

IN THE HIGH COURT OF LESOTHO

In the matter of :

REX

v

1. KHOKOANE MANAMOLELA
2. NKEMESE TSIKA
3. KUTOANE MOTSOENE
4. 'MELI MOTLOMELO
5. MPINANE MOHALE
6. MATHABO TSIKA
7. RETSELISITSOE MATSOSO
8. MOJARI MANAMOLELA
9. NKANANA KAO
10. QHEBIANE SEBOLELO
11. MANKUTLE KAO
12. KOPANO MAQOMA.

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 29th day of April 1982

Twelve accused persons were originally indicted before me on a charge of murdering Jimisi Seroke (the deceased) at or near Tsoelike in the district of Qacha's Nek on or about the 25th December 1980.

During the trial the Crown discontinued the proceedings against accused 10 (Qhebiane) 11 (Mankutle) and 12 (Kopano) and they were accordingly acquitted and discharged. The trial proceeded against the remaining nine accused.

It is common cause that at sunrise on Xmas morning 25th December 1980 the deceased set off from his parental home at Hill Top village with his younger brother Likotsi to take animals to graze in the veld down some cliffs below the village. He wore a white overall, a hat, and soft shoes and carried a stick. He had other clothes under his overall. His watch was on him. Likotsi's evidence as it appeared on the Preparatory Examination record was admitted by the defence (in terms of s.273 of the Criminal Procedure and Evidence Act 1981) and he was not called to testify. The deceased and Likotsi left the

/animals

animals to graze and returned to Hill Top. They appeared to have had a drink at the house of Mapuleng Mokone (PW9). Deceased and his brother Likotsi parted the latter saying he was going home and the deceased saying he was going to his grandmother Mantsoele's house. Mantsoele, whose evidence at the Preparatory Examination was also admitted by the defence, confirmed that the deceased passed by her house around 9 or 10 a.m. accompanied by one Korote Jase. Present in her house, amongst others, was Nkemese Tsika(A2). She gave the deceased and his companion food and they left.

It is also common cause that the deceased was seen at the shop of Khokoane Manamolela (A1) at Hill Top. A1 gave the deceased a large (750 ml) bottle of brandy. It was open, not sealed, and was not full. It so happened that deceased's other younger brother Mosala(PW 10) was hanging around A1's shop by the Fridge when the deceased arrived. A1 was behind the counter and a man called Taole was seated on a chair in the public section. Mosala saw the bottle in deceased's hand but he did not know if it was a gift or whether deceased bought it, though he thought it was the latter. Deceased put it in his overall and left.

Mateboho Makhobeng (PW8) says that on that Xmas day she had children at her home at Hill Top and wanted to take them back to their own home at Thoteng an adjoining village. She accompanied them to the outskirts of the village crossing the Mothabisa stream, but on her way back home, alone, to Hill Top, whilst crossing the stream, she saw the deceased sleeping not far away from her path above a well known by the same name. She is seen pointing the spot in Exhibit B photo 4. The red arrow is probably the "well" seen better in Exhibit B photo 5. This well is man made and shallow. Mateboho says she went to

rouse the deceased. He had rolled his overalls from the bottom showing his trousers. His stick and hat were nearby. He had a wound, described as a scratch, bleeding slightly, on the head. The deceased woke up and told Mateboho to leave him alone. He spoke in a drunken manner. The deceased was known to some to be a heavy drinker though not to the extent of lying prostrate. He went back to sleep. Mateboho says she reported this to other women on her return home. The distance between the stream and Al's shop/cafe is put at 500 meters on the map Exhibit C1. Al says the distance is as from the Court room to Husteds chemists.

That same afternoon a hail and rain storm broke up at Hill Top. It was heavy. We do not know from the Crown witnesses when it started and how long it lasted except from Al who says it started at 2.15 p.m. and ended at 3.05 p.m.

