

TABLE OF CONTENTS

	Page.
1. The Sterkstroom Three	1.
2. The two from Burgersdorp	5.
3. The Queenstown Six	7.
4. The Stutterheim Case	11.
5. Abraham Zeyo	15.
6. Sipho Gonya and Phutumile Dlabathi	18.
7. Mtutuzeli Ngqandu	21.
8. The Whittlesea Case	23.
9. Thembisile Baneti - Another one freed from death row	25.
10. Miki Yelani versus the State	27.

Note:

- * The Sterkstroom Three have been refused leave to appeal and are petitioning the Chief Justice for leave to appeal.
- * Sipho Gonya and Phutumile Dlabathi will apply for leave to appeal in the Port Alfred Supreme Court on December 8.
- * The remaining cases are all on appeal to the Appellate Division.

THE STERKSTROOM THREE:

On October 19, 1985, a teacher who had defied the schools' boycott in Sterkstroom by taking junior pupils to school, was necklaced by a crowd of people. Of six people convicted of the murder, Mangena Boesman, 36, Msokoli Willie, 23, and Mhlawubi Desemele, 24, were sentenced to death. According to Mr Ian Meyer, a psychologist who gave evidence in extenuation, the necklacing incident was the only one of its kind in the village during the 1985 period of unrest. "In the aftermath of this brutal and heinous crime, the community which was divided in its attitude to the youths' domination and control of township politics, collected R4 000 to assist the eight accused in their defence," he told the court.

BACKGROUND:

Eight people stood trial for the murder of the 50-year-old school teacher, Mrs Mellina Fass. They were also charged with arson and the illegal possession of petrol bombs. Two of the accused were women, one of whom (Nombuzo Nyaqela) was eight months pregnant when she was sentenced to an effective three years imprisonment in October 1988. Those who were convicted of the murder were Boesman, Willie, Desemele (death sentences), Manditini Mabombo (one year, wholly suspended), and the two women, Tozana Stuurman (an effective 18 months imprisonment) and Nombuzo Nyaqela. The remaining two were acquitted.

In his judgement, Judge Zietsman said the evidence proved that at about 12pm on October 19, 1985, a group of people approached Mrs Fass's house in a threatening manner and threw petrol bombs at it. Mrs Fass ran to a relative's home, pursued by the crowd. She was attacked and assaulted near the relative's home and she then ran on to the home of another resident, Thandi. She was followed by her attackers and finally burnt to death in a lane.

The State called eight witnesses as eye-witnesses, four of whom were warned as accomplices. The Judge said the four accomplices were contradictory and unreliable witnesses and the court was not asked to place much reliance on their evidence. However, the evidence of the four other eye-witnesses - Merci Fass, Normaindia Dingani, Mampho Malgas and Nomvume Skweza - was accepted as reliable and it was on their evidence that the six were convicted.

Based on their evidence, Judge Zietsman said Boesman, Willie and Desemele were among the leaders of the crowd who chased Mrs Fass to her relative's home. Mrs Fass ran into the house but was dragged outside where petrol was poured on her and she was set alight. She ran to Thandi's house pursued by Boesman, Willie, Desemele, Stuurman and Nyaqele. At Thandi's house, she was given water by Mampho Malgas, but was again attacked by Boesman, Willie and Desemele. Willie placed a tyre around her neck and set it alight. Boesman sent Mabombo to fetch more petrol and he fetched paraffin from Thandi's house. After this, Mrs Fass was again set alight and she died.

Accepting the evidence of these four witnesses, the Judge said it was clear Boesman, Willie and Desemele played an active part in the assault on Mrs Fass. The two women also pursued her and carried the petrol which was used to burn her. Mabombo, who did not participate in the actual assault, was sent to fetch petrol and he carried out this task knowing that petrol would be used in a further attack.

The court rejected the evidence given by each of the accused that they did not participate in the attack and that it was the state witnesses who assaulted Mrs Fass.

EVIDENCE IN EXTENUATION:

Mr Meyer presented a lengthy report to the court in which he detailed a theoretical analysis of crowd psychology and an application of the theory to the circumstances present in Sterkstroom at the time.

Mr Meyer told the court that individuals, once in a crowd, often did not consider their own personal interests or well-being: "It is generally acknowledged even by the layman that crowds can commit atrocities, brutalities and acts of heroism that the individuals would be quite unlikely to perform if alone."

Turning to the situational circumstances prevailing in Sterkstroom at the time, Mr Meyer said on August 13, 1985, Steyo (Sterkstroom Youth Organisation) was established. Steyo was a youth movement formed with the aim of improving community circumstances and raising the personal, social and political awareness of its individual members. Willie attended the inaugural meeting together with an estimated 300 other youths. When Desemele took up residence in Sterkstroom shortly before the incident, he joined Willie and Nyaqele, becoming active in Steyo. Boesman, who did not generally attend meetings, was active as a marshall in enforcing the economic boycott.

Prior to the formation of the organisation, schools were being boycotted and Mrs Fass was defying the boycott by taking junior primary pupils to school. "This step incensed the youth who, in the beginning of October 1985, sent a delegation (which included Willie and Desemele) to the local school to retrieve the school-attending pupils and thereby reinforce the boycott." He said Mrs Fass was allegedly informed by a youth delegation her stance was wrong, but she refused to leave town.

Sometime between October 7 and 9, 1985, a meeting was held where it was decided to burn the home of Mrs Fass. On October 16, 1985, a group of comrades entered her home and damaged her telephone, in the hope that this would disrupt her alleged role as an SAP informer. Early on October 19, a group of "vigilantes" congregated on the banks of the river in the township, with the rumoured intention of attacking the "comrades". Later that morning, specific confrontations did occur and the crowd swelled its ranks to approximately 100.

Mr Meyer said these violent confrontations highly aroused the mob, which later congregated around the home of Mrs Fass. "The atmosphere was highly charged with an enthusiastic and angry crowd singing protest songs and freedom chants, while dancing the Toyi-Toyi. For the accused, normal consciousness and awareness was suspended."

He said earlier, while assaulting one of the vigilantes, the mob suggested that the comrades should take this opportunity to get rid of all vigilantes and informers. This suggestion was taken up by all in the enthusiasm of the moment and the mob moved spontaneously to the home of Mrs Fass. The accused did not disagree with the suggestion as one did not dare go against the decision of the group for fear of creating the suspicion of being an informer oneself.

Mr Meyer submitted that psychological forces making for aggression were very strongly present at the time of the crime. Such forces mitigated the level of the responsibility of the accused - "they did things they would normally not have been likely to do as individuals acting on their own accord," he said.

SENTENCING:

Commenting on the evidence given by Mr Meyer, Judge Zietsman said what the accused told him was not what they had told the court, "but he (Mr Meyer) accepted (what they told him) and he based his conclusions on their statements...what we find inexplicable is Meyer's apparent disinterest in the factual findings of the court."

The judge said mob violence "may cause the so-called deindividuation and this factor together with other factors may constitute extenuation." It was still necessary however to consider the facts of each case. Based on the evidence that had been accepted by the court, he said the court found it unacceptable that Boesman, Willie and Desemele did not appreciate that death could ensue from the actions of the attackers. He found there were no extenuating circumstances with regard to the three of them.

