IN THE SUPREME COURT OF NAMIBIA

In the CRIMINAL APPEAL of:

HENDRIK JACOBUS VAN WYK Appellant

versus

THE STATE Respondent

CORAM: BERKER, C.J.
MAHOMED, A.J.A.
ACKERMANN, A.J.A.

Delivered on: 1991.10.29

JUDGMENT

ACKERMANN, A. J. A. : This is an appeal against the appellant's conviction in the High Court of murder and against his sentence of twelve years imprisonment.

The appellant (as accused 1) was, together with four other male persons, indicted in the High Court on a charge of having murdered one JOHANNES HAUFIKU at Windhoek on the 27th October 1990.

The appellant (to whom I shall refer as accused 1) and the other four accused all pleaded not guilty. At the time of pleading a written statement made and signed by accused 1 was, in terms of section 115(2) of the Criminal Procedure Act, handed in. In it accused 1, while denying all allegations against him,

made the following formal admissions in terms of section 220 of the Criminal Procedure

Act:

1. "I was in Windhoek on the 27th October 1990".

2. "I struck another person, whose identity was to me unknown, several times with my fist after he originally adopted a threatening attitude towards me and a friend of mine".

At the conclusion of the State case all the accused closed their cases without adducing any evidence. At the conclusion of the trial accused 2 and 3 were acquitted. Accused 1 was convicted of murder and sentenced to twelve years inprisonment. Accused 4 was convicted of assault and accused 5 of being an accessory after the fact to assault with intent to do grievous bodily harm. Accused 4 was sentenced to a fine and accused 5 to a fine as well as a period of imprisonment conditionally suspended on appropriate conditions.

Only accused 1, leave having been granted by Frank, J. in the Court a quo, has appealed to this Court.

The corpse of the deceased was found by Warrant-officer Coraizin on a rubbish dump near the Windhoek/Gobabis main road at approximately 8 a.m. on the morning of Sunday 28th October 1990. The deceased's feet were bare and he was lying on his back. The surface of a gravel road, approximately one metre from where the deceased was lying, was disturbed. In the same area Detective Warrant-Officer Coraizin saw a man's wrist-watch lying loose and also noticed a number of small spots which he described as blood

spots. On the same day the deceased's body was identified to him by Mr Julius Shipena, a friend of the deceased, as well as by a brother of the deceased, a Mr Nujoma.

On the 29th October 1990, Dr Linda Liebenberg, a medical officer in the employ of the Namibian Government, conducted a post mortem examination on the deceased's body. At examination the deceased's height was determined at 1,60 metre and his mass at 57 kilogram. Dr Liebenberg could not establish a time of death but ascribed the cause of death to brain damage. The body exhibited multiple external injuries. There were bruises on the face and head, including a semi-circular bruise 40 millimeters in diameter in the middle of the back of the head, and scratches on the nose, shoulder and arms. There were tears through both lips, a tear of the left upper eyelid and a tear on the right elbow. The deceased's left cheek was swollen and a subcutaneous haematoma was present on the right side of his back.

Dr Liebenberg found multiple subcutaneous haematomas on the back of the deceased's head and on opening the skull she discovered bilateral diffuse subdural and subarachnoid bleeding over both hemispheres of the brain. Blood was present in the mouth, tongue and pharynx as well as in the oesophagus, trachea and bronchi. The right anterior and left posterior neck muscles were bruised. A small amount of blood, mixed with food, was found in the stomach. The mid-abdominal mesentery was bruised.

Dr Liebenberg testified that the injuries to the face and head had been caused by blunt force. She doubted, however, whether the semi-circular bruise on the rear of the deceased's head had been caused by a flat object and preferred the view that it had been caused by a round or pointed object.

Any blunt force applied directly to the head has an effect on the brain. The degree of such effect depends on the extent of force used. It is necessary to emphasise that Dr Liebenberg mentioned that on opening the head more injuries were discoverd on the deceased's head subcutaneously than were externally visible. The abdominal injury had been caused by considerable force and could have been inflicted by one or more kicks on the stomach. Although her evidence was that the injuries to the deceased's head had caused the brain injury leading to the deceased's death, Dr Liebenberg could not say whether only one of these head injuries or a combination of them had caused the fatal brain injury in question.

Dr Liebenberg was pressed as to how long the deceased had lived after the infliction of the injuries to him. She explained that a person who has sustained brain damage is inclined to develop pulmonary oedema very rapidly. The deceased's lungs did not exhibit such oedema and she therefore concluded that the deceased probably died quickly. Apart from indicating that it would have taken an hour or two, she could not be more specific. Some play was made in argument that Dr Liebenberg had compared the totality of the

external injuries she found on the deceased with an average assault case admitted to the Katutura casualty department. Apart from the fact that this comparison is not helpful in trying to quantify the amount of force used in the assault, Dr Liebenberg did make the important qualification that in the present case the deceased had sustained the brain injuries already referred to. Furthermore regard must be had to the fact that the subcutaneous head and brain injuries were not duplicated by the external injuries, that is to say, the external head injuries did not indicate fully the extent of the internal brain damage.

During the afternoon of Monday 29th October, Dr Liebenberg physically examined accused 1. She found multiple small fissured abrasions across the knuckles of his left hand which were consistent with having been caused by fist blows on the body or face or head of another person. Accused 1 told Dr Liebenberg that he was left-handed. There were no similar injuries on the hands or knuckles of any of the other accused. Dr Liebenberg was closely examined on the fact that she found no swelling on the back of accused's left hand. It is not easy to reconcile all her answers with one another in this regard. When first asked whether she would not normally expect to find swelling around the knuckles of a person who has fisted another person her answer was that it was or was not to be expected, depending on the extent of the force used. Dr Liebenberg did, however, state that if a person inflicted 20 hard blows with his fist on another's face and body, she would probably expect a measure of swelling and if there had been extensive

swelling it would probably not have disappeared within 48 hours. She concluded her evidence on this issue by stating that swelling was not inevitable* and that the larger the number of blows struck and the greater the force used, the more probable it would be to find swelling.

It is necessary to deal antecedently with the above issues as a backdrop to the eye-witness account of the assault on the deceased, particularly because of the fact that the eye-witness did not directly link accused 1 with the assault.

On the evening of Saturday the 27th October 1990, Miss Elsie van Rhyn was visiting a friend, Mr Francois Barnard, at his flat on the first floor of the Ausspannplatz flats, which flats are located in Lossen Street, Windhoek. Sometime after 7 p.m. Miss van Rhyn heard a noise emanating from the vicinity of the gardening shop immediately below Mr Barnard's flat and being unable to obtain a good view from the flat balcony of what was taking place, she went downstairs to the entrance of the flats. From here she had an unobstructed view of the events which then unfolded before her and which she described in her evidence. She saw a white man, watched by three other white men, in the process of assaulting a black man with his fists. Miss Van Rhyn was a distance of some 100 - 150 metres from the scene of the assault. Although there was a street-lamp in the vicinity, the area she was observing was fairly dark. The assault was taking place next to the gardening shop in the flat complex. Although she was able to observe that the man assaulting the victim had a bare torso, he apparently had

his back to the witness because Miss Van Rhyn said that she could not see the face of the aggressor, only his back. She was not able to positively identify the person attacking the victim. The victim appeared to be unarmed. The assailant fisted the victim who fell to the ground and struck his head heavily on the sidewalk. He attempted to get to his feet but the assailant struck him again and his head was knocked against the wall (presumably the wall of the shop next to which the assault was occurring) once or twice. The victim tried to defend himself with a bottle which had fallen from a rubbish bin standing in the immediate vicinity and which had apparently been knocked over in the struggle. This served to aggravate the assailant who remarked in Afrikaans "Oh, now you want to hit me with a bottle as well" and kicked the bottle out of the victim's hand. This suggests that the victim had by this time been knocked to the ground again. The assailant continued fisting the victim and then started kicking him as he was lying on the ground. This kicking continued until the victim was reduced to a state of physical incapacity. The description which Miss Van Rhyn gave of the events was not that of a fight, in the sense of blows being exchanged between the combatants. On the contrary the account she gave was of a determined and persistent aggressor attacking a victim who did no more than try at one stage, to defend himself. Although the tenor of her evidence in chief was that there was only one assailant, the witness stated in cross-examination that another member of the group, a man of slender build, kicked the victim, but only once, while he was lying on the ground. One of the bystanders, who was watching the assault, then went to a

white Volkswagen Jetta motor vehicle which was parked in the road in front of the block of flats where the assault was taking place, but soon returned. From the evidence it does not emerge what the purpose was of his going to this car. After this person had returned to the scene of the assault, one of the bystanders addressed the following remarks to the aggressor in Afrikaans "Dirk, that's enough .... you've hit him enough". At this stage a fifth male appeared on the scene, introduced himself as a policeman and told the men at the scene that the victim of the assault should be taken to the police station where the matter could be further discussed. Thereupon this fifth person and one of the bystanders each took the victim by an arm and half-carried, half-dragged him to the white Jetta motor vehicle. The victim appeared to be quite senseless. Miss Van Rhyn estimates that the victim was fisted about twenty times and kicked between six and seven times. She says that the victim was fisted on his body and in the face and kicked on the stomach and in the chest area.

At the stage when the victim was being carried/dragged to the car Miss Van Rhyn returned to her friend's flat. From the flat balcony she could hear the doors of the Jetta being closed. The lights of the car were switched on and she saw it drive away. At no time did any of the five men appear to her to be drunk.

