C. of A. (CRI) 8-11 of 1980

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

1. LEKENA MOSHEPHI)
2. SEFALI LEFATLE) Appellants
3. SHOAEPANE RANKU)
4. KHOANYANE LEKHAFOLA)

v.

R E X Respondent

HELD AT MASERU

Coram:

MAISELS, P.
VAN WINSEN, J.A.
MARAIS, A.J.A.

J U D G M E N T

Marais, A.J.A.

The four appellants were convicted by the Chief Justice and two assessors of murdering one, Ralekhooa Ntsoane during or about the month of February 1979 at or near Qanya in the district of Qacha's Nek. Second appellant was sentenced to be detained during His Majesty's pleasure in terms of the second proviso to section 291 of the Criminal Procedure and Evidence Proclamation No. 59 of 1938. The other three appellants were sentenced to death. All the appellants appeal against their convictions, and the three appellants who were sentenced to death also appeal against their sentences.

An unusual feature of the case is that the defence contests, inter alia, the Crown's allegation that Ralekhooa Ntsoane is indeed dead. I shall commence by sketching the facts which were either common cause, or not disputed. Ntsoane lived at Mpharane in the district of Matatiele in South Africa. He bade his wife farewell on the 4th January 1979, saying that he was going to search for his missing horse and foal. He borrowed a horse and set out on horseback for Lesotho. He was

/never

never seen again by his wife. He had said that he would also visit his wife's sister to pay dowry. She was a day's ride away. To that end, he took with him R300.00. He failed to arrive.

When he left, he was wearing, inter alia, a green and orange Lesolanka blanket, a pink blanket, black trousers and gum-boots. His horse was saddled, and he took with him a purse containing money, and a plastic receptacle containing beer. After approximately a month had passed, and he had not returned, his wife reported his failure to return to the police at Matatiele. Some time thereafter, she was asked to call at the police station at Qacha's Nek in Lesotho. There, on the 18th April, 1979, she purported to identify as her missing husband's property, a pair of black trousers, a green and orange Lesolanka blanket, a pair of gum-boots, a saddle, saddle bags, a bridle, a black purse and a plastic receptacle. How the police came into possession of these articles will emerge in due course.

Mrs. Ntsoane described her husband as being of medium build and height, and sixty years of age. He had a full beard and four of his front teeth were missing.

On the 8th April 1980 the skeleton of a human male was found on top of Khamokha mountain, in Lesotho. The hands of the skeleton were bound with a grass rope and the skull lay four or five feet away from the rest of the body. It was impossible to determine the time or cause of death by scientific examination. A number of teeth were missing. They included four front teeth which the scientific evidence established were missing prior to death. The Crown contended that these skeletal remains were those of Ralekhooa Ntsoane.

The case for the Crown rested partly upon circumstantial evidence, partly upon direct evidence of the participation of the four appellants in a murderous assault upon a person alleged to be Ralekhooa Ntsoane, and partly upon incriminating admissions and conduct. The appellants' defence consisted of a total denial of any knowledge of Ralekhooa Ntsoane, or of his death, and of any complicity whatsoever in the alleged killing.

On appeal, counsel for the appellants attacked the convictions upon four broad grounds. Firstly, as I have said, he contended that the Crown had failed to prove that the skeletal remains were indeed those of Ralekhooa Ntsoane. Secondly, he submitted that the evidence of the only witness

/who claimed

who claimed to have seen the appellants attack and kill a person in the vicinity of the spot where the skeletal remains were found, was untrustworthy and should not have been accepted by the Court a quo. Thirdly, he argued that certain articles which the Court below found belonged to the deceased, and which were found in the possession of the appellants, had not been proved beyond reasonable doubt to have belonged to the deceased. Fourthly, he contended that the Crown had failed to prove the incriminating admissions and conduct attributed to the appellants by certain of the Crown witnesses.

The appeal thus raises only questions of fact. Before I review the evidence in broad, some preliminary observations are desirable.

The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again, together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees. I shall not summarise all of the evidence. But some of it is so critical to the case of the Crown and the appellants that a synopsis is necessary, for a proper appreciation of the contentions which were advanced. I turn now to the evidence.

THE DIRECT EVIDENCE

Sakoentsane Mokhahle (PW6) was called by the Crown. His evidence, if true, was of crucial significance. He did not know his own age. The Court a quo estimated him to be about 16 years of age. It was common cause that he knew all of the appellants. Indeed, in January 1979 he was in first appellant's

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employ as a herdsman, and lived with him. Second appellant also lived there. Third appellant's home was near his own, and fourth appellant came from a nearby village.