The deceased was not in the habit of sleeping out and on the following morning boxing day the 26th December 1980 the deceased's father Molefi Seroke (PW5) discovered that his son had not slept at home. He made enquiries from the family and then informed the chief's representative or bugle one Caswell Mokhifa of Hill Top. Mokhifa did not give evidence, but according to the deceased's father Molefi, he requested Mokhifa to notify the chief, Kutoane Motsoene (A3) who lived at Ha Rankakala. A3 did not come on Friday but a small search party was organised by Mokhifa on the same day after the sun got hot. Since the search party had nothing to go on except Mateboho's information, the search was confined to the area where deceased was last seen, i.e. around the Mothabisa well and stream. In the process the shallow well above which deceased had been seen sleeping was dragged but nothing was found. There may or may not have been a public search on Saturday 27th and A3 having made no appearance on either Friday or Saturday morning Molefi proceeded to Ha Rankakala in the afternoon and personally informed A3 requesting help for more men. A3 allegedly told Molefi that his(A3's) father Nite had informed him the previous evening of the disappearance of deceased at Hill Top. A3 denies saying anything of the sort, but says he told deceased's father Molefi (and gave him a note) to tell Mokhifa to organise a search party for the following day Sunday the 28th December. Mokhifa apparently did not gather many men.

/A3 did arrive

A3 did arrive with about 6 persons on Sunday. They searched the same area down to the confluence of the Mothabisa stream with the Tsoelike river. Molefi says or implies it was cursory and not a thorough search. A3 says on the other hand that the day was hot, the men got tired and wanted to eat, and the search was given up.

Molefi, Mokhifa and other searchers were acting on the theory that the deceased may have drowned. There was, it should be remembered, a rain storm on Xmas day afternoon, but the evidence is abundant (including evidence from A3) that the Mothabisa stream has little and sometimes no water and that the rain or hail storm did not prevent people crossing it. In fact it was crossed, shortly after the storm, by a number of people. It was not known as being ever uncrossable, but the deceased was seen drunk and asleep and thus caught, he may have drowned and drifted downwards. Molefi deceased's father says he went to A3 again on the evening of Sunday and expressed to A3 his concern and his desire to see the search widened. It seems that it was on this day that A3 said he will pass instructions to the chiefs on the Tsoelike river to keep a look out. In other words A3 at this stage gave the impression that he too believed deceased had drowned. There was no public search (apart from Seroke family members) on Monday the 29th or indeed subsequently.

On Tuesday 30th December 1980 Molefi proceeded without introduction and on his own to Qacha's Nek police station. There is a bus between Hill Top and Qacha's Nek which is 43 km away. The journey ordinarily takes about an hour by car, by bus or if the road is wet, perhaps a little longer. Molefi says he gave the police information about his son. The police gave him a letter to take to A3, but Molefi would not have this and went to complain to the District Administrator who sent him back to the police who told him they will follow the matter up. The first records (occurrence book) of the Qacha's Nek police speak of Molefi giving information about his missing son on Wednesday 31st December 1980. Molefi says he was given a tall uniformed policeman to go along with him to Hill Top to investigate. We have since learned that the uniformed policeman was Trooper Shoa. We have no evidence of what Trooper Shoa did. The search was, however, continued by members of the Seroke family. It would also seem that soon after that a detective called on Molefi and told him a body had been found at White Hill. Molefi went

'to Qacha's Nek

to Qacha's Nek mortuary but it was not his son.

On Saturday 3rd January 1981 A3 informed A1 that the Qacha's Nek police would like him to call at the charge office on Monday 5th January 1981 in connection with the disappearance of the deceased. A3 says that a trooper Jonas gave him the order. On Monday A1 says the bus was full and he could not go to see the police until Tuesday the 6th January 1981. They asked him to account for his movements on Xmas day 1980 and he did. A1 says he also told them that he had given the deceased about half a bottle of brandy that Xmas morning. It was certain that he was interviewed by the police but we have no account from the police as to the contents of that statement.