Finding extenuation for the other three, the judge said it was probable that factors mentioned by Mr Meyer applied in Mabombo's case. His youthfulness and the small part he played constituted extenuation. Likewise, Stuurman, 18, played a minor role and with regard to Nyaqele, the judge accepted Mr Meyer's evidence that because of her father's position in the SAP, she probably felt the need to prove she was with and not against the "so-called struggle".

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PERSONAL CIRCUMSTANCES:

* Mangena Boesman was born on April 6, 1952. He attended school as far as standard one and was unemployed at the time of his arrest. Boesman's father was killed in a train crash when he was a young child. Later, his mother took a common law husband who was employed as a driver for the Provincial Administration. Boesman is not married and he has no children.

* Msokoli Willie, born on March 20, 1965, came from a broken family. His parents separated when he was about eight years old and he lived for periods of time separately with both parents. Within the family there was a strong religious influence, which has remained part of his life. He is one of four children. He dropped out of school after passing standard four for financial reasons. In 1983, he started certain biblical studies by correspondence. Willie was briefly employed as a farm labourer and thereafter on the mines in an unskilled capacity. He returned to Sterkstroom in 1985, but could not find any employment. Whilst unemployed, he concentrated on religious matters, acting as Secretary for his Church. Msokoli is not married and he has no children.

* One of seven children, Mhlawubi Desemele was born on December 24, 1963. His father died when he was an infant and he adopted his uncle as a father figure. Religion played a central role in his family, with his mother being an elder in her Church. Mhlawubi, who is illiterate, completed Sub A at school, but then dropped out because of finances. He worked as a gardener and thereafter on the mines and in the building industry in an unskilled capacity. At the time of his arrest, he was unemployed, having returned to Sterkstroom in July 1985. He is not married and has no children.

THE TWO FROM BURGERSDORP:

Nico Ledube Mnyamana, 32, Menzi Tafeni, 22, and three other men were convicted of the murder of Maqanda Gxalaba who was burnt to death by a crowd of people on January 2, 1986, in the Sandbult township, Burgersdorp. Mnyamana and Tafeni were sentenced to death in the Port Elizabeth Supreme Court on September 25, 1987. The other three men, who were all in their late teens at the time, were each sentenced to 18 years imprisonment.

Evidence for the State was given by a police officer and two men, "Mr X" and "Mr A," whose identity was withheld. Mr X and Mr A were warned as accomplices, but were indemnified at the end of their testimony. Leave to appeal against conviction and sentence was granted to Mnyamana and Tafeni on the grounds that their convictions were based on the evidence of the two accomplices.

BACKGROUND:

At the start of his judgement, Mr Justice Solomon said there were three salient features that emerged from the case:

*If the state evidence was accepted and the defence evidence rejected, the facts pointed inescapably towards common purpose.

*One of the prime issues to be decided on was the question of credibility.

*The State case and the defence case were irreconcilable: there was no middle ground between the two.

Judge Solomon said the evidence of Mr X and Mr A could be accepted as establishing that the following events occurred: Both Mr X and Mr A met some of the accused in the street on the night in question and were told to accompany the accused. A search was carried out for Mr Gxalaba who was eventually "run to earth" in a house at about 9pm by a group which included all five accused. Some people entered the house and Mr Gxalaba was brought outside where he was assaulted and stabbed by Mnyamana. He attempted to run away, was stoned and was then picked up by Mnyamana. He ran, fell and stones were again thrown at him. A tyre was then brought and put over his head by Tafeni. Petrol was poured into the tyre and over his body and bystanders were told to fetch paper and other material. Mr Gxalaba was set alight and he died in hospital later that night.

The Judge said while there were discrepancies in the evidence of Mr X and Mr A, their versions corresponded in all material aspects: "In assessing the importance of these discrepancies, it will not be overlooked that the incidents occurred ... in a mobile situation. We are satisfied that Mr X and Mr A gave their evidence clearly and unhesitatingly. Their description of the events is so similar, we have no reason to doubt they described those events accurately."

Mnyamana testified that he drank two and a half to three quarts of beer and brandy at a friend's house between 6.15 and 7pm that night. On his way home, he was met by his brother Kusani and taken to bed. Rejecting his and Kusani's evidence, the judge said Mr X and A had positively identified him as having been at the scene.

Tafeni told the Court he was at home on the evening of January 2, 1986 and went to bed after 9pm. The Judge said his claim that he was at home stood uncorroborated. Faced with the evidence of Mr X and Mr A who specifically indentified him as one of the principal actors, the court rejected his evidence.

Finding the five men guilty of murder, Judge Solomon said: "It is not necessary to show that each party did a specific act towards attainment of the joint object. Association in the common design makes the act of one the act of all. Being a member of a gang with a common intention to kill, coupled with presence, at the scence of a crime, attracts liability."

While extenuating circumstances were found for three of the accused on the basis of their youthfulness at the time of the commission of the offence, the court found no extenuating circumstances for either Mnyamana or Tafeni.

Commenting on the Defence Counsel's submission that the court should take into consideration the conditions in which the accused lived, Judge Solomon said: "The fact that persons live in luxurious or poor conditions does not seem to us in any way to affect the rights or their duties to act reasonably and as decent human beings."

Before the death sentence was passed, Tafeni said: "The Court made mention of my failure to call my mother as a witness. To that I would like to mention that the father of the deceased had approached people who were to give evidence on behalf of us, the accused. He had told my mother I am already sentenced to death so I was told by my aunt my mother was not able to come to court. She is already weak as a result of what she was told, so I want to request the court to consider not imposing a death sentence, but any sentence whether it be 20 years imprisonment."

PERSONAL CIRCUMSTANCES:

* Menzi Tafeni, born on April 11, 1966, was at school in standard two at the time of his arrest. His mother, who lives in Burgersdorp, is not working because of high blood pressure. His father died in 1968. Tafeni's two sisters and one of his brothers work in Johannesburg and provide money for the family in Burgersdorp. His youngest brother is still at school.

* Nico Mnyamana has only one parent - his mother has died. He comes from a large family of 10 children and was engaged in a taxi business in Burgersdorp at the time of his arrest.

THE QUEENSTOWN SIX:

"Let the Court proceed as it deems fit, but the Court must know it silences a person who is innocent." (Mzwandile Gqeba).

"I am not stopping the Court from reaching its decision, but I did explain in court that I did not kill her. I did admit I hit her but the Court found I killed her when I know I did not." (Whanto Silinga).

These were the words of two Queenstown residents who were given an opportunity to speak shortly before they, with four others, were sentenced to death in June 1987 by the Supreme Court in Port Alfred. The six were among 14 people charged with the murder of Nosipho Zamela, a young woman who had associated with Zulu policemen (known as the Inkatha) stationed in the town during the 1985 unrest. Two of the accused were acquitted, five were found guilty of assault and seven were convicted of murder on the basis of common purpose. The Court found there were no extenuating circumstances with regard to any of those convicted of murder. However, because one of the seven, Lozamile Bacela, was under the age of 18, Judge Kroon was able to exercise his discretion and he sentenced him to 20 years imprisonment. Mzwandile Gqeba, 23, Whanto Silinga, 28, Lundi Wana, 21, Thembinkosi Pressfeet, 32, Mzwandile Mninzi 27, and Monde Tingwe, 24, were sentenced to death. One of the six, Whanto Silinga died of tuberculosis while in prison in 1987. The other five have been on death row since June 1987.

