IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CASE NO. 185/92

In the matter between

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| JULY PETROS MHLONGO | First Appellant |
| MSHIYENI NTSHANGASE | Second Appellant |
| ELLIOT MADLOTI MDZINISO | Third Appellant |
| and | |
| REX | Respondent |

JUDGMENT

Browde JA:

The three Appellants (referred to herein as Nos. 1, 2 and 3) were charged in the High Court on nine counts as follows:-On count 1 all three Appellants were charged with the murder of Alvit Dlamini at Malandzela on 15th March 1992. On count 2 the three Appellants were charged with being in possession of parts of a human body in contravention of section 8Obis. (1) (a) of chapter 4 of the Crimes Act 1889, as amended by Act No. 7 of 1986. This offence was alleged to have been committed at Malandzela on 16 March 1992. On counts 3 and 4 Appellants 1 and 2 were charged with the attempted murder of Nokubonga Mogongo and Zablon Dlamini also at Malandzela on 15

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March 1992. On count 5 Appellants 1 and 2 were charged with robbery at Malandzela on the same date the victim alleged being Alvit Dlamini. In regard to this count it was alleged that the Appellants, acting in common purpose, unlawfully assaulted Alvit Dlamini and by intentionally using force and violence to induce submission by the said Dlamini took and stole from him certain property one Bruno 9mm pistol . It should be noted as well that insofar as counts 1, 3 and 4 are concerned it was alleged that the Appellants acted in furtherance of a common purpose in committing the offences charged.

Counts 6, 7 and 8 allege contraventions of section 3(1) and 11(2) of the Arms and Ammunition Act No. 24 of 1964 as amended by Act 6 of 1988. These concern Appellant No. 1 only, it having been alleged that he was in possession of two firearms and eight rounds of ammunition at Malandzela on 16 March 1992.

Counts 9 and 10 allege contraventions by Appellant No. 2 of sections 3(1) and 1(2) of the Arms and Ammunition Act as amended namely wrongful and unlawful possession of a firearm and six rounds of ammunition at Malandzela on 16 March 1992.

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As was pointed out by Dunn J in his judgment in the court a quo the references to section 3(1) of the Arms and Ammunition Act should have been a reference to section 14 (1) of the Act as amended.

Section 3(1) is a section by which the provisions of the original section were amended. The numbering of the original Act was not affected by the amending Act. As there appeared to have been no prejudice to any of the Appellants -the relevant charges were clearly particularised and the Appellants knew what case they were to meet - no point was taken by the Appellants in regard to these apparent discrepancies.

The deceased, Alvit Dlamini, was the owner of a farm at Malandzela which, when he purchased it, had several squatters settled on it. These squatters had made representation to the traditional leaders at Lobamba with a view to acquiring the farm upon the deceased being reimbursed in the amount of the purchase price which he paid for it. Nothing appears to have come of these representations and the deceased remained the registered owner of the farm. However the relationship between the deceased and the squatters was very strained to put it mildly. Appellant No. 3 who is a traditional healer was one of the squatters on the farm and Appellants No. 1 and 2 both of whom were normally resident in South Africa had been residing at the homestead of Appellant No. 3 for six days prior to the deceased's death.

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The circumstances under which the deceased was murdered are not in dispute and are set out fully in Dunn J's judgment. It appears that on the day in question the deceased drove his cattle to a dipping tank on the farm at about 7.00 a.m. in the morning - Sunday March 15. At the deceased's request his wife Siphiwe called at the deceased's brother's house and requested him to join the deceased at the dipping tank. The deceased's wife drove the deceased's Nissan light delivery vehicle and had her three-month old baby and a young child Khamyisile with her in the cab. On completion of the dipping at about 9.00 a.m. the deceased, his brother Zablon Dlamini, Zablon's son Sifiso and a young child, Nokubonga Magongo, seated themselves on the back of the light delivery vehicle. Siphiwe drove the vehicle and still had her baby and Khamyisile with her in the cab. When the vehicle reached an incline where there were shrubs and tall grass at the sides of the road somebody shouted "watch out!" and Siphiwe saw two men with guns running towards the vehicle from the shrubs on the right hand side of the road. There were gun shots. Siphiwe panicked and in fear sharply accelerated the vehicle away from the scene. She drove at a fast speed for a distance and on looking back realised that her passengers were no longer on the vehicle. Siphiwe drove home and on finding no adults there drove back towards the scene. She met Zablon and Nokubonga along the way and Zablon informed her that the deceased had been killed. Nokubonga was injured on the left side of the chest. Zablon took control of the

