para 2 of judgment *a quo*

[17] The main evidence against the appellants was given by Napo Maluba-lube (PW1), an accomplice, following the provisions of s 236(a) of the Criminal Procedure and Evidence Act, 1991. The evidence of four police officers who were involved in the investigation of the offence was admitted by consent. The appellants took issue with the fact that the admitted evidence of the police officers was not in the record initially placed before this Court. The record of that evidence was later produced when the Crown filed supplementary submissions. It does not appear to me that that evidence makes any difference. It is basically of a technical nature and was in any event admitted by the appellants. Nor do the appellants make anything out of the fact that that evidence was not in the record first placed before this Court. This disposes of the appellants' first complaint set out in the grounds of appeal.

[18] The court *a quo* accepted that prior to Simon's death, White was killed and the perpetrator was not found or identified. Goods had also been stolen from his shop. This theft does not appear to have been carried out simultaneously with the killing of White because the evidence shows that before he met his death White had indicated that he was going to visit Simon and, after he embarked on that trip, he never returned. White and Simon had been jointly involved in some business venture, running a shop or a car wash business or both. It seems that because of the suspicion that he was responsible

for White's death, Simon is alleged to have disappeared from, or not seen, at Lithabaneng village after White's death.

[19] The appellants said that, as residents in the same village they were members of a village anti-crime organisation, some sort of vigilante group. They held meetings together with others who have not been accounted for before they apprehended Simon. At the meetings they agreed to pick up Simon from his home and somehow deal with him in relation to White's death. Although the appellants said that they picked him up for the purpose of taking him to the police, that is not supported by what actually later transpired as indicated by the evidence of prosecution witnesses, in particular that of PW1.

[20] The court found as fact that after several meetings at which it was agreed that Simon must be picked up, nine persons including Paraffin (appellant 4), Sehlabaka Motebang (appellant 3) Karabo Nyakane (appellant 9), Moeketsi Mothepu (appellant 2) and Lethola Mothepu went to Simon's village at Ha Motlohelo and picked him up. They were driven by PW1 in his father's motor vehicle, the same that was used throughout the commission of the offence. The vehicle was a pick-up truck and in the front seat were the driver (PW1), Moeketsi, Bonki Mokhathi and Liekhe. Ramafikeng Motsie (appellant 8) must have been in this group because the learned Judge believed PW1 who said that when they arrived at Simon's village, he, PW1, remained behind while the others went to Simon's residence and that, after Simon was found, it was Motsie who

asked him to drive into the village. The judge believed PW1's evidence that when he drove into the village "the other accused were already questioning Simon about the death of White and [Simon] was already being roughly handled by his [captors] and assaulted." They drove away from the village with Simon in the back of the truck. They stopped the vehicle along the way, ordered Simon to alight and assaulted him with an assortment of weapons. They were asking him about the death of White. He denied having had anything to do with the death. From Ha Mokhoathi village near Phuthiatsana river, the group was assaulting Simon. At some point during the assault Simon fell into the river, they brought him out, loaded him back into the truck and drove to Ha Teko village through which the Phuthiatsana river passes. At the bridge on this river the appellants again assaulted Simon and threw him into the river. Although PW1 said that he was still alive when thrown into the river, the postmortem report is clear that he did not die of drowning but of the injuries he sustained from the assault. After throwing the body into the river, the appellants and others in their group left the scene in PW1's vehicle back to Lithabaneng. None of them reported the matter to the police or other authority.

[21] PW1 and the appellants washed the motor vehicle of Simon's blood. The learned judge states:

"[23] According to PW1's evidence, and contrary to what the defence said, there was never a time when

any of those who were in that group ever separated. They remained together up to and until when they left the area of Ha Teko after having thrown the deceased's body into that river. From Ha Teko they travelled back together to Lithabaneng.

[24] The only time that this group parted ways or separated was when they were back at the village of Lithabaneng after they had come back from Ha Teko. In fact, according to PW1's evidence even when back at Lithabaneng, they did not part ways immediately.

[25] They all assisted PW1 to wash the motor vehicle in question and only parted ways after having washed that motor vehicle. He further testified that the purpose of having had that motor vehicle washed that late in the night was so that they removed or washed off the blood which had come out of the deceased's injuries.

[26] In brief, having committed this heinous crime, the [accused] further worked together to tamper with evidence and none of them even reported about this incident even to their chief until after they were arrested by the police."

[22] The court found that White's wife participated in the capture of Simon, not only by assisting the appellants to locate

him but also by providing M50.00 for fuel. That evidence was given by PW1 and PW2 (Mookho Mphoto). It seems to me that PW2's assistance may have been much more than that stated but there is no clarity from the judgment as to how much that may have been.³ Nothing turn on it in so far as PW2 is concerned. The learned judge found that PW2's evidence corroborated that of PW1 in regard to the role played by White's wife. The learned judge bemoaned the fact that White's wife and the Chief from whom, according to the appellants, permission to arrest Simon was sought, were not called to testify.