In the meantime and on Sunday the 4th January 1981 (the 10th day of the search) deceased's father Molefi was informed that a shoe had been seen on the bank of the Tsoelike river. He proceeded there with the people who had seen it. He picked up the shoe Exhibit G. It was on the northern bank of the Tsoelike, near a path, opposite the village of Lioling though some distance from the place deceased was later found. The river is seen in Exhibit B photo 10. It was one of the deceased's shoes. It was identified by his father Molefi and by Tselane (more about her later) as the one deceased had been wearing on the day of his disappearance. Likotsi Molefi's younger son was not quite sure though it was the same size and similar. Molefi took it first to Mokhifa and on the following day (that would be 5th January 1981) personally to A3. A3 did not give him a letter to the police or a representative to accompany him. Molefi boarded a bus and took it to the Qacha's Nek police. A3, however, testifies that Molefi did not give him a chance to do either and he dashed to the bus which was about to depart.

On Saturday 10th January 1981 at about 10 a.m. (on the 17th day of the search) a naked body of a person was seen by Paulus Phomolo (whose evidence as detailed at the Preparatory Examination was admitted by the defence) in a deep hollow or gorge on the bank of the Tsoelike river at a place called Maqatomeng apparently suspended between two boulders his body not touching the ground. The gorge can be seen in the album, Exhibit B photo 12. It was the smell that had attracted him. Phomolo raised the alarm first at the village of Lioling and

/then

then at Hill Top. People converged on the river bank including A1, A2, A3, Molefi the deceased's father, and others. Two men braved the stench and went down. One gave evidence, Lesoetsa Lepheane (PW6). He says a stone was on the ribs. A sack having been placed below, the body was kicked and it dropped on to the sack and was then hauled up to another spot seen in Exhibit B photo 13. Molefi the deceased's father testifies that he did not object to his son's body to be lifted up though the order came from the chief A3 himself. When the body was brought up and it was seen that genitalia and other parts were missing A1 allegedly remarked that the parts were eaten by crabs and offered Molefi a coffin and A3 suggested that the body be buried right away. It has not been established with certainty that the river water ever reaches that hollow. One witness who knows the river says it does not, the other says it does, but only if the river is in spate. The river however was not in flood during the period in question. Molefi says he refused the coffin and objected to the burial so much so that a row on this matter was about to degenerate into a fight.

Mlandeli Simelane (PW7) was the man who took it upon himself, after the application of "doom" spray upon the parts of the deceased's body most attacked by maggots, to clean them from maggots which clarified the situation to onlookers. Asked about the commotion over the coffin and burial he testifies that he did not wish "to commit himself", his hands were filthy, he went to the river to wash, and on his return left his sons on guard to await the arrival of the police and he went home. Mlandeli says A3 gave the order for the body to be brought up though he himself objected. He heard A3 say that the body should be kept until the arrival of the police.

If I may digress for a moment here, Molefi, deceased's father, says he sent his uncle Sisimane Seroke to Qacha's Nek to call the police. Sisimane Seroke gave evidence at the Preparatory Examination and this was admitted by the defence. He was not therefore called. As I understand his evidence there, it appears he did not go to the Tsoelike river in the morning and did not see the body but he received a report (Molefi says he sent it) directing him to proceed to the Qacha's Nek police to inform them. He came back accompanied by the police (Detective Troopers Manka - called by the Court - and Lephoto) to the Tsoelike river.

/A1 testifies

A1 testifies that he did proceed to the Tsoelike river on the 10th January on hearing that a body of a drowned person was discovered. When it was hauled up and the parts mostly attacked by maggots cleaned, he asked a question (but did not make a positive statement) whether those missing parts could have been eaten by crabs. He says he did not offer to donate a coffin to Molefi, he simply told Molefi, when someone else suggested it, that he has a coffin in stock in his shop, which, if he wishes, Molefi could buy. A1 adds that people were in separate groups sitting away from the body because of the stench and he heard no argument about the burial of the deceased.

A3 denies he suggested a burial and says that he was not such a lunatic to have made the suggestion when he himself had sent a boy called Teboho to inform the police about a body being discovered at the Tsoelike river bank quite apart from the fact that Molefi, deceased's father, had also told him that he too had sent someone to call the police. He heard nothing about a coffin. People make loud noises without necessarily quarrelling.

