

THE STATE -vs- JEFTA HAGGAI & 8 OTHERS.

1994/06/02

Strydom, J.P.

CRIMINAL PROCEDURE:

Common purpose - Identity -what
evidence necessary

CASE NO. 117/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

JEFTA HAGGAI

LAZARUS KORNELIUS

MARTIN UUPINDI

ERASTUS SHEGAVALI

PAULUS EVAS

NIKOLAUS NGHIPANDE

TOBIAS KORNELIUS

BENJAMIN IYAMBO

ILINILIUS HOSEA

CORAM: STRYDOM, J.P.

Heard on:

Delivered on: 1994/06/02

JUDGMENT

STRYDOM, J.P.: During the beginning of 1992 some dissatisfaction arose amongst the workers of the firm MKT Enterprises (Pty) Ltd. concerning bonuses payable to the said workers. This eventually led to a strike by all the workers of the company.

After negotiations with representatives of the Workers Union, it was agreed to reinstate all workers, at a salary which was 30% less than the salary earned by such workers during the previous year namely 1991. The result of this agreement was that the workers also forfeited the 10% raise which they had received during 1992 so that the actual salary decrease was 40% less than what was earned before the strike. According to the evidence the atmosphere at MKU Enterprises was tense when on the 24th September 1992 a meeting took place on the premises of the company where some workers, mainly those in the wood section, were addressed by a Mr Haikali. Soon after the resumption of work a group of 12 to 15 men was seen by witnesses von Shirp and Schaeffer, walking in the direction of the administration buildings of the Company. Some of these men carried wooden slats and the two witnesses gained the impression that the group was angry. The group followed behind the witness Ku'hn who was seen to have come out of one of the buildings closer to the offices and was also proceeding in the same direction. This group of men also passed the witness Erasmus at Point D shown on photograph no. 1 of EXHIBIT A.

Erasmus, who was at the time talking to Mr Dickson (senior) , saw the group moving into the entrance to the offices namely Point A on photograph no. 1. At this stage

inside the office were the deceased, Mr Zapporoli, Mrs Erasmus, Mr Kiihn and Mr Dickson (junior).

Kiihn, according to his evidence, went to the office to enquire about a fax which he was expecting and also to get some information from the deceased. Shortly after he entered a group of men came in. One of them, accused no. 1, said, "What have you done now?", or words to that effect. This was addressed to the deceased. The deceased then enquired as to what had been done by him. He was not given an answer. The atmosphere became tense and the group of people aggressive. The deceased then ordered Mrs Erasmus to phone the police. At this stage accused no. 1, who was standing next to the deceased as shown on photograph 2.G, said "Stop them". And when the deceased tried to get hold of his brief case, which was standing behind him on a shelf and which contained a pistol, he was, according to Dixon and Kuhn, grabbed from behind by accused no. 1 who pinned him to his chair and so prevented him from getting hold of his brief case. Further, according to the evidence, the people surrounding the desk of the deceased started to hit him with the wooden slats or poles. In this process Kiihn was also attacked. He, however, by holding his arms in front and above his head, succeeded to block most or all of the blows which he said were aimed at his head and he further succeeded to escape from the office.

Mrs Erasmus, who tried to reach the telephone, was hit over the back presumably also with a wooden slat or pole. At a stage she slipped and fell, and then got hold of her handbag from which she removed a pistol and she then fired a shot into the air. As a result thereof, the people left the office except for accused

no. 1, who now had a wooden slat in his hand and who took a step or two in her direction. She then fired a second shot whereupon accused no. 1 also left the office. Erasmus, who was still outside, saw two groups of people coming out of the office block at different doors marked F and G on photograph no. 1. Shortly before, Kiihn also came out of the office block and told the witness to telephone the police. He, that is Erasmus, went into the office, where he armed himself with a pistol of the deceased and, after having satisfied himself that his wife was not in danger, left the office and went to point C shown on photograph no. 1.

In the meantime a group of people, allegedly led by accused no. 1, entered the office of witness Burger at point B on photograph no. 1.

According to Burger accused no. 1 said they had finished talking. He, Burger, also enquired what was meant by such words but he, likewise, did not receive an answer. He said that accused no. 1 had a chisel in his hand and kept shoving him in the direction of the group of people who was standing in his office, some of whom were armed with wooden sticks. Without anything else being said, Burger was then attacked by the group. He was hit on his head and face, and as he was bending forward, he was also hit on his back. Then all of a sudden the group stopped the attack and left the office.