Later that evening, at between 9.30 p.m. and 9.45 p.m., approximately, Miss Van Rhyn and her friend, Mr Barnard, left the flat and passed by the scene of the assault. She

saw the rubbish bin lying on its side and noticed blood on the sidewalk. At the place where the white Jetta motor vehicle had been standing she saw an empty colddrink tin, a number of empty beer bottles and a pair of white shoes. Mr Barnard took possession of the white shoes.

Miss Van Rhyn subsequently attended an identification parade and identified accused 5 as the fifth man on the scene who had introduced himself as a policeman. In cross-examination she conceded that her identification might well be mistaken. Prior to the events of the evening of the 27th October 1990 the only one of the five accused who had been known to her was accused 1. It is common cause that all five the accused were present on the identification parade. When asked to point out the person who had committed the assault Miss Van Rhyn indicated one C. Marais, who was not one of the accused or suspects.

Mr Barnard, the friend of Miss Van Rhyn, had fallen asleep in front of the television in his flat that evening but was woken up by the noise of an altercation. He followed Miss Van Rhyn out onto the balcony of the flat but could not see what was taking place. In order to get a better view he climbed onto a roof below the balcony from where he could see a white man assaulting a black man. To his right (from his evidence it does not emerge precisely where) Mr Barnard could see other men standing next to a white car which looked to him like a Jetta or a "Fox" . The car was equipped with what the witness described as a white "aerokit" and had dark windows. Mr Barnard testified that the assailant

initially pushed the victim against a wall while hitting him. The victim of the assault fell to the ground and the assailant then proceeded to sit on top of him and continue the assault. The victim was lying on his back. The assailant had no weapon and was hitting the victim in the face with his fists. Mr Barnard makes no mention of the victim being kicked. Mr Barnard could not say how many times the victim was struck, but says it was often. He did not see the victim trying to defend himself but at a stage heard someone remarking in Afrikaans "Oh, you want to stab (or hit) me with a bottle." Later in his evidence Mr Barnard stated that the assailant had a bare torso. A male person approached the scene from across the street and told the attacker to stop hitting the victim. The victim tried to stand up but was unable to do so. Two of the men picked up the victim and dragged him to the white motor vehicle. At the car one of the men identified himself as a policeman and said that they were going to take the victim of the assault to the police station. The victim was put onto the back seat of the car and three of the men climbed into the rear. Two climbed into the front and thereupon the lights of the car were switched on but as it drove off the lights were switched off again. Although, as mentioned above, one of the men at the scene suggested that the victim be taken to the police station, Mr Barnard says he became suspicious when the white car raced off with its lights off. Later that evening he went to the police station to find out whether the incident had been reported. When informed that it had not, he returned to the scene of the assault and inspected the place where the white Jetta had been standing.

At the scene he saw blood on the pavement (which he had noticed previously from the balcony) and he also noticed a pair of white shoes covered with blood. He took possession of the shoes. The next morning he saw a group of men standing in front of the shop below the flats. He gained the impression that they were there as a result of the previous night's events. On questioning them the men verified this. One of the men identified himself as the victim's brother and Mr Barnard handed the white shoes, which he had picked up the previous evening, to him. Mr Barnard attended an identification parade and identified accused 5 as the person who had assaulted the victim and had helped to drag him to the car. He could not identify any of the other persons who had been on the scene on the night in question.

On the evening of the assault Mr Jaco Conrad, a police constable in the Namibian police force, was at home in his flat at 6 Lossen Street, Windhoek, the same street in which the flat occupied by Mr Barnard was situated. It appears from Constable Conrad's evidence that Mr Barnard's flat is situated diagonally opposite Constable Conrad's flat. Constable Conrad says that at approximately 8.45 p.m. that evening accused 1,2 and 5 arrived at his flat. They were all previously known to him and he had seen them arriving at his flat in a white Jetta motor vehicle fitted with a "windscoop" or "aerokit". He recognised this vehicle as belonging to accused 5. The car was parked in Lossen Street opposite Constable Conrad's flat. It was apparent to Constable Conrad that accused 5 was in an aggressive mood,

12 adopting a physically threatening attitude and complaining that Conrad had been spreading rumours about him. He eventually managed to calm accused 5 down who in due course left the flat in the company of accused 2. Accused 1 had left the flat earlier. According to Constable Conrad accused 5 had spent approximately 35 minutes in his flat. About 10 minutes after accused 2 and 5 had left the flat, Constable Conrad heard a car drawing away from outside his flat. At about 9.30 p.m., which on Constable Conrad's version must have been very soon after he had heard the car drawing away, he left his flat to go on duty. On the opposite side of Lessen Street, where accused 5's motor vehicle had been parked, he noticed some paper, a number of beer bottles and a pair of white leather shoes. Constable Conrad says that when accused 1,2 and 5 were in his flat they all appeared to be under the influence of alcohol. He described their state as being reasonably under the influence and said that their gait was slightly unsteady.

Mr Shipena, a friend of the deceased, heard that the deceased was missing and, as a result of a report he had received, went to Mr Barnard's flat. As Mr Shipena was inspecting the scene of the assault Mr Barnard arrived and there handed a pair of white shoes to Mr Shipena who immediately identified them as belonging to the deceased. Mr Shipena confirmed that there was blood on the wall of the flats and also on the ground. Mr Shipena handed the white shoes to Detective Warrant-Officer Coraizin who in due course returned them to Mr Shipena who in turn sent them to the deceased's relatives. These shoes were not produced as

13 exhibits in the trial. In cross-examination Mr Shipena said that there were blood-stains on these shoes. Detective Warrant-officer Coraizin visited the scene of the assault where he met Miss Van Rhyn. He confirms that he saw blood-marks on the ground and also against the wall of a building. In cross-examination he said that on one occasion he saw accused 5 arriving at the police station driving a white Jetta fitted with a so-called "aerokit".

Sergeant Hough testified that on the 29th October 1990 he accompanied accused 1 and 4 to their home in Klein Windhoek where accused 1 and 4 handed certain clothes to him which, according to the accused, they had been wearing on the evening of the 27th October. The accused informed him that the clothes had been washed since then. Unfortunately Sergeant Hough's evidence is confused as to what each accused handed to him and what the precise nature of the clothing and footwear was.

Certain facts were also admitted on behalf of the accused regarding various forensic scientific tests carried out on a blood sample of the deceased, on certain clothing admittedly belonging to accused 2 and on a brown seat cover which had ■ been used to cover the rear seat of a motor vehicle belonging to accused 5. The formulation and recording of these admisssions was accompanied by a degree of informality not to be encouraged.

For purposes of the present appeal the following facts were admitted on behalf of the accused and are common cause:

1. A blood sample ("the deceased's blood sample") was drawn from the deceased. This blood falls into blood group "A" and is also of EAP type "BB".

2. Primate blood (i.e. human or ape blood) was found to be present on the seat cover used to cover the seat of a motor vehicle owned by accused 5. This primate blood was found to belong to blood group "A" and was also of EAP type "BB" .

Thus deceased's blood sample and the blood on the seat cover were not only both primate blood but were of the same blood group and EAP typing.

In the admissions, the precise identity of the motor vehicle, belonging to accused 5, from which the seat cover was taken was not recorded. Nor was it expressly agreed that, for example, accused 5 only possessed one motor vehicle. On the other hand it must be remembered that Constable Conrad identified the white Jetta car, fitted with an "aerokit" or "windscoop" which had been parked in Lossen Street on the night in question, as belonging to accused 5 and Detective Warrant-officer Coraizin also testified that accused 5 arrived at the police station driving a vehicle of such description a few days after the 27th October 1990.

Before considering the factual issues which confronted the court a quo and the arguments raised on appeal it is necessary to deal with the evidential implications of the failure by accused 1 to give evidence.

It has long been settled that failure to testify may, depending on the circumstances, be taken into account against an accused. It is necessary to distinguish between a situation where the State's case is based on circumstantial evidence and where there is direct prima facie evidence implicating the accused.

(a) Where the State's case against an accused is based on circumstantial evidence and depends upon the drawing of inferences therefrom,

> "the extent to which his failure to give evidence may strengthen the inferences against him usually depends upon various considerations. These include the cogency or otherwise of the State case, after it is closed, the ease with which the accused could meet it if innocent, or the possibility that the reason for his failure to testify may be explicable upon some hypothesis unrelated to his guilt".

(S v Mthetwa, 1972(3) SA 766(A) at 769 B-D and see also S v Theron, 1968(4) SA 61(T) at 64B).

In S v Letsoko and Others, 1964(4) SA 768(A) at 776D Holmes, J.A., stated, in regard to cases resting on circumstantial evidence that

> "if there is a prima facie case against the accused which he could answer if innocent, the failure to answer it becomes a factor, to be considered along with the other factors; and from that totality the Court may draw the inference of guilt. The weight to be given to the factor in question depends upon the circumstances fo each case".

An important consideration in evaluating the weight to be attached to an accused's silence is whether the particular factum probandum is one that is peculiarly within the knowledge of the accused. The following remarks of Trollip and Trengove, JJ. (as they then were) in S v Theron, 1968(4)

SA 61 (T) at 63 F-H are apposite:

> "That the factum probadum is one that is peculiarly within the knowledge of the accused, like for example his state of mind, is an important factor to be taken into account in the State's favour when considering whether it has gone as far as it reasonably can (Union Government v Svkes, 1913 AD 156 at pp.173/4), and, if it has, whether the accused's failure to testify has converted the prima facie proof of that fact into conclusive proof. Generally, in the latter case, his silence weighs heavily against him because, ex hvpothesi, the accused could so easily have refuted the prima facie proof by his own evidence if it were not correct (cf. R v Ismail, 1952(1) SA 204 (A.D.) at p.210C). That applies especially where the accused's state of mind is in issue, for it has been authoratatively pronounced that
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> > "it is not easy for a court to come to a conclusion favourable to the accused as to his state of mind unless he has himself given evidence on the subject".
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> > (per Schreiner, J., as he then was, in R v Mohr, 1944 T.P.D. 105 at p.108, approved and applied in R v Deetlefs, 1953(1) S.A.418 (A.D.) at p.422; S v Kola, 1966(4) S.A. 322 (A.D.) at p.327F."
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> (Emphasis added in last sentence).