[23] PW3, an employee of Simon, gave evidence about how the appellants arrived at Simon's business premises, a shop, and took Simon away never for him to return alive. He however could not identify any of the persons who took his boss away.

[24] The learned judge appears to have accepted the evidence of PW1 and PW4 does not show that at their meetings the appellants specifically planned and agreed to kill Simon or throw his body into the river.⁴ After saying this the judge focussed on the question whether the appellants were responsible for Simon's death.

[25] In seeking to answer this question the learned judge considered the postmortem report and concluded that there

³ Of PW2 and other the learned inexplicably says at para 22:

"In effect, PW2 and those who assisted him [PW1] to wash this vehicle, have directly tampered with evidence as they washed off the blood of the deceased which was in that vehicle."

⁴ Para 32 of judgment

was “no doubt ... that indeed the deceased had been subjected to assault in the way in which the Crown witnesses have testified.”⁵ She analysed the evidence and submissions of the defence in general terms and states:

“[46] Be that as it may, there is no doubt in the mind of this court that subsequent to their numerous meetings as detailed above, all the accused as well as the accomplice witness have indeed actively participated in the fatal assault of the deceased in this case.

...

[48] In effect, all the accused first acted in common purpose of arresting and handing over the deceased to the police, but all that changed after they had all realised that they had not [only] brutally assaulted the deceased but [also] realised that they had actually killed him.

...

[53] That the accused had unlawfully and negligently caused the death of the deceased in this case need not be deliberated upon any further. Indeed, had it not been [for] their unlawful, negligent assault, the deceased would not have died.

...

⁵ At para [34]

[58] This court is left in no doubt that it was the accused persons in this case who had subjected the deceased to assault for a prolonged period and that having realised that they had killed him, they changed their plan of having him handed to the police; instead, they caused his death and later threw his body in the river.

[59] For the above reasons, and regard being had to the surrounding circumstances of this case, it becomes clear that it was the accused now before court who have unlawfully and negligently caused the death of the deceased herein. They are accordingly found guilty of having assaulted the deceased with intent to cause grievous bodily harm.”

[26] It seems to me that the learned judge *a quo* was not clear in her mind whether the basis of the accused's liability was an intentional act, or an act committed with constructive intent on the one hand or a negligent act on the other. She clearly confounded these concepts. If a group of persons assaults a person with intent to kill and causes his death, the persons concerned are guilty of murder. The group is equally guilty of murder if it assaults a person in circumstances in which they foresaw that the assault will result in death. But where a group assaults a person negligently without an intention to kill him and did not foresee that death would result, they are guilty of culpable homicide. The law appears to me to be that in essence

there must be more than negligence and even more than gross negligence to constitute that form of negligence which amounts to constructive intent or *dolus eventualis*. As stated by Jansen JA in *S v Ngubane*⁶, there must be in the accused's mind "a volitional component": the accused must say to himself "I know I may kill this person if I assault him with the weapon in my hand. But I am going to assault him anyway." Jansen JA went on to say:

"Our cases often speak of the agent being 'reckless' of that consequence, but in this context, it means 'consenting', 'reconciling' or 'taking into the bargain', and not the recklessness of the Anglo-American systems, nor the aggravated degree of negligence."

[27] The unclear approach of the judge is partly the foundation of the main ground of the cross appeal which is that she "erred in finding the appellants ... guilty of assault with intent to cause grievous bodily harm instead of murder regard being had to the overwhelming evidence showing how the deceased was killed."

[28] It is necessary to consider, at the appropriate stage, the appellants' version of their state of mind and determine whether their version might not reasonably be true. If the appellants are truthful or even fairly truthful then I may agree with the learned judge *a quo* that they were negligent and therefore guilty of culpable homicide. On the contrary, if I were

⁶ 1995 (3) SA 677 (A) at 685D

to find that the appellants had the requisite actual intent or constructive intent, then the verdict will have to be murder.

[29] It is generally accepted that constructive intent to kill is not an easy concept to apply to a set of facts, especially where an assault, as in this case, is perpetrated by a group of persons. The difficulty arises in separating the facts which, on the one hand show an intention to kill and which, on the other, show negligence falling short of recklessness. The issue here may be framed in the form of a question are we concerned with an actual intent to kill or constructive intent to kill on the one hand or with mere negligence. It is trite that negligence cannot found an intent to kill.

[30] I reiterate that the learned judge *a quo* was not exactly helpful in setting out the facts that she found proved by the evidence. She made no findings of credibility, adverse or otherwise, nor any analysis of the probabilities. Her judgment was somewhat confused in that, as earlier stated, it is not clear whether she held the appellants criminally liable on account of actual intention or legal intention or of negligence or a mixture of the three. As such this Court can come to its own conclusions on the facts in relation to which the Crown has cross-appealed because it is a trite proposition of law, and I need not support it with authority, that that this Court has jurisdiction to hear an appeal from a lower court on a point of law. And if there is a serious misdirection on the facts that amounts to a misdirection

in law. Additionally, the giving of reasons that are bad in law constitute a failure to hear and determine according to law.

