

SOUTH AFRICA / JUDGMENT

S v Mazibuko an Others (384/87) [1988] ZASCA 25 (29 March 1988)

[1988] ZASCA 25

COURT

Supreme Court of Appeal

BEFORE

Van Heerden, Nestadt, Kumleben

CASE / FILE NUMBER

384/87

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384/87 /mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ENOCH MAKHOSONKE MAZIBUKO APPELLANT 1

PHILLIP TLHAPANE APPELLANT 2BARNEY HAYNES APPELLANT 3RALPH HAYNES .
APPELLANT 4andTHE STATE RESPONDENTCORAM : VAN HEERDEN, NESTADT et KUMLEBEN, JJAHEARD : 18 MARCH 1988 DELIVERED : 29
March 1988

JUDGMENT/

2. JUDGMENT

KUMLEBEN, JA

The four appellants, to whom I shall refer

as accused nos 1 to 4, stood trial in the Witwaters-

rand Local Division. They were charged with: count

1 - murder; count 2 - robbery with aggravating cir-

cumstances; counts 3 and 4 - unlawful possession of

a firearm and its ammunition; and count 5 - theft. The indictment alleged in reference to these charges: that on 22 February 1985 at or near Randfontein the accused intentionally and unlawfully killed the deceased, Charl Petrus Marais, by fatally injuring him with a sub-machine gun; that they unlawfully possessed this firearm and its ammunition; that they robbed him of R14 100,69; and that a Cortina motorcar was stolen

by/

4

by them in order to carry out this planned robbery. Accused no 1 was initially represented by pro deo counsel (Mr Katzew) but after the close of the State case was unrepresented. Pro deo counsel acted for the others throughout: Mr Liebowitz for

accused no 2 and Mr Robinson for accused nos 3 and 4. Notwithstanding their pleas of not guilty, each was convicted on some or all counts. Accused no 1 was found guilty on count 1 of murder with the ancillary finding that the degree of intent was *dolus directus*. However, when the court came to the consider whether there were extenuating circumstances, it, for reasons which will be discussed in due course, concluded that this accused had acted *dolo eventualis*

and/

4. and that this lesser degree of intent in the circum-

stances amounted to extenuation. On this count, and

on counts 3, 4, and 5, on which he was also convicted,

prison sentences were imposed. On count 2 this

accused was found guilty as charged and in the exercise

of his discretion the learned Judge, Mc Creath J,

imposed the death sentence. The other three accused

were each convicted on counts 1, 2 and 5 as charged but were found not guilty on counts 3 and 4.

As regards

count 1, the murder charge, the Court held that the

degree of intent was *dolus eventualis* and extenuating

circumstances were found to be present. Prison sentences

were imposed in respect of each of the counts

on which they were found guilty.

The/

5. The following facts giving rise to these

convictions were common cause or indisputably proved. Accused no 3 came to know that a certain Mr Lowe regularly sent someone by car on Friday afternoons with money to be paid to employees. It was conveyed from his business premises in Randfontein to the Cook Reduction Works in the district. The four accused and one Goosen decided to intercept the car and rob its driver. The five of them discussed in detail how this was to be done. Accused no 4 obtained a sub-machine gun to be used in the robbery. On Friday 22 February 1985 it took place. Goosen stole a Cortina motorcar. He drove it to the business premises of Mr Lowe. Accused nos 1 and 2 joined him and sat

in the/

6. in the car. Accused nos 3 and 4 were in the vicinity

to see that things went according to plan. In due

course the deceased left in a Mercedes Benz motorcar. He was followed by Goosen driving the Cortina with accused nos 1 and 2 still in it. At a point shortly before the Mercedes Benz reached an intersection the Cortina overtook it and, when it stopped at the intersection, blocked its passage. Accused nos 1 and