According to Erasmus some of the people standing outside saw him coming with a pistol in his hand and shouted a warning to the group attacking Burger.

After the arrest of some 17 workers an identification parade was held at the Windhoek prison where 9 people were identified by various witnesses. By some mistake accused no. 9, who was not so identified, was charged instead of another person who was in actual fact identified. During the proceedings accused no. 9 was found not guilty and discharged. I will further-on only refer to the remaining 8 accused.

As a result of the attack on him, Mr Zapporoli died on 28 September 1992. Flowing from the occurrences on the 24th September, the accused are now charged with the murder of the deceased and furthermore with the attempted murder of Mr Burger, Mr Kiihn and Mrs Erasmus.

The State is represented by Mr Miller, whilst Mr Metcalfe represented all the accused.

All the accused pleaded not guilty to all the charges.

After the State's case was closed only accused no. 1 and no. 5 gave evidence under oath. Accused's no. 2, 3, 4, 6, 7 and 8 elected to remain silent. Accused no. 1. testified that on the particular day he was requested by the deceased to come and see him. He forgot about it but during the afternoon he remembered and then proceeded towards the office on his own. Inside the office he stood in front of the deceased's desk. The deceased was busy on the computer and said that he just had to wait a moment when he, the deceased, would give his attention. The next moment people

came into the office, and he, the accused, was hit twice over his back. He managed to escape from the office and went to inform his foreman, Mr Burger, that he was assaulted and that there were people in the office who assaulted other people. While he was with Burger, he heard people shouting that Erasmus was coming with a gun. He went to investigate. When he returned he found Burger outside his office. Burger asked him to explain what was going on but he informed Burger that he was finished talking.

Accused no. 1 therefore denied that he was part of the group of people who assaulted the deceased and others on the afternoon of the 24th and claimed himself to have been assaulted by these people.

Accused no. 5 denied that he was part of the group of people who assaulted the deceased and others. He stated that he never attended a meeting during the afternoon and that he continued to work. Whether the accused are guilty of some or other crime therefore depends on identification. In this regard, and as stated before, an identification parade was held at the Windhoek prison where all eight the accused were identified by various witnesses. What complicates matters is that some of them were identified during various stages during the happenings of this fateful afternoon. So, for instance, accused no. 3 was only identified by Burger and the question is was he part of the group of persons who attacked the deceased, Kiihn and Mrs Erasmus? Some of the accused, namely 4, 6 and 7, were only identified by Erasmus who recognized them when the group of people moved passed him on their way to the office.

According to the evidence there were some 270 to 300 workers in the employ of MRU Enterprises at the time of the incident. Obviously some of them would be better known to particular witnesses than others, depending on the nature of previous contact with them by a particular witness. We know from the evidence that there were some eight or nine different sections of work at the company and that workers were sometimes transferred from one section to another. The danger inherent in a situation such as this is of course that a witness may be able to bona fide recognize a particular accused, perhaps not because he was part of the particular group who was marching on the office on that afternoon but because his face looked familiar as a result of previous chance encounters. This, in my opinion, is inevitable where a large group of people work together. The Court must be alert to this danger and must guard against it.

On the other hand it is also understandable that where twelve to fifteen or more people move together in a group, that a witness may only recognize some whereas there may be, in the same group, others equally known to the witness but not seen and recognized by him or her because his attention may not be focused on each and every individual in the group.

On this particular afternoon, those who saw the group walking to the offices did not really expect or foresee anything untoward happening. This is demonstrated by the fact that none of them did anything until after the assaults took place.

With all this in mind I will now proceed to analyze the evidence in regard to each accused as far as identity is concerned.

Accused no. 1.

Accused no. 1 was identified by each and every witness who was on the scene on the afternoon of the 24th. Shaeffer and Von Shirp who were standing at point X on photograph no. 1 saw the accused in the front part of the group. Shaeffer had known the accused since 1989. He had worked in the same section as Shaeffer. Although the accused was later on transferred to Burger's section Shaeffer remembered him because he was a very good worker, one who understood his work very well and very fast. This witness could still remember that on the particular afternoon accused was wearing a white T-shirt.

Von Shirp also knew him, that is the accused no. 1, well, because he saw him nearly every day and sometimes even more than once a day.