[31] There can also be a misdirection as to the evidence and an appellant may avail himself of such a misdirection if the nature and circumstances of the case are such that it is reasonably probable that the lower court would not have determined as it did had there been no misdirection, that is to say, the determination was irrational. That I think was partly the basis of the Crown's attack on the verdict. In the words of Lord Diplock in *CCSU v Minister for the Civil Service*⁷-

“Whether a decision falls within the category of irrationality is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1953] 3 ALL ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.”

⁷ 1984 3 All ER935 (HL)

[32] These parameters I have set out are relevant in determining the cross-appeal against the lower court's findings of fact, to which the Crown takes objection.

[33] To her credit, the learned judge *a quo* at least made two important findings of fact. First that dangerous weapons - including a hammer, screwdriver, slashes and tomahawks were used in assaulting the deceased.⁸ Tomahawks are light axes used as missiles or as hand weapons and contain other tools in addition to the axe head, such as spikes or hammers and are used as alternatives to hatchets. They are indeed dangerous weapons with which to assault a person. Slashers have long sharp blades often used to clear dense or low-lying bush or scrub. Grass slashers are long-handled pieces of metal bent at the end and sharpened and swung back and forth when being used. They are also dangerous weapons with which to assault a person.

[34] The other finding of fact is that the appellants severally used the weapons upon the body of the deceased. It is understandable that there was no clarity about the number of weapons used. The plural is used in respect of slashers and tomahawks. Evidence could have established how many of these were used. PW1 was driving the motley group around and the assaults mostly took place at the back of the truck except when the vehicle stopped at certain intervals. PW1 did not directly witness the assaults all the time.

⁸ Para [35] of judgment

[35] The judge found the appellants guilty of assault with intent to cause grievous bodily harm. To prove this offence the remarks of Beadle J (as he then was) in *R v Edwards*⁹ are apposite:

“I therefore come to the conclusion that so far as assault with intent to do grievous bodily harm is concerned, it is sufficient to prove that the accused committed the crime knowing that his act was likely to cause grievous bodily harm and that he committed it in circumstances which show that he was reckless and careless as to whether or not such harm resulted. If that was his state of mind, then I think the Crown proved all the intent required to establish this crime.”

[36] It is clear that foreseeability should be coupled with recklessness: they are two limbs of the same test. Hunt¹⁰ defines constructive intent, which is the same thing as legal intent, as consisting of “foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not.” It is axiomatic that recklessness on its own cannot constitute legal intention because a person can only be reckless about something that he foresees as a possibility: unless he can foresee something as likely to occur, he cannot be reckless about whether or not it occurs, hence Holmes JA in *S v de Bruyn & Another*¹¹ defines

⁹ 1957 R & N 107 (SR)

¹⁰ *South African Criminal Law and Procedure* Vol 1 1 ed at p 119

¹¹ 1968 (4) SA 498 (A) at 511G-H

recklessness as “persistence in such conduct, despite such foresight.” CR Snyman¹² cautions against confusing Roman-Dutch law with English law:

“By ‘reckless’ is meant that consciously accepts a risk. It would however be erroneous to equate *dolus eventualis* with the form of *mens rea* of English law known as ‘recklessness’. In English law recklessness may (depending upon the definition of the crime or the intention of the legislature) be a third form of *mens rea* in addition to intention and negligence; unlike *dolus eventualis* in South Africa, it is only a requirement in certain crimes and not in all crimes for which intention is required. *Dolus eventualis* is a concept foreign to English law; our law has taken it over from Continental legal systems.”

[37] I have considered the law as to when an appellate court may interfere with a lower court’s findings of fact. I have also considered the law on the crime of assault with intent to cause grievous bodily harm in order mainly to determine whether the verdict of the court below was correct on the facts before it, it being the contention of the Crown that the correct verdict should have been murder. The judge a quo may have been correct in finding that the appellants had the requisite constructive intent, but she then ignored the fact that death eventuated. Had she alerted herself to the end result, I have no doubt that she would have convicted the appellants of murder

¹² *Criminal Law 2 ed at p 200*

with constructive intent. I now consider the submissions of the parties before this Court.

Appellants' submissions

[38] The appellants submitted on two issues, without having made them grounds of appeal. The first is that the delay of twelve years in the prosecution of the appellants was inordinate and for that reason alone this court should acquit or discharge the appellants. The second is that the record was not properly transcribed: it omitted the admitted evidence of the police officers. I consider that these challenges are not only not insignificant in the circumstances of this case but also that they were not raised as appeal grounds. Considering them at this stage is accordingly entirely inappropriate.

[39] The main contention of the appellants for this Court to acquit them is that the evidence does not establish that they participated in the assault upon Simon. It is submitted on their behalf that "the police deliberately refused to arrest the perpetrator of the crime who high-jacked the good intention of these appellants", to wit, the agreement to arrest Simon only and take him to the police. It is further submitted that the appellants dissociated themselves from the intention of the people who were sitting in front of the truck with PW1 after a bitter dispute at Dam 1. At Dam 1 the appellants left for their homes, it is said. This evidence was not challenged and

whatever PW1 said about their further association with the conduct of the perpetrators was not corroborated.

[40] As I understand the basis for seeking appellants' acquittal, it is that the Crown failed to prove the participation of each and every one of them. The offence was committed at night and PW1 did not have an opportunity to clearly see who was assaulting the deceased. This contention is dramatized by appellants' counsel in these terms:

“All facts before and after the crime was committed are always taken into account in analysing a case. The appellants are not harbouring any guilty conscience. Unlike Liekhe who has fled the country they stayed at their homes. They were cooperative with the police. They did abide by the bail conditions. They did not know about the death of Simon until they were informed three days later or so. The Crown did not bring any evidence to refute their dissociation at Dam 1. Most appellants were scared when the deceased was being manhandled by the perpetrators of this crime because they were at tender ages. How could they have been brave and stayed at home if they knew Simon was dead? It is the defence submission that if they knew before sleeping that Simon had passed on they would not have remained so [calm] and so secretive until they were arrested. Liekhe and his friends disappeared into thin air

because they knew what they had done. There is an explanation that Bonki died, but there is no explanation as to why other suspects were not arrested and brought before court. ... The Crown has failed, through PW1, to show the participation of each and every appellant in the assault in order to say each deviated from the initial plan and associated himself with the assault.”

[41] At the hearing of the appeal appellants’ counsel reiterated the main contention against conviction – that “all appellants were not present at the place where the deceased was killed. My clients stopped at Dam1 and went away.” He also submitted that PW1 was purposefully left in possession of the motor vehicle used in the commission of the crime in order to influence him to implicate the appellants; that there was no forensic evidence to connect the appellants to the assault; no evidence as to when exactly the deceased died, and no evidence as to when exactly the appellants joined the common purpose in circumstances where the group only agreed to apprehend Simon and take him to the Chief or to the police. The Crown thus failed to prove that the appellants were at Dam 2. PW 1 only mentioned four persons as having been in possession of four weapons. And, only two of the appellants are mentioned by PW1 as having been present at Dam 2, namely appellant 9, Karabo Master Nyakane and appellant 8, Ramafikeng Motsie.

Respondent/Cross-appellant submissions

[42] The respondent's grounds of cross-appeal must be considered against the factual findings of the court below first and then the substantive challenge of the verdict. It was submitted that the court erred in finding that the appellants' intention was not to kill the deceased but to recover White's stolen property from him. The evidence of the treatment of Simon from the moment he was captured does not support the conclusion that the appellants had gone to his place of residence in order to recover the allegedly stolen property. There was no evidence that upon reaching Simon's residence they asked or otherwise looked for the stolen property. That coupled with the judge observation that –

“Also unchallenged, is the fact that subsequent to the apprehension of Simon at his home village of Ha Matlohelo, the stock allegedly stolen from the shop of White was found with Simon. It is however, noted that the wife of White was never called to testify and/or to corroborate evidence that the stock which had been stolen by Simon from her shop was indeed the one found at Simon's shop.”¹³

[43] Although the Crown says that the learned judge found as fact that White's property was recovered from Simon's shop, the above rendition of the fact is not clear. The judge seems to

¹³ At para [39] of judgment

me to have doubted that any such property was recovered from the deceased. This is clear from the concern she expresses that White's wife was not called to confirm that the property taken from Simon belonged to her or to White's shop. The Crown submitted that PW1 did not talk about any stolen property being found and seized. PW3 Bokang Maime, who was employed by Simon, related how Simon was picked up and did not say that any stock was taken away as stolen property. It was never put to him during cross-examination that any property was recovered from Simon.

[44] Assuming that the Crown and the appellants are correct that the judge *a quo* found as a fact that stolen property was recovered from Simon, that finding is clearly not supportable on the evidence. No confirmation was given by anyone that property taken from Simon was indeed part of, or indeed all, the property stolen from White's shop. If any property was taken as appeared to the judge to be the evidence of PW1¹⁴, the fact remains that it was not proved conclusively that it was stolen property: it may very well have been Simon's own stock. A perusal of PW1's evidence does not show that he agreed that any property was recovered from Simon. He says he only heard a rumour to that effect. On a conspectus of the evidence, I come to the conclusion that the finding that White's property was recovered from Simon cannot correct.

[45] The second finding of fact with which the Crown is aggrieved, is that the appellants went to pick up Simon to take

¹⁴ P ... or record

him to the police or to the chief. The treatment accorded to Simon from the moment of his apprehension is not supportive of an intention to take him to the authorities. The evidence shows that upon arrival at his residence, they manhandled him, forced him into the truck and drove away with him. The assaults started the very moment they apprehended him. The rest is a gruelling story of persons bent on fatally assaulting the deceased with no inclination at all to take him to the police.

[46] It is necessary to analyse the evidence of PW1 in further detail in order to deal with the issue of the appellant's intention when they pursued Simon at his residence. PW1 told the court that on 15 September 2009 he was approached by one Bonki who was in the company of "Liekhe, Maphusha, Lethola (A7), Paraffin (A4) and Phinias (A3)", and asked to drive them to Ha Matlohelo, being Simon's village, to ask him about White's death and also to take him to the police. They agreed to meet later in the evening. They indeed met at between 7.00 and 7.30 pm. The group had now increased in number with "Tebello (A1), Moeketsi, Majooa (A5), Motie (A8) and Master(A10), who had joined in. They all drove to Simon's village, but they did not find him. They went back to their respective homes.

[47] They met again the following day at a place referred to as the Dairy. By this time, they had been advised that White's wife knew where Simon could be found and three of them, PW1, White's wife and Bonki had driven to locate Simon's village and Bonki had been shown the residence. After the visit, White's

wife gave M50.00 to PW1 for fuel. Before the appointed time for the meeting at the Dairy, PW1 filled up the truck with petrol and thereafter picked up the rest of the group at the Dairy. They went to Simon's village, picked up Simon and "pulled him into the back of the vehicle, and they boarded too." PW1 sat in the front with Liekhe and while driving the vehicle he could hear that Simon was being assaulted. Along the way they stopped, and Simon was assaulted with a slasher, tomahawk and hammer. "Liekhe was using a hammer, Master was using a screwdriver, tomahawk was used by Bonki. Paraffin was using a slasher. ... He was being assaulted all over his body."¹⁵ The assault took a long time. Simon was protesting that he did not kill White. PW1 also assaulted the deceased with a slasher and after that he told Liekhe that he was "not comfortable with what they were doing."

[48] When the above-mentioned assault was taking place they were at Dam 1. At some point Simon fell into the water. PW1 thought Simon had died but he was taken out of the water and loaded onto the truck. They drove off to Ha Leqele and there took the gravel road, joined the Main South 1 to Masianokeng and followed Kofi Anan Road to Ha Tsolo and then onto Ha Morakane road. At the bridge over Phuthiatsana river Liekhe ordered him to stop the vehicle and park facing Maseru. There Simon was again assaulted and then thrown into the river. PW1 had remained seated in the front alone and did not see who actually threw Simon into the river. Thereafter the group drove back to Lithabaneng where PW1 noticed blood in the vehicle

¹⁵ P 11 of transcribed record

which had to be washed away. He washed the vehicle with “Master (10), Tebogo (12) and Bonki after which everyone went to his home. The time was now 1.00 am. The following morning after learning from Bonki that Simon’s young brother was at Simon’s home and that Simon’s body had been retrieved from the river, PW1 told his brother-in-law about what had happened. The latter took him to Pitso Ground Police Station where he eventually made a statement.

[49] PW1’s evidence under cross-examination was this. He admitted that Bonki had told him that Simon was responsible for White’s death; that they had decided to take Simon to the police¹⁶; confirmed the assistance rendered by White’s wife in locating Simon and that their mission aborted on the first day and they regrouped on the second day at around 7 .00 pm at the Dairy. When it was put to him that a dispute arose among the group at Dam 1 when Simon refused to confess that he had killed White with some saying there was no point taking him to the police if he had not confessed and others saying he should be beaten some more to induce a confession, he stated that the plan to take Simon to the police had now changed but reiterated that the group remained intact and no one dissociated himself either at Dam 1 or at Phuthiatsana bridge. PW1 confirmed that he made a statement to the police at the time of his arrest and stood by that statement. In that statement he said that, in a conversation with Liekhe, he urged that since Simon had confessed to killing White he had to be

¹⁶ P 18 of transcribed record

taken to the police and not assaulted some more.¹⁷ He denied knowledge of any stolen items that were recovered but admitted that “there were some rumours that some items were found at Simon’s shop.”¹⁸ He confirmed that Liekhe and Bonki were close associates of White and that while he did not know the whereabouts of Liekhe, he knew that Bonki had been stabbed to death at Lithabaneng.¹⁹

[50] In general PW1 stuck to his evidence that all the appellants were at the scene both at Dam 1 and at Dam 2, the latter being the bridge where Simon’s body was thrown into the river. He admitted that the offence was committed during darkness when he could not see clearly who of the persons involved did what exactly.

[51] The importance of PW1’s evidence is that it places all the accused at the scene both on the first day and the second day and confirms their participation in the assault of the deceased up to the point that the body was thrown into the river. To be noted as well is that the mission was carried out after sunset both on the first day and on the second. And this by persons who genuinely wanted to take Simon to the police. To be recalled also is the fact that the police had already released Simon in relation to the death of White.

[52] PW2 was employed by Simon in his shop at Motlohelo. He told the court that after he had closed the shop at 8.00pm a

¹⁷ P 42 and p 49 of transcribed record

¹⁸ P 68 of transcribed record

¹⁹ P 71 and p 72 of transcribed record

group of people arrived. He advised Simon about the group's presence. Thinking that the people wanted to buy items from the shop, Simon instructed him to open the shop. PW2 soon realised that the persons were not interested in shopping but were looking for Simon. Simon came out and they took him away. The following morning PW2 saw traces of blood at the shop and later learnt that Simon was late. He was not cross-examined by defence counsel even though his evidence showed that no items were taken from the shop or otherwise recovered from Simon. He also testified that Simon was assaulted upon apprehension hence the traces of blood he saw the following morning.

[53] PW4, Paseka Pitso, gave evidence that he grew up together with White, which was his nickname. He also knew Simon. They had attended school together and both resided at Lithabaneng village. He testified that because White had visited Simon on the day he disappeared, and his body found a month later "at a certain place on the way to Roma" he was one of those who met at the Dairy because they had decided to ask Simon about White's death. He said they were many at the meeting "but I recall Thabo Semoli, Napo (PW1), Purusi Marole, Liekhe, Parrafin, Sethlabaka Motebang, Motebang Mothobi, Karabo Nyakane, Moeketsi Mothepu, Lethola Mothobi. Among that group the Accused were there also Bonki was there." He was in that group when they went to look for Simon at Ha Matlohelo on the first day at around 7 pm. On the following day when Liekhe called him at around 7 pm he was bathing, did

not call Liekhe back and decided to go to sleep. He was accordingly unhelpful about what transpired on the second day. His evidence is however significant in that he did not allude to the group having had any intention to recover stolen property or to take Simon to the Chief or to the police

[54] An okapi knife was produced and admitted as an exhibit, it being the sharp object which was used to inflict some of the wounds on the deceased. That exhibit was part of the admitted evidence of one of the police officers.

[55] In summary, the prosecution witnesses established that the appellants were part of a group of persons who met and agreed to deal with Simon on suspicion that he was responsible for the death of White. They may have originally toyed with the idea that they could extract a confession from him and then take him to the police. That idea was not pursued either because Simon did not confess, or the appellants abandoned it and were carried away by the assault they embarked upon immediately upon capturing him. Their visits to Simon's place on the two occasions were in the early evening, somewhat negating the contention that they wanted to take Simon to the proper authorities. The appellants did not, contrary to their assertions, recover any of the allegedly stolen property from Simon. Even if it is accepted that they took some property from Simon, which is not supported by the evidence, they did not seek confirmation from White's wife that the seized items were stolen property. The purpose of their capturing Simon was in

order to assault and to kill him. They assaulted Simon with dangerous weapons for a long time until he died. Thereafter they threw his body into the river. At all material times all the appellants were at the scene and participated in the assault. It cannot be denied that Liekhe and Bonki participated in the assault as well and were probably the ring leaders. Although they were not brought before the court because the one fled and the other died, that cannot absolve the appellants who participated in the assault on Simon in their own right.

Evidence of appellants

[56] Appellant 1, Tebello Mothobi, admits participating in the events on the first day only. He however did not challenge, by way of cross-examination PW1's evidence about his presence at the scene on the second day or about him assisting in washing the blood off the vehicle. Appellant 2, Moeketsi Mothepu, also admitted participating in the events of the first day only. Appellant 4, Letela Ramotseoa admitted being one of those present on the second day but said that after the motor vehicle stopped the first time at Ha Makhoathi (Dam 1) he and others left the scene and returned to their homes after an argument whether or not Simon was to be taken to Lithabaneng alive. Later he said he left the group at Phuthiatsana bridge.²⁰ He denied having been in possession of and using a slasher. No denial of the evidence of PW1 on these issues was made by way of cross-examination. Appellant 5, Lethola Mothobi, said that when the vehicle stopped for the first

²⁰ P 154 of record

time it was around 9:00 pm and that he left the group at that point before Simon was assaulted. Appellant 8, Motsie Ramafikeng, said that he left the group at Dam 1 together with one Musuhli and walked for two hours back to their homes and further that he saw a box containing what he believed was recovered stolen property. When he arrived at home, he told his mother what had transpired. Appellant 9, Karabo 'Master' Nyakane, admitted being in the group on the second day. He left the group at Dam 1 when Liekhe and others started assaulting Simon but later said Simon was never assaulted in his presence. He denied PW1's evidence that he assaulted Simon with a screwdriver and that he assisted in washing the blood off the vehicle, yet that was never put to PW1 during cross-examination. Appellant 10, Teboho Shelane, said that he parted company with the group at Dam 1. He denied that he helped wash the motor vehicle as stated by PW1, yet that denial was not put to the witness in cross-examination. I have not addressed the evidence of the remaining three appellants 3, 6 and 7 in similar detail merely because the record before me had a gap - pages 111 to 132, where their testimony appeared were not in the record. Despite this shortcoming in the record, the submissions on their behalf was, as with the co-appellants, that they did not participate in the assault upon the deceased because they parted company with the actual perpetrators before the assaults or the fatal assaults were committed.

[57] The bulk of the appellant's evidence was that they either dissociated themselves by leaving those who were assaulting the deceased at Dam 1 or at Dam 2 and that they did not participate in the assault at all: the assault was mainly carried out by PW1, Liekhe, Bonki and one or two other strangers who had joined the group. In this connection the trial judge noted that –

“counsel for the accused are now shifting the blame of the fatal assault of the deceased upon those accused persons who have either since passed on or those who have not been jointly charged and some two strangers who were part of the group which assaulted the deceased but who have never been identified and as such have not been charged together with the other accused now before the court.”

[58] The facts I find established by the evidence show that there is no room for hesitation in accepting the trial judge's main findings of fact. The appellants were patently untruthful in most of what they said. Where their 'facts' are inconsistent with the facts placed before the court by the Crown witnesses I, as did the judge *a quo*, accept the version of the Crown witnesses.

Common purpose

[59] This brings me to another basis of the judge *a quo*'s decision that the appellants assaulted the deceased and are guilty of any consequent crime arising therefrom. The learned judge found that the appellants acted in common purpose. Common purpose is applicable in two situations. The one arises from an agreement to commit an unlawful act. The other arises from presence at the scene of crime and associating in its commission. In *Director of Public Prosecutions v Pita and Others*²¹ Grosskopf AJA set out the requirements of common purpose thus:²²

“The prerequisites that have to be satisfied for a finding of common purpose where there was no prior agreement are set out as follows in *S v Mgedezi and Others* 1989 (1) SA687 (A) at 705I-706B:

‘In the absence of a prior agreement, Accused No. 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause

²¹ LAC (2005-2006) 377

²² At 380H-381C

with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.”

See also *Mokoonya and Others v R*.²³

[60] The learned judge *a quo*, in dealing with common purpose and resultant events, said:

“[48] In effect, all of the accused first acted in common purpose of arresting and handing over the deceased to the police; but all that changed after they had all realised that they had not [only] brutally assaulted the deceased but they [also] realised that they had actually killed him.

[49] The failure to later report to anybody about the fate of the deceased is another aggravating factor on their part. Indeed, they may have had good

²³ LAC (2007-2008) 237

intentions initially but their subsequent actions of deliberately failing to report about the deceased's gruesome death and their assisting PW1 to get rid of the evidence places them squarely in the commission of this offence.

[50] Of course the court is aware that they have never had the requisite intention to kill the deceased, but they associated themselves with the actions of those who ultimately had the deceased's body thrown into Phuthiatsana river."

[61] Other cases of the same genus as *Mgedezi*, such as *S v Motaung & Ors*²⁴ and *S v Khumalo & Ors*²⁵ make it clear that each individual in a common purpose is to be judged on his own *mens rea* and that the *actus reus* of the accused, on which criminal responsibility for the murder is founded, consists not necessarily in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill – per McNally JA in *S v Mubaiwa & Anor*²⁶.

[62] The doctrine of common purpose has no application to the commission of a non-criminal act or an innocent act but only to the commission of an unlawful act. The learned judge *a quo* therefore misapplied the doctrine by relating it to the act "of arresting and handing over the deceased to the police, a

²⁴ 1990 (4) SA 485 (A)

²⁵ 1991 (4) SA 310 (A)

²⁶ 1992 (2) ZLR 362 (S) at 370 G-H

perfectly lawful act.” Looking at the evidence in this case, principally at that the reason established by it for picking up Simon, an act done by agreement of all concerned; the frivolity and falsity of the assertion that the appellants and the others in their group went to recover stolen goods and take Simon to the police or to the chief; the fact that the assaults on Simon commenced immediately after abducting him and continued until he succumbed, all this shows that at the very minimum the agreement of those involved was to pick up Simon and assault him, a patently unlawful act. Their mission was an act of revenge: they wanted to deal with Simon for his suspected role in the death of White. The present is an instance of appellants agreeing to assault Simon. As such there is prove of an agreement to commit an unlawful assault upon Simon; each of the appellants causally contributed to the death of Simon by assaulting him with dangerous weapons; they were all present at the scene and intended to make common cause with those assaulting Simon, their act of association consists in picking up Simon and assaulting him. Even without conclusive proof of what each one of them did, they had the requisite *mens rea* in that they foresaw the possibility that Simon might be killed and associated themselves with recklessness as to whether or not death ensued.

[63] I have rejected the evidence that the appellants went to pick up the deceased for the purpose of taking him to the chief or the police. I have also rejected their evidence that they intended to recover goods stolen from White’s shop. That

leaves only one purpose of going to pick up the deceased. It was to exact punishment through assaults with lethal or dangerous weapons. To attribute an actual intention to kill to each in the group is not safe as there was no evidence to prove such an intention. The intention established by the evidence was to assault the deceased with dangerous weapons. In associating with each other in the use of dangerous weapons against a defenceless person and doing so for a long period of time and at night for that matter, each of them foresaw the possibility that Simon might be killed and associated himself with recklessness as to whether or not death ensued. In consequence each one of them had the legal intention to kill the deceased. Each is accordingly guilty of murder with constructive intent.

Sentence

[64] The judgment of the trial court deals with sentence in five short paragraphs²⁷ and merely records that counsel addressed the court in mitigation, does not detail the mitigating factors or the reasons for sentence. The court did not have to deal with extenuation considering its verdict. Now, having found the appellants guilty of murder and the record containing nothing on factors that are relevant to sentence, let alone to extenuation, this Court is at large to make its own determination based on what the appellants' evidence on record and the niggardly submissions made by counsel in relation to sentence.

²⁷ Paras [60] - [64]

[65] Regarding extenuating circumstances, which are factors that tend to reduce the moral blameworthiness of the appellants, I do not hesitate to find in favour of the appellants. They acted as a group. Left alone each of them was unlikely to have embarked upon such a criminal enterprise on his own. To the extent that the appellants acted as a group and were each emboldened thereby, their individual blameworthiness is accordingly reduced or attenuated. They took the law into their own hands believing that the deceased was responsible for the death of one of their own. This too must be brought into the scales and it serves, in my view to reduce their moral blameworthiness. As remarked by Schreiner JA in *R v Fundakubi and Others*²⁸ -

“But it is at least clear that the subjective side is of very great importance, and no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused’s moral blameworthiness in committing it, can be ruled out from consideration.”

[66] A conviction founded on constructive intent has been viewed as warranting a finding of extenuating circumstances in a number of cases - *Lebeta v R*²⁹ and *Letuka v R*³⁰. I therefore find that extenuating circumstances exist in this case.

²⁸ 1948 (3) SA 810 (A) at 818

²⁹ LAC (2007-2008) 220 at 235 at 234 I - 235B

³⁰ LAC (1995-99) 405 at 420J- 421D

[67] This court has altered the conviction from assault with intent to cause grievous bodily harm to murder with constructive intent. For this reason alone, the Court is at large to impose an appropriate sentence.

[68] The record does not show what factors the court below took into account on sentence. No information was placed before this Court that any of the appellants have previous convictions. I proceed on the basis that they are first offenders. In their evidence, most of the appellants indicated that they are bread winners for their families. It was submitted that most of them were “of tender age” at the time of committing the offence.³¹ The trial took inordinately long to complete. These are relevant mitigating factors.

[69] In sentencing a convicted person it is trite that the court considers the gravity of the offence, the interests of the accused and the interests of society and attempt, as best it can to balance them, see *S v Zinn*³² and *Mokoonya* supra at 3261 para [55]. The offence committed here is serious. The appellants agreed to abduct the accused in the evening to deal with him as an act of revenge for the death of a colleague. They took the law into their own hands. According to PW3 it was after 8:00 pm after the deceased had closed his shop when they picked him up. They were armed with dangerous weapons and assaulted the deceased with abandon until he died. The assault was unusually vicious and directed to all parts of the

³¹ Para 15 of appellant written submissions

³² 1969 (2) SA 537 (A)

body as spoken to by the postmortem report. After that they threw his body into a river. In these circumstances society would naturally call for a severe penalty. In regard to the interests of the convicted person the court must temper punishment with mercy recognising human foibles however serious the result may be and having regard to all the mitigating factors urged upon it by the accused person. I also take into account that that the appellants are convicted on the basis of *dolus eventualis*. I think that in all the circumstances a sentence of 10 years imprisonment on each appellant is justified.

[70] In the result the following order is made:

- (a) The appeal against conviction to the extent that it was based on a conviction for assault with intent to cause grievous bodily harm is dismissed.
- (b) The appeal against sentence of fifteen (15) years imprisonment to the extent that it has been reduced succeeds.
- (c) The cross-appeal against the conviction for assault with intent to cause grievous bodily harm is upheld to the extent that the conviction for assault with intent to cause grievous bodily harm is set aside and replaced with a conviction for murder with extenuating circumstances.

(d) The sentence of 15 years imprisonment imposed on each of the accused is set aside and replaced with the following sentence -

“Each accused is sentenced to ten (10) years imprisonment.”



MH CHINHENGO
ACTING JUSTICE OF APPEAL

I agree



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS: ADV K LESUTHU

FOR THE RESPONDENT: ADV L M MOFILIKOANE