2 alighted from the Cortina. No 2 accused struck the deceased on the jaw with his fist. Accused no 1 shot the deceased with the sub-machine gun as he sat slumped in the driver's seat as a result of the blow he had received. (Accused no 1 initially denied but later admitted that he had shot the deceased.) The post-

mortem/ 7. mortem examination revealed that one bullet had

entered the right shoulder of the deceased and penetrated the skull where it lodged. The course of the other was through his chest, the bullet being found lodged in the arm rest between the two front seats. Shortly before or at the time the shots were fired, the Mercedes Benz moved forward, collided with the left hand side of the Cortina and came to rest on the far side of the intersection. Accused no 2 took an attaché case, containing the money, from the rear seat of the car. Goosen drove the Cortina to a secluded spot. The money was removed from the attaché case before it and the car were abandoned. Later Goosen and the four accused met at the house of

Goosen's/

8.

Goosen's mother and most of the money was divided

amongst them. Goosen was the key witness for the State. He recounted in detail the events, which I have briefly summarised, and explained the role played by each accused. He in fact featured as an accused at the trial before a separation of trials was ordered. At the time he testified he had been convicted on counts 1, 2 and 5 for which the death sentence, twelve years' imprisonment and five years' imprisonment respectively were imposed (The facts and decision in his appeal, which was heard immediately after this one, appear from the

judgment

of my Brother van Heerden - S v Goosen.(Appeal 278/87))

He said that a number of discussions took place on how the robbery was to be carried out and the part each one was to play. Nothing was left to the independent judgment of a participant. It was explicitly agreed that the firearm was only to be used to intimidate the driver and that it was not to be fired. They confidently expected that the blow to be delivered by accused no 2, who was apparently a man of formidable physique, would immobilize the driver. During the discussions no 3 accused had told them that it was the policy of the company to instruct its couriers not to offer resistance if way-laid and attacked. (Mr Lowe in his evidence confirmed this.) They therefore expected little or no resistance. That afternoon as they travelled in the car, at a distance of about 500 metres from the intersection, accused no 1 took the sub-machine gun out of a haversack./

10. sack. He was seated next to the witness, who was driving. He instructed accused no 1 to steer whilst he (Goosen) took the sub-machine gun from him, removed the magazine and operated the breech mechanism two or three times to ensure that there was no cartridge in it. Had there been, it would have been ejected. He said he did this to make sure that the driver would not be injured or killed by the firearm during the robbery. He handed the sub-machine gun back to accused no 1 and placed the maga-

zine on the lap of no 1 accused. When the car had stopped in the way of the Mercedes Benz, the two passengers alighted from the Cortina, accused no 1

armed with the sub-machine gun. Accused no 2, as

planned,/

11.

planned, struck the deceased on the jaw with his fist. The witness noticed that he seemed dazed; his head was resting on his shoulder. He next saw accused no 1 pointing the firearm at the driver and moving towards him as accused no 2 retreated. He heard what he took to be one shot being fired by accused no 1. (If Goosen's evidence on the detachment of the magazine is accepted, accused no 1 must have re-placed it and cocked the sub-machine gun.) Accused no 2 reacted to this by heading back to the Cortina. Accused no 1 shouted at him telling him to take the money from the back seat. This he did. The witness said that the Mercedes Benz was stationary when the "shot" was fired but

he was/ 12. he was not all that certain about the precise sequence of events. During cross-examination, when asked whether the forward movement of the Mercedes Benz preceded the shot or shots, he said he did not think

so. ("Nee, ek glo nie.")

Mindful of the caution to be exercised in

evaluating the evidence of an accomplice, the Court, after a close examination of his evidence, concluded that Goosen was a reliable witness. His evidence was accepted: though with a measure of scepticism as regards the removal of the magazine. As pointed out

in the judgment, his evidence was corroborated in various respects by other reliable witnesses and was

not effectively controverted by any evidence on the

Part/ 13. part of the defence. Accused no 1 gave patently false evidence on the part he played in the commission of the offences. The evidence of accused no 2 large-

ly corroborated that of Goosen. Where it differed the Court concluded that Goosen's evidence was to be preferred. Accused nos 3 and 4 declined to give evidence. In short - and on appeal this was implicitly conceded - for the purposes of this appeal Goosen's evidence is to be accepted in all material respects.