BACKGROUND:

The State's case was that on December 12, 1985, a People's Court hearing was held at the house of one of the accused, Ndodana Matshoba, at Mlungisi township in Queenstown. At this hearing, Nosipho faced a charge of associating with Zulu policemen. She was found guilty and sentenced to a whipping with sjamboks and thereafter to be burnt to death by the necklace method. It was alleged that this was carried out and that the accused had acted with common purpose in conducting the trial and in executing the sentence.

In his judgement, Judge Kroon described the accused's version as follows: Six of the 14, including Mninzi and Tingwe, testified that they were not present at any of the events on the night in question. Gqeba, Wana and Bacela told the court they held an enquiry at Matshoba's place. Silinga joined in later. It was decided at the enquiry that Nosipho should be hit with a sjambok and at a nearby toilet, Gqeba, Silinga and Bacela took turns to beat her on her hands with a sjambok. Silinga and Wana then left the scene. Gqeba and Bacela said a group of people from another section of the township, New Brighton, arrived at the toilet and demanded that Nosipho be handed over to them for further punishment. Gqeba informed the group that Nosipho had mentioned the names of other girls who had similarly transgressed and she would now point those girls out. After leaving

the toilet, Gqeba managed to persuade the group that he, Bacela and Nosipho should follow a different route. On becoming separated from the group, the three of them sought refuge in another house. However, they were discovered by the group, who insisted that Gqeba and Bacela accompany them. At a convenient spot, Gqeba and Bacela said they managed to escape and were not present when Nosipho was burnt at a place called the Golden.

Turning to the background history, the Judge said when the unrest developed, the police became "personae non gratae". The Inkatha policemen were brought into Queenstown to replace the local black police, who had been driven from the township. The move did not find favour with the people and any fraternising with Inkatha was severely frowned upon. At a meeting, it had been decided that any girls fraternising with the Inkatha policemen should be punished. According to the accused, it was on this basis that Gqeba, Wana and Bacela decided to hold an enquiry into Nosipho's behaviour.

Outlining the roles each of the accused had played, the Judge said GQEBBA was one of the organisers of the proceedings at Matshoba's house. It was he who, on his own admission, pronounced the punishment of a beating to be inflicted upon Nosipho. Gqeba maintained all along that what had taken place was a discussion, not a trial. Rejecting his evidence, the Judge said his story of how he managed to secure a separation of himself, Bacela and Nosihpo from the group "rings singularly unconvincingly", as did his evidence of his escape.

There was no evidence that Gqeba was one of those who had taken part in the actual setting alight of Nosipho, but, said the Judge, "that circumstance would not assist if, on the application of the principles of the doctrine of common purpose, he is to be visited with the responsibility of those who did."

On all the evidence, he was one of those in the forefront when Nosipho was taken around the township, including the final stage when she was taken to the place known as the Golden. "Though there is no direct evidence on which we can rely that Gqeba was in at the kill, we find inferentially as a fact he was there. We reject as false his evidence that he left the group before it reached the Golden and the only inference is that he did accompany the group to the Golden". The Court found that he fully associated himself with the common purpose of the group to kill Nosipho.

SILINGA participated in the proceedings against Nosipho. He was a party to the verdict and the punishment decided upon and helped carry it out. On Silinga's version that he left the scene at the toilet, the Judge said: "His sudden disinterest does not ring true." The Court found he accompanied the group to the Golden and as with Gqeba, he fully associated himself and made common cause with the group's purpose.

WANA admitted to participating fully in the meeting. "While he did not physically participate in the beating of Nosipho, on application of the doctrine of common purpose, he is guilty of assault." The court found his alleged departure from the scene at the toilet to be "highly improbable" and found him guilty of murder on the same basis as it had done with regard to Gqeba.

With regard to PRESSFEET, who admitted in a statement that he had tied Nosipho's hands with wire, Judge Kroon said the State had proved that he associated himself with the group's intention to kill and was guilty of murder.

MNINZI was present at the toilet and according to the evidence, he was part of the group which brought Nosipho to the Golden. He therefore associated himself with the "murderous intention" of the group. Likewise, TINGWE also "sufficiently associated himself" with the intention of the group and made common cause with them so as to be guilty of murder. And, by the same token as Gqeba, BACELA'S evidence was rejected as false and he was found guilty of murder on the basis of common purpose.

EVIDENCE IN EXTENUATION:

Professor Don Foster, head of the Department of Psychology at the University of Cape Town, gave evidence about crowd behaviour and "mass psychosis". He said some distance must have been covered before Nosipho was taken to the Golden, and all this was within a crowd situation, surrounded by a background of highly emotionally charged events. It was his understanding that this would render a high degree of psychological susceptibility to crowd influence and crowd pressure. Some explanation for the events of that day could be found in terms of collective action and "it is my further suggestion that this sort of well established psychological situation could reduce the moral blameworthiness of the participants," he said.

Soniwabo Kwaza, 25, who was one of the accused convicted of assault, testified about the conditions in Queenstown's townships. He said in the New Town section, many people were unemployed and there were no recreation facilities for the youth who entertained themselves by forming soccer clubs and playing football in the field. On December 7, the day before Nosipho's death, there had been a funeral in the township for 11 people.

Counsel for the accused argued that there was extenuation on the following grounds: the age of the accused, the minor roles they had played, the influence brought to bear on them by those they looked up to, the influence of "mass psychosis", their lack of premeditation and the reasons why Nosipho was killed.



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The Judge said that the evidence disclosed that substantial roles had been played by each of the accused. "Their roles were only minor in the sense that the accused were not shown to be the actual killers, but the actions of those who actually killed the deceased fell within the mandate given by each participant to the joint venture and the actions of the former were accordingly the actions of the latter." On Prof Foster's evidence, he said: "Whatever the attractiveness of his views may have in theory, we have difficulty in effecting a practical application thereof in favour of the accused."

He found no extenuating circumstances with regard to any of the seven, but because Bacela was only 17 years at the time, the Judge exercised his discretion and sentenced him to 20 years imprisonment.

PERSONAL CIRCUMSTANCES:

* Gqeba was born on June 6, 1965. He left school in standard five because of a lack of funds and did some casual work and assisted his family in the shack shop they owned. He has one brother and two sisters.

* Silinga, born on March 3, 1960, passed standard eight at school and left because of a lack of funds. He was employed at the Coca Cola depot in Queenstown at one stage, but was obliged to leave because of ill health. He died from tuberculosis after he had been imprisoned.

* Wana was born on September 1, 1967, making him just over 18 years old at the time of the commission of the crime. He was in standard six when he was arrested. He was an orphan and lived with his grandparents.

* Pressfeet was 31 the time. He attended school as far as standard three, but left because of a lack of funds. He was employed at a hotel, earning R125 a month. He has two children, aged three and seven.