Late one afternoon, while the witness was rounding up the cattle to bring them to the cattle post, a stranger on horseback drew nigh. The stranger said that he was searching for his horses, that he had met first appellant at the cattle post, and that first appellant had invited him to spend the night at his cattle post. They returned to the cattle post together. There they found first and second appellants and one, Thakaso. At first appellant's request, the witness unsaddled the stranger's horse and hobbled it. The stranger produced a plastic container in which there was beer, and some apples. At the stranger's invitation, they all partook of the beer and the apples. The stranger retired to sleep and so did Thakaso and the witness. First and second appellants did not retire and continued talking to one another.

During the night, the witness was wakened by the screaming of the stranger. Thakaso remained sleeping. First and second appellants left the hut and the stranger immediately followed suit. Second appellant had an axe in his possession. The witness went to the door and saw first appellant exhorting three dogs to attack the stranger. They brought him to the ground and first appellant then called them off. The stranger got up and joined the witness near the kraal. The witness could not say what became of first and second appellants. The stranger stayed with him for a short while and then disappeared. The witness did not return to the hut at the cattle post. Instead, he slept in the veld.

The following morning, the witness saw first and second appellant at the cattle post. The hut was visible from the place in the veld where he had spent the night. They were saddling the stranger's horse. The sun had already risen. The stranger mounted his horse. First and second appellants did likewise and the three of them moved off along the pass leading to Khamokha. They disappeared from view when they entered a valley. When they came into view again they had been joined by two other persons who were also on horseback. The witness saw the stranger being struck while he was on his horse. A prolonged assault upon him ensued. The other four persons all participated in the assault. They dismounted for the purpose. The witness could not discern the faces of the stranger's

/assailants.

assailants. The assault occurred several hundred yards away. But he said that two of the assailants were wearing blankets similar in colour to those which first and second appellants were wearing when they set out with the stranger. First appellant had been wearing a red blanket and second appellant a "Sandringham" blanket. He said that the other two assailants were wearing respectively, a black "Lesolanka" blanket and a donkey coloured blanket. The stranger was struck with shiny objects which he could not identify.

The assault came to an end and the stranger was carried away by his assailants to another place where there was a crevice between some rocks. There they placed stones upon him and left him. The four persons who had participated in the attack upon the stranger then went to the cattle post. They brought the stranger's horse with them. The witness remained in the veld and saw that the four persons were the four appellants. Later, first, third and fourth appellants left the cattle post. Second appellant remained behind.

The witness then returned to the cattle post. It was by now afternoon. He saw at this cattle post certain articles which he had seen before in the stranger's possession, namely, a pair of gum-boots, a pair of black trousers and saddle bags. He said that he asked second appellant where the stranger was and drew attention to the fact that these articles belonged to the stranger. Second appellant's reply was that they had killed him.

At this stage I should mention that the witness also testified that, when the stranger arrived, he had in his possession certain of the exhibits which were before the Court a quo, namely, the black trousers (Exhibit 1), a purse (Exhibit 2), a plastic container (Exhibit 3), a blanket (Exhibit 4), a saddle (Exhibit 5a), a bridle (Exhibit 5b), a saddle bag (Exhibit 6) and a pair of gum-boots (Exhibit 7).

The witness said that he was shocked by what he had seen. He did not remain at the cattle post. Instead, he returned to first appellant's home. There he found first appellant's mother. He told her that first appellant had killed a person. When first appellant returned home the following day, his mother confronted him with this allegation. First appellant denied it. This episode engendered animosity towards him on the part of first appellant and the witness

decided to leave and to return to his own home.

That, in broad, was the evidence of the only alleged eye-witness.

THE CIRCUMSTANTIAL EVIDENCE

That after the discovery of the skeletal remains, the appellants were in possession of certain of the articles which the Crown sought to establish belonged to the deceased, Ralekhooa Ntsoane, was not disputed. Thus, first appellant claimed that the saddle (Exhibit 5a) was his. Second appellant claimed ownership of the black trousers (Exhibit 1), the purse(Exhibit 2), the plastic container (Exhibit 3), and the gum-boots (Exhibit 7). Third appellant claimed that the blanket (Exhibit 4) was his. Fourth appellant said that he was the owner of the bridle (Exhibit 5b). Indeed, in some instances, the appellants provided reciprocal evidential support for their respective claims. Second appellant confirmed that the saddle (Exhibit 5a) and the plastic container (Exhibit 3), were first appellant's property. And that the blanket (Exhibit 4) was third appellant's property. First appellant confirmed that he had given the black trousers (Exhibit 1) and the gum-boots(Exhibit 7) to second appellant. He also confirmed that the purse (Exhibit 2) belonged to fourth appellant.