The witness Erasmus also knew the accused by name and stated that he recognized no. 1 when the group went passed him. To this evidence must be added the evidence of Mrs Erasmus, Kiihn, Dickson (junior) and Burger, who all knew accused no. 1 well and who recognized him as the leader of a group of persons who entered the administrative offices and who was present when the deceased, Kiihn and Mrs Erasmus were attacked. Again he led a group of people into the offices of Burger and was present when the attack was launched on the witness.

As stated the accused gave evidence under oath. He was by no means an impressive witness. He changed his evidence in regard to statements made by his counsel in cross-examination to State witnesses. His evidence that he himself was the victim of an attack is so improbable that it can be rejected out of hand. He had great difficulty in explaining why he went to Burger instead of reporting the attacks to the first person he met. His explanation that Burger came out of his office after somebody had shouted that Erasmus was approaching with a gun, and that when he saw Burger he had no injuries, is clearly out of context with what had happened on this afternoon.

Against this evidence, the evidence presented by the State, overwhelmingly placed the accused no. 1 as the leader of the group of people from the outset until after the assault on Burger. Notwithstanding his denials it seems that acts of violence were committed in both the office of the deceased and in the office of Burger, where accused went after the attack on the deceased, Kiihn and Erasmus. In the light of all the evidence the concession by his counsel that the accused was correctly identified was, in my opinion, correctly made.

Accused no. 2.

Accused no. 2 was identified by Schaeffer as part of the group which walked past him and von Shirp on their way to the administrative office. The witness knew the accused from 1989 when he worked in Shaeffer's section and he knew that he was one of the deaf workers. Nobody identified the accused in the office where the first attack was launched on the deceased, Kiihn and Mrs Erasmus. However, Burger again saw him amongst the group of

persons who attacked him. Accused no. 2 was one of the workers in his section.

In my opinion both Shaeffer and Burger demonstrated that they knew accused no. 2. well and there is therefore no danger of a wrong identification of the accused. This, so I understood the argument of Mr Metcalfe, was also accepted by him. Although there is no positive identification of the accused in the office of the deceased it can, in my opinion, safely be accepted that he was also there. Shaeffer testified that he watched this group until they disappeared around the corner of building no. 2 on their way to the office. According to Shaeffer nobody left the group, and neither did anybody join them. Erasmus, who was passed by the group at Point D, saw the whole group entering the office complex. It is further highly unlikely that accused no. 2, who was seen by Schaeffer in the group, would have left the group and then popped up again when Burger was attacked.

In the circumstances I find that accused no. 2 was correctly identified and that he also formed part of this group when deceased, Kiihn and Mrs Erasmus were attacked. Accused no. 3. Accused no. 3 was only identified by Burger as forming part of the group of people who came into his office. Accused no. 3 was not identified by any other witness at a stage prior, or at the attack on deceased, Kiihn and Mrs Erasmus.

Burger conceded that he did not know the accused for a long time. However, he testified that accused was working in his section and because the accused was working with one of his key

men, he was almost daily in contact with the accused. In the circumstances I am satisfied that Burger knew the accused well and that there is no danger of a wrong identification.

Mr Miller argued that because accused no. 3 was identified by Burger, and the other circumstances present to which Mr Miller has referred the Court, it must be accepted that he was also present when the deceased and others were attacked in the administration office. I do not agree. Although there is evidence that nobody joined or left the group as they were on their way to the administration office, there is no such evidence in regard to the movement of the group once they had left this office and were on their way to Burger. The possibility that accused 3 could have joined the group after the first attack cannot be excluded. It is correct that the accused did not testify but in the absence of any direct evidence linking him to the group at that stage and the evidence being at best only circumstantial, no inference can be drawn from the accused's silence in regard to this incident.

As far as the circumstantial evidence is concerned, I am not satisfied that the only reasonable inference that can be drawn from the fact that the accused was present in the office of Burger, and the other circumstances referred to by Mr Miller, is that the accused must also have been present when the deceased and others were attacked. The possibility that he was not present is equally reasonable, especially in the light of the fact that he was not identified by six other witnesses who saw the group approaching and who saw them, or some of them, in action. My finding is therefore

that the State only proved that accused no. 3 was present during the attack on Burger.

Accused 4, 6 and 7.