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vehicle and a report was made to the Swaziland Defence Force camp in the area. Nokubonga was taken to a clinic for treatment. Zablon returned with Siphiwe to the scene and found some people who had gathered around the deceased's body which was lying there. Members of the Royal Swaziland Police arrived at about 11.00 a.m.

There is also no dispute about the cause of the deceased's death, namely multiple gunshot wounds.

Dr Berson who performed the post mortem found that the deceased was struck by at least three bullets one through the right jaw, one through the right thigh and one over the left upper arm. He also found that the deceased's penis, scrotum and testes had been removed in what the doctor described as a deliberate mutilation with a sharp instrument.

It appears that when Siphiwe heard the shout "watch out" Zablon was seated on the right hand side of the vehicle behind the driver and the deceased was on the left hand side. According to Zablon the two men who were seen by Siphiwe emerged from the bushes carrying handguns. The men approached

the vehicle started firing and the deceased was hit.

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Zablon's evidence was to the effect that he could identify some of the clothes worn by the two men.

One of the men was wearing a brown dustcoat while the other was wearing what appeared to be a tracksuit top. The top was bluish in colour with yellowish blocks or stripes on the front of the chest.

The two men ran past Zablon towards the deceased who was lying on the ground and the man in the brown dust coat fired a shot at the deceased. From a distance of approximately 1km Zablon, who had run away, looked back and saw the man in the brown dustcoat bending over the deceased. (In this regard Dunn J mistakenly stated that it was the man in the bluish tracksuit top who bent over the deceased but nothing seems to turn on this). The other man was standing a short distance away.

Both thereafter ran away from the scene. Zablon confirmed having taken over control of the vehicle from Siphiwe in order to make a report to the soldiers and he then returned to the scene where he saw the bullet wounds on the deceased and the fact that the deceased's genital organs had been removed. Zablon told the Court that he gave the police a description of the clothes he had seen the two men wearing but admitted that he was not in a position to identify the two men. He did say, however, that he saw the clothes very clearly and described them to the police before they came into police possession. Thereafter, when shown clothing by the police, he confirmed that they were those seen by him being worn by the men at the scene.

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The question of the identification of the appellants has been a feature of the defence case and it is therefore pertinent to refer to a piece of evidence given by Zablon. He said that when he later saw the first two appellants in the custody of the police "I was able to recognise them when looking at them properly, though I had the slightest moment of seeing them at the scene". Having regard to the fact that Zablon also stated that that was the first time he had ever seen the appellants no weight can, in my view, be attached to this identification. It remains only to be said, as far as Zablon is concerned, that on being recalled he conceded there are many dustcoats similar to the one he saw on the fateful day and that he could not remember the colour of the decoration on the front of the tracksuit.

Another alleged eye-witness was the 17 year old Dumisani Mazuja. He stayed at the home of appellant No. 3 where he looked after the cattle. In his evidence in chief he said that on the morning of the murder he saw "accused Numbers 1 and 2 - they were shooting a vehicle" . He then described how they (the 2 appellants) took the direction towards the dipping tank and then shot at the vehicle "when it was leaving or driving away". He said he remembered hearing three shots while they were "chasing the car". He also said that No. 1 was dressed in a brown dustcoat while No. 2 had on a pair of shorts which were multicoloured. A material point