THE INCRIMINATING ADMISSIONS AND CONDUCT

Apart from the incriminating admissions to which Mokhahle (PW6) testified, the Crown led evidence of the following incriminating admissions or conduct by the appellants.

First Appellant

Trooper Khasoane (PW3) and a tribal messenger, Jobo(PW 10) testified that first appellant had led them to the place where the skeletal remains were found. This was flatly denied by first appellant. Khasoane also claimed that both first appellant and fourth appellant had said that the bridle (Exhibit 5b) and the saddle cloth (Exhibit 8) which were handed over by fourth appellant at his house, belong to the person whose skeletal remains had been found. First and fourth appellants denied that they had said so. Khasoane said further that first appellant had pointed out fourth appellant who had been working in the fields outside the village in which he lived, and had also taken them to third appellant's village and pointed third appellant out to them. He added that third appellant was wearing the blanket which is Exhibit 4. The purpose of his

visit was explained and third appellant said that the blanket had belonged to the person whose skeletal remains had been found. He also testified that first and second appellants had led him to a cattle post. There, second appellant gave him the plastic container (Exhibit 3) and the purse (Exhibit 2).

First appellant denied that he went to the home of third appellant in the company of the police. He also denied that he was present when second appellant gave the police the plastic container and the purse. He admitted that he went with Khasoane to the home of fourth appellant, but said that this was because the police had wanted to see a saddle of his which he had told them was with fourth appellant. He did not know, so he said, that the police were looking for the saddle which allegedly belonged to the deceased. He did not answer Khasoane's allegation that he had pointed third appellant out to the police.

Second Appellant

It will be recalled that Khasoane said that first and second appellant led him to a cattle post and that the second appellant handed over the plastic container and purse. Second appellant neither specifically admitted nor denied that he led the police to the cattle post or that he gave the plastic container to the police. But he denied that Khasoane was one of those policemen. And he said that the police seized the purse which had been hanging round his neck. He denied that these two items belonged to the deceased and said that they belonged to him.

The evidence of Sefali (PW 8) is also of some relevance. He is related to first, second and fourth appellants. He also knows third appellant. He lives at the home of first appellant. In March 1979 second appellant gave him the black trousers (Exhibit 1) before the Court, saying that they were too large for him. This evidence was not disputed.

Third Appellant

Khasoane said that third appellant had admitted to him that the blanket (Exhibit 4) in his possession belonged to the deceased. Third appellant denied the allegation. Another witness for the prosecution, Masupha (PW7), said that third appellant asked him to hand over to the police the saddle bags which were Exhibit 6, saying that they belonged "to us". Apart

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from the police, those present with third appellant when he said this, were first and fourth appellants. Masupha testified that during January, 1979, he had found these saddle bags lying on the ground at Khamokha. They were brown in colour and old. The cattle post nearest to the place where he found the saddle bags was that which belonged to the father of first appellant and which first appellant used. He took these saddle bags home. About three weeks later, he went back to Khamokha. He encountered one, Mpusana, who drew his attention to some vultures on the side of the mountain, and said that he had seen a human corpse in that vicinity. Suspecting that the saddle bags might have belonged to the person whose corpse Mpusana had seen, and encouraged to do so by Mpusana, he tore up the saddle bags and buried the pieces. He had not told any of the appellants specifically that he had the saddle bags, but he had told people generally. He did not know how third appellant knew that he had found the saddle bags. As a consequence of the request to produce them made by third appellant, he dug up the pieces of the saddle bags and handed them to the police.

Third appellant's response to these allegations by Masupha was that he did indeed ask Masupha to produce the saddle bags which he had found. But he said that contrary to what this would convey ordinarily, he did not know that Masupha had found any saddle bags, and that he, third appellant, had been instructed by the police, who beat him, to accompany them to Masupha and make this request.

Fourth Appellant

Khasoane testified that he, trooper Jonase and Jobo were taken by first appellant to fourth appellant's village. First appellant identified fourth appellant for the police. Fourth appellant was found working in the fields outside the village. Fourth appellant was told by the police that they were investigating the question of the skeleton they had found at Khamokha. They went with fourth appellant to his home. There, fourt appellant handed over a bridle (Exhibit 5b) and a saddle cloth (Exhibit 8) which he said belonged to the person whom they had killed. For reasons which will emerge, it is of importance to note at this stage that Khasoane did not claim that a saddle was produced on this occasion, and that fourth appellant and first appellant acknowledged it to be the property of the person who had been killed.