* Mhinzzi, born on February 2, 1961, completed only his first grade at school. He has not been employed, but earned an income by hawking fruit and vegetables.

* Tingwe was born on August 2, 1963, He passed standard five at school and has one child. He was employed at a milling company, earning R89,50 a week.

THE STUTTERHEIM CASE:

Mxolisi Malgas, Michael Mambukwe and Lulamile Maneli were sentenced to death by Mr Justice Beckley after they were found guilty of the murder of three women who were burnt in Stutterheim's Kubusie township on the night of December 23, 1985.

A significant feature of the trial was that five young girls, who ranged in age from 14 to 18 at the time of giving evidence, but who were all under 18 at the time of the crime, were the main witnesses. It was on their evidence that the convictions were based.

Two of the children were relatives of the deceased and the other three, who claimed to be present at the scene of the crime, were warned as accomplices. These three were held in "protective" custody from March 12, 1988 until they gave evidence in September. It emerged during the trial that in all, 10 girls had been detained in protective custody - however, only the three were called to give evidence.

During the course of the children's testimony, the case was heard in camera, allowing for only guardians of the accused and members of the Press to be present. The Judge ordered that the identity of the state witnesses not be disclosed and it is for this reason that we shall refer to the five girls as A, B, C, D and E.

BACKGROUND:

Sixteen Stutterheim residents stood trial for the murder of Nobanzi Yaze and her two adult daughters, Noncebe and Nosisi Yaze. The women were assaulted and burnt by a crowd of people on December 23, 1985 and died some days afterwards as a result. The 16 were also charged with arson, having allegedly set fire to Nobanzi Yaze's house.

The court found 10 of the 16 guilty of murder on three counts on the basis of common purpose. No extenuating circumstances were found for three of them and the others were sentenced to terms of imprisonment ranging from 10 to 14 years. (One of the accused, Lungile Bacela, who was sentenced to 14 years imprisonment, was found dead in his prison cell in September 1988. He was reported to have hanged himself.)

Witness A, who was 14 years old, told the court she was woken at about 1am that night by Nobanzi's scream and she saw many people at the door. Nobanzi cried, asking what she had done, whereupon she was told she was a witch. Three boys wearing balaclavas entered the room and started assaulting her with sjamboks. Petrol was poured onto the bed and it caught fire. Before running away, the girl recognised Maneli, when he peeped in through the door.

Witness B said the door of Nobanzi's house was kicked down that night. About eight people entered and started assaulting the adults with sjamboks. The girl identified three of the accused.

Witness C, who was 18, was warned as an accomplice before she gave her evidence. C told the court she attended a meeting at which the conversation was about the burning of Nobanzi, who was apparently a witch. It was decided she was a witch because she had killed one of the comrades. She said Malgas and Mambukwe participated in the meeting whilst Maneli and two others were also present. Later, at Nobanzi's house, Maneli and Mambukwe were among those who entered. She saw one of the accused, a youth, setting Nobanzi on fire.

Under cross-examination, it was revealed that she had been detained as a witness since March 12, 1987 and had not seen her mother or her child since then. Mr TL Skweyiya, Defence Counsel, cross-examined her about a note she had written on toilet paper to one Rusta who had been detained at Alexandria prison while she was being kept there. In the note, C complained about having been assaulted. C admitted to having written the note, but said it was not the truth and she had written it just to "keep the conversation live". Mr Skweyiya asked her: "And you also told him that look, he should ask these accused to get lawyers so that lawyers can come and see you because you are being forced to implicate these accused when it is not true? And that was just conversation?" To this, she replied, "Yes, it was just conversation."

Mr Skweyiya also produced a letter she had written to the accused, in which she said that she had been arrested with nine other girls. She wrote that the investigating officer in the case, Detective Sergeant Deon Dates, visited them frequently in prison and told them to implicate the accused if they wanted to go home. Again C admitted she had written the letter, but that it was not the truth. Mr Skweyiya also put to C that her mother said she had spent the night at home. C once again denied this.

Witness D, aged 16, was also warned as an accomplice. She said she attended a meeting where all 16 accused were present. Malgas, Mambukwe and Maneli were among the speakers who said Nobanzi should be burnt because she had killed one Msokoli. At Nobanzi's house, she stood in the street and did not move. And, while it emerged later that it would have been impossible for her to see what was happening at the front door of the house, she told the court Maneli knocked on the door and poured petrol over Nobanzi. She also claimed to have seen four of the other accused entering the house.

Witness E, who was 15, testified that she was asleep that night and was aroused by knock on the door. She found three of the accused, including Maneli, at the door. Outside, she recognised a group of nine persons in a crowd of about 50 people. They walked to Nobanzi's house and Maneli and two others knocked on her door. Nobanzi was dragged outside and two of the youths poured petrol over her and set her alight. She was also warned as an accomplice.

For the defence, Malgas testified that on December 23, he worked during the day and spent that night at his home. Mambukwe told the court that he was at home that night with his wife, mother, brother and children. And Maneli also said he spent the night at home with his parents, children, brothers and sisters and knew nothing about the incident.

Rejecting these alibis, Judge Beckley said the court accepted C's evidence as supported by D and E, as well as part of the evidence given by A and B. Referring to the letters written by C, the Judge said there was nothing in them "of such significance to indicate that she is an untrustworthy witness". D's evidence about the events at Nobanzi's house was not reliable due to the fact that she was standing behind the house and was unable to see what was happening at the front door. However, the court found that her evidence relating to the events that took place up to that stage should be accepted.

Based on the girls' evidence, he said the State had proved beyond reasonable doubt that all the accused with the exception of two of them were at the meeting.

On the question of whether those who were present at Nobanzi's house were guilty of murder, he said it was necessary to establish whether a common purpose to murder the three women had been proved.

In this regard, the court found that a unanimous decision was taken at the meeting to burn Nobanzi and her daughters. "We find that the State has proved that a common purpose was formed, despite the fact that as Mr Skweyiya submitted, there was no chairman or organiser or any opportunity for anyone to express dissatisfaction with the decision taken...we find that the mere presence at the meeting and accompanying the crowd to Nobanzi's house, well knowing what the purpose of the journey to her house was, and what had been said at the meeting, is sufficient to establish participation in the common purpose," he said.

The court found that 10 of the accused were proved beyond reasonable doubt to have been members of the conspiracy and were guilty of murder on three counts and of arson.

EXTENUATING CIRCUMSTANCES:

Mr Skweyiya asked the court to take into account the general circumstances at the time and the fact that the crimes were committed by a group of people. A consumer boycott was implemented in Stutterheim in 1985 and tempers ran high. This atmosphere led to different camps forming and fighting between the groups.

The Judge found there were extenuating circumstances for seven of the accused, on the basis of their ages and the fact that they had not played an active role in the commission of the crimes. He found no extenuation for Malgas, Mambukwe and Maneli.

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He said while Malgas and Mambukwe did not actively participate at the time when the three women were actually being burnt, they both spoke at the meeting and suggested to the others present at the meeting what should be done. With regard to Maneli, he fetched E from a house and according to C, he attended the meeting. It was he who knocked on the door, according to C, D and E and there was also evidence that he entered the house. "It is clear that he, at least, played an active role in the house," Judge Beckley said.