Two special entries were made on the record in terms of sec 317 of the Criminal Procedure Act, 51 of 1977, to which I shall refer as "the Act". Although the application for the second entry was made/

14. made by counsel representing certain of the accused,

once recorded it was taken to have been made on be-

half of all of them. During the course of the trial the learned Judge ruled that Mr Liebowitz, representing accused no 2, and Mr Robinson, for accused nos 3 and 4, were not permitted to cross-examine accused no 1 on his previous convictions.. The first special entry avers that, having regard to the provisions of sec 197 of the Act, this constituted an irregularity.

The following passage in the cross-examination of accused no 1 reflects how this issue arose:

"You were forced to participate in the robbery because of your fear of Accused 2? My Lord, I said so .

And/

15. And as regards robbery itself, you did not go near the sub-machinegun or rather you did not handle the sub-machinegun in any manner whatsoever? No, My Lord, I never touched it. And further that you had never possessed a firearm in your life? -- No, My Lord, I never possessed a firearm. You had never handled a firearm of any description in your whole life? No, I had never held a firearm . And you were entirely ignorant of fire-arms at all? COURT : Of the workings of firearms. MR LIEBOWITZ : Of the workings of a fire- arm, sorry, My Lord. Even now, My Lord, I have no knowledge of handling a firearm ." (My underlining)

Mr Liebowitz thereupon informed the Court that he intended cross-examining accused no 1 on his

previous/ 16. previous convictions, submitting that the provisions

of sec 197(b) and (d) of the Act entitled him to do

so. This section, omitting sub-paragraphs (a) and

(c), reads as follows:

"An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he has committed or has been convicted of or has been charged with any offence other than the offence with which he is charged, or that he is of bad character, unless-

- (b) he gives evidence against any other person charged with the same offence or an offence in respect of the same facts;
- (d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is charged."

Mr Robinson/...

17. Mr Robinson associated himself with the

claim to cross-examine as aforesaid and presented

argument on behalf of the three accused concerned.

Although not explicitly stated at the

start of the argument, it emerged that counsel wished to put to this accused certain of his previous convictions which would disclose that he had been convicted of offences involving a firearm. The learned Judge, although he heard the argument on this issue in the absence of the assessors, did not allow counsel to furnish details of the previous convictions on which he wished to cross-examine. However, counsel said that they would show that no 1 accused had knowledge of firearms and had committed offences involving

their/ 18. their use. It was submitted, with reference to sub-

paragraph (d) of sec 197, that these previous convictions, if admitted or proved, would, or might, refute the assertion that no 1 accused had no experience in the handling of firearms, and would also be relevant to the defence raised by him at that stage of the trial, namely, that he had been forced to take part in the robbery, was not a willing participant and had not fired the shots. Counsel further submitted that, apart from considerations of relevancy, sub-paragraph (b) of sec 197 in any event authorised such questioning since this accused had given evidence implicating all his co-accused. (As a matter of fact these previous convictions, which were admitted when put

to him/ 19. to him after conviction, show that of the fifteen, seven were for robbery involving the use of a firearm, one was for theft of a pistol and one for unlawful possession of a firearm.) At the conclusion of argument the application to thus cross-examine was refused on the ground, as Mc Creath J put it,

"that there should be the prima facie evidence in view of the denial of an actual use of a firearm by whatever means that prima facie evidence is obtained. But not merely a document which is in itself not proof if it is denied."