/Fourth appellant

Fourth appellant did not deny that the bridle (Exhibit 5b) and the saddle cloth (Exhibit 8) were in his possession. In fact, he said that they belonged to him. But he did deny that he told the police that these articles belonged to the person who had been killed. And he said that he was assaulted by the police before he produced the bridle.

THE DEFENCE EVIDENCE

First Appellant

He testified that he did not know Ralekhooa Ntsoane. He knew nothing about the skeletal remains which were found and did not lead the police to them. Second appellant is his cousin and herdsman, and third and fourth appellants are known to him. The saddle (Exhibit 5a) and the plastic receptacle (Exhibit 3) belong to him. The gum-boots (Exhibit 7) and the black trousers (Exhibit 1) were bought by him as a present for second appellant when second appellant returned from his initiation rites.

He bought the saddle at Qacha's Nek in 1976 for £45. He said that the bridle before the Court (Exhibit 5b) belonged to fourth appellant, and that the purse (Exhibit 2) belonged to second appellant. He had been present when one, Salemone, gave the purse to second appellant.

The trousers were purchased for £9.10 in 1977. They were new at the time. They were too large for second appellant. He did not enquire what his correct size was before buying the trousers because second appellant was away being initiated and he did not tell second appellant he intended buying him a pair of trousers.

He denied that Mokhahle(PW6) had been employed by him as a herdsman. In March 1979, Mokhahle came to him seeking employment. First appellant went to see Mokhahle's father and was told that Mokhahle had left home because he had stolen bells belonging to others. As a consequence, first appellant did not employ him. He said that Mokhahle had never been to the cattle post at Khamokha. Indeed, he denied that either he, or his parents, had a cattle post at Khamokha. His cattle post, so he said, was at Sekoting. And Mokhahle had never been there.

Each and every facet of the evidence given against him by Mokhahle was denied, including Mokhahle's evidence that first appellant's mother had confronted him with the killing of the stranger. First appellant could suggest no reason why

/Mokhahle

Mokhahle should implicate him falsely in so heinous a crime. They had never quarreled with one another.

As for Jobo, first appellant suggested that he had a motive for implicating him falsely because Jobo suspected him of stealing his horses. He said that Khasoane had assaulted him to induce him to produce Jobo's horses and that he had lost an eye in consequence.

He denied that he was present when second appellant handed over to the police the plastic receptacle (Exhibit 3) and the purse (Exhibit 2). He acknowledged that he knew Thakaso, the young herdboy who Mokhahle had testified was present at the cattle post when the stranger arrived there. Thakaso is the son of first appellant's paternal uncle. First appellant denied that Thakaso had stayed at the cattle post.

Second Appellant

He denied all knowledge of the stranger. He is a cousin of first appellant and lives at his home. He said that the gum-boots (Exhibit 7) were his (second appellant's). The police took them from him, saying that they were too large for him and that they belonged to the deceased. They also took the trousers (Exhibit 1) from Rannemase Sefali (PW8), to whom he had given them because they were too large for him. He was beaten by the police before he handed over the gum-boots. The trousers had also been used for a time by one, Salemone. At some stage one of the seams had split and required mending. Salemone re-stitched the split seam.

He knows Mokhahle. He saw him at first appellant's home when he was seeking employment and first appellant sent him away. Second appellant said that in January 1979 he was staying at the cattle post of first appellant's mother. So were Sefali (PW8) and Salemone. First appellant was not; he was at his home but used to call at the cattle post to count stock, and then return home. He denied that Mokhahle had been at the cattle post. Indeed, he denied all Mokhahle's allegations concerning the stranger, the attack upon him, and his alleged participation in it. When asked how Mokhahle could have known that he, second appellant, was living at the cattle post in January 1979, he said that they used to meet at Khamokha when they were herding cattle. But the cattle post, so he said, was far from Khamokha. In the end, he said he did

/not know

not know how Mokhahle knew he was living at the cattle post in January 1979.

He conceded that the police had taken the purse (Exhibit 2) from him. But he said it belonged to him. He had made the pursestring himself. The plastic receptacle(Exhibit 3) was found at the cattle post. He used to draw water with it at the cattle post and it is his. He denied that it belonged to first appellant.

He knew nothing about the bridle (Exhibit 5b). The blanket (Exhibit 4), so he said, belonged to third appellant, who had owned it for a long time. The saddle (Exhibit 5a) belonged to first appellant.