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regarding this witness' evidence which was relied on by counsel for the first two appellants namely Mr Mamba and Mr Matsebula, was that although he was later in the day told that the shooting had resulted in the death of the deceased he did not tell the police, despite ample opportunity to do so (he was actually taken into custody and questioned by the police) that he knew the identity of those who did the shooting. This is indeed a strange circumstance. He knew the appearance of the first two appellants very well since, as I have said, they had spent some days at the homestead of No. 3 prior to the day of the murder and Maziya looked after No. 3's cattle. He says he recognised them as the persons who were "shooting the vehicle" yet, despite being taken into custody and kept at the police

station for two days where he made a statement, he did not divulge the identity of the two appellants.

This must throw some doubt on the reliability, if not the sincerity of his identification. However he impressed Dunn J. as an honest witness and his corroboration of the clothing worn by the culprits must have considerable cogency since there was no suggestion, as far as I am aware, that Maziya had any reason to conspire with the other witnesses regarding this feature of the case. Another crown witness who described the brown dust coat was Mphambukeli Joseph Dlamini who was employed by the deceased as a herdman. He described how two men were seen by him to cross the river and not walk along the existing highway, one wearing a brown dust coat. This was on the day in question and prima facie

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would also appear to be corporation of the evidence relating to the wearing of the brown dustcoat by one of the culprits. On being recalled in regard to what he saw the men wearing his evidence was very confused, however, and I believe that little or no weight can be attached to his evidence save for such evidence on which he was not seriously cross-examined namely the crossing of the river by the two men.

It needs hardly to be said that were the evidence of identification referred to thus far be the only evidence against the appellants the crown case would indeed be a weak one. The crown also relied however on the evidence of Detective Sub-Inspector William B. Dlamini who testified to the pointing out by the appellants of human parts in No. 3's hut, of the pointing out in the boot of his car by No. 1 of a wet and muddy dust coat which he admitted he had worn on "the previous day" i.e. the day of the murder. Also the pointing out by No. 1 of guns wrapped in socks and by Nos 1 and 2 of a knife in tall grass where, so they are alleged to have said, they had hidden the knife. The final pointing out was by No. 2 of clothing which he had worn on the fateful day, namely, a dark green and yellow shirt and a pair of shorts with black, white and "foaming" colours.

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It was on these pointings out that Dunn J. largely relied in coming to the conclusion that the case had been proved against the appellants. There are certain valid criticisms which have been directed by defence counsel at the police evidence. The main thrust on appeal has been, however, that the "pointing out" were not proved to have been freely and voluntarily made and that, therefore, the sub-stratum of the crown case should fall away. It is perhaps regrettable that this aspect of the matter, if it was argued before the learned judge a quo, was not specifically dealt with in his judgment. As I have said he found the first two appellants guilty of the murder largely on the pointings out and what was discovered as a result thereof and the third appellant guilty as an accessory after the fact. This latter verdict was based almost entirely on the fact (and this involved an acceptance of the police evidence) that No. 3 informed the police of the presence of the genital organs at his homestead and pointed out the hut in which they were.

The attack levelled by counsel for the first two appellants on the verdict a quo can, I think be summarised as follows:-

i. If a pointing out is to be admitted in evidence it has to be freely and voluntarily done and that the crown must prove it was so done.

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ii. The pointings out were part of a confession made by the appellants whilst they were being interrogated - this much is clear from the inadmissible evidence led from the witness Sub-

Inspector Dlamini in which he said explicitly that the appellants admitted to him that they had shot the deceased and cut off his genital organs. The fact that Dunn J. ruled the evidence to be inadmissible does not detract from the clear effect of the evidence - namely that the appellants made a confession to Dlamini.

iii. The warning given by Dlamini to the appellants prior to their interrogation was hopelessly inadequate albeit that the confession would have been inadmissible even with a proper warning. This point is also well made since Dlamini's words were "... if there was anything he knew about that (the killing and mutilation of the deceased) he should disclose it. And that if ... he was not obliged if he did not want to say anything about it". It need hardly be stated that any policeman of the most elementary experience would know that that is not a proper warning. The detainee must at least be warned that if he chooses to say anything that it could later be used in evidence against him.