When the police arrived they transported the deceased's body to Qacha's Nek.

A post mortem held by Dr. Zaal at Qacha's Nek mortuary on the 12th January 1981 revealed that the deceased's penis, scrotum, and part of the armpit and chest and above the throat had been cut by a sharp object. The mandible was bare. There was no tongue. There was a cut in the heart caused by a sharp object. The eyes were gone. The doctor was unable to say if these cuts or incisions were inflicted before or after death. The body was too decomposed to find any cause of death from internal organs and the sum total of his evidence is that if those injuries were inflicted when the deceased was alive they could have caused death. The post mortem report is Exhibit A and the cut parts can be seen on the original report in the attached diagram of the human body Form M 42.

The star witnesses for the Crown are :

Tselane Matoetoe(PW3) born in 1957, of Ha Makoe and Hill Top, an accomplice murderess according to the Crown, a slut and a liar according to the defence.

Ntsokeleng Nteke(PW4) born in 1957, of Hill Top, an accomplice murderess according to the Crown, and if not quite a slut, a liar according to the defence.

/Kantini

Kantini Mabote(PW2) born in the 1940s of Hill Top, an ex-mier, an accomplice murderer according to the Crown, a dishonest loafer, and a liar according to the defence.

Tselane(PW3) was the deceased's girl friend. According to his passport, Exhibit F, the deceased, born in 1954, had arrived home at Hill Top from the mines in Republic of South Africa on the 21st November 1980. A love affair developed between him and Tselane. She says he had shown her a wad of Rand notes but he seems to have handed R400 to his father Molefi Seroke. She described the deceased as a good lover, a loner, and with a spot of white hair on his otherwise black head. Tselane had two children but no husband. Her own parents lived at Ha Makoe but she had recently rented premises from one Khotso at Hill Top. Sexual intercourse between her and the deceased took place at her place at Hill Top and at Ntsokeleng's parents place.

Ntsokeleng (PW4) was Tselane's bosom friend. She was married to a man from Mashai some distance away from Hill Top, but in June of 1980 she left her matrimonial home and repaired to live with her own parents also at Hill Top.

Kantini Mabote(PW2) was himself married and he and his parents had their home at Hill Top. Kantini had taken a job with Khokoane Manamolela(Al) about a year prior to December 1980. Al says he employed him in February 1979. Kantini was given a room in a servants quarters behind Al's shop/cafe. He was employed as a gardener, a herdsman, and a watchman. His love association with Ntsokeleng started after her arrival from Mashai and (Kantini's wife having earlier left him for her own parents) sexual intercourse between them took place at his room in Al's servants quarters where she often slept.

Al himself, though not a Hill Top man by origin, had opened a shop/cafe there in December 1978. He was a married man with two daughters the eldest born in 1973. His wife did not live with him. She was employed in the police force. Al passed Cambridge Overseas School Certificate at "O" levels. He had a relatively prosperous complex at Hill Top consisting of a residential house, a shop/cafe combined, two lots of servants quarters (one behind the shop/cafe and another behind his house) and various outhouses as can be seen accurately from a site lay

/out

out plan Exhibit C4. Kantini occupied one room in the servants quarters behind the shop/cafe. It can be seen photographically in Exhibit B picture 9. Exhibit B picture 6 is a bird's eye view of the complex, Exhibit B pictures 7 and 8 show the shop and residence. Two coloured photographs, Exhibits D1 and D2 show A1's shop/cafe at closer range.

Kutoane Motsoene (A3) is the gazetted headman of a cluster of villages that include Lioling, Ha Rankakala (where he lives), Hill Top, Thoteng and Ha Makoe. These are shown on a map(not drawn to scale) Exhibit C1, to which the Court added in ink Ha Makoe village. The survey map Exhibit C2 does show Ha Makoe, Hill Top, and Ha Rankakala, as does a larger survey map Exhibit C3, but those last two do not show Lioling or Thoteng villages. The two additional villages under the chieftainship of A3 are said to lie north-east of Ha Makoe. The village of Mapakiseng from which 'Meli Motlomelo(A4) hails is to the east of Ha Makoe. I have marked the relative positions of the two villages north-east of Ha Makoe, and Mapakiseng east of Ha Makoe with crosses in ink on the survey map Exhibit C3. Mapakiseng village does not fall within A3's jurisdiction.