This ruling, so it appears, was based on the fact that the customary SAP form recording the previous convictions was not regarded as prima facie evidence/

20. evidence of the fact that the accused had actually handled a firearm. In thus deciding the learned Judge erred for the simple reason that the only point at issue was whether the accused could be cross-examined on his previous convictions. Were they to be denied then, and then only, would any questions arise as to whether evidence to refute the denial could be adduced and, if so, the form it should take. In this regard it is to be noted that sec 272 of the Act expressly provides that a fingerprint record of previous convictions emanating from the South African Criminal Bureau shall be prima facie proof of the facts contained therein. This, however, is by the way,

since, as I have said, the question of proof formed no part/

21.
part of the inquiry.

In the judgment on the conviction the reason given at the time of the ruling was repeated and another added, as appears from the following extract:

"After hearing argument, I ruled that the majority of the questions sought to be put in regard hereto were irrelevant in that, although Counsel wished to refer to previous convictions in regard to crimes involving the use of a firearm, it appeared that others were also involved in the alleged previous offences committed by accused number 1 and that in those circumstances the relevance of the questions as to accused number 1's knowledge of firearms in general and the possible consequent lack of any reluctance on his part to participate in crimes of this nature had not been shown to exist. It appears that there may have been one offence in which the

accused personally was involved in the use of a firearm, but

accused/

22.

accused number 1 indicated that he did not admit any such previous conviction and I was of the view that in the absence of Counsel being in possession of information to substantiate the fact that accused number 1 had previously made use of a firearm, cross-examination of this nature was not permissible unless and until such information was available. It was for this reason that I ruled that at that stage cross-examination of the nature sought to be embarked upon, was not to be permitted."

I mention in passing that there are two inaccuracies in this passage. Firstly, as has been pointed out, nine of the fifteen previous convictions involved the unlawful acquisition, use or possession of a firearm and, secondly, there was no clear indication from the accused that he did not, or would not, admit his previous convictions. What he said

was/

23.

was "My Lord, I have never used a firearm. My Lord, I do not dispute that (sic) my previous convictions, but My Lord, I say that I have never used in the past a firearm." Be that as it may, in the judgment irrelevancy is relied upon as an additional reason for not permitting cross-examination on any of the previous convictions. This ground is necessarily based on the supposition that the court has a discretion in this regard. None is conferred by the language of sec 197(b). If an accused gives the evidence against a co-accused charged with the same offence - as accused no 1 plainly did in this case

- the immunity is forfeited and he is required to answer any question tending to show that he has been convicted

of/

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of any offence other than the offence with which he is charged. There is a considerable body of authority which supports the view that a court, when cross-examination is authorised by sec 197(b), has no general or residual discretion to prohibit or restrict such cross-examination on grounds of irrelevancy or at all. (See *Rex v Bagas* 1952(1) SA 437(A) at 44CE -441A, in which the similarly worded sec 295(b) of Act 31 of 1917 was considered; *Hoffmann and Zeffertt*' South African Law of Evidence (3rd ed) 71; *Hiemstra Suid-Afrikaanse Strafproses* (4th ed) 423; and *Schmidt Bewysleer* (2nd ed) 299. It is, however, in the instant case unnecessary to decide this question since, firstly, the initial ruling was not based on the

exercise/...

25.

exercise of any judicial discretion and, secondly,

as I have indicated, nine of the previous convictions

are clearly relevant.

For these reasons, having regard to sec

197(b) of the Act, counsel for accused nos 2, 3 and

4 ought to have been allowed to cross-examine accused no 1 as requested by them. This counsel for respondent on appeal did not dispute. In the light of this conclusion it is unnecessary to decide whether the provisions of sec 197(d) also thus entitled them.