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This was not done. The evidence was that the appellants, although making full confessions to the police, declined to repeat them before a magistrate. This strikes one as strange and suggests that the confessions might well have been made under duress and the police were not going to take the chance that this might be disclosed to the magistrate. Whatever the truth may be, however, it is my view that the evidence of the crown witnesses falls short of proving that the confessions and the subsequent pointings out were made freely and voluntarily.

iv. Section 227(2) of the Criminal Law & Procedure Act 67 of 1938 reads -

"Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him."

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This sub-section is in almost identical terms to section 218(2) of the South African Act No. 51 of 1977.

The latter sub-section has been considered by the Appellate Division and has been said "not to permit evidence of a confession by an accused person in the guise of a pointing out by him".

S v Magwaza 1985 (3) SA 29 at 36 and, put another way, that the section validates only the pointing out and not the reference to a confession under the pretence of a pointing out.

S v Mbele 1981 (2) SA 738 at 743.

In the present case the pointing out of the knife was accompanied, according to the police evidence, by the statement that the place pointed out was "where they (Nos 1 and 2) had hidden the knife". The pointing out of the clothes in his boot was accompanied by a statement from No. 1 that those were the clothes he had worn on the previous day. The pointing out of the guns was accompanied by a claim by No. 1 that the pistol was his and by No. 2 that he owned the revolver.

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It seems to me that there is a great deal of cogency in the criticism levelled by both Mr Mamba and Mr Matsemela and also, on behalf of Appellant No. 3 by Mr Ntiwane, at the apparent acceptance by the trial judge of the pointings out without consideration of their admissibility in the circumstances. In this regard I should also refer to the passage from Magwaza's case (supra) at p. 3 9 where Hoexter JA said:

"The next question which presents itself is whether it is somehow possible to excise the bare pointing out by the appellant to Captain Oelofse from the statements which accompanied it, and thus still to rely on the former. When a person points out a thing his act proves that he has knowledge of some fact relating to the thing. See R v Tebetha 1959 (2) SA 337 (A) at 346. It is one thing for a Court to receive evidence of a pointing out by an accused when the Court knows no wore than that the pointing out may or may not form part of an inadmissible confession by the accused. It is an entirely different situation, and one which cannot be countenanced, for a Court to have regard to what an accused has pointed out when that Court has certain knowledge not only that the pointing out forms part of an inadmissible confession but also what the precise content of the inadmissible confession is.

In my view it is a necessary consequence of the exclusion of the inadmissible confession that in considering the criminal responsibility of the appellant in this case all the evidence of Captain Oelofse should be entirely disregarded".

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As I have indicated it is clear to me that the pointings out were part of an inadmissible confession and the precise content of those confessions was expressly stated by Sub-inspector Dlamini in the evidence which was ruled to be inadmissible by Dunn J.

There is a further consideration which I think needs to be adumbrated upon. In S v Sheehama 1991 (2) SA 860 to which we were referred by counsel it was held that (and I quote the headnote) -

"A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of s 219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily. It is also a basic principle of our law that an accused cannot be forced to make self-incriminating statements against his will, and it is therefore inherently improbable that the Legislature, with a view to sound legal policy, could ever have had the intention in s 218(2) of Act 51 of 1977 to authorise evidence of forced pointings out.

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The decisions in the cases of S__v

Tsotsobe and Others 1983 (1) SA 856 (A) and S v Shezi 1985 (3) SA 900 (A) to the effect that a relevant pointing out does not amount to an extra-judicial admission are clearly wrong.

The decision in the case of S v Ismail and Others (1) 1965 (l) SA 44 6 (N), which was followed in the cases of S_v Bvuure (1) 1974 (1) SA 206 (R) ; S__v Nyembe 1982 (1) SA 835 (A), and in the Tsotsobe and Shezi decisions supra, that evidence of a forced pointing out is admissible in law is clearly wrong. The precedents set by these cases should also for another reason not be maintained, viz the objection in principle which exists against the admissibility of evidence of forced pointings out.