When asked whether there was any enmity between himself and Mokhahle, he said that Mokhahle "looked down upon him" because he, second appellant, had undergone initiation rites before him, and he, second appellant, used to beat Mokhahle. He denied that he had been anywhere with Jobo and Trooper Jonase.

Third Appellant

He recently came to know first appellant. He knows first appellant's cattle post at Sekoting and has been there. He was not at the cattle post in January 1979. He said that the blanket (Exhibit 4) is his. He bought it at Lesoli's shop for R19-65. He produced some documentation to support this claim. But it was not possible to correlate the particular blanket with any of those to which the documentation related.

Khasoane and Jobo arrested him and took him to Masupha's (PW7) home. Before doing so, they assaulted him and told him to tell Masupha to hand over the saddle bags he picked up at Matatiele. He carried out their instructions and Masupha produced the saddle bags (or what was left of them). He assumed that the police must have known where the saddle bags were before they came to his (third appellant's) home. He denied that he had led them to the home of Masupha.

He knows Mokhahle (PW6) and Mokhahle knows him. Mokhahle's evidence was false. Mokhahle had a reason for falsely implicating him. In 1977 third appellant caught him stealing his sheep. He arrested him. His parents pleaded for forgiveness and third appellant's father released him. Again, in 1980, Mokhahle stole a sheep from the cattle post. He ran away and

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third appellant was unable to arrest him.

He knew nothing about Mokhahle having worked as a herdsman for first appellant. He had never told Mokhahle that he had been to first appellant's cattle post.

Fourth Appellant

First appellant is his uncle. He knows his parents' cattle post. He has been there once, in December 1979. The bridle (Exhibit 5b) and the saddle (Exhibit 5a) were found in his possession by the police. The saddle belongs to first appellant who lent it to him in exchange for a smaller saddle. The bridle is his (fourth appellant's). He acquired it in 1974 when he was at the mines. It was cut by a horse on some occasion and he mended it. There is also a missing stud. The saddle cloth (Exhibit 8) is also his.

He denied that he told Khasoane that the articles found in his possession belonged to the person who had been killed. He told him that the saddle was first appellant's and that the bridle and saddle cloth were his own.

As to Mokhahle's evidence, he denied it in its entirety. There had been clashes in the past between him and Mokhahle because of the latter's propensity to steal stock bells.

Jobo and Khasoane assaulted him to induce him to produce the bridle and the saddle and also to reveal where certain horses which belonged to Jobo were. He knew nothing about the horses.

When his attention was drawn to the evidence of one, Chabana (PW9), who had identified the bridle as one which had belonged to Ralekhooa Ntsoane, and said that he had renewed the reins using dissimilar pieces of leather on each side, fourth appellant said that he had replaced the reins when the original ones broke. He said that he had forgotten to mention this earlier.

The Court a quo had no doubt that the skeletal remains were proved to have been those of Ralekhooa Ntsoane. It regarded the evidence of the alleged eye-witness, Mokhahle, as overwhelming and as given "with confidence and conviction". It was satisfied that the various articles which were either found in the possession of the appellants, or claimed by them

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to be their own property, were satisfactorily identified by the Crown witnesses as having belonged to the deceased. It accepted the evidence of Khasoane and Jobo that the police did not know precisely where the remains of the deceased lay until first appellant led them to the spot. The trial Court was sceptical about Khasoane's claim that third and fourth appellants had described certain of the articles which were taken by the police from them, as having belonged to the person who had been killed. It therefore ignored this aspect of his evidence in considering whether the guilt of the appellants had been established. It considered the evidence of the appellants to be unimpressive and concluded that the guilt of all the appellants had been proved beyond reasonable doubt.

Mr. Mall submitted that the approach of the trial Court towards the evaluation of the evidence was fundamentally unsound He contended that the reasons given by the trial Court for convicting the appellants showed that the Court had considered the evidence tendered by the Crown in isolation and found it to be acceptable and, having done so, simply rejected the appellants' evidence because it conflicted with the Crown evidence. Reliance was placed upon the learned trial Judge's concluding sentences, namely,

> "In the face of the formidable evidence adduced by the Crown they really have no defence and the one they advanced is so fanciful that I am convinced beyond any shadow of doubt that they are guilty of murder and I convict them accordingly. My assessors agree.".

In my view, this does not show that the trial Court failed to consider the appellants' evidence when evaluating the evidence led by the Crown. In his judgment, the learned trial Judge summarised the material aspects of the evidence led by the Crown and then did likewise in respect of the evidence given by the appellants. He then gave his evaluation of all the evidence. I can see no justification for the suggestion that the trial Court made so fundamental an error as failing to consider the evidence for the defence before reaching any conclusions about the evidence for the Crown.