This approach was adopted in the case of S v Saaiman, 1967(4) SA 440(A) where the effect of alcohol on the accused's state of mind was in issue and where it was held at 442 F that the appellant himself was in the best position to testify on the amount of liquor he had ingested, what

effect such consumption usually has on him, or had on the particular day, and had on his state of mind at the time of committing the offence and, if innocent of the crime of murder, to explain his actions which might otherwise unavoidably lead to a conclusion that he had committed murder.

(b) Where there is direct prima facie evidence implicating the accused in the commission of the crime -

> "... his failure to give evidence, whatever his reasons may be for such failure, in general ipso facto, tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability;..."
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> (S v Mthetwa, supra, at 769 D-E)

As pointed out, however, in S v Snyman, 1968 (2) SA 582(A) at 588H,

> "The ultimate requirement .... is proof of guilt beyond reasonable doubt; and this depends upon an appraisal of the totality of the facts, including the fact that (the accused) did not give evidence."

Proof beyond reasonable doubt does not, however, mean that the State must exclude an unlimited number of proferred possibilities which are imaginary or speculative and for which no factual basis has been laid or established in the evidence; see S v Glegg, 1973(1) SA 34(A) at 38H-39A.

In the court a quo Frank, J., found as a fact that the

deceased, whose body was found on the rubbish dump, was the person whom the two State witnesses had seen being assaulted. This finding was not assailed on appeal and indeed it could not fairly have been so challenged. The deceased's white shoes were found at the scene of the assault. The deceased was found barefoot on the rubbish dump. Primate blood belonging to the same blood group "A" and EAP type "BB" as the deceased was found on the seatcover of a car belonging to accused 5.

On the unchallenged State evidence accused 5 owns a white Volkskwagen Jetta with a so-called "windscoop" or "aerokit". There is nothing in the evidence to suggest that he owns another motor vehicle. Accused 5 and this car were seen at the scene of the crime by Constable Conrad at a time very close to that of the assault. The unchallenged evidence of the two eyewitnesses was that the victim was loaded into such a motor vehicle and driven off. The cumulative circumstantial cogency of these factors is overwhelming.

Frank, J., also found as a proved fact that accused 1 was the assailant who had assaulted the deceased as described by Miss Van Rhyn and Mr Barnard.

Mr Botes, who appeared for accused 1 on appeal, conceded that the State had proved that accused 1 had taken part in an assault on the deceased but submitted that he had not played the role ascribed to him by Miss Van Rhyn. This concession was also properly made. Constable Conrad, who

knew accused 1, places him at the scene of the assault shortly before the assault takes place. Accused 1 arrived at Constable Conrad's flat in accused 5's white Volkswagen Jetta. When Constable Conrad leaves his flat accused 1 is nowhere to be seen. Miss Van Wyk and Mr Barnard say that all the men who were at the scene of the fight left in the taxi. In his plea statement accused 1 admits that on the evening of the assault in question he struck a person several times with his fist. Two days after the assault Dr Liebenberg finds the abrasions across the knuckles of accused 1' s left hand which are consistent with having been caused by fist blows. Conrad could not be mistaken in his identification of accused 5. When assessed cumulatively these incriminating facts lead, in the absence of any evidence from accused, to the inescapable conclusion that accused 1 was on the scene and took part in the assault on the deceased.

Two main contentions were advanced on appeal regarding the merits of the conviction. In the first place Mr Botes argued that it could not safely be accepted on the evidence of Miss Van Rhyn that accused 1 was the sole aggressor that evening nor that he was the person who inflicted some twenty blows and six or seven kicks. Secondly, it was contended that, whatever finding was made on the exact involvement of accused 1 in the assault that evening the facts did not warrant the finding, beyond reasonable doubt, that accused 1 had the necessary intention to kill the deceased.

In assessing the reliance to be placed on the evidence of

Miss Van Rhyn and Mr Barnard it must be emphasised at the very outset that both these witnesses were quite independent and impartial with no involvement either with the victim or with the attackers. There is absolutely nothing to suggest any bias or predisposition against any of the accused and the court a quo was fully justified in treating them both as scrupulously honest witnesses. They were rightly commended for their public spirit in concerning themselves for the fate of the deceased. It is a notorious fact, however, that the most honest witnesses can be mistaken or unreliable observers.

Mr Botes placed great stress on the fact that Miss Van Rhyn, although accused 1 was previously known to her, did not identify him as an assailant at the identification parade, testified positively that she did not see him at the scene that evening and stated that if he had been there she would have recognised him. He argued that, given Miss Van Rhyn's fairly detailed account of the assault perpetrated by one man, she must inevitably have recognised this main perpetrator as being accused 1, if indeed he was this main attacker. Her negative evidence therefore ruled out accused 1 as being the main perpetrator or at least (which would be sufficient in a criminal case) established the reasonable possibility that it was not accused 1. This submission requires a detailed consideration of the scene of the assault and the opportunity which Miss Van Rhyn had for identifying the assailant (or assailants) as distinct from describing the details of the assault. Miss Van Rhyn stood at ground level at a distance of 100 to 150 metres from the

assault. It was night time and there was only one street-light in the vicinity and although there was one light burning in the shop Miss Van Rhyn described both the shop and the scene of the assault as being reasonably dark. These factors alone would make a positive identification difficult. It must moreover be remembered that because of the poor lighting, or the position of the assailant vis-avis ' Miss Van Rhyn or a combination of both (from the evidence it does not appear which) she could not see the face of the assailant, only his body. The evidence is silent as to whether the white motor vehicle', to which the deceased was ultimately carried/dragged, stood between the scene of the assault and Miss Van Rhyn's point of observation or stood on the other side of the scene. There is also no indication that in dragging/carrying the deceased to the motor vehicle the faces of the group members would have been turned towards or made more visible to Miss Van Rhyn. Under these circumstances it is not improbable that, if accused 1' was on the scene, Miss Van Rhyn failed to indentify him. The matter goes further, however. It has been conclusively established that accused 1 was on the scene. Had accused 1 disassociated himself completely from the assault by, for example, sitting in the car the whole time, it was for him to tell the Court this. He did not do so. In any event the unchallenged evidence of Miss Van Rhyn was to the effect that the five white men eventually on the scene were all outside the car and that three of them climbed into the back of the car and two into the front. Finally, there are the injuries to accused l's knuckles and accused 1's explanation on plea that he had struck a person

several times that evening with his fist. In the absence of any explanation in evidence from accused 1 that the injuries to his knuckles were sustained on a different occasion that evening and there being no suggestion in any other evidence that there was a different assault, it would be fanciful and unwarranted to entertain the possibility that his injuries and admission related to some other incident. I am satisfied that it has been proved beyond reasonable doubt that the injuries to accused l*s knuckles were caused by the fist blows he admitted in his statement on plea and that these fist blows were the fist blows delivered to the deceased. On the evidence of both Miss Van Rhyn and Mr Barnard it was the main attacker (and no one else) who delivered the fist blows. The cumulative effect of all the evidence leads, in the absence of any explanation from accused 1, to the inescapable conclusion that accused 1 was the main attacker described by Miss Van Rhyn. It also means, if Miss van Rhyn's evidence is to be believed that the deceased was kicked six or seven times by the attacker, and that it was accused 1 who inflicted these kicks.

Mr Botes submitted, however, that there was a conflict between the evidence of Miss Van Rhyn and Mr Barnard as to whether the deceased was kicked by his assailant. Miss Van Rhyn is quite clear in her evidence that the deceased was kicked 6 or 7 times whereas Mr Barnard made no mention of such kicking. It was contended that Miss Van Rhyn's evidence could therefore not be accepted on this score. It is true that the testimony of the aforesaid witnesses does differ in the respects indicated. It is inherently

improbable, however, that Miss Van Rhyn could have been mistaken about the kicking. The rejection of her evidence could only be justified on the basis of its being deliberately untruthful, and there simply are no good grounds for so impugning her credibility. Mr Barnard conceded in cross-examination that Miss Van Rhyn had enjoyed a better view of the assault than he had. Moreover his evidence is not to the effect that the deceased was not kicked, he merely does not mention such kicking. His description of events is more truncated and less detailed than that of Miss Van Rhyn and it is not without significance that his observation took place immediately after he had woken up, after falling asleep in front of the television in his flat. All these factors suggest that Miss Van Rhyn had a better opportunity for a more accurate and complete observation of the events than Mr Barnard. There is accordingly no warrant for disbelieving Miss Van Rhyn on this score merely because Mr Barnard makes no mention of the kicking. When, moreover, it is borne in mind that Miss Van Rhyn's evidence was not controverted by any defence testimony then, in my view, it becomes quite safe to accept her direct evidence in this regard and to find that the kicking was proved beyond reasonable doubt.