It was never the intention of the Legislature in s 218(2) of Act 51 of 1977 to admit evidence of a pointing out which was otherwise inadmissible as soon as such pointing out formed part of an inadmissible confession or statement. The section, on a correct interpretation thereof, provides that evidence of a pointing out which is otherwise admissible shall not be inadmissible merely by virtue of the fact that it forms part of an inadmissible confession or statement. Put differently: when evidence of a pointing out is otherwise inadmissible, it will not be admissible simply because it forms part of an inadmissible confession or statement."

In my judgment the evidence of the pointings out in the context of the circumstances in which they were made was evidence of confessions in the guise of pointing out and were not proved to have been

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made freely and voluntarily. On the contrary they were probably effected under duress. They ought, therefore, to have been disregarded by the court a quo. If that had been done then all that would have remained is, as I have already indicated, a very weak identification of the first two appellants by the crown witnesses. In my view, therefore, the two appellants should have been found not guilty on all the counts with which they were charged.

As far as the third appellant is concerned he was found guilty as an accessory after the fact by virtue of his possession of the genital organs. These were found in No. 3's hut and were, correctly in my view, found to be the genital organs of the deceased Alvit Dlamini . In his judgment Dunn J adopted a statement of the law in Burchell and Hunt, South African Criminal Law & Procedure to the effect that it is sufficient to render an accused an accessory after the fact to the crime charged if he "had constructive knowledge in the sense that he foresaw the possibility of the crime's commission and yet recklessly associated himself with it". On the "evidence that No. 3 knew that the crime had been

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committed the learned judge decided that as the genital organs were found in his hut No. 3 must have gained knowledge of the genital organs with full knowledge of the murder and mutilation of the deceased. This was the basis for Dunn J's conclusion that No. 3 was an accessory after the fact. This, too, has been brought under the spotlight in this appeal. Crown counsel has urged us to find that the mere possession of the genital organs by No. 3 is sufficient association by him with the murder as to make him an accessory. He has referred us to decided case both in this Court and South African courts and has gone so far as to suggest that the mere indication of approval by No. 3 of the perpetrators' actions would suffice to render him an accessory. He has relied on R__v Jongani 1937 AD 400 as a case where mere approval of the offence ex post facto was regarded as sufficient to impose legal liability. I do not think that that is an acceptable proposition and doubt whether Jongani's case is really authority for it. In that case it was not disputed by the defence that the accused was at least an accessory to the crime of attempted murder and the judgments show that there was evidence that the accused "protected" and "sheltered" the criminal whom he "knew had committed the offence.

While it is true

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in this case, as the learned judge found, that No. 3 gave no explanation for his possession and that therefore an inference against him might justifiably be drawn, the question remains whether the case against him has been proved beyond reasonable doubt. I can do no better, I think, than to quote in extenso from the judgment of Marais J in S v Augustine 1986 (3) SA 294 at 297H. He said:-

"Before I proceed any further, I should perhaps dispose of any suggestions that a person who knowingly receives a part of the proceeds of the sale of stolen goods commits theft or the offence of receiving stolen property. That he does not commit theft seems to me to be obvious. He took no part in the theft of the goods or in their sale or disposal. It seems equally obvious that he has not received stolen property. The money which he received was not stolen money. Nor do I think it can be suggested that he is an accessory after the fact to either of these two crimes. He has in no sense assisted in the commission of a crime, or enabled the thief to escape justice. I am aware that it is not

uncommon for Judges and writers on the law to speak of an accessory after the fact as being one who "associates" himself with an already committed crime, and that it may be suggested that one who knowingly takes a benefit from the commission of a crime "associates" himself with it. The use of the word "associates" in this context is perhaps unfortunate, because it tends to obscure the fact that something more than mere ratification or approval of an offence is required before criminal liability will exist. The writer of a letter of congratulation to the killer of a