The irregularity was not of the order which per se vitiates a trial. In the words of the

judgment in *The State v Naidoo* 1962(4) SA 348(A)

at/

26.

at 353 D - F, it cannot be said that there was "so gross a departure from established rules of procedure" that the accused were not properly tried. It follows that the irregularity can only influence the conviction of these three accused if it can be shown that they were prejudiced. (Cf. *S v Gaba* 1985(4) SA 734(A) at 750 G - H.) The purpose of this proposed cross-examination, as I have said, was to prove that the accused had experience of firearms, acted voluntarily and was an untrustworthy witness. The Court in convicting him, found that he handled, in fact fired, the sub-machine gun; that he was a willing participant; and that his evidence was false. Thus, on the face of it, no prejudice could

have/ 27. have arisen. After his conviction accused no 1 admitted that he had shot the deceased but said that he had done so accidentally. Mr Potgieter, who appeared for accused no 2 on appeal, submitted that the proposed cross-examination may have elicited this admission and explanation from accused no 1 whilst he was in the witness-box and before he closed his case and that this might have significantly affected the course of the trial. This appears to me to be a purely speculative ground of potential prejudice.

(Cf. *S v Gaba* (supra)). It is, however, unnecessary to express a final view in this regard in the light of the decision I have reached on the merits of the

second special entry, which I now turn to consider,

28.

and the resultant order I propose making. This special entry is in substance that the presiding Judge failed to have due regard to a statement made by accused no 1 when addressing the Court on the merits of his defence and that he ought to have construed the statement as an application on no 1 accused's part to re-open his case, bearing in mind that he was a layman and at that stage unrepresented. The events giving rise to, and related to, this special entry are important:

- (i) It was initially accused no 1's case that he had remained in the car and had not shot the deceased. He gave evidence to that effect. It was convincingly

refuted by the evidence of Goosen and accused no 2.

Accused/ 29. Accused no 1 no doubt came to realise this.

- (ii) Thus it was that during argument on the merits he said "Ek wil nou die Hof die waarheid vertel"; ek het die man geskiet en ek wil die Hof vertel hoe dit gebeur het." The learned Judge did not react to this statement by explaining to the accused his procedural rights or by asking him whether he wished to apply to reopen his case to explain what he contends actually happened. Instead it was decided, in the interests of the accused, not to take into account his admission that he had shot the deceased but no attention was directed at the rest of his statement, which may have presaged an exculpatory explanation.

- (iii) In the course of the judgment following upon argument the court referred to this statement by accused no 1 and said:

"In/

- 30. "In view of the fact that this was mentioned by accused number 1 during the course of argument, this Court came to the conclusion that that admission should not be held against accused number 1, but that in fairness to him the case should be adjudicated upon the evidence before the Court and ignoring that admission. The Court has accordingly approached the matter along these lines."

- (iv) Having been found guilty on the murder charge

(and on certain others), accused no 1, in the course of giving evidence in mitigation of sentence, testified to the alleged inadvertent discharge of the sub-machine gun. He said that he did not know how to operate it and that he had no intention of firing it. When they arrived at Goosen's place after the

robbery,/

- 31. robbery, he told them, Goosen and his co-accused,

that he had fired it accidentally. He repeated this

explanation to a police officer at the Brixton Po-

lice Station. He said in evidence that when the Mercedes Benz came towards him he thought that he would be pinned between the two cars and in a state of panic he accidentally fired. He added that he was surprised that the bullet did not strike accused no 2. This evidence was not really, or at least not effectively, challenged by cross-examination. Mr de Kock, who appeared for the State at the trial, merely asked him whether he had perhaps fired the

shot to prevent the Mercedes Benz driving off. This

he emphatically denied, reiterating that it was not

his/

32.

his intention to shoot at the car or the deceased.

- (v) In the judgment on extenuating circumstances the Court, after referring to three decisions of this Court in which the significance of *dolus eventualis* as an extenuating factor is discussed, said:

"It is against the background of these principles that the Court approaches the issue of extenuating circumstances in the present case and in doing so, the Court bears in mind the findings of fact which were made by the Court in dealing with the facts of the case. In its previous judgment the Court found as a fact that at the time the robbery was planned, it was known to the accused that the deceased would not offer resistance if he were to follow the policy of his firm and that that policy was to avoid risk of life as the payroll monies had been insured. The Court also bears in mind the fact that as part of the planning, it had been

arranged/

33.

arranged that accused number 2 would render the deceased incapable of offering resistance by striking him a blow with the fist.