APPLICATION FOR LEAVE TO APPEAL:

Applying for leave to appeal, Mr Skweyiya submitted inter alia that the court failed to have due regard to the letters written by witness C and also to the fact that C, D and E were accomplice witnesses who were very young. They were kept in detention and were probably provided with their statements to memorise. He also argued that the Court erred in finding that the mere presence of certain of the accused at the scene of the crime was sufficient evidence to have them convicted - even though there was no proof of any overt act on their part.

The Judge granted leave to appeal to all ten accused, in respect of their convictions.

PERSONAL CIRCUMSTANCES:

Michael Mambukwe, 31, was born on June 1, 1957. He worked as an ambulance driver in Stutterheim and Grahamstown until August 1985. At the time of his arrest, he was working in a mine recruitment agency in Stutterheim. He is married with four children - two sons and two daughters. His wife, brother and mother are presently looking after the children. He attended school as far as standard eight and has one brother. His father died in 1965.

Mxolisi Malgas, 40, was born on April 9, 1948. He has two children aged 21 and 11. He was a policeman before he resigned to become a school teacher. He has no brothers and sisters and his mother died this year (1988).

Lulamile Maneli was born on March 4, 1957. He has one brother and two sisters.

ABRAHAM ZEYO:

"In a general situation of unrest, sensitivity to violence is often weakened, with blunting of perspective and judgement. This aspect cannot, however, be taken too far."

These were the words of an Acting Judge of the Supreme Court, Mr Justice Erasmus, who was giving his judgement on whether there were extenuating circumstances for five Kirkwood residents who had been convicted of murder. He found extenuation for four of the five, but sentenced 23-year-old Abraham Zeyo to death.

BACKGROUND:

Abraham was one of 14 Kirkwood residents who each faced 12 charges. These included three counts of murder, eight counts of attempted murder and one count of arson. The 14 were alleged to have killed Elizabeth Klaas and her grandchildren, Goodman (three) and Livingstone (seven), who died when the house they were in was burnt down by a crowd of people on April 20, 1985. They were also alleged to have attempted to murder seven other members of the family and a friend by setting fire to the house.

The Judge said the evidence showed that during the night of April 19 and 20, 1985, a group of men congregated at a house in Bontrug township. From there they went to the home of Elizabeth Klaas. Someone said: "We are the amacabani" (comrades). One of Elizabeth's daughters, Nokuzola, opened the front door and some of the group entered the house, while others remained outside. The men stood in the dining room and some of them kept asking for Jimmy Klaassen. (Jimmy Klaassen, a businessman, was reputed to be a close friend of the notorious Kinikini family in Uitenhage. During the unrest, he fled the town and has not been back since).

One of the intruders was carrying a plastic container of petrol. Nokuzola grabbed hold of the container and for some time she and the person struggled over it. Elizabeth called from her bedroom, whereupon someone said: "Good enough, here is Mankomo". (Elizabeth was also known as Mankomo). Another member said: "Let us do what we have come to do." At this stage, Nokuzola and the intruder were still struggling over the container. She was threatened with being stabbed and she let go and ran away. The man with the container went into Elizabeth's room and brought her into the dining room where petrol was poured over her and she was set alight. Petrol was also thrown on the floor and this too started burning. All the occupants, except the three who died, fled the house.

Abraham was identified by four state witnesses - three daughters and a cousin of Elizabeth - as having been there. Nokuzola said he was the person with whom she struggled over the petrol container. She saw him entering her mother's bedroom, but did not see him coming out of it. Another daughter, Pumla, also witnessed the struggle and said

Abraham brought her mother out of the bedroom and poured petrol over her. The third daughter, Nomathemba, as well as the cousin confirmed that a struggle took place between Abraham and Nokuzola.

Abraham also made a statement to the police, saying he knew nothing of the incident. He said he was in Uitenhage at the time: he lived with his brother in Uitenhage during the first half of 1985 and returned to Kirkwood in June that year.

The Judge rejected this evidence and said the court was satisfied beyond a reasonable doubt that Abraham was present at the Klaas's home on the night in question and that the testimony of the state witnesses as to his actions was correct.

The court found that the five accused who had been identified as members of the group inside the house at the time were guilty of the murder of Mankomo as principal offenders. Abraham had played an active role and the other four had stood around armed either with stones or other weapons.

With regard to the death of the infants, there was no evidence that any of them were aware of the presence of the children in the house. The court found those inside the house were guilty of culpable homicide. They were also guilty of arson.

The remaining seven accused were acquitted.

EXTENUATION:

In his judgement on extenuation, the Judge commented on the environment in which the accused lived: "The Court, during the inspection in loco had an opportunity of viewing the township. There were signs of poverty everywhere. We feel those living there had a degree of cultural deprivation."

Turning to the general circumstances at the time, he said: "We have it that at the time there was political unrest throughout large areas of the country. These influences permeated and poisoned the local area. We can safely say that without such outside influence, there would have been no unrest in this area and probably no crime committed. To some extent, all the accused were influenced by the country-wide occurrences, which led to an emotionally-charged situation in this area. These are factors the court cannot ignore in assessing the moral blameworthiness of the accused. Perhaps we speculate. I can say so because there was no direct evidence that the offence was politically motivated."

He said it was never clear what connection there was between Jimmy Klaassen and Elizabeth Klaas. One witness said there was confusion in the minds of the accused and "then there is the similarity in the surnames".

The court found extenuation for four of those convicted of murder. Ntsikelelo Sito and Xolile Williams, who were under the age of 18 at the time, were sentenced to 10 years imprisonment. With regard to the other two, the court took into account the "general emotional disturbances" in the area, the fact that they were part of a group and their degree of participation in the crime. Sentencing Signet Mambo, who was a teacher, to 20 years imprisonment, Judge Erasmus told him: "You turned literally at death's door". Member Mgwandleni was sentenced to 12 years imprisonment.

The Judge said although there were extenuating circumstances in Abraham's case, they were not sufficient to abate his moral blameworthiness. The court took into account that there was some degree of immaturity as well as the factors of emotional disturbances and group activity. However, these were outweighed by the active role he had played. Abraham was consequently sentenced to death.

All five were granted leave to appeal against their convictions and Abraham and Mambo were granted leave to appeal against their sentences as well.

PERSONAL CIRCUMSTANCES:

Abraham, the youngest of six children, was born on November 23, 1964 and brought up in Bontrug township, Kirkwood. He progressed to standard five at school. His parents have died. According to his sister, Virginia Zeyo, he looked after the family house in Bontrug. "There is no-one there now - the house is locked," she said. Abraham has three small children, who are looked after by another sister. Virginia said Abraham was out on bail pending the trial and for the duration of the case. She said when he was sentenced to death, she had a stroke and was still under treatment. She has been to see him regularly in Pretoria Central Prison.

SIPHO GONYA AND PHUTUMILE DLABATHI:

Quoting extensively from the case of State vs Safatsa and others (the "Sharpeville Six"), Acting Judge, Mr Justice Grobbelaar, convicted Phutumile Dlabathi, 23, and Siphon Gonya, 21, of murder on the basis of common purpose. The two men, from Duncan Village in East London, were sentenced to death on July 22, 1988, in the Port Alfred Supreme Court.