Nkemese Tsika(A2) also owns a shop/cafe at Hill Top. He is an ex-miner. His wife is Mathabo Tsika(A6). The cafe was said to have been opened by A2 "recently", but there is a dispute about the date which will be referred to later in this judgment. It is separate from but close to their residence and has been said to be about 150 paces (pointed) from A1's cafe/shop. Sgt. Putsoane (evidence at Preparatory Examination admitted) who made a sketch (Exhibit J) makes it 200 paces.

Mpinane Mohale(A5) was employed by A1 as a saleslady in the shop. Retselisitsoe Matsoso(A7) according to the accomplice Crown witnesses was A1's mistress and lived at his residence though occasionally helped in the shop/cafe. This is disputed by A1 who says she lived in a room in the servants quarters, served in the shop/cafe, and though she was his girl friend, it did not go as far as sexual intercourse.

If we leave for the moment precise dates and many variations in the evidence of the Crown accomplice witnesses and assessment of their credibility the broad story that emerges, or it so seems to me, is that initially, sometime before Xmas 1980,a

three pronged, separate but more or less simultaneous approaches, were made to Tselane and Ntsokeleng and Kantini to "find a person". Tselane says she was first tackled by A2 in the presence of A6 when she went to buy at their cafe and A2 asked her to find him a person, for a reward of R400, "to strengthen" his cafe, and Ntsokeleng says that one day she went to see her lover Kantini in Al's cafe when she was tackled by A5, in the presence of A7, who told her that Al wanted them to find a person "to strengthen" his shop. No rewards were mentioned by A5 to Ntsokeleng. Kantini himself was not there but Ntsokeleng went to see him and told him about A5's suggestion. According to Ntsokeleng Kantini "appeared" to have had prior knowledge about this. Neither A2 nor A5 had mentioned any particular person to Ntsokeleng or Tselane. Kantini says Al was the first to approach him in the shop about finding a person "to strengthen" his cafe but no names were then mentioned. Kantini says the question of reward came later. It was to be one hundred which Kantini understood to be Pounds since he does not recognise Rands. Then a man called Taole (who is said to have escaped from police custody at Sekake after his arrest) came and also mentioned to him that Al wanted a person. Kantini says he and Taole discussed the matter alone but thought they cannot carry on with the mission. Ntsokeleng, as I said, went to see Kantini after A5's approach and discussed the subject of finding a person with him.

Ntsokeleng says that some three days later she and Tselane met at the former's parental home. When Ntsokeleng mentioned the subject, Tselane alleged that she too had been approached by A5, and that Tselane had selected the deceased. Ntsokeleng agreed with this and the selection was passed on to A5 at the shop who undertook to explain the choice to Al. In the meantime Al told Kantini that the deceased was chosen because he had a white spot on his hair.

After some days a meeting took place at dusk at Al's residence: also before Xmas. Ntsokeleng and Tselane seem to be agreed that there were the following persons present: Al, A2, Kantini, A5, A7, Taole.

Al approved the deceased's choice. The ploy was for Tselane, the deceased's lover, to entice him to go to Al's shop to get his "Xmas present" on Xmas day 1980. It does not appear

/as if

as if the details of the execution of this conspiracy was known to all those who allegedly took part, but there is no doubt at all. that deceased's ritual murder was contemplated and did in fact take place.

Tselane says A5 came to her house in the morning of Xmas day to tell her that Al wanted the deceased to come to the shop to have his liquor. Tselane told A5 that she was expecting the deceased to come to her place and will pass the message to him. The deceased duly arrived. He appeared sober and was told to go to Al's shop for his Xmas present. The probabilities are that deceased's visit to Tselane took place after his visit to Mapuleng and his grandmother's Mantsoele.