The second issue is whether, even on the acceptance of Miss Van Rhyn's description of the assault taken in conjunction with the medical evidence, it has been proved beyond reasonable doubt that accused 1 had the requisite intention to kill the deceased necessary to sustain a conviction of murder. It is convenient to cite here the following

passages from the judgment in S v Sauls, 1981(3) SA 172(A) at 182 G et sea, which were quoted in the judgment of the Court a quo:

> "The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating..... A passage in a minority judgment given by Malan J. A. in R v Mlambo, 1957(4) SA 727(A) at 738 is apposite. I may add that two paragraphs in this passage were cited with approval by Rumpff J.A. in S v Rama, 1966(2) SA 395(A) at 401:
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> > •In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.
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> > An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'"

In order to prove the requisite intention to kill it is not necessary to establish that the accused desired the death of the deceased or was certain that death would ensue from the assault on the deceased. It is sufficient if the accused subjectively considers that death is a possible consequence of his unlawful actions but proceeds with such actions reckless as to whether death will ensue or not or, as it is sometimes stated, reconciles himself with the possibility that death may ensue.

The test for dolus eventualis has been authoratively formulated as follows:

> "It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result".
>
> (per Holmes, J.A. in S v Siqwahla, 1967(4) SA 566(A) at 570 B-C and see also S v Bisset, 1990(1) SACR 285 (ZS) at 290 E-F and S v Nango, 1990(2) SACR 450(A) at 457 C-D.)

The term "possibility" can cover a range of degrees of likelihood. In S v Mini, 1963(3) SA 188(A) Holmes, J.A., in a minority judgment, and without motivating his conclusion, stated at 191H:

> "that the appellant did foresee the possibility, even if slight, of death resulting from what he was about to do and was doing" (emphasis added)

and found that such foresight (coupled with reckless disregard of such possibility) constituted the necessary

intention to kill. In S v De Bruvn en 'n Ander, 1968(4) SA 498(A) at 51OG, Holmes, J. A. in a separate concurring judgment, expressed the view that "subjective foresight of the possibility, however remote, of his conduct causing death to another" satisfied the foresight part of the test. Once again the wide formulation is not motivated. In S v Shaik and Others, 1983(4) SA 57(A) the Appellate Division of the Supreme Court of South Africa, per Diemont, J.A. at 62 D-F, confirmed the wide formulation as follows:

> "No doubt the more remote or unlikely the possibility of injury, the more difficult it will be for the Court to draw the inference that the accused foresaw what might happen (See S v Dladla en Andere, 1980(1) SA 1 (A) at 4) but, as was stated by Holmes, J.A. in S v De Bruvn en 'n Ander, 1968(4) SA 498(A) at 510, legal intention is present if the accused 'foresees the possibility, however remote, of his act resulting in the death of another' ..... it will not assist the defence to show that the risk of injury or worse appeared unlikely, highly improbable or remote".

Although Diemont, J.A., referred to the fact that there has been "some discussion among academics as to whether the possibility which the accused foresees must be strong or slight" he does not deal with the views so advanced. It would appear, however, that in S v Beukes en 'n Ander, 1988(1) SA 511 (A), Diemont, J.A.'s dictum that "legal intention is present if the accused 'foresees the possibility, however remote, of his act resulting in the death of another'" appears to have been overruled. I say "appears" only because it was not overruled in express

terms. The judgment of the Court in Beukes's case (per Van Heerden, J.A. at 522 B-I) cannot, in my view, be reconciled with Diemont, J.A.'s formulation of the test in Shaik's case and must therefore be taken to have overruled it by necessary implication. After referring expressly to Shaik's case and the wide test therein formulated, Van Heerden, J.A., said the following at 522 B-G:

> "Suid-Afrikaanse skrywers verskil van mekaar oor die vraag of naas die voorsienbaarheidselement daar in dolus generalis nog 'n verdere element opgesluit le. Diegene wat die negatiewe leer, vereis egter dat die dader die moontlikheid as •reeel' of •konkreet' of op 'n ander wyse byvoeglik gekwalifiseer, moes voorsien het. Hulle teenstanders vereis 'n voluntatiewe element maar gee nie inhoud daaraan nie.
>
> Daar is, sover ek kon nagaan, geen gewysde waarin pertinent beslis is dat 'n dader 'n gevolg voorsien het maar nie onverskillig teenoor die intrede daarvan gestaan het nie. Die rede is voor die hand liggend. Die kanse dat 'n beskuldigde sal erken, of dit uit ander direkte getuienis sal blyk, dat hy inderdaad 'n verwyderde gevolg voorsien het, is bitter skraal. ' n Hof maak dus 'n afleiding aangaande ' n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, redelik moontlik was dat die gevolg sou intree. Indien so ' n moontlikheid nie bestaan nie, word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reel uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het.
>
> Dit kom my dus voor dat die tweede element

normaalweg slegs bevredig is indien die dader die intrede van die gevolg as • n redelike moontlikheid voorsien het. Is dit dan nog nodig om twee kriteria in verband met dolus eventualis te formuleer, of kan volstaan word met die enkele vereiste dat die dader die gevolg as 'n redelike moontlike een aangemerk het? Ek meen dat die twee kriteria wel nog nut het. Eerstens kom hulle ter sprake indien ' n dader besef dat ' n gevolg bes moontlik kan intree, maar dan stappe neem om teen die intrede daarvan te waak. Weliswaar sou in so 'n geval gese kan word dat die dader uiteindelik nie die gevolg as ' n redelike moontlikheid in ag geneem het nie, maar die tweeledige toets vervul dan tog ' n praktiese funksie. Tweedens kan dit gebeur dat 'n dader aanvanklik nie die intrede van die gevolg as redelik moontlik aangemerk het nie, maar nadat die kousale verloop in aanvang geneem het, tot *n veranderde siening kom. In so ' n geval sou hy onverskillig teenoor die intrede van die gevolg staan indien hy nie stappe doen om die kousale verloop te beeindig nie. Neem bv. die geval waarin A,B,C en D saamsweer om roof te pleeg. A, die leier, en D sal volgens afspraak in ' n motor wag terwyl B en C die rooftog onderneem. A deursoek B en C om seker te maak dat hulle geen wapens by hulle het nie, veral omdat hy weet dat hulle ligtelik van messe gebruik maak. Tevrede in sy gemoed dat niemand sal sterf nie, laai A vir B en C by die betrokke perseel af. Terwyl hulle na die gebou daarop stap, vertel D vir A dat hulle vroeer die betrokke dag messe op die perseel versteek het. Nou voorsien A dat hulle, as ' n redelike moontlikheid, iemand wat horn teen die roof verset, kan dood. Indien A nie stappe neem om hierdie gevolg te vermy nie, staan hy onverskillig daarteenoor".

The English headnote at" 511H - 512A of the report in substance correctly reflects the major part of the above

quotation as follows:

> "South African writers on criminal law differ from one another on the question whether there is, besides the element of forseeability, a further element implied in dolus eventualis. Those who advocate the negative (response to this question) require, however, that the actor should have foreseen the possibility in question as 'real' or 'concrete' or as adjectively qualified in another manner. Their opponents require a voluntative element but accord no content to it. There is (as far as the Court could trace) no decision wherein it was pertinently held that an actor had foreseen a consequence but had not been reckless as to such consequence eventuating. The reason is obvious. The chances of an accused admitting, or of it appearing from other evidence, that he had indeed foreseen a remote consequence are very thin. A Court therefore draws an inference concerning an accused's state of mind from the facts which point to it being reasonably possible, objectively seen, that the consequences would eventuate. If such a possibility does not exist, it is simply accepted that the actor did not become conscious of the consequences. If it does exist, it is usually inferred from the mere fact of his taking action that he took the consequence into account. (In my view the phrase ' hy die gevolg op die koop toe geneem het' is in the context better rendered by 'he accepted the risk of the consequence' than by 'he took the consequence into account'). It therefore appears that the second element is normally (only) satisfied if the actor foresaw, as a reasonable possibility, the consequence eventuating. Is it then necessary to formulate two criteria in connection with dolus eventualis, or would the single requirement that the actor foresaw the consequence as a reasonable one suffice? The Court was of the opinion that the

> two criteria would indeed still serve a useful purpose".

There can, in my view, be no doubt that in this passage, and particularly by virtue of his repeated reference to "redelike moontlikheid" ("reasonable possibility"), also when discussing the two reasons he advances for retention of the two criteria, the learned Judge of Appeal lays down a test to the effect that, without proof that the actor foresaw, as a reasonable possibility, that the particular consequence would result, dolus eventualis cannot be established. It matters not, in my view, whether "reasonable possibility" is formulated as part of proving the first or the second criterion.

It may also be noted that in S v Ushewokunze, 1971(2) SA 360 (RA) the Rhodesia Appellate Division (per Beadle, C.J. at 363H) held that in regard to dolus eventualis "(w)hat must be foreseen, therefore, is nothing more than a reasonable possibility of the harm or wrong eventuating".

In R v Steenkamp, 60(3) SA 680(N) (a case of assault by shooting) the Court held at 684F that "the conviction can only stand if it was proved that the appellant fired the shot with the specific intention of wounding the complainant or that, when he fired the shot, he knew that there was a substantial risk of his wounding the appellant". In R v Suleman, 1960(4) SA 645 (N) (a case on the contravention of s.27(l) of the Rents Act, 43 of 1950) the Court held at 647A that in the absence of actual knowledge of the existence of a lease it was necessary to prove, inter alia, that the

lessor contemplated "the reasonable possibility" that the room was the subject of a lease. In S v Ostillv and Others, (1), 1977(4) SA 699(D), Kumleben, J., (as he then was) applied the general principles of dolus eventualis to the question whether, in a case of fraud, there was an honest belief in the truth of the representation. At p.728F the learned Judge held that the State had to prove that the accused foresaw "as a real, as opposed to a remote, possibility" that the statement might be untrue.