BACKGROUND:

Gonya, Dlabathi and four others were charged with the murder of an alleged informer, Wiseman Mrwebi (also known as Maglasana), who was burnt to death near Freedom Square in Duncan Village on October 12, 1985. One of the six on trial, Ringo Farland, absconded in the week before judgement was given. A warrant was issued and Farland was apprehended shortly afterwards. The case against him is to proceed in Port Alfred on December 5, 1988. Of the remaining five, two were acquitted and Mrs Fukama Nkata, 51, was sentenced to 18 years imprisonment.

The court found that on the evening of October 12, 1985, a group of people gathered in Duncan Village outside Beauty Ngxama's house, where Maglasana lived. Some of the group entered her house and forcibly removed Maglasana. He was assaulted outside, called an impimpi and dragged by the leaders of the group down Tappa Street. While he was being dragged down Tappa Street, people in the group said: "Maglasana is an impimpi (informer), he must be burnt". Maglasana broke loose at the gate of a house in Tappa Street and held onto the witness, Joyce Sokuyeka. However, he was pulled away from Joyce and dragged further down Tappa Street, where he broke away again and ran into the house of Nomzi Goyi. He was then dragged into Sandile Street where he escaped and fled into the property of a person called Spokes. There he was assaulted, dragged out again and at Freedom Square, the group of people stopped, formed a circle around him and assaulted him. He was taken to Noxoholo School, where tyres were put around him and he was set alight. His burnt remains were found later that night.

The State called a number of witnesses, of whom six were eye-witnesses to various stages of the events leading up to the killing. One of the witnesses, Mfene Mazeka, who was only 15 at the time, was warned as an accomplice and indemnified from prosecution at the end of the case. For the defence, all of the accused gave evidence and various witnesses were called on their behalf. Gonya and Dlabathi both said they were not present at the scene of the killing, but were at home on the night in question.

The Court rejected their alibis and found that Gonya, Dlabathi and Nkata were guilty of murder on the basis of common purpose.

With regard to the role that Gonya played, the court found that he held onto Maglasana and pulled him as he was dragged down Tappa Street. At Freedom Square, he was one of the people who formed a circle around Maglasana and he hit him with a pipe or a stick. He also questioned Maglasana about a firearm while he sat bleeding on the ground. On the way to the school, Gonya hit Maglasana with a sjambok. Five people, including Gonya and Maglasana, entered the school grounds, where three tyres were put around Maglasana's body. A certain Simphiwe then poured petrol over Maglasana and set him alight. Gonya and the others sang while Maglasana burnt.

The Judge said Dlabathi pulled Maglasana away from Joyce and helped to pull him further along Tappa Street. Dlabathi was one of those who caught him in the house of Nomzi Goyi and dragged him outside. He had also pulled him out of Spokes' house and stabbed him at Freedom Square with a knife. Dlabathi was one of the five who went into the property of the school where tyres were placed around Maglasana and where Simphiwe poured petrol over him and set him alight. Dlabathi also sang while Maglasana burnt.

The Judge said in the light of the findings made by the the Court, the question was whether the accused were guilty of murder. "To answer this question, the Court is guided by the principles applied in the case of S v Safatsa and others," he said.

Judge Grobbelaar quoted extensively from this Appeal Court judgement in which Judge Botha posed the question of whether it was competent for a participant in the common purpose to be found guilty of murder in the absence of proof that his conduct individually caused the death of the deceased. Judge Botha found that the individual acts of the Sharpeville Six manifested an "active association" with the acts of the mob which had caused the death of the deceased and that "consequently the acts of the mob which caused the deceased's death (had to) be imputed to each of the accused."

In the light of the principles laid down in the Safatsa case, the Court found that Gonya, Dlabathi and Nkata were participants in the common purpose to kill Maglasana and were therefore guilty of murder.

In extenuation, Mr L Kalimashe, Counsel for the defence, emphasised the youthfulness of Gonya and Dlabathi, who were only 18 and 19 at the time. He also stressed the fact that none of the accused poured petrol onto Maglasana, but that it was one Simphiwe, who set him alight as well.

The Court found there were extenuating circumstances with regard to Nkata, who was under the influence of alcohol and who left the scene while Maglasana was burning. However, there were no extenuating circumstances for Gonya and Dlabathi and they were sentenced to death.

PERSONAL CIRCUMSTANCES:

Sipho Gonya was born on March 3, 1967, at Mashabati township in Berlin, near East London. He was born outside of marriage and his father never lived at home. He was brought up by his grandparents when his mother left home to marry someone else. However, she returned to her parental home when her husband died. Gonya went as far as standard six at school, but left because of financial problems. He intended to work to save money to go back to school, but could not find a permanent job because of his age. He eventually built himself a shack in Duncan Village, where he was living at the time of his arrest.

Phutumile Dlabathi, born on December 19, 1965, is the third of four children and grew up in Duncan Village. His father who was the only breadwinner in the family, died in June 1986. Dlabathi attended school as far as standard six. At some stage, he attended school in Mdantsane, but left because he could not afford to pay for his school uniform. Dlabathi was detained under the emergency regulations six days after the death of his father. He was in detention for nine months. Since his sentencing, his mother, who was unemployed, has taken to selling meat as a hawker. The family also depends on a disability grant for the youngest child who is disabled.

MTUTUZELI NGQANDU:

Mtutuzeli Ngqandu was sentenced to death for the murder of a policeman, Detective Constable Lungile Manene, who was necklaced near Soweto township, Port Elizabeth, on the night of September 22, 1985. Six others were on trial with Ngqandu. However, three of the trialists were discharged at the end of the state case, one was acquitted at the end of the trial and two were found guilty of assault and sentenced to three years imprisonment, conditionally suspended for five years. The case took place in Uitenhage before an Acting Judge of the Supreme Court, Mr Justice Foxcroft.

BACKGROUND:

In Judge Foxcroft's words, there was only one state witness who was "able to shed any light on the actual events" of the night in question. Vuyani Nqotobi testified that on the night of September 22, he was serving people in a cafe in Soweto, when Ngqandu, who had blood spots on his face, entered the cafe. Ngqandu explained to people in the shop that they had killed Manene. He left, but returned the following day and showed people in the cafe a newspaper with a photograph and a small news item making mention of Manene. Ngqandu explained that this was the same person they had killed the previous day.

Nqotobi also described how he was arrested and assaulted by police when he refused to identify the person who had come into the cafe. Ultimately, to avoid further assaults, he decided to tell what he knew.

Said Judge Foxcroft: "This witness made an excellent impression on us and we have no reason to disbelieve anything he told us. The persons whom he alleged were responsible for the assaults upon him were not witnesses and we are unable to test his allegations in that regard." The Judge said the court was conscious of the danger of relying on a single state witness and that such evidence had to be scrutinised with great care. However, this danger normally related to uncorroborated evidence.

The other evidence against Ngqandu was a confession he had made to a magistrate three days after the event. The confession, in which he implicated himself in the killing of the policeman, was ruled admissible after a trial within a trial. (Another confession which Ngqandu had made to a police lieutenant the day before he made the statement to the magistrate was ruled inadmissible by the court after it was found that Ngqandu had been assaulted by police.)