The Court also bears in mind the warnings which were given and, more particularly, in the Cortina immediately prior to the robbery, by Goosen and by accused number 2. It is the view of the Court that, if regard is had thereto, then the possibility of resultant death of the deceased in consequence of the activities of the accused was foreseen as being remote and that, therefore, in the light of the dicta to which I have referred, this is a factor which must be taken into consideration in assessing whether extenuating circumstances exist or not.

Mr Liebowitz, on behalf of accused number 2, was good enough to be of assistance to the Court in relation to the position of accused number 1, in view of the fact that the said accused is unrepresented, and in this connection referred the Court to the case of *S v SEFUTI* 1985 (1) S.A. 9 (AD).

He/

34.

He raised what was said in that case, in dealing with the evidence of accused number 1 in respect of this issue of extenuating circumstances to the effect that he did not intend to fire the sub-machine gun and that in consequence of the sudden forward jerking movement of the Mercedes Benz, and his 'running away' as a result thereof, the shots went off in error. The Court has given consideration to this factor, but does not consider that it is an element which detracts from the foreseeability of the consequences of their conduct in respect of any of the accused and that it does not operate to disturb the finding of *dolus eventualis*."

This judgment concludes with a finding that in the case of all four accused extenuating circumstances were proved, and that the death of the deceased was

foreseen as no more than a remote possibility. (In

the case of accused nos 3 and 4 additional grounds

for/

35.

for extenuation were found to exist.) In the light of the conclusion in this judgment that in the case of each accused the degree of intent was *dolus eventualis*, I have difficulty with the statement in the last paragraph of the passage quoted in so far as it suggests that the finding of *dolus eventualis* in respect of any of the accused was not disturbed. In the judgment on the merits, as mentioned at the start of this judgment, the Court, quite correctly on the evidence before it at that stage, found no 1 accused guilty of murder "the requisite intent being that of *dolus directus*". Thus the judgment on extenuation does in fact alter this finding in the case of accused no 1 by substituting

one/

36.

one of *dolus eventualis*. A further difficulty the judgment on extenuation presents is that it is not made at all clear whether this substitution is based on a finding of fact that an accidental killing was proved (either on a balance of probabilities or as a reasonable possibility) or whether, for the purposes of reconsidering the degree of intention in the case of accused no 1, it was assumed that he did not deliberately kill the deceased. In the first two paragraphs of the quoted passage certain relevant findings of fact are set out. However, from what was said in the last paragraph, one cannot infer with any degree of certainty whether "this factor" was held to have been proved or is merely assumed. What is subsequently

said/ 37. said in the judgment for leave to appeal strengthen the view that there was no such finding of fact. I refer to the following passage in that judgment giving reasons for allowing the second special entry:

"Die rede hoekom ek dit sê, is dat ek van oordeel is dat 'n ander Hof wel tot die slot-som mag kom dat indien die omstandighede waaronder die skote afgegaan het vanuit die vuurwapen wat beskuldigde 1 hanteer het, verder ondersoek word, die Hof moontlik tot 'n ander slotsom sou gekom het, wat betref die aanklag van moord en of dit moord sou wees en of strafbare manslag en/of selfs iets wat 'n novus actus uitgemaak het, en wat tot gevolg sou hê dat die beskuldigdes onskuldig bevind sou word op daardie beson-dere aanklag."

In the circumstances, and particularly since this defence was raised after conviction and not fully canvassed by cross-examination, to my mind the correct

approach/

38.

approach is to conclude that no such finding of fact

was made in the Court a quo.