Burchell and Hunt, South African Criminal Law and Procedure, Vol.1, General Principles, 2nd ed. at 146, in dealing with dolus eventualis, require "foresight of at least a real or substantial possibility". The learned authors defend this requirement on the basis that it is necessary to prevent anomalous and unjust results. If foresight of the remotest possibility were sufficient every time X drives his car he would have legal intention in respect of the unlawful death of some other user of the road. It would also tend, so they argue, to extend the concept of intention to a state of mind that cannot properly be regarded as such. Snyman, Criminal Law, 2nd. ed. suggests the test of a "substantial or reasonable possibility" which he defends on similar grounds. In an interesting note "Die . Onderskeid tussen Dolus Eventualis en Bewuste Nalatigheid" in 1982 THRHR 321 at 323 Prof.D.W.Morkel proposes the test of a concrete possibility ("konkrete moontlikheid") referring to the absurdity which would ensue if foresight of the remotest possibility constituted dolus eventualis. A person would be found to have acted with intent because of such person's exceptional

insight even where her actions did not depart from that of the reasonable person. He points out that dolus eventualis is not concerned with the objective "degree" of risk, but with the actor's subjective assessment of it.

In an article "Defining dolus eventualis: a voluntative element?" in 1988 SACJ 415 at 418 Professors M.M.Loubser and M.A. Rabie argue that the possibility must be a concrete or real one. In the same volume of the same journal Professor J.T.M. Labuschagne at 438-439 expresses a similar view but Professor Roger Whiting at 446 concludes that while in the great majority of cases the happening of the result will have to be foreseen as a substantial possibility, in other cases more than a substantial possibility will be required while in others a remote possibility will suffice. Professor Van Oosten in (1982) 45 THRHR 183 at 192-193 and 423 at 424-429 defends the view that a remote possibility suffices.

There appear to be good grounds for circumscribing the degree of foresight required for dolus eventualis, so as to ensure that an actor will not be found to have intended a consequence which is foreseen as possible, but only possible in the remotest or merely statistical sense.

Any such circumscription will of course be difficult to apply in practice, but this arises from the problem of establishing by and on the evidence the state of mind of an accused. It does not seem that the test of a "reasonable possibility" in the context of foresight of the occurrence

of a consequence is more difficult to apply than that of a "concrete possibility". Inasmuch, moreover, as "reasonable possibility" is the test used in S v Beukes and S v Ushewokunze, supra, I am accordingly of the view that the subjective foresight required for dolus eventualis is the subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue. In casu, the State must prove that accused 1 subjectively foresaw the reasonable possibility that his attack on the deceased would cause his death.

The external injuries sustained by the deceased already speak of a severe and powerful assault on him. The internal injuries, and in particular the multiple subcutaneous haematomas on his head and the bilateral diffuse subdural and subarachnoid bleeding over both hemispheres of the brain strengthen the inference that the force applied to the deceased's head was considerable. It would be unwarranted speculation to entertain the possibility, in the absence of any evidence to sustain such an inference, that the deceased was further assaulted after his removal from the scene by persons other than accused 1 and under circumstances which would not render him liable for the consequences of such assault. The Court, it seems to me, is fully justified in accepting that all the injuries which the deceased sustained were sustained at the scene of the assault and that accused 1 inflicted those injuries.

The State is, from the nature of things, seldom able to offer direct evidence of the accused's state of mind at the

time of assaulting the deceased and must therefore rely on inferences to be drawn from the circumstances of the assault (including its nature and duration), the nature of any weapons used and the nature, position and extent of the injuries inflicted. These must in turn be weighed up against any other circumstances (such as the consumption of drugs or alcohol) which may indicate that the accused did not foresee the consequences of his actions. This does not involve any piecemeal assessment or process of reasoning. All the relevant facts which bear on the accused's state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die from the assault but, reckless as to such fatal possibility, embarked on or persisted with the assault.

On the medical evidence the injuries which caused death were the blows to the head. It is not possible to link up particular fist blows or kicks with particular injuries, nor is the trier of fact required to do so. Once it is established that accused 1 killed the deceased, and it has rightly been so found by the Court a quo, the trier of fact can look at the assault as a whole in order to determine what accused l's intention was.

In a case such as the present the trier of fact is not required to enquire into the subjective state of mind of the accused as he inflicted each injury. Neither principle nor

common sense requires this.

Had there been any provocation for the assault or had accused 1, even initially, been acting in self-defence then accused 1 was the person to adduce these facts in evidence. He did not do so. There is no other basis for such a finding and this possibility must therefore be excluded. It is in any event distinctly improbable that a slightly built man (only 1.6 0 meter tall and weighing but 57 kilogram) would have attacked or provoked four or five young men. This is not a case where accused 1 acted in retaliation, on the spur or in the heat of the moment. Apart from the possible effect of alcohol on his cognitive faculties there was nothing in the circumstances of or giving rise to the assault which could in any way have impaired or clouded accused l*s faculties of perception or evaluation. In the absence of any explanation from the accused, there is nothing standing in the way of the inference that the attack was a vicious, deliberate and unprovoked one by accused 1 in the company of four apparently healthy young men. The only reasonable inference one is left with on the evidence is that accused 1, with his companions, had deliberately embarked on a sortie of violence that evening. From the outset accused 1 intended to do the deceased bodily harm. Apart from one unsuccessful attempt to defend himself after the attack had started, the deceased offered little if any defence to the assault. Accused 1 must have realised very early on that he had a passive human punch bag at his mercy. This is relevant, I believe, to the actual foresight which accused 1 had of the possible consequences of his actions.

It was contended, mainly on the basis of the absence of swelling on the back of accused l*s hands when he was medically examined on the 29th October, that the damage inflicted by accused l's fists could not have been severe. It is true that Dr Liebenberg expressed the view that she would have expected to find swelling around accused 1' s knuckles if he had inflicted 20 hard blows two days previously. This is of course a matter of degree, as Dr Liebenberg herself pointed out. The severe and fatal damage to deceased's head is irreconcileable with a minor assault. Considerable force must have been used. The semi-circular or crescent-shaped 40 millimetre diameter bruise-abrasion on the back of the deceased's head testifies to this. On the totality of the evidence accused 1 must be held responsible for all these serious injuries.

It is unnecessary to determine what object (a cement wall, its corner, a brick, a circular piece of concrete, a cement curb or the heal of a shoe) caused the semi-circular bruise. If there was an innocent explanation accused 1 could have tendered it.

According to Miss Van Rhyn the deceased was felled to the ground early in the assault, causing him to strike his head heavily on the side-walk. From photographic exhibits 1,2 and 4 it appears that the side-walk consisted of hexagonal shaped cement or concrete flagstones. Viewed objectively, the heavy impact of the human head with a solid cement

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surface, particularly when this occurs as a consequence of a person being felled from a standing position to the ground, is potentially very dangerous. The head and skull are notoriously vulnerable parts of the human anatomy in the sense that it is generally know that blows to the head, if delivered with sufficient force, can easily cause death. The inference is not necessarily justified 'that accused 1 actually foresaw the possibility that the deceased would strike his head in this manner. Once it happened, however, he must have realised the possibility that the deceased could have sustained serious injury. Accused 1 did not, however, desist from his attack at this stage. As the deceased was in the process of struggling to his feet accused 1 struck him again in such a way that the deceased's head was once again struck against the solid surface of a wall. For Miss Van Rhyn to have noticed this, the blow and physical impact against the wall must have been powerful, with potentially dangerous consequences. Even after the deceased had been permanently felled to the ground, deceased 1 continued with his fisting attack on the deceased. Not content with this, accused 1 then started kicking the deceased as the latter lay unresisting on the ground. It requires no expert testimony to conclude that kicks inflicted with a shoed foot can be applied with great force and are capable of causing lethal injury, depending on the part of the victim's body to which they are directed. The testimony of Miss Van Rhyn suggests that the kicks were directed to the deceased's body rather than to his head. As I have previously indicated, it is not necessary to link up every blow with the actual injury it caused. Accused l*s

attack on the deceased killed him. The evidence regarding the kicks, 6 or 7 in number, is relevant to determine accused l*s overall state of mind in pursuing the assault. He persistently kicked someone who was lying senseless on the ground. He did not stop of his own accord but had to be cautioned to do so. Some appreciation must have been present to accused 1' s mind when he went on kicking and persisted in his assault on an incapacitated victim. What was he hoping to achieve? Accused 1 did not tell the Court a quo what this appreciation was.

The only passage in the Court a quo's judgment dealing with the question whether accused 1 had formed the requisite intention to kill the deceased, is contained in the following passage at 130 of the record:

> "Beskuldigde nommer 1, net soos sy mede beskuldigdes, het verkies om nie te getuig nie. In die lig hiervan is daar net een afleiding wat ek kan maak uit die feit dat die oorledene op ' n vuilishoop buite Windhoek en op * n afgelee plek gaan aflaai is, dit is dat die oorledene daar gaan verwerp is, soos ' n persoon ander nuttelose en uitgediende artikels verwerp. Toe die oorledene daar papgeslaan en geskop op die vuilishoop gegooi is, het die beskuldigde nommer 1 die moontlikheid voorsien dat hy daar sou kon sterwe, maar horn nie daaraan gesteur nie. (Sien ook in die verband S v Simbamba, 1977(4) SA 803 (R))".

It is implicit in this passage that the Court a quo found that the deceased had only died after being thrown on the rubbish dump and that the act of dumping constituted part of the factors contributing to the deceased's death. The

reference in the judgment to S v Simbamba strengthens this construction, for at p.808 in fin. - 809 of this latter judgment it is stated -

> "Applying general principles, there can be no doubt at all that the crime of murder is committed if a person in need of assistance is intentionally prevented from obtaining it and in the result dies or dies earlier than he or she would otherwise have done".