I deal with these three accused together because their circumstances are more or less the same. They having only been identified by the witness Erasmus. All three the accused were identified by Erasmus as workers of MKU who worked in the wood section. He also indicated that accused no. 6 was one of the deaf people. He did not know any of the three by their names and did not work together with them. Although the evidence is that various of the persons in the group carried wooden slats Erasmus only saw one person carrying a piece of wood. In fact, he was positive that none of the others, when he saw them, was carrying anything. In this regard Mr Erasmus is clearly wrong. See the evidence of Schaeffer and the witnesses Dickson, Kiihn, Mrs Erasmus and Burger.

His explanation of how he recognized the accused because their faces were subconsciously registered, is also not very reassuring bearing in mind further that all the workers basically looked the same to the witness. The descriptions given by the accused of the individual accused also did not go far. Number 4 had a beard, but the witness also conceded that there were many other workers there with beards. No. 6 stood out as a deaf and dumb person and he also brought in stapler guns and other tools to be repaired. Mr Erasmus however did not know that accused no. 2 and 7 were also deaf and dumb. It is so that the witness did not identify accused no. 2. However, in regard to accused no. 7, whom he did identify, one would have expected him

to know no. 7 was also one of the deaf. No. 7 was solely identified on the form of his head. Also the description of accused no. 6 as walking around with a hard-baked expression on his face does not take the matter much further, because an expression may change. The most positive identification by this witness was made in regard to accused no. 6. In this regard however, contrast the evidence of Schaeffer, who stated that he knew accused no. 6, and that if he was in the group he would, in all probability remember him. It may of course be that Schaeffer, because he saw a group of people, did not see no. 6 or did not recognize him. However, if there is any doubt, that doubt must go to the accused.

I have no doubt that these identifications were made bona fide and honestly by Erasmus. But, as experience has shown, honesty is no guarantee against a wrong identification and courts must ever guard against such an eventuality. It is clear that of those identified by Erasmus, these three all were the least known to him. The danger of calling up their faces from the subconscious as stated by this witness, does not exclude the possibility that they were remembered from other previous encounters. In certain respects Erasmus's power of observation is suspect. See in this regard for instance his evidence concerning the objects carried by the group. His further observation that the group was laughing and talking normally when they passed him, stands in stark contrast to the evidence of von Shirp and Schaeffer and those present in the administration office and what then actually happened there.

In the light of these problems pointed out by me it would, in my opinion, be risky to accept the witness's evidence of identification of accused no. 4, 6 and 7 especially where such evidence stands alone and where these accused were not identified by any other witness. The fact that the three accused did not testify can, in my opinion, not convert unsatisfactory identification evidence into proof beyond reasonable doubt. There is no onus on the accused and the State must prove their guilt beyond reasonable doubt. I find therefore that the State did not prove beyond reasonable doubt that accused 4, 6 and 7 were present in the group who attacked the deceased and others in the administration office or who attacked Burger.

Accused no. 5.

Accused no. 5 was identified by Kiihn in the administration office as the specific person who attacked him. Accused no. 5 was again identified by Burger as one of the group of persons who came into his office prior to the attack upon him. Kiihn testified that he had known accused no. 5 for nearly three years and although he was at that stage only seeing him once or twice a week, he was a hundred percent sure that accused no. 5 was the person who hit him. Burger testified that accused no. 5 worked in his section.

Mr Metcalfe, correctly in my view, conceded that the accused was a poor witness and that the Court should reject his evidence. In my opinion, there is no reason to doubt the identifications of Kiihn and Burger and I therefore find that accused no. 5 was present in both the administration office and in Burger's office when the attacks took place.

Accused no. 8.

Accused no. 8 was identified by the witness von Shirp and by Erasmus. Von Shirp saw accused no. 8 when the group of people went past where he and Schaeffer were standing. Accused worked on one of the machines under the control of the witness and he saw him daily. Erasmus also knew the accused as he also used to work with him in one section in the plate shop. In my opinion both witnesses demonstrated that they had known the accused well. This evidence of Erasmus stands in contrast with his evidence in regard to accused 4, 6 and 7. Both witnesses saw accused no. 8 in the group at different points and on the evidence I am satisfied that accused no. 8 was properly identified and that he was at least present in the administration office during the attack on the deceased, Kiihn and Mrs Erasmus.