In the light of what accused no 1 said

in argument (as set out in para (ii) above) his rights ought to have been explained to him and, had he decided to apply for a re-opening of his case, as in all probability he would have, the merits of such an application ought have been considered. This Mr Jordaan, who appeared for the respondent on appeal, conceded. It is consequently unnecessary to consider whether the evidence given by the accused in extenuation (see para (iv) above) could also to be taken into

account in deciding whether an application to re-open

ought to have been entertained. (Cf. *S v Mavhungu*

1981(1)/

39. 1981(1) SA 56(A) at 65F - H; but see *S v Theron*

1984(2) SA 868 (A) at 879 C - H.) Whether this irregularity resulted in prejudice to the four accused depends upon whether the Court a quo was correct in deciding that, even if the shots were accidentally fired, the accused were nevertheless guilty of murder. This question must in the first instance be examined with reference to the causative element in the crime of murder. Viewed factually the planned robbery and unlawful assault upon the deceased were conditions sine qua non of the fatal end result. It is, however, generally acknowledged that causation in that sense is inadequate to determine legal liability:

It/ 40. It would extend liability beyond reasonable and rea-

listic limits. As Jansen JA in *S v Daniëls en Ander*

1983(3) SA 275 (A) at 331 B - G observes:

"Daar kan weinig twyfel bestaan dat in ons regspraak die bepaling van 'feitelike' oor-saaklike verband op die grondslag van die conditio sine qua non geskied (vgl S v Van As en 'n Ander 1967(4) SA 594(A) op 602D; en wat die onregmatige daad betref, Minis - ter of Police v Skosana 1977 (1) SA 31 (A)). Sonder sodanige verband tussen die dader se handeling en die beweerde, gewraakte gevolg is daar in die algemeen geen aanspreeklik-heid nie. Aan diè ander kant is dit ook dui-delik dat 'n dader nie aanspreeklik gestel be-hoort te word vir alle gevolge waarvan sy handeling 'n conditio sine qua non is nie -sy aanspreeklikheid sou dan te wyd strek en die grense van redelikheid, billikheid en regverdigheid oorskry. Beleidsoorwegings verg dat iewers 'n grens gestel moet word. Oor hoe die grens bepaal moet word, is daar geen eenstemmigheid onder ons skrywers oor die strafreg nie. 'n Paar voorbeelde sal dit

illustreer./...41.

illustreer. Volgens De Wet en Swanepoel Strafbare Manslag 3de uitg op 63 -64 geskied be-grensing met aanwending van die skuldver-eiste. Snyman Strafbare Manslag op 54 - 55 verg dat die handeling adekwaat ten opsigte van die gevolg moet wees (wat blykbaar onder andere daarop kan neerkom dat daar geen novus actus interveniens aanwesig moet wees nie - vgl op 49, 55, 59). F F W van Oosten Oorsaaklikheid by Moord en Strafbare Manslag (proefskrif

1981) meen dat daar naas skuld ook na wederregtelik-heid gekyk moet word (op 584 ev). Hunt South African Criminal Law and Procedure band II ("Common Law Crimes") op 327 vereis benewens voldoening aan die sine qua non-toets ook voldoening aan

'a further test of legal causation which may require X's conduct' (nl die van die dader) 'to be not only a sine qua non but a 'decisive' or 'substantial' or 'proximate' or 'direct' or 'ade-quate' cause of Y's death; or, otherwise put, it may require that no novus actus interveniens inter-rupt the chain of effects which can be traced back to X's act!'"

42.

The same view is expressed by P M A Hunt, in a comment

on S v Masilela and Another, 1968(2) SA 558(A) in The

South African Law Journal Vol 85 (1968) 383 at 385:

"But the sine qua non is obviously in-sufficient as a general test of causation, for it spreads the net of liability ab-surdly wide. It serves as a test of 'fac-tual' causation, but in addition a test of 'legal' or 'policy' causation must be for-mulated. X's conduct must be not only a sine qua non of Y's death, but also the 'proximate' or an 'adequate' cause of it. Expressed negatively: not only must X's conduct operate as a sine qua non, but there must be no novus actus interveniens. What is a novus actus interveniens depends very much on the circumstances. See, ge-nerally, J.C. Smith and B. Hogan, Criminal Law (1965), pp. 171-3; R.M. Perkins, Cri-minal Law (1957)), pp. 596 ff.; H.L.A. Hart and A.M. Honoré, Causation in the Law (1959), ch. XII. Even X's own subsequent conduct may rank as a novus actus if it takes the form of an innocent or even neg-

ligent/.....