I am not suggesting that the learned trial Judge convicted accused 1 on this basis, or on this basis alone, but the reference to Simbamba's case does strengthen my conclusion that the word "daar" in the phrase "dat hy daar sou kon sterwe" in the passage cited refers to the rubbish dump and that the trial Judge therefore clearly found that the deceased was still alive when he was dumped there.

In reaching this conclusion the trial Judge was in error. There was no direct evidence, admissible against accused 1, that the deceased was still alive at this stage.

The deceased's body was found at approximately 8 a.m. on the 28th October 1990, more than 10 hours after he was removed from the scene of the assault. The dumping could have occurred at any time during such period of 10 hours. The medical evidence does not establish the exact time of death but Dr Liebenberg testified that, on the injuries she saw and because of the lack of pulmonary oedema, the deceased probably died quickly. -That being the case there is no basis on the evidence for finding, even as a probability,

that the deceased was alive when he was dumped on the rubbish dump.

On the basis that all the injuries that Dr Liebenberg saw were inflicted at the scene of the assault (and as already indicated that is the only finding open on the evidence in the absence of testimony from the accused) the deceased was fatally injured when removed from the assault scene in the white motor vehicle. On Dr Liebenberg's evidence the probabilities point strongly to him still being alive at this stage. Yet instead of taking the deceased to a police station or a hospital where he could be treated, the gang races off in the motor car with its lights turned off. This is quite inconsistent with any plan on the gang's part to take the deceased to hospital or the police station. There is no suggestion that they did so. By rushing off in the way they did and by not taking him for medical intention, the inhabitants of the car (including accused 1) manifested a reckless indifference as to the well-being of the deceased. When they left the scene the deceased was quite incapacitated, bleeding freely and, to put it no higher, semi-conscious.

Into this factual scenario must be introduced the effect (if any) which accused l's consumption of alcohol (or other intoxicating substance) had on his ability to foresee the consequences of his assaulting the deceased in the way he did. Whereas Constable Conrad says that accused 1, together with accused 2 and 5, appeared to be reasonably under the influence of liquor and walking with a slightly unsteady

gait, Miss Van Rhyn says that at no stage did any of the gang appear to be drunk. Obviously Constable Conrad had a much better opportunity of evaluating accused 1■s sobriety and there is no warrant for finding him to be untruthful on this score. Yet, if any of the gang had been seriously drunk Miss Van Rhyn or Mr Barnard would certainly have noticed it. The persons involved in dragging/carrying the deceased to the car and loading him in had no difficulty in performing this task. Accused 1 made no mention of drink in his plea statement and because he did not testify on the merits there is no way of determining how much liquor he had consumed or what effect it had on his powers of perception and foresight.

The Courts have warned against adopting an arm-chair approach when attempting to decide, by inferential reasoning, what the state of mind of a particular accused was at a particular time. Williamson, J.A., expressed this cautious approach as follows in S v Mini, 1963(3) SA 188 (A) at 196 E:

> "In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time. He must of course also be on his guard against the insidious subconscious influence of ex post facto knowledge".

Holmes, J.A. delivered a similar warning in S v De Bruyn en •n Ander. 1968(4) SA 498(A) in the following terms at 507D:

> "One must eschew any tendency toward legalistic armchair reasoning, leading facilely to the superficial conclusion that the accused must have foreseen the possibility of resultant death. And one must avoid any hindsight tendency to draw the inference in question from the fact of death".

In similar vein are the following remarks of Wessels, J.A., in S v Bradshaw, 1977(1) PH H60(A) that -

> "(the) Court should guard against proceeding too readily from 'ought to have foreseen' to 'must have foreseen' and thence to 'by necessary inference in fact foresaw' the possible consequences of the conduct enquired into. The several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances which attended the conduct being enquired into".

Alive to these dangers one must ultimately asks the question whether, on all the facts, it has as a matter of inference been established beyond reasonable doubt that accused 1, at any stage of the assault, actually subjectively thought that there was a reasonable possibility that the deceased might die of the assault? That he was reckless to the consequences of the assault is clear, as evidenced by his part in driving off with the deceased without seeking any attention for him.

Had the injuries to the deceased been inflicted only by accused l's fists in the course of a fight, I would have hesitated to answer the question in the affirmative. There are, however, a number of features which must as a fact have given accused 1 a clearer opportunity to appreciate, and to concentrate his mind on, the possible consequences of the assault. Accused 1 was the aggressor from the beginning. The motive to assault was formulated in advance of the assault. His mind was not clouded or confused by problems

of self-defence or retaliatory anger or fear. One would have expected the heavy striking of deceased's head on the cement pavement to have sounded a warning bell, as well as his head being struck against the wall and the flowing blood. Likewise one would have expected the deceased's rapidly declining powers to alert accused 1. Against this background and with the deceased lying on the ground in a physically spent condition, accused 1 kicked him six or seven times with a shoed foot. At least some of these kicks were delivered with substantial force. It is more than probable that at least some of the multiple haematomas on the back of the deceased's head were caused by such kicks.

All this evidence leads, as a matter of inference and beyond reasonable doubt to the conclusion that accused 1 did in fact realise that there was a reasonable possibility that the deceased might die in consequence of the assault but was reckless as to this result. Accused l's intention to kill, in the form of dolus eventualis, was accordingly properly proved and he was therefore rightly convicted of murder in the court a quo.

I turn next to accused 1's appeal against his sentence of 12 years imprisonment.

Punishment being pre-eminently a matter for the discretion of the trial Court, the powers of a Court on appeal to interfere with sentence are limited. Such interference is only permissible where the trial Court has not exercised its discretion judicially or properly. This occurs when it has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing. It will also be inferred that the trial Court acted unreasonably if:

> "There exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed (Berliner's case, supra at p.200) - or, to pose the enquiry in" the phraseology employed in other cases, whether the sentences appealed

> against appear to this Court to be so startingly (S v Ivanisevic and Another, supra at p.575) or disturbingly (S v Let solo. 1970(3) S.A. 476 (A.D.) at p.477) inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence".

S v Whitehead, 1970(4) SA 424 (A) at 436' D-E.

Compare also S v Anderson, 1964(3) SA 494 (A); S v Letsoko, 1964(4) SA 768 (A) at 777 D-H; S v Ivanisevic and Another, 1967(4) SA 572 (A) at 575 G-H and S v Rabie, 1975(4) SA 855(A) at 857 D-F.

A Court of appeal will not readily differ from a trial Court in its assessment either of the factors to be had regard to or as to the value to be attached to them; S v Fazzie and Others, 1964(4) SA 673(A) at 684; S v Berliner, 1967(2) SA 193(A) at 200 D.

It is not suggested that the Court a quo misdirected itself in regard to any of the main principles applicable to sentencing. Relying on S v Zinn, 1969(2) SA 537 (A) Frank, J., rightly pointed out the triad of factors which have to be considered, consisting of the crime, the offender and the interests of society. He also referred to the main purposes of punishment as referred to in S v Kumalo & Others, 1984(3) SA 325 (A), namely, deterrence, prevention, reformation and retribution and the fact that while deterrence has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment and the other aspects as accessory, retribution is considered in

modern times to be of lesser importance.

As in many cases of sentencing the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other. It is more, although not exclusively, in this context that it was submitted that the court a quo had wrongly overemphasised the retributive and deterrent aspects of punishment at the expense of the accused's personal circumstances, his psychological background, and his mental state (in broad sense) at the time of the murder.

It is unnecessary to repeat in any detail what has already been said concerning the crime itself. It was premediated, in the sense that accused and his companions were on a spree looking for trouble (but not in the sense that the actors went to the scene of the crime in order to find the deceased) . It was a brutal and cowardly attack on an unarmed and defenceless victim. He was treated generally as an un-human being. There can also be no doubt that, as the court a quo found, the crime was racially motivated. It is in the highest degree unlikely that the attack would have taken place on a person of the same size and age if he had been white. I deal presently with the significance hereof.

Accused 1 was born on the 24th August 1969 which means that he had just turned 21 years of age when the crime was committed. He was born into a middle-class family, his father being a teacher. During his high school years it emerged that he had some type of learning problem but through perseverance and with the encouragement of his parents he managed to matriculate at the Gobabis High School at the end of 19 87. At the time of his arrest he was close to qualifying as a diesel mechanic and working as an apprentice in a major workshop of the Namibian department of transport. In 1984, at the age of 15, accused 1 suffered a seizure which was subsequently diagnosed as epilepsy. Since then he has had two further major attacks. Originally a drug called "Epanutin" was prescribed for the treatment of his illness but subsequently his medication was changed to a drug called "Fenobarb" of which he regularly takes 100 mg. once per day.

Accused 1 is unmarried and has no previous convictions. Until the events of the 27th October 1990 accused 1 had led an exemplary life and had, apparently, never previously been involved in any physical violence.

In his evidence in mitigation accused 1 testified that on the day in question he had been drinking steadily with friends since 10 a.m. and, after a barbecue at lunch-time, had continued drinking all afternoon. He had on several prior occasions indulged in similar drinking episodes over weekends. He professed to have a very limited recollection of what occurred on the day in question. He can remember

being in a street in Windhoek in the evening but doesn't recollect how he got there. He remembers fighting with a black man but doesn't know why or how the fight started or how it ended. He can remember nothing further until the next morning. He said that he was unaware of the fact that drinking alcohol at the same time as taking his Fenobarb medication would abnormally heighten the intoxicating effect of alcohol on him. The court a quo found that accused 1 had not been honest regarding the degree of his intoxication or memory loss. It conflicted inter alia with his plea statement as well as with the impressions of the State witnesses and his behaviour on the scene of the assault that evening. It is moreover distinctly unlikely that, on the basis of his regular heavy drinking over weekends, he would have been unaware of the adverse effect of his medication when drinking. In my view the court a quo's scepticism regarding accused l's credibility was justified.