Mr. Mall also pointed to some errors of recollection of the evidence by the Court a quo. For example, the learned trial Judge said in his judgment that the stranger had told Mokhahle that he had been struck on the head whilst asleep and showed him a wound. In fact, there was no such evidence. But nothing

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turns on this. It was a mistake of little consequence and Mr. Mall conceded that it could not possibly vitiate the trial Court's entire evaluation of the evidence led at the trial.

Mr. Mall's criticism of the trial Court's approach to the evidence of Khasoane has more merit. But even here, I am not satisfied that he has shown that the trial Court did in fact err in its assessment of Khasoane's evidence. A major strut in Mr. Mall's argument upon this question rests, in my view, upon a misunderstanding of the recorded evidence. Considerable reliance was placed upon the gross improbability, indeed, the impossibility, of first and four appellant ever having said to Khasoane that the saddle which was found at fourth appellant's home belonged to the person who had been killed. The reason why this was said to have been inconceivable, was because it appeared from the evidence that this particular saddle was never identified as the deceased's saddle and that the police returned it to fourth appellant after the saddle which is Exhibit 5a had been found.

The flaw in the argument is that there is no evidence that Khasoane ever claimed that the saddle (as opposed to the bridle and a saddle cloth) which was taken from the home of fourth appellant was said by first and fourth appellants to be the property of the deceased. This particular attack upon the evidence of Khasoane and the trial Court's alleged failure to appreciate the significance of that aspect of his evidence is thus without substance. But that does not mean that Khasoane's evidence is beyond reproach. There are aspects of it that are disturbing. For example, the evidence which he gave at the trial about first, third and fourth appellants' alleged acknowledgement that some of the articles in their possession belonged to the deceased was not recorded as having been given at the preparatory examination. He asserted that he had given such evidence. It was important evidence and I think it more likely than not, that it would have been recorded if it had been given. Moreover, Jobo said nothing about this having occurred yet he was present when the admissions are said to have been made.

These considerations must raise serious doubt about the reliability of Khasoane's evidence. But the trial Court did not adopt a wholly uncritical approach to his evidence. As I have said, it was sceptical of his claim that these

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particular admissions had been made and rightly disregarded them. In other respects it accepted his evidence, more especially, his evidence that first appellant had led the police to the place where the skeletal remains lay. There was substantial corroboration of that aspect of his evidence because Jobo said that he accompanied him when first appellant led them to the remains. And Jobo's evidence does not suffer from the disquieting features which afflict Khasoane's.

I am unpersuaded therefore that the trial Court misdirected itself in any way which would have an all-pervasive effect upon its evaluation of the evidence of the witness Khasoane, or, indeed, any of the evidence at the trial. It was plainly conscious of the risk of accepting Khasoane's ipse dixit on any particular point and, in fact, disregarded his evidence in an important respect.

Insofar therefore as the fate of this appeal rests upon alleged misdirections in the evaluation of the evidence given at the trial, I consider that no case of misdirection has been made out. It remains to consider the larger question which the appeal raises, namely, whether the evidence justified the verdicts.

Mr. Mall, in a careful argument launched a full scale attack upon the evidence of the alleged eye-witness, Mokhahle. He was impelled to concede that there could be no room for any honest mistake on the part of this witness. His evidence was either substantially true, or a wicked and total fabrication from beginning to end. The manner in which Mr. Mall sought to cast doubt upon the veracity of this witness was by focussing attention upon aspects of his evidence which he contended were inherently improbable. He did not refer us to any evidence which showed inconsistency on the part of this witness nor did he refer to any evidence given by him which was in conflict with the other Crown evidence. His demeanour obviously impressed the trial Court. I mean no disrespect to Mr. Mall's submissions when I say that I do not intend to detail the various respects in which the evidence of this witness was said to be improbable. They are all matters of degree and I have weighed the submissions carefully. Suffice it to say that singly, and cumulatively, their impact upon me is not such that I am left in doubt about the veracity of the witness.

In reaching this conclusion, I have kept in mind that the witness is a mere youth and that his evidence stands alone in the sense that no one else testified to the attack upon

the stranger. But substantial objective corroboration for his evidence exists, in my view, in the other evidence which was before the Court. It also derives additional support from certain other considerations to which I shall advert presently.

I have not overlooked the suggestions made by second, third and fourth appellants that this witness had reason to entertain some animus against them. These suggestions do not impress me. They were never put to the witness in cross-examination. They do not provide any explanation for his implication of first appellant and, even if they were true, they are hardly reasons which would be likely to induce the witness to lay a murder at the door of the four appellants. There is no suggestion that the witness volunteered information to the police. On the contrary, the evidence was that the police had sought out the witness.