Tselane says after deceased left her to go to Al's shop she went to Ntsokeleng's parental home. The deceased joined them there carrying the bottle Al gave him. The time it seems was before people eat lunch. All three drank from the bottle. Tselane asked deceased for his watch but he refused her request. Deceased was in a jolly mood but not drunk at the time. She then went to her own house. Deceased followed her soon after - now minus the bottle - and asked her for more drinks. Her own "joala" was not yet ready. Deceased by then looked drunk and left her staggering: (Ntsokeleng says deceased was not staggering) saying he will go and sleep at home and took that direction. Tselane says she asked the deceased to accompany her to her parental home at Ha Makoe where she and Ntsokeleng were to continue Xmas feasting but he said he will go and sleep. She did not see deceased again except at dusk of that same day in Al's shop.

There is no evidence that deceased got to his parental home but if Mateboho saw him asleep near the Mothabisa well it is quite possible that he may have been on his way to Tselane's parental home at Ha Makoe.

Tselane and Ntsokeleng, both of whom went to Ha Makoe for the festivities, celebrated it in different houses. Each apparently made her own way back towards Hill Top. Tselane says that after the storm she set off with Kantini and another man but on the way they separated. She did not see the deceased on her way back near Mothabisa well but met A9 on crossing the stream. She was carrying a can of "joala". A9 snatched it and

/drank

drank some of it. A9 says Tselane gave him the "joala" of her own free will. Ntsokeleng says she left Ha Makoe before the storm with her sister Makhauta but it caught them at Thoteng and they sought shelter at Mabote's who was Kantini's married sister. When it stopped they continued on their way home to Hill Top. The trip was uneventful though Tselane says that at Hill Top she stopped by a house where music records were being played and then passed by A2's shop who told her that "the person" was already in A1's cafe. Kantini joined Ntsokeleng at her parents house, and then came Tselane about sunset. They drank. Kantini departed apparently earlier to his room in A1's servants quarters and at dusk Tselane (having changed into a dry blanket) and Ntsokeleng proceeded to Kantini's room. He came and said "you are being called". Kantini, Tselane and Ntsokeleng proceeded to A1's shop.

On entering they saw deceased behind the counter. The shop was lit. Present were A1, A2, A3, A4, A5, A6, A7, A9 and Taole according to the two women, but Kantini adds to the list the former A10, A11 and A12.

The people that assembled waited. Whilst waiting a person came to the shop to buy but was turned back at the door on the ground that the shop was closed. This person is the lady Mapuleng Mokone (PW9) who testified that she went to A1's shop to buy a candle.

After about an hour (very rough estimate by Ntsokeleng) A8 entered. A8 is A1's brother, but did not live at Hill Top. He was known to Kantini and Ntsokeleng from his periodic visits to A1's shop but not to Tselane. He had property, including a shop and a house at Qacha's Nek. He also had a house and shop at Qhoalinyane some sixty kilometers away. The shop at Qhoalinyane was run by his wife.

A1 allegedly said that they have been waiting for him (A8) for a long time or words to that effect. A8 went behind the counter where deceased was. According to Kantini deceased was stripped naked after being overpowered. Kantini was one of those inside the counter who helped in subduing the deceased. Kantini estimated the space inside the counter at about 4 feet right across. A sketch plan (admitted by consent as with all photographs and maps) of the shop/cafe is Exhibit J and the

space is marked at 117 cm = 3 feet. 117 cm however is nearer 4 feet than 3. Be that as it may according to Kantini deceased made little noise or movements - no more than what a sheep does when slaughtered. A8 using a knife cut deceased's penis, testicles, a piece from the armpit and part of the breast, and extracted one of the eyes. Kantini saw no cutting in the region above the throat, but A1 later told him that the small tongue was cut as well and showed it to him. When each part was cut out boiling water was poured over the region and then a hot iron applied. Tselane and Ntsokeleng say they did not see what was happening behind the counter since they were at the customers side.