It must be accepted on the evidence that this was the first occasion on which accused I had indulged in aggressive or anti-social racial behaviour in public. A petition subscribed to by 4 8 of this fellow workers, of whom only 16 were white, was accepted in evidence on mitigation. It averred that accused I had always behaved normally in the work environment and had never indulged in violence or discrimination.

Dr Louw, a well qualified expert and publicist in the field of criminological and general psychology, testified for accused 1 in mitigation of sentence. The value of his

evidence concerning accused 1' s state of mind on the evening in question is of course crucially dependent on the truth and correctness of the data supplied to him by accused 1 concerning the extent of his drinking and his amnesia and whether he had in fact taken medication that day. To the extent that accused 1 was disbelieved by the trial Court on any of these issues this will of course impact negatively on the reliability of Dr Louw's evidence.

Dr Louw excluded the possibility that, on the evening in question, accused 1 had acted in a state of epileptic qutomatism or, because of an epileptic attack, had not been responsible for his actions. In fact, in cross-examination he excluded epilepsy in itself entirely as a causal factor in the present crime. He described accused 1 as being emotionally unstable and easily affected by external stimuli. Accused 1 suffered from tension and anxiety, was a follower rather than a leader and tended to live out his impulses. This however did not mean that he was not responsible for his actions.

Dr Louw also strongly doubted whether the deceased would have been killed if he had been white. His view was that this was a racially motivated crime. He stated that a person's chances of becoming a racist were greater if he grew up in a racist environment, governed by racist legislation and was subjected to racist indoctrination. One hardly needs the expert testimony of a psychologist to establish this proposition. Dr Louw suggested that racism was a personality trait or characteristic. If the

suggestion is that it is not possible for a racist to cure, or be cured of racism, I must clearly disagree. The tenor of Dr Louw's evidence was that an accused who commits a racially motivated crime is entitled, from a psychological perspective, to be dealt with more sympathetically if his racism is environmentally induced. This view, as a legal proposition, will be dealt with presently. Dr Louw said that because of accused 1' s personality and psychological make-up, it was distinctly unlikely that he would commit a crime of this or similar nature again. He also felt that accused 1 was fully aware of the enormity of what had occurred and was, from a psychological point of view, not really in need of reformation.

Mr Botes in essence launched the following threepronged attack on the sentence imposed by the court a quo;

1. The Court had misdirected itself by overemphasising the deterrent and retributive functions of punishment in this case and had failed to individualise properly the sentence imposed to meet appellant 1 * s particular personal circumstances.

2 . The Court had failed to take into account the fact that accused 1' s racist proclivities were the result of racist socialisation. It was submitted that because such proclivities were induced by socialisation, the Court had misdirected itself by not taking this fact into account as a mitigating circumstance but regarded it instead as an aggravating feature.

3. That, having regard to accused l*s youth and his clean record, the sentence of 12 years imprisonment imposed was startingly inappropriate and amounted to an improper exercise of its discretion by the court a quo.

As already indicated, the trial Court has a discretion in the balancing of the various sentencing considerations and in deciding what value or weight has to be given to the different considerations in any particular case. It is only when a Court of Appeal is satisfied that such balancing has taken place improperly or has been based on a wrong principle that it can interfere. In his judgment Frank, J., alluded to accused l's youth and to the effect which the conviction of murder itself will have on his future life and prospects. He mentioned the suffering which any prison sentence would cause to his parents and by implication, how such parental suffering would in turn impact on the accused. The learned Judge did not expressly mention accused l's clean record as a mitigating factor. The mere fact, however, that a trial Judge omits to make specific reference to a factor relevant to sentence does not by itself warrant the inference that he has overlooked that aspect in deciding upon sentence. (cf. R v Ramanka, 1949(1) SA 417 (A) at 421; R v Karg, 1961(1) SA 231 (A) at 236 and S v Berliner, supra, at 200 A-B). Frank, J., gave careful consideration to accused l's personal circumstances. He emphasised the fact that, by virtue of his character, it was highly unlikely that he would ever commit a crime of this nature again. The learned Judge was alive to and alluded to the fact that sentences have to be individualised. He also made express

mention of the fact that accused 1 had never, in the past, manifested aggressive attitudes. Under these circumstances it cannot be concluded that the learned Judge did not give due weight to the fact that accused 1 was a first offender or that he had misdirected himself in any other way in this regard. The trial Court rightly described the crime as a cruel, violent and revolting act. There are certain crimes, such as the present one, where the retributive and deterrent requirements need to be emphasised, if needs be at the expense of the accused's individual, personal considerations.

I consider next whether the court a quo erred in not regarding the fact that accused 1•s racist proclivities had been induced by socialisation as a mitigating circumstance, but instead treated it as an aggravating feature. The trial Court rightly found that the attack on the deceased was motivated by racism. Dr Louw made explicit reference to the fact that accused had specific racist attitudes and that one could expect that such attitudes would, under certain circumstances, by overtly manifested. In his evidence in chief Dr Louw said that he very much doubted whether the deceased would have been killed had he been white and labelled the crime as a racist act. This provides psychological support for the finding of the court a quo that the assault was motivated by racism.

E. Du Toit, Straf in Suid-Afrika, 98, quite rightly points out that general principle, flowing from the equality before the law norm, requires that in sentencing an offender no

regard be had to his race.

This of course means that accused, whose circumstances and crimes are otherwise similar, should not be sentenced differently merely because of racial differences.

In a footnote the author qualifies this general remark as follows:

> "An important exception is constituted by crimes which threaten the harmonious co-existence of races in our country. Crimes (such as crimes of violence, impairment of dignity) which give offence across the colour line or fan racial friction, ought naturally to be severely dealt with. In such cases the race of the offender and the race of the victim could indeed play an aggravating role". (My translation)

We were referred to no decided case in support of this view. The only case that I have been able to find which alludes, albeit somewhat obliquely, to this principle, is S__y__M, 1972(2) SA 25 (A). The appellant had in this case been convicted in the magistrate's court of crimen injuria against a person of another race. The offending acts were obscene comments directed at the complainant and linked explicitly to complainant's race. In his reasons for judgment the magistrate considered this racist motivation and connotation to be an aggravating factor and stated that

> "The Court also considered the critical position which prevails in this country between Whites and Blacks and that such behaviour must be

3 exterminated".

In an appeal on sentence only to the Appellate Division of the South African Supreme Court it was explicitly submitted (see p.28B) that the magistrate had misdirected himself by taking into account "the critical situation which prevails between Whites and Blacks". Diemont, J.A., (who delivered the judgment of the Appellate Division) while pointing out that the expression "exterminated" ought not to be taken literally, found (at 28E) that there was "no substance in this submission".

Article 6 of the Namibian Constitution mandates respect for and the protection of life; article 8(1) provides that the dignity of all persons shall be inviolable; article 10(1) provides that all persons shall be equal before the law; and article 10(2) provides that no persons may be discriminated against on the grounds of, inter alia, race, colour or ethnic origin.

Article 23(1) provides that

> "the practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices".

Article 23(2) provides, inter alia, that

> "Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices ....."

In terms of article 131 no repeal or amendment of the above principles (falling as they do in chapter 3 of the Constitution) shall be permissible under the Constitution.

> "in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained in that Chapter (i.e. Chapter 3) ."

It should also be pointed out that in terms of Article 24(3) (also contained in Chapter 3 of the Constitution) read with article 26 (dealing with states of emergency, states of national defence and martial law):

> "Nothing contained in this Article shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles ....6, 8, .... 10 ..... hereof ...."

Although, in terms of article 24(1), it is provided that measures taken in a state of emergency, national defence or during martial law under the authority of article 26 shall

not be held to be inconsistent with or in contravention of the Constitution, article 24(3) clearly overrides this provision and prohibits the derogation from or suspension from the rights mentioned, even during a state of emergency, national defence or martial law.

I have alluded to the above provisions in the Constitution because they demonstrate how deep and irrevocable the constitutional commitment is to, inter alia, equality before the law and non-discrimination and to the proscription and eradication of the practice of racial discrimination and apartheid and its consequences. These objectives may rightly be said to be fundamental aspects of public policy-

Article 23(1) in fact authorises Parliament, when enacting legislation to render punishable practices of racial discrimination and apartheid, to prescribe such punishment "as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices'*.

It seems to me therefore that a Court of law, when considering an appropriate punishment for a crime which has been motivated by racism, will in fact be acting in accordance with the constitutional commitment and public policy above referred to if it considers such racist motive to be an aggravating circumstance and therefore places additional emphasis on the retributive and deterrent objects of punishment in order, inter alia, to contribute to the eradication of racism. It needs to be emphasised, however,

that it does not follow that merely because an offence has been committed across a race, colour or ethnic line it necessarily follows that the offence was motivated by racism. There are innumerable instances of crimes such as, for example (and by way of limited example) theft, robbery and housebreaking, which may occur across race, colour or ethnic lines and where such fact is quite co-incidental to the motive for the crime. This will be so in many (if not most) other crimes, whether accompanied by violence or not. Each case will depend on its own circumstances but it may not be assumed that a crime was racially motivated merely because it occurred across race lines. Racial motivation will have to be specifically proven in any case before it can be taken into account as an aggravating circumstance.