Burger did not identify accused no. 8. On the evidence of Erasmus it must be found that when the group of persons left the administration office, they came out in two different groups. The one group consisted of about three persons while the rest were together. Whether the two groups again merged into one before the attack on Burger is uncertain. Whether everybody who was in the administration office went along to Burger's office is also uncertain. The fact that the group split up at least opened the possibility that the small group of three or some of them did not again join the attack on Burger. It therefore does not follow that those in the administration office all went to Burger's office. As Burger did not identify accused no. 8 the possibility exists that he was not present when the attack on Burger was perpetrated.

I therefore find that the State proved that accused no. 8 was present during the attack on the deceased, Kiihn and Mrs Erasmus,

but that it was not proved that he was also so present when Burger was attacked.

The Court must now decide the liability if any of those accused found to have been present during the attacks vis-avis the charges they are facing or possible competent verdicts in regard thereto. With a few exceptions the State could not prove what was the share, if any, of each accused in the various assaults committed. Mr Miller, on behalf of the State, and with reference to all the evidence, argued that the accused at the very least had a common purpose to commit acts of violence and that they foresaw it as a reasonable possibility that, in the execution of their plan, death could ensue. This being the case, all the accused should be found guilty as charged except in respect of count 4, that is the case of Mrs Erasmus, where the State did not prove more than an assault.

Mr Metcalfe, for the accused, submitted that in order to come to the conclusion that a common purpose existed it was incumbent upon the State to prove, in regard to each accused, some act committed by such an accused whereby his willingness to associate himself with the commission of the crimes is proved. On the strength of various cases quoted by counsel he submitted that the mere passive presence of an accused on the scene of the crime does not give rise to any criminal liability. As there is no evidence of any acts of association committed by accused 2, 3, 4, 6, 7 and 8, they should be discharged on all counts. In regard to accused no. 1, Mr Metcalfe submitted that he can at most be convicted of culpable homicide. As far as accused no. 5 is concerned, he should be found guilty of assault with the

intent to do grievous bodily harm in respect of counts 2 and 3 only.

These submissions by counsel in regard to the legal doctrine of common purpose, when seen in proper perspective, and in regard to the commission of the crime of murder, cannot be faulted. In S v Savatsa and Others 1988(1) SA 868 A, the following question was asked and unanimously reaffirmed by the Appeal Court of South Africa, namely:

"In cases of the kind commonly referred to in our practice as cases of common purpose in relation to murder is it competent for a participant in the common purpose to be found guilty of murder in the absence of proof that his conduct individually caused or contributed causally to the death of the deceased."
See: p. 894.

In cases where the State does not prove a prior agreement to a common purpose or where such prior agreement cannot be inferred from the facts and circumstances proved, the State will still be able to rely on common purpose by proving that the accused had the necessary mens rea and proving that the accused associated himself in some way or other with the commission of crime. To facilitate proof of such association Botha, J.A. in S v Ngedezi and Others 1989(1) SA 687 A at 705i to 706c laid down certain guidelines. These guidelines are of particular significance in the so-called "joining-in" cases. Where there is however a prior agreement to a common purpose and the purpose is achieved a party to such agreement is liable whether he has performed some act of association with the conduct of the others or not.

In the present case there was a background of labour unrest. On the afternoon of the 24th September a meeting was held with specifically the workers in the wood section. On the evidence of Burger, I think it can safely be accepted that most of the accused, if not all, attended this meeting. What transpired there is not known. However, shortly thereafter a group of person led by accused no. 1 was seen, armed with wooden poles of slats. These poles were not cut off and discarded pieces of wood which one would pick up in a wood factory. At least some of them were prepared and trimmed and the grips on square pieces were rounded off to facilitate better and easier handling. According to the description of these wooden slats at least some of them were formidable weapons. The evidence is that the group was angry and when they entered the administration office they became aggressive. Each of the accused identified, with the exception of accused no. 1, who had at some stage a chisel, was armed with a wooden slat. Taking into consideration the background and atmosphere at that stage, the fact that the accused armed themselves with these weapons prior to going to the administration office, is in itself ominous. However, what then happened there and also in Burger's office, is also relevant.