The deceased was then carried naked to the main area of the shop and put down on the floor for those present to look at him. A1 made a short speech. The men left some carrying the body outside. The women were told to clean the mess.

According to Kantini the body was carried to A8's vehicle, an open blue (or grey) van with no canope parked half way between the shop and A1's house, some 23 (pointed) paces from the shop. There an argument developed as to whether the body should be taken to A2's shop. A2 objected strongly. Whilst the argument was going on by the van the women were cleaning the shop. Ntsokeleng was ordered to remove her dress. The deceased clothes (including his shoes one of which is Exhibit G) were wrapped in this dress, Ntsokeleng remained clad only in a shawl and the bundle was taken by one of the women in the assembly. These were never seen again except for one shoe (Exhibit G) that I had earlier referred to. According to Kantini the argument amongst the men was resolved by returning the body to A1's shop. The women had by then finished cleaning and the shop locked. Kantini says it was reopened and the body was put in a ditch or a hole in the floor behind the counter area large enough to take a body. It was covered with corrugated iron sheet.

According to Kantini, on the following day, 26th December 1980, A8 arrived in the same van at dusk. All the male accused persons, plus Taole (and the three former accused against whom the prosecution was discontinued) carried the deceased's body to the van. It was driven by A8. They drove to the outskirts of the villages of Lioling, some 6 kilometers by road from Hill

Top (see map Exhibit C1) and parked below Mokhosi's compound (he was not at home) the furthest a vehicle can go. They waited until the moon rose, and whilst A3 and A8 remained with the vehicle, the men carried the deceased's body to the river bank. Deceased's body was wrapped. According to Kantini A3 told the former A10 to throw the deceased's shoes in or near the river to fake a drowning. The going was slow and the distance covered (according to the map Exhibit C1) was 1100 meters. The body was lowered in a hollow by the river between boulders after the blanket wrapping was removed.

A1, born in 1944, testifies that on the 25th December 1980 at the time when the alleged killing took place he was at home, asleep, after having had too much to drink during the day. He was with his two daughters. Two relatives in a lorry descended upon him unexpectedly, and they slept over night as they did not wish to drive the lorry in the rain. It had bogged down earlier on when crossing a stream near Ha Makoe. These two, Limpho Manamolela and Rasethunyane Manamolela (DW5 and DW6) gave evidence supporting A1. They are his nephews. He says the deceased came to his shop that morning whilst he was distributing sweets to the village children, and asked for a Xmas present. A1 says he was not expecting him and offered him sweets but the deceased replied that he was "not a child" and wanted liquor. A1 says he had no licence for and did not stock liquor in the shop, but happened to have a bottle of brandy under the counter. He kept liquor for his own consumption at home. However he made a quick mental calculation of his home stock before his next visit to Qacha's Nek. The bottle was originally half full, but A1 had from it two swigs before deceased's arrival. He was reluctant to part with it but he ultimately gave it to the deceased. The deceased did not snatch it. The deceased promised to reimburse him on New Years Day.

A1 says that the following morning the 26th December 1980 whilst in his garden he saw people going in an easterly direction and they told him the deceased disappeared and he joined a search party along the Mothabisa stream (after hearing a rumour that deceased was seen sleeping there) from the east and in the afternoon rejoined the search party on the west of the Mothabisa stream. He then went home and slept. Tselane,

/Ntsokeleng

Ntsokeleng, and Kantini were liars. Until the Preparatory Examination he never knew or heard of Tselane or A4, or A9. Kantini once took 50 kg of mealies from the shop under false pretences and was a suspected associate of a burglary of his shop. He did not know A2 except by sight or repute when he was told shortly before Xmas that he had opened a shop in Hill Top. He says that A5 and A7 were away from Hill Top on that day.