The next broad issue to which I turn is the alleged possession by the appellants of various articles said to have belonged to the deceased. Mr. Mall sought to persuade us that in each and every instance the evidence of identification was inconclusive. Now there can be no doubt that certain of the articles are articles of a kind and appearance which are far from unique, for example, the plastic receptable (Exhibit 3), the saddle bags(Exhibit 6), the gumboots(Exhibit 7) the blanket (Exhibit 4), the saddle (Exhibit 5a)/and the saddle cloth (Exhibit 8). But there were others which were considerably more distinctive. There were the black trousers (Exhibit 1). The wife of the deceased pointed out to the court the particular repair which she had herself made to this pair of trousers. This is not the kind of thing she is likely to be mistaken about. What is more, the defence version provided no explanation for the existence of this particular repair. The defence version was that the trousers were new when purchased. In the course of time, a seam had split and had been re-stitched. It was clear that this was not the repair to which the wife of the deceased drew attention. Then there is the admitted fact that the trousers were too large for the second appellant for whom they were allegedly bought by first appellant. No doubt it is possible for someone to mistake the size of another, but once the mistake was appreciated, one would have expected it to be remedied, rather than that the new trousers would simply be given away. In my view the cumulative impact of all these considerations makes it entirely safe to conclude that the trousers were correctly identified as having belonged to the deceased.

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Next, there is the purse (Exhibit 2). The wife of the deceased said that she had made the string for this purse herself. I should mention that her testimony in this regard did not appear in the original transcript of the record. However there was reference in cross-examination to her having said so when she testified. Counsel for the Crown referred the court to the learned trial Judge's contemporaneous personal note of her evidence from which it appeared that this had indeed been said. The tape upon which her evidence was recorded was replayed and a corrected transcript of her evidence was made available to the court. This bears out that the witness did say that she had made the purse string herself. She was not the only person who identified the purse as the purse which had belonged to the deceased. Mokhahle (PW6) also did so. And so did the deceased's uncle, Chabana (PW9). He was not cross-examined specifically upon his identification of the purse. I consider it so unlikely that all three of these witnesses could be mistaken in this regard, that the trial court's rejection of the defence version that the purse belonged to second appellant appears to me to have been justified.

The bridle (Exhibit 5b) is also, in my view peculiarly susceptible of accurate identification. It was common cause that the original reins had been replaced by reins which were of a differing width on either side. Chabana (PW9) said that he had given these reins to the deceased. The deceased's wife and Mokhahle also identified the bridle as the deceased's bridle. When fourth appellant gave evidence of the features of the bridle to support his claim that it was his, he failed to mention the disparity between the reins. Under cross-examination, he asserted that he had renewed the reins but had forgotten to mention it earlier. Here again, I think that the trial Court was justified in accepting the evidence for the Crown and rejecting that of the defence.

To return to the articles which are less susceptible of secure identification. In my opinion, the possibility of an erroneous identification of them by the witnesses for the Crown is eliminated when the evidence is looked at as a whole. I say this for the following reasons.

The plastic receptable (Exhibit 3) bore a dent which was familiar to the wife of the deceased. The saddle (Exhibit 5a) had certain white strings attached to it by which she recognised

it. And it was in the possession of first appellant who was also in possession of other articles which it was proved beyond reasonable doubt belonged to the deceased. The gum-boots (Exhibit 7) were suspiciously large for second appellant. And he also happened to have had in his possession, other articles which it was satisfactorily proved belonged to the deceased. The saddle cloth (Exhibit 8) was in the possession of fourth appellant who was also in possession of a bridle (Exhibit 5b) which was proved to have belonged to the deceased. The blanket (Exhibit 4) was in the possession of third appellant. Not only was he directly incriminated by Mokhahle in the assault upon the stranger, he conceded that he had told Masupha to produce the saddle bags which he had found to the police. It is true that he claimed that the police had instructed him to say this, and that he had no personal knowledge of the bags, but the overall impact of all the evidence leaves me in no doubt that the blanket which he had in his possession belonged to the deceased. I may add that the third appellant's attempt to show that he had documentary proof of his purchase of this blanket was unimpressive. The saddle bags (Exhibit 6) were found in February, 1979 at Khamokha some distance away from first appellant's parents' cattle post. Third appellant appeared to know something about them. And the wife of the deceased, Mokhahle and Chabana said they were the deceased's. Here again, the overwhelming probability is that they were correctly identified.