Accused no. 1 was no doubt the leader and spokesman of the group. It was he who said to the deceased, with the others in close attendance, "What have you done now?". This was countered by the deceased asking what the accused was referring to. This was asked more than once, but no answer was forthcoming from the accused. This is significant, and shows in my opinion, that the weapons were not taken along merely to intimidate or to threaten

the deceased into addressing the grievances of the accused because if that was the purpose of the accused they would have informed the deceased what he had done wrong. Again the same pattern was followed in regard to the attack on Burger. Burger was informed by accused no. 1 that they had finished talking. This by itself sounded threatening. Again the accused were requested to explain what was meant. Again no explanation was forthcoming and, after Burger was shoved in the direction of the group the beating started spontaneously. The group was certainly not interested in solving their problems in any other way but by the use of force. In regard to Burger, an additional factor can be added and that is that those who were present at the attack on the deceased now at least knew what the effect of such an attack was and the seriousness thereof. In any event it seems to me highly unlikely that those accused who were part of this preconceived plan, and who were armed, would stand around idle during the attack in the offices. If that were the case I would have expected accused to come and tell the Court or not to lie about what had happened. In the case of S v Mdlala 1969(2) SA 637 A the following was stated by Holmes, J.A. in regard to common purpose at 640 F - H.

"It is sometimes difficult to decide when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them. And, leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -

(a) that he individually killed the deceased with the required dolus, that is by shooting him; or

(2) that he was a party to a common purpose to murder and one or both of them did the deed; or

(3) that he was a party to a common purpose to commit some other crime and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence and it occurred.

See: S v Malinga and Others 1963(1) SA 692 A at 694 F - H and 695; or

(d) that the accused must fall within a or b or c. It does not matter which for in each event he would be guilty of murder."

The correctness of this decision was again confirmed in the Sawatsa case supra p. 896 H - 898 A. See further: S v Talana 1986(3) SA 196 A at 206 E - 207 A; and

S v Mbatha and Others 1987(2) SA 272 A at 282 B to 284 C.

Applying the principles as set out in the above cases, I agree with Mr Miller that the fact that the accused armed themselves before the events that took place and, taking further into consideration the facts set out by me herein before, clearly indicate that violence was indeed planned beforehand. I also agree with counsel that the accused were under no illusion as to the fact that people were going to be beaten that afternoon and beaten severely. In regard to the deceased, no.'s 2, 5 and 8 were armed with wooden slats, each one knowing that he had no control over the other as to how these slats were going to be used. To this must be added the fact that these slats were used in a murderous way on the deceased and I am satisfied that

accused 1, 2, 5 and 8 did foresee it as a reasonable possibility that someone could be killed in the execution of their plan, but, notwithstanding this realisation, they were reckless as to the outcome of this attack and, that if they themselves did not partake therein, it was proven that they fully associated themselves therewith.

The attack itself was mercilessly executed. According to the medical evidence of Dr Liebenberg, most of the force was aimed at the head of the deceased. The injuries sustained by the deceased to his head were extensive. The skull was fractured in two places which required the application of considerable force. The determination with which the attack was carried out, is illustrated by the fact that the beating continued, even at the stage when the deceased was already lying helpless on the floor, and that the attack upon the deceased only stopped when Mrs Erasmus fired a shot with a pistol into the air.

As regards count 2 I am satisfied that the attack on Burger was meant to have the same consequence as the attack on the deceased and that it was only the timely arrival of Mr Erasmus with a pistol which saved Burger. Also in this case, the initial force was aimed at his head and at least four blows landed on his head and face. According to Dr Hanekom a considerable amount of force was necessary to cause the injuries he sustained. Burger was able to bend down, and, as I understood his evidence, was able to protect his head by holding his arms over his head and by protecting himself by crouching under the desk. He, Burger, was also hit on his arm and there were four linear abrasions on his back. According to Dr Hanekom, the amount of force used in

regard to Burger was greater than was the case with Kiihn. Also here, the attack was only stopped when Erasmus appeared on the scene.

In the circumstances, I am satisfied that the State proved count 2 as regards accused 1, 2 and 5.

The position of accused no. 3 is somewhat different. I have found that it was not proved by the State that he was present during the attack on the deceased, Kiihn, and Mr Erasmus, and that the possibility existed that he only joined the group when they went to Burger. However, it seems that he came prepared, and when he was seen by Burger, he was also armed with a wooden slat. He was observed in close proximity to Burger. If he did not know of the attack beforehand, bearing in mind that he came prepared with a wooden slat, then, by joining the group so armed, and also having observed others so armed and being present during the attack, he, in my opinion, clearly demonstrated his association therewith. The intensity of the attack was such that the inference is inescapable that he, together with accused 1, 2, and 5 foresaw death as a reasonable possibility, but was reckless in regard to such consequence.