A2 testifies that on Xmas day 1980, he left home at 9 or 9.30 a.m. to Lioling. When the hail storm broke out in the afternoon he was drinking at Khojane's house at Lioling village with friends. When the storm finished he and his friends passed by a house whose owner said had been flooded. He helped scoop the water out. Then he went back and continued drinking. It was getting dark and he and a friend borrowed a torch from a young man and returned to Hill Top to the house of Lepheane and continued drinking. He went back home to sleep that night. He denies Tselane's, Ntsokeleng's, and Kantini's allegations. He never knew or met A1 except after Xmas 1980 when he went to A1's shop to get some change. He never knew or met Tselane (except from the Preparatory Examination) or her parents, although he knew Ntsokeleng. All three accomplices concocted their evidence. In November 1980 when the plot was supposedly hatched he was still at the mines. Kantini just loitered about and was probably jealous of his success. His wife (A6) was at home that Xmas night. He called no witnesses.

A3 a gazetted headman since 1966 or 1967 testifies that on Xmas day 1980 he was at home at Ha Rankakala. In the morning he was at home drinking. In the afternoon he drove back and kraaled his horses, and went to Masilai's where he continued drinking. At late dusk he went to his father's home where he ate and drank "joala". At night fall he returned home and slept. He denies Tselane's, Ntsokeleng's, and Kantini's allegations. A1 is not his acquaintance, he first saw Tselane at the Preparatory Examination and never before. He knew Ntsokeleng and her parents. Kantini had once stolen one of his goats and this may or may not be the reason for concocting the story against him. A3 was not asked in chief about the shoes which Kantini says he (A3) instructed the former A10 to throw in or near the river to fake a drowning. A3's reply in cross-examination was that this was one of Kantini's other

/fabrications

fabrications proved by the acquittal of A10 during the trial when the Crown withdrew the charge against him. He suggested Molefi may have had a grudge against him when his horses trespassed on his (Molefi's) land.

A4 testifies that he lives in Mapakiseng. On Xmas day he went to the home of a relative Quamo Takane and his wife at Ha Makoe for the Xmas festivities and spent the night there. On the following day the 26th December he heard of the deceased's disappearance at Hill Top. He conducted a one man search around the Mothabisa stream and went back home to Mapakiseng and slept and did so on the following day the 26th. He did not know A1 at all, but knew A2 since they were in Durban together at one time. He knows Kantini but Ntsokeleng he saw for the first time at the Preparatory Examination. Tselane was related to him by marriage through her mother and was a disgraceful child prepared to give sex to anyone for money. She made up her story because he had reprimanded her on her behaviour. He did not know A7 and A8 though he knew A5, A9 and A3.

A5, A6 and A7 elected to keep silent.

A8 is A1's elder brother. He testifies that on Xmas day 1980 he was at his home in Qhoalinyane on the other side of Qacha's Nek which is four hours drive from Hill Top. (See coloured survey map Exhibit C5). The distance has been said to be 103 kilometers from a bus chart Mr. Kolisang had. He was with his family. People called in for food and drink at his home and these included the chief of the village Mopeli Makoko (DW1). When darkness had fallen and before he and his wife had gone to bed (usually after the 8.45 p.m. news bulletin) a young man called Lebohang Seala and his grandmother Mrs. Mokhothu arrived in a vehicle in his compound and sought his permission to park their car there. He knew the Sealas. He allowed them to do so as he had ample space. He learnt that the Rev. Seala and his wife had come to visit an elder sister that lives nearby. He then went to sleep. In support A8 called chief Mopeli (DW1) Mrs. Seala the Reverend's wife (DW2) Lebohang Seala their son (DW3) and Suzan Mokhothu (DW4) Mrs. Seala's elder sister. On the following day the 26th December 1980 he left home in the morning in search of his daughter who had eloped and later paid a visit to the Reverend Seala and his wife where they were staying and in the evening he went home got drunk and slept.

/He did

He did not know A2, A4, Ntsokeleng and Tselane (except from the Preparatory Examination) but did know Kantini from his visits to Al's at Hill Top. He suggested that Kantini, Tselane, and Ntsokeleng may have dragged him in because of some clash with his brother Al at Hill Top and in any event W/O Mapeshoane(PW11) told him at the Preparatory Examination that he was going to "frame them all up".

A9 testifies that on Xmas morning he left home