43. ligent act which is completely inde-pendent (in conception and execution) of his original conduct...."

Thus, should a proper investigation of the issue

establish as a reasonable possibility that the shots were fired accidentally, it may well be, depending on the proved facts, that the shots were, adopting Hunt's phrase, "completely independent (in concep-tion and execution) of his original conduct." (Cf.

S v Masilela and Another (supra) at 571D, 573A and D - E, and 574A.) If the causative link is not forged in the case of accused no 1 (he being a person who, albeit accidentally, fired the shots) there is a fortiori scope - again depending on the proved facts

- for a cogent argument that the other accused are not

to be/

44.

to be found guilty of murder on an application of the doctrine of common purpose. There is a further ground on which the conviction of murder might be challenged, if it is accepted that the killing was accidental. Dolus eventualis is attributed to an accused person when-ever the possibility of death as a consequence of the unlawful act is foreseen (and is persisted in), whether or not the precise manner in which death eventuated was foreseen or contemplated. See R v Lewis, 1958(3) SA 107 (A) at 109H; S v Msiza 1984 (1) P.H. H116 (AD) and S v Nhlapo and Another 1981(2) SA 744(A) at 750 F - G. In the last mentioned decision Van Heerden JA posed the question in this form:

"whether/

45. "whether the unforeseen manner in which a foreseen consequence was caused is legally relevant; in other words, whether dolus eventualis requires fore-sight not only of a consequence but also of the causal sequence leading to the consequence."

Thus, with reference to the requirement of foresee-ability as well, an argument may be profitably advanced on behalf of the accused, should it appear that the shots were accidentally fired.

In the circumstances, since the possibility of prejudice arising from the irregularity cannot be ruled out, the conviction and sentence on count 1 cannot stand and the matter is to be remitted to the trial Court to give no 1 accused the opportunity of applying to re-open his case and, should the application be

granted,/

46. granted, to allow further evidence to be led on the

question whether the deceased was accidentally shot.

Council were all agreed that, should there be a risk of prejudice, the matter ought to be remitted. (If this results in a finding that no 1 accused acted negligently in killing the deceased, the question whether his co-accused ought also be found guilty of culpable homicide will arise - cf. *S v Nkwenja en 'n Ander* 1985(2) SA 560 (A).)

All four accused were granted leave to appeal against their convictions and sentences on count 1. The decision on the second special entry requires that they be set aside. This decision is also pertinent to the sentences imposed on count 2, the robbery charge since one may infer that the finding that the deceased was deliberately killed/...47. killed (murder: *dolus eventualis*) was, or may well

have been, taken into account as an aggravating factor in deciding on an appropriate sentence for the robbery conviction. But leave to appeal against sentence on count 2 was restricted to accused no 1. It is, however, unnecessary to decide whether this presents a difficulty in setting aside the sentences on count 2 in respect of accused nos 2, 3 and 4 which cannot by the exercise of the wide powers conferred by the provisions of sec 22 of the Supreme Court Act, 59 of 1959, be overcome. Mr Jordaan, very properly, agreed that in the special circumstances the matters should be dealt with as if they too had been granted such leave to appeal and that their sentences on the robbery/

48. robbery charge ought also to be set aside.

In the result:

1. The appeals are allowed. 2. In the case of each accused the conviction and sentence on count 1 and the sentence on count 2 are set aside. 3. The matter is remitted to the Court *quo* to consider the re-opening

of the case of accused no 1, if so requested by him, and, should the application be granted, to hear further evidence.

M E KUMLEBEN JUDGE OF APPEAL

VAN HEERDEN) JJA -ConcurNESTADT) JJA -Concur

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