Ngqandu gave evidence to the effect that he drove his taxi on the day in question and went home to bed that night. He denied having visited the cafe and also denied showing anyone a newspaper report relating to the killing of constable Manene. Under cross-examination, he said what he told the magistrate was gleaned from what he had heard while

conveying passengers in his taxi, on the Monday following the events of the Sunday night of September 22. He implicated himself in the story of the attack on Constable Manene, because the policeman who took him to the magistrate had instructed him to do so.

Nggandu also denied that a tracksuit, which had blood on it and which was handed in as exhibit, was removed from his home at the time of his arrest. His mother, who gave evidence in this regard, said the tracksuit was removed from her home a few days after her son's arrest. The Judge said Nggandu never took the Court into his confidence as to how the tracksuit happened to have blood on it and this afforded further support for the Ngotobi's evidence.

The court found that Nggandu was a "most unsatisfactory witness" and that his confession constituted "reliable evidence" of his participation in the events of that night. The Judge said it was clear he was guilty of murder.

Judge Foxcroft said "after very anxious consideration", it was the court's unanimous view that extenuating circumstances were not present in the case. Based on his statement, Nggandu had played a leading role in the chase and repeated attacks upon Maneli.

APPLICATION FOR LEAVE TO APPEAL:

Counsel for Nggandu, Mr L Kalismashe, applied for leave to appeal on the grounds that Nggandu's confession to the magistrate was made just hours after he had made a pointing out to a police officer and on the day after he had made a confession to the same policeman. (The confession and pointing out to the policeman were not admitted as evidence because of the court's finding that Nggandu had been assaulted). Mr Kalimashe argued that there existed a reasonable possibility another Court could find the statement to the magistrate was equally tainted with the effects of the assault and that the it was therefore not admissable. He also argued that there was no evidence connecting the blood on the tracksuit either with Maneli or any of the accused.

Judge Foxcroft refused Nggandu leave to appeal, but as a result of a petition to the the Chief Justice, leave to appeal to the Appellate Division was granted. The appeal has not yet been heard.

PERSONAL CIRCUMSTANCES:

Nggandu was born on October 22, 1963 and passed standard eight at school. At the time of his arrest, he was engaged in a private taxi business.

THE WHITTLESEA CASE

Basayi Nxaleko Maqoko, 34, and Zwelinkosi Mjo, 29, were sentenced to death by Mr Justice Claasens in the Bisho Supreme Court, Ciskei, on June 23, 1987, for their role in the murder of Joseph Sebatana, who was beaten to death by a crowd of people in Whittlesea on February 1, 1986. Given an opportunity to speak before the death sentence was passed, Maqoko, who was found to be one of those who had "orchestrated" the events, said: "I am asking this court to forgive me because I was taken from my home...It is clear a blind man cannot drag a person who is not blind, who can see. As an uneducated man, I cannot lead people who can see."

BACKGROUND:

Maqoko and Mjo and three others faced charges of murder, attempted murder and assault. They were alleged to have murdered Joseph Sebatana, to have attempted to murder his wife, Jane Fuzani and to have assaulted Nota Dyani on the same day. One of the accused, Richard Matiwane, gave evidence against his four co-accused and was discharged at the end of the case. The other two were found guilty on the assault count and sentenced to an effective 18 months and 15 months respectively.

It emerged from the evidence as "common cause" that a group of people, referred to as Comrades, congregated in a house known as the "dark house" in Madakeni township, Whittlesea on February 1, 1986. During the course of the evening, various people were fetched and brought to the house where they were questioned about firearms being sought by the Comrades. In the "dark house", Joseph and Nota were assaulted with sjamboks because they did not co-operate with their questioners. They were then tied together and taken by the group to the river where they were again questioned about firearms and assaulted with sjamboks. The assaults endured for some time, during which time Joseph and Nota became untied. Once separated, Joseph went into the river to pray. At a certain stage, the assaults on Nota ceased, but the group continued assaulting Joseph. He was later carried back to his house and put on a mattress. At some stage, paraffin was poured over his wife, Jane Fuzani.

Four eye-witnesses gave evidence for the State: Jane Fuzani, Nota Dyani and the two brothers of Richard Matiwane - Bantu and Mzikayise Matiwane.

Bantu Matiwane testified that during the night, he was woken by Maqoko who told him that Richard was fighting with the comrades. Mzikayise was also woken and they were taken by car to the "dark house". He recognised all five accused on the way to the river and at the river, he saw Nota and Joseph being assaulted by a group, amongst whom was Maqoko. Mzikayise also testified that he was fetched by Maqoko and said he saw Joseph being assaulted at the river by Maqoko and Mjo. Nota told the court he was fetched by Richard Matiwane and that

Maqoko asked him for firearms. He told the court that he and Joseph were hit at the house by Maqoko. They were tied together, taken to the river and assaulted by various people, including Maqoko and Mjo.

Of the accused, Richard Matiwane testified that he was ordered to fetch Nota and Richard and he did so under duress. He identified Maqoko and Mjo as being among the assailants at the river and said Maqoko played a prominent part in the activities at the "dark house".

Maqoko said he was an unwilling participant and that one Vuyisele led the proceedings. He did not take part in any of the assaults upon Richard or Nota, but unable to escape because of threats. Mjo also said he was taken to the "dark house" against his will.

The court found Richard Matiwane's evidence to be "reasonably possibly true" and rejected the evidence of Maqoko and Mjo. It found that the two were members of the Comrades group and that they assaulted Richard and Nota with sjamboks - Maqoko did so in the "dark house" and Mjo at the river. "We find that Maqoko and Mjo shared a common purpose in the quest for firearms and that in that quest, violence was to be used," said Judge Claasens.

EXTENUATION:

Arguing that there were extenuating circumstances, Counsel for the two, Mr VEM Tshabalala, pointed out that sjamboks were not inherently dangerous weapons and that the assaults had not been continuous. He argued that because of the uncommon cause of Joseph's death, death might well not have been foreseen by Maqoko and Mjo. He also mentioned the effects on the individual caused by mob or group psychology.

The Judge said this could not apply to Maqoko who was "one of those who orchestrated the events of that night" and to Mjo who was "one of those instrumental in inciting mob violence". He found there were no extenuating circumstances for the two of them and sentenced them to death.

APPEAL:

The judge granted leave to appeal because of the unusual nature of Joseph's death. "The evidence was that he had been beaten by sjamboks (by Maqoko and Mjo) over a period of time and it was the consistent assault upon him with these instruments which eventually caused his death. Another court may come to a different conclusion in that the mens rea (intention) necessary to support the conviction could be found to be of a different nature to that which was found," he said.

The appeal has already been argued and lawyers are awaiting the outcome.

THEMBISILE BANETI - ANOTHER ONE FREED FROM DEATH ROW.

Thembisile Baneti walked out of death row a free man in November 1988 after the Appellate Division of the Ciskei Supreme Court set aside both his conviction and sentence. He had been on death row in the Ciskei's Middledrift prison for 13 months.