It may be that accused l*s racist proclivities were induced by socialisation and that such proclivities are, subjectively and psychologically and perhaps even morally speaking, less reprehensible than racism which is not so induced. It would be quite anomalous, however, to treat a person with socially induced racist proclivities more leniently in respect of a crime motivated by racism, than a person who commits such a crime without such racist motivation. It furthermore seems to me that whatever merit such an argument may have at a theoretical level, it is far outweighed by the public policy considerations I have mentioned, and which justify regarding racist motivation as an aggravating circumstance. The submission on accused l's behalf in this regard must therefore fail.

The final question to be considered is whether, in all the circumstances, the sentence was so startlingly inappropriate that it amounted to an improper exercise of the trial Judge's discretion. The prospect of 12 years incarceration, when one tries to place oneself in an accused's position, is an extremely daunting one. When one considers what one has oneself done over the past 12 years, such a period represents a substantial portion of one's life.

When it is considered that accused 1 was only 21 years of age when the crime was committed and that he has an unblemished record, his sentence of 12 years should not be regarded as anything but severe. But this is not necessarily a criticism of a sentence, for severity may be called for; see R v Karg, supra, at 238A and S v Berliner, supra, at 200 E-F. I believe that in this case severity was called for. The fact this Court might have imposed a lesser sentence is neither the test of nor a reflection on the sentence actually imposed. Having given anxious consideration to all the facts relevant to sentence in this case I am in the end result left unpersuaded that the sentence is so severe that it warrants interference from this Court.

IN THE RESULT the appellant's appeal, both against sentence and conviction, is dismissed.

SIGNED AT WINDHOEK THIS 29th DAY OF OCTOBER 1991.

ACKERMANN, A.J.A.

I agree

BERKER, C.J.

I agree

MAHOMED, A.J.A.

IN THE SUPREME COURT OF NAMIBIA

In the CRIMINAL APPEAL of:

THE STATE Respondent

and

HENDRIK JACOBUS VAN WYK Appellant

CORAM: BERKER, C.J.; MAHOMED, A.J.A.; ACKERMANN, A.J.A.

Delivered on: 1991.10.29

JUDGMENT

MAHOMED, A. J. A. : I have had the privilege of reading the judgment of my brother Ackermann and I am wholly in agreement with the conclusions to which he has arrived and the reasons which he has given for those conclusions, I wish however, to make a few additional observations on the issue of sentence.

In his full argument on behalf of the appellant, Mr Botes repeatedly contended that because the appellant was "socialised" or conditioned by a racist environment for many years, the fact that the murder of the deceased was racially motivated, should in the circumstances be treated as a mitigating factor and not as an aggravating factor. He accordingly contended that the Court a quo had erred in "finding that .... the racial undertone must be seen as an aggravating fact".

This submission raises an important issue pertaining to sentencing policy in post-independent Namibia. Crucial to the identification of that policy is the spirit and the tenor of the Namibian Constitution.

As I have previously said:

> "The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul'; the identification and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion". (S v Acheson, 1991(2) SA 805 (Nm.H.C.)

Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread - an abiding "revulsion" of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people "for so long" and a commitment to build a new nation "to cherish and to protect the gains of our long struggle" against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity. (See the Preamble of the Constitution and articles 10 and 23).

That ethos must "preside and permeate the processes of judicial interpretation and discretion" as much in the area of criminal sentencing as in other areas of law.

To state that the appellant's racism was conditioned by a racist environment is to explain but not necessarily to mitigate. At different times in history, societies have sought to condition citizens to legitimize discrimination against women, to accept barbaric modes of punishing citizens and exacting brutal retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. That time for the Namibian nation arrived with its independence. The commitment to build a new nation, was then articulated for everybody inside and outside Namibia to understand, to cherish, to share and to further. The appellant must, like other citizens, have been exposed to the force and the significance of this message.

To allow the "racist socialisation" of pre-independence Namibia, to continue to operate as a mitigating circumstance, after the new Constitution has been publicly adopted, widely disseminated and vigorously debated both in Namibia and the international Community, would substantially be to subvert the objectives of the Constitution, to impair the process of national reconciliation and nation building and to retard the speed with which Namibian society has to

recover from the legacy of its colonial past.

Having regard to the aforegoing I can find no fault with the finding of the Court *a quo* that the racial motive which influenced the appellant to commit a serious crime, must in the circumstances of the case, be considered as an aggravating factor. The sentence imposed should and did in my view correctly reflect the determination of the Courts to give effect to the Constitutional values of the nation and to project a strong message that such criminal manifestations of racism will not be tolerated by the Courts of the new Namibia.

I. MAHOMED

ACTING JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF NAMIBIA

In the Criminal Appeal of:

HENDRIK JACOBUS VAN WYK versus Appellant

THE STATE

Respondent

Coram: Berker, C.J.
Mahomed, A.J.A.
Ackermann, A.J.A.

Delivered on: 1991/10/29

JUDGMENT

BERKER, C.J.: This appeal is of fundamental importance to the people of the Republic of Namibia, in so far as it deals with the problem of violence motivated by racialism.

The facts which gave rise to the present appeal have been set out in great and searching detail by Ackermann, A.J.A., who prepared the judgment of the Court. I shall only refer to the basic essentials to deal with the aspect referred to above.

The Appellant, a young white man, 21 years of age, happened, together with four other young white men, to be in a street in Windhoek in the early hours of the evening of 27 October 1990. There they accidentally met a black man, Johannes Haufiku (to whom I shall hereafter refer to as "the deceased"). The deceased, who was only of small stature (1,60 meters tall) and merely weight 57 kilograms, was peacefully walking in the street, when he came across the appellant and the other young white men. The deceased was then brutally and viciously assaulted. The evidence proved beyond reasonable doubt that the assault was

perpetrated by appellant. The deceased was struck a number of blows, and fell against a concrete wall. He tried to defend himself, without any success, but managed to get up when the assault continued in a most brutal fashion, so that he again fell, this time to the concrete sidewalk. By this time he was described as having been reduced to pulp. The assault was nevertheless continued, by him being kicked severely a number of times, resulting in him being just a bundle of flesh. As Ackermann, A.J.A. stated in the main judgement:

> "It was a brutal and cowardly attack on an unarmed and defenceless victim. He was treated generally as an unhuman being."

It is also clear that this assault was racially motivated. To quote Ackermann, A.J.A. again:

> "It is in the highest degree unlikely that the attack would have taken place on a person ... if he had been white."

I shall deal with this aspect later.

To continue the events of the evening. The deceased, after the assault (when he was still alive) was then picked up by two of the men and dragged into a motor car nearby, where he was put on the back seat of the car. The five men then climbed into the car, and the car then drove off with its lights switched off.

The deceased's body was found at approximately 8 a.m. the following morning, where he was dumped on a rubbish heap at Avis. He was dead.

This, then, if the background to this gruesome affair. Appellant was thereafter tried on a charge of murder by Frank, J. in the High Court. He was found guilty of murder and sentenced to twelve years imprisonment.

There are some aspects emanating from this which should, in my view, brought to the attention to the people of Namibia and the press.

First of all there can be no doubt that the assault was racially motivated. Very regrettable incidents of this nature have occurred and still occur in our country on quite a number of occasions, where white men attack and assault black citizens, being motivated by racism. The rate of this type of crime must be brought under control, and this Court will act firmly and very severely with such cases, imposing heavy and long sentences of imprisonment. Assaults of a non-racial nature, mainly with the motive of enrichment, will of course also be very severely dealt with as serious crimes. Regrettably this concerns members of our black population.

However, I am concerned here with racially motivated crimes.

As one of the many defences put up was the defence that racism

was a personality trait or characteristic. This was the view given in evidence by a psychologist called by the Defence, the gist of which was that "an accused who commits a racially motivated crime is entitled, from a psychological perspective, to be dealt with more sympathetically if his racism is environmentally induced". In short, the proposition was strongly advanced by the Defence that because appellant had grown up in a racist environment, which formed his whole personality and approach, that this .should be treated as a mitigating factor. This was, as already stated, the view of the psychologist, which view was strongly advanced by Counsel for the Defence. I can only join my brethren on the Bench that I vehemently disagree with this approach. In my view, and that of my brethren, it is on the contrary a strongly aggravating factor in passing an appropriate sentence.

The Namibian Constitution in several Articles (Art. 6, 19(2), 23(1), 23(2), 131) which have been quoted in detail by Ackermann A.J.A., makes it abundantly clear "how deep and irrevocable to constitutional commitment is to, inter alia, equality before the law and non-discrimination and to the proscription and eradication of the practice of racial discrimination and the practice of racial discrimination and apartheid and its consequences." These objectives amy rightly be said to be fundamental aspects of Namibian public policy.

The situation in our Country has been well summarised in the following:

"Article 23(1) in fact authorises Parliament, when enacting legislation to render punishable practices of racial discrimination and apartheid, to prescribe such punishement 'as Parliament deems necessary for the pruposes of expressing the revulsion of the Namibian people at such practices'.

> It seems to me therefore that a Court of law, when considering an appropriate punishment for a crime which has been motivated by racism, will in fact be acting in accordance with the constitutional commitment and public policy above referred to if it considers such racist motive to be an aggravating circumstance and therefore places additional emphasis on the retributive and deterrent objects of punishment in order, inter alia, to contribute to the eradication of racism".

I have referred to the above in order to make one thing quite clear, and that is that this Court will act in the letter and the spirit of the Constitution, as set out above. In doing so it will deal extremely severely with persons in the Country who act contrary to the Constitution and public policy.

Any person who will offend against this will be extremely severely punished. And it is this approach by this Court which

I believe should be brought to the attention of all citizens of our Country, so that hopefully racially motivated crimes and offence will be stopped.

H.J. BERKER, C.J.