When this body of circumstantial evidence is considered in conjunction with the account given by Mokhahle of the assault upon the stranger, and weighed against the denials of the appellants, the conclusion that Mokhahle's account is a true account, and not a fabrication, is irresistible. It is stretching co-incidence too far to suggest that Mokhahle fortuitously happened to select as his victims, in a diabolical attempt to procure an unjust murder conviction, four persons who, mirabile dictu, happened to have (or have had) in their possession articles which belonged to the deceased, Ralekhooa Ntsoane. It is equally unthinkable that this youth could have been primed to tell a tale of the kind which he did. If he, or anyone else for that matter, was intent upon implicating falsely the four appellants, why did he have third and fourth appellants entering the picture in the way in which he described? Why did he not involve them ab initio? And why did he introduce first appellant's mother when she would have

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given the lie to his story, if it were indeed false?

Then there is the inference to be drawn from the reciprocal support which certain of the appellants attempted to give to claims by the others that articles proved to have been the deceased's were theirs. If that support was untruthfully given, as I think it is clear it was, it provides further support for the inference that the Crown's case against the appellants was well-grounded, and certainly not founded upon a malicious fabrication by Mokhahle, or other persons.

I have not overlooked the disparities, to which Mr. Mall drew attention, between the evidence for the Crown and the opening remarks of counsel at the trial. The argument lacks any real force for three reasons. Firstly, the discrepancies were not of a fundamental kind. Secondly, they were never put to any of the Crown witnesses. In particular, they were not put to Mokhahle who Mr. Mall suggested was their author. Thirdly, there had been a preparatory examination. If there was any inconsistency between the evidence of Mokhahle at the trial and that given by him at the preparatory examination, I would have expected attention to have been drawn to it. Moreover, while counsel should obviously be as accurate as possible in opening a case, it is not unknown for counsel to convey less than accurately what the evidence that is to be led, will be.

Thus, even if the disputed evidence of incriminating admissions and conduct is ignored, there was a formidable body of evidence against the appellants. In my judgment, it left no reasonable doubt as to their guilt and, if the skeletal remains which were found were indeed those of Ralekhooa Ntsoane, they were correctly convicted of murder. Did the Crown succeed in proving that the skeletal remains were indeed those of Ralekhooa Ntsoane? Mr. Mall suggested that this was left in doubt. He pointed to the lack of any precision in the evidence as to the date upon which the assault of the stranger took place. He reminded us that the expert witness who examined the remains initially put the person's age at no more than 25 years, and that she had said that the person concerned had suffered a fracture of the jaw in his lifetime. He stressed that none of the Crown witnesses who knew Ralekhooa Ntsoane were aware that he had fractured his jaw.

Once again, the cumulative impact of all the evidence leaves me in no doubt that it was the remains of Ralekhooa Ntsoane which were found. It is plain that he disappeared mysteriously and has never been seen or heard of since by his

wife to whom he had been married for many years. It is plain that he failed to arrive at his destination. The skeletal remains were found within four months of his departure. They were found in an area which he could be expected to have traversed. Articles which he took with him when he left were found in the possession of the appellants. The appellants were seen to have murdered a stranger who was searching for his missing horses early in 1979. That stranger was in possession of the articles with which Ralekhooa Ntsoane left on his journey. The person whose skeletal remains were found, had four front teeth missing just as Ralekhooa Ntsoane did. All these factors render it fanciful to suggest that the remains were those of someone else. The expert conceded that she could easily have have been wrong in limiting the age of the person whose skeletal remains had been found to 25 years. And the evidence is that Ntsoane wore a full beared. I am not convinced that the fracture of the jaw which the expert witness detected would necessarily have been discernible to others and there is no reason why his wife and sister-in-law should necessarily know that he had sustained such an injury.

Finally, I should mention that in considering this matter, I have not attached undue weight to the absence of cross-examination by appellants' counsel upon some of the issues. I have done so only in the instances where the omission seems to me to be of real significance.

THE SENTENCES

No argument was addressed to us in support of the appeal against the finding that there were no extenuating circumstances. In my view, it cannot be said that the finding was not justified.

In the result, the appeal is dismissed and the convictions and sentences are confirmed.

Signed: R.M. Marais
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R.M. MARAIS
Acting Judge of Appeal

I agree Signed: I.A. Maisels
.....
I.A. MAISELS
President

I agree Signed: L. de V. van Winsen
.....
L. DE V. VAN WINSEN
Judge of Appeal

Delivered on this 3rd day of July 1981 at MASERU

For Defence : Mr. Mall
For Crown : Mr. Mdhluli