He is one of three Eastern Cape men to have had their convictions and death sentences set aside on appeal in recent months. This points to the fact that mistakes can be made by the courts and if for no other reason, the death penalty - which is irrevocable once carried out - should be abolished.

Thembisile, a resident of Alice, and 17 others were charged with the necklace murder of an alleged vigilante, Kwezi Nyengane, who was killed on July 19, 1986. One of the accused absconded after the first hearing, eleven others were acquitted and five were convicted of murder on October 12, 1987, by Mr Acting Justice Mynhardt. Thembisile was the only one of the five sentenced to death - the remaining four were given sentences ranging from 12 to 20 years.

On appeal, Mr Justice Diemont with Mr Justice van Winsen and Mr Justice Galgut concurring, set aside the convictions and sentences of all five people.

Sketching the background of events leading to the murder, Judge Diemont said that on the afternoon of July 19, 1986, a meeting attended by a crowd of between 100 to 200 people was held on the soccer field in the Nondyoza area of Healdtown. At the meeting, two proposals were put forward: that Kwezi should be burnt to death or that he should be chased out of the township. From the soccer field, the group of people moved through the township visiting various homes and places in search of their victim. Eventually he was located at the house of the state witness Nomfusi Gqamane. Kwezi escaped from the kitchen, was chased, caught and assaulted near the house of George Nobolwana. He was then burnt to death.

The trial court found that Thembisile proposed this action against Kwezi, incited the group at Nomfusi's house to kill him, threatened to burn down the room in which Kwezi was hiding, used a large stone or an axe to break the locked door of the room and took an active part in the killing of Kwezi.

Judge Diemont said in order to arrive at these findings, the trial court relied entirely on the evidence of four women called by the State - Nonsikelelo, Nomathansanga, Nomfusi and Nombali. It also relied on its finding that Thembisile had given false evidence that he was at home that day.

The Judge said the critical question was whether the evidence given by the four witnesses should have been accepted as truthful by the trial court.

The first of these two witnesses, Nonsikelelo and Nomathansanqa, both 17 years old, were warned as accomplices. Judge Diemont said it was not surprising that the trial court found that in certain respects, both girls had lied and that some of their evidence had to be rejected as false. But, despite the trial court's finding that the two witnesses were not entitled to indemnification from prosecution, it held that the evidence of these two accomplices could be accepted in so far as it was corroborated by other evidence. However, the unsatisfactory features in the evidence given by Nomathansanqa led one of the members of the court to disagree with the majority in the case of the convictions of two of the accused.

"The reasoning of the dissenting member should have been applied by the whole (trial) court in the case of (all of the accused who were convicted)...these two witnesses proved so unreliable in the witness box that their evidence should have been totally rejected," said Judge Diemont.

With regard to the evidence of the two other witnesses, Nomfusi and Nombali, the judge said neither of the two were present at the meeting on the soccer field and could shed no light on the events that took place there.

In respect of the events at Nomfusi's house, where Kwezi had taken refuge, Judge Diemont said there was merit in the argument submitted by the appellants' Counsel that the trial court had overlooked irreconcilable conflicts in the evidence of the witnesses. "The picture is one of great confusion - an excited and noisy crowd of some 200 or more young people dancing, shouting and singing. It is not surprising that the evidence contains so much uncertainty and so many contradictions. It is evidence on which it is wholly unsafe to rely for purposes of a conviction," he said.

And on the actual killing, Judge Diemont said evidence of the killing was given by the two girls, Nomathansanqa and Nonsikelelo. No reliance could be placed on their evidence and the court was left in the dark as to the role, if any, played by Thembisile when the "unfortunate Kwezi" was set alight.

The Judge therefore concluded that Thembisile should not, on the evidence before the court, have been convicted of murder.

MIKI YELANI versus THE STATE

On September 29, 1987, a young man from Uitenhage was sentenced to death in the Grahamstown Supreme Court. Fourteen months later, sitting in his cell on death row in Pretoria, Miki Yelani heard that his appeal had succeeded. Eager not to spend one more minute in the place where the sense of death is all-pervasive, Miki declined the prison's offer of supper and headed for home...

In Bloemfontein that day (November 24), Mr Justice Smallberger, with Judges Botha and Nicholas concurring, handed down a judgement which set aside both Miki's conviction and the death sentence imposed on him by the current Judge President of the Eastern Cape, Judge DDV Kannemeyer. Even though there was no evidence that Miki was at the scene of the killing, Judge Kannemeyer found him guilty of murder on the basis of common purpose.

Miki was one of nine people charged with the murder of Thami Ntshenge, who was burnt to death in Kabah, Uitenhage, on April 9, 1985. The killing was preceded by the burning of the house of one of the accused on April 6, 1985. The following afternoon (Sunday), a meeting was held to discuss the incident. Thami was present and returned home later that night. On the Tuesday, a crowd of people caught Thami and took him to a house where his fate was discussed. He was then taken outside, stoned and set alight. Miki was not present at any of the events on the Tuesday.

The case against Miki was confined to the role he played at the meeting on the Sunday. Two witnesses testified to his involvement in the meeting - Thami's mother, Ida, and her friend Deborah. In addition, evidence was given by Sipho Toise to whom Miki had made a statement the day after Thami's death. The trial court accepted a part of this statement in which Miki said he had been in charge of the meeting. However, it rejected the exculpatory portion of the statement that no decision to burn Thami had been taken at the Sunday meeting and that Miki would have saved Thami if he had known he was to be killed.

On the strength of the evidence given by these three witnesses, the trial court found Miki was the chairman at the Sunday meeting where Thami had been sentenced to death for allegedly burning down Gloria's house. The court's reasoning was that if a person in Miki's position "presides at a tribunal which sentences a person to death and if... the victim is killed when the sentence is carried out, that person is as much responsible for the death of the deceased as is the person who set him on fire." Miki was therefore guilty of murder.

The Appeal Court accepted the conclusion that Miki had presided over the Sunday meeting. However, said Judge Smallberger, the cardinal issue was whether Miki had sentenced Thami to death at that meeting.

He said if a decision had been taken to burn Thami, one would have expected it to be carried out with immediate effect. However, no-one looked for Thami on the Sunday night, the whole of Monday or the Tuesday morning. There was also no evidence that Thami went into hiding. "Why was it necessary to hold a further meeting on the Tuesday afternoon - if a decision on what was to happen to (Thami) had already been taken?"

Considering the evidence of Ida and Deborah, who were both in their 60's, the judge pointed out that they were testifying to events that had taken place well over two years previously and neither had made a statement concerning the events at the Sunday meeting until about one week before the trial. "These are features which are not conducive to accurate recollection," he said. There were significant differences in the versions given by Ida and Deborah. They were differences which left one "at least in some doubt" as to whether a final decision was reached about Thami's fate.

He said the trial court did not, "in an otherwise careful and convincing judgement," subject these differences to a careful scrutiny. Had it done so, the court would have concluded that Miki's exculpatory statement was sufficiently cogent to be accepted as reasonably possibly true.

The Judge said it had been conceded by the State that if the whole of Miki's exculpatory statement were accepted, the foundation of his conviction would fall away.

His conviction and sentence were thus set aside.