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detested member of the community may be associating himself with the crime of murder, but he is certainly not an accessory or an accomplice, and he attracts no criminal liability. Just how unhelpful the use of this terminology is, is well illustrated in the decision of the Swaziland Court of Appeal in Mfanyana Joseph Dlamini v__R 1977-78 Swaziland Law Reports 90. The Court a quo had been beguiled by the notion that, if the Crown proved "an 'association' in the broad sense by No 2 accused in the killing within the law as expounded in Nkau Majara's case", a conviction was justified. It lost sight of the fact that in R v Nkau Majara 1954 AC 235 (PC) the accused was a headman who was under a legal obligation to take action to prevent the escape of the killer, so that even inaction could suffice to render him liable as an accessory after the fact to murder, and it found such an "association" to have been proved. The conduct upon which the find (in Dlamini 's case) rested was substantially the following. After accused No. 1 had stabbed the deceased, and left him and the knife with which he had stabbed him lying on the ground, accused No. 2, who had witnessed all this, placed his own knife upon the ground in such a way that it crossed the knife of accused No. 1. Accused No 2 then suggested to accused No 1 that they sleep at the home of accused No 2, and not the home of accused No 1.

The Court of Appeal did not consider it to be a necessary inference that the crossing of the knives showed that accused No 2 put "his seal of approval" on the killings as the Court a quo had found it did. Nor did it feel that the fact that accused No 2 accompanied accused No 1 home to sleep did so.

Oglivie Thompson P concluded his judgment with the following words:

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"As a matter of language, 'association' is no doubt a word of wide import: but, having regard to the onus of proof resting upon the Crown, the record as a whole falls short, in my view, of establishing against accused No 2 an 'association' rendering him criminally liable as an accessory after the fact to the killing of the deceased.

The case is near the border-line and I have given it anxious consideration. The conclusion which I have reached is that accused No 2 was not proved beyond reasonable doubt to have 'associated' himself with the killing of the deceased to a degree sufficient to constitute him an accessory after the fact within the meaning of that term as interpreted in Majara's case supra."

What emerges clearly from this judgment is that proof that an accused has "associated" himself in a general sense with a crime ex post facto, does not mean that he is criminally liable. Whether or not he is so liable depends upon whether he did so "to a degree sufficient to constitute him an accessory after the fact within the meaning of that term as interpreted in Majara's case"".

Although the case of No. 3 is also a border-line one I think he must be given the benefit of the doubt. His failure to give evidence does not, in my opinion, quite fill the lacuna in the crown case namely the failure to lead any substantive evidence that No. 3 knew that in taking possession of the genital organs he was assisting,

protecting, sheltering or in some other way identifying himself with the perpetrators of the murder.

In my judgment the appeal on this count should be upheld.

It is not surprising that no appeal was brought against the conviction and sentence of No. 3 on the charge of possession of human parts and such conviction and sentence therefore stand.

The result is that I would uphold the appeal of No. 1 appellant on the counts on which he was found guilty, namely counts 1, 2, 6, 7 and 8 (the latter three all depending on the admissibility of the pointings out) and would set aside his convictions and sentences.

As far as No. 2 is concerned I would uphold his appeal on counts 1, 2, 9 and 10 and would set aside his conviction and sentence on those counts. I would uphold No. 3's appeal on count 2 and would



set aside his conviction and sentence on that count.

J. BROWDE J.A .

I agree. The appeal of No 1 Appellant on the counts on which he was found guilty, namely counts 1, 2, 6, 7 and 8 is upheld and the convictions and sentences are set aside.

The appeal of No 2 Appellant on counts 1, 2, 9 and 10 is upheld and his conviction and sentences are set aside.

The appeal of No 3 Appellant is upheld on count 2 and his conviction and sentence on that count are set aside.

KOTZE J.A.

I agree

HULL CJ. (A.J.A)