In coming to the conclusions above, the fact that the accused elected to remain silent and/or lie to the Court notwithstanding the direct implication by Burger, is a further factor which I have taken into consideration in coming to such conclusion.

This brings me to count 3, namely the attack on Kiihn. On all the evidence I am not satisfied that this attack was part of the preconceived plan. The evidence is clear that the main object of the anger and aggression of the group, which came into the administration office, was the deceased. Without anything being said, they all went and stood around or near his desk when they filed into the office. When Kiihn tried to intervene at the stage when accused no. 1 was still talking, and tried to calm everybody, he was told by accused no. 1 not to interfere and to stay out of it. Then, when accused no. 1 said "Stop them.", the modus operandi seems to have been that the three people in the office, except the deceased, were immediately guarded by someone. The evidence is that somebody went to Dixon and stood in front of him. Dixon did not do anything and was also not assaulted.

Somebody went to Mrs Erasmus, and when she was still trying to reach the phone, she received a blow on her back and was turned around. Nothing further happened to her.

However, Kiihn, who also did nothing, was attacked by accused no. 5. Kiihn is not sure whether he was only attacked by accused no. 5 or whether other persons also hit him. On the scenario sketched above, it seems to me unlikely that anybody else joined in this attack. Everything points, in my opinion, to the fact that accused no. 5 decided on his own to attack Kiihn, and that he alone is liable for this attack. Although considerable force was used, Kiihn was able to guard his head and to take the force of the attack on his arms. Dr Hanekom was of the opinion that the force applied in respect of Kiihn, was less than that applied to Burger. Kiihn also stated on questions by Mr Metcalfe, that the

blows landed in quick succession on his arms. This, so it seems to me, shows that the blows which were executed were short sharp blows which were not hit full force. It was indeed fortunate for Kiihn that he was able to escape from the office. The fact that he was not restrained from escaping further shows that it was probably only accused no. 5 who was interested in him.

I have some doubt in my mind whether accused no. 5 attempted to kill Kiihn. However, Kiihn suffered injuries, and the left ulna bone in his arm was cracked. I am satisfied that the State at least proved an assault with intent to cause grievous bodily harm against accused no. 5.

Also, as far as count 4 is concerned, that is the attack on Mrs Erasmus, I have some doubt whether it was planned by the accused to attack her. It may be that it was foreseen that in the event of any of the parties resisting that they would be subdued by force. However, Mrs Erasmus is a small, slenderly built woman, who at least on appearance, and I say this guardedly, should be easily subdued. I think nothing was further from the minds of the accused than that she would in actual fact be the person to put an end, an effective stop, to the assault on the deceased by firing the shot into the air. By firing the shot, she drew attention to herself and so could easily provoke another assault upon her. That however, did not deter her from acting. **she** unfortunately was not able to identify her attacker and in the circumstances the accused must be acquitted on the fourth charge.

Lastly I want to thank the photographer and investigating officer on the photographs and plan which were compiled by them.

They thereby enabled the Court to have a very visual impression of the relevant scenes where the crimes were committed.

The findings of the Court are therefore as follows: Accused no.

1:

Count 1 - guilty as charged. Count 2 - guilty as charged. Counts 3 and 4 not guilty and discharged.

Accused no. 2:

Count 1 - guilty as charged. Count 2 - guilty as charged. Counts 3 and 4 - not guilty and discharged.

Accused no. 3:

Count 1 - not guilty and discharged.
Count 2 - guilty as charged.
Counts 3 and 4 - not guilty and discharged.

Accused no. 4:

Counts 1, 2, 3 and 4 - not guilty and discharged.

Accused no. 5:

Count 1 - guilty as charged.
Count 2 - guilty as charged.
Count 3 - guilty of assault with the intent to cause grievous bodily harm. Count 4 - not guilty and discharged.

Accused no. 6:

Counts 1, 2, 3, and 4 - not guilty and discharged. Accused no.

7:

Counts 1, 2, 3, and 4 - not guilty and discharged. Accused no.

8:

Count 1 - guilty as charged.

A handwritten signature in black ink, appearing to read "Strydom", written over a horizontal line. The signature is stylized and somewhat cursive.

STRYDOM, JUDGE PRESIDENT

Counts 2, 3, and 4 - not guilty and discharged.

FOR THE STATE

MR MILLER

FOR THE ACCUSED
Instructed by

MR METCALFE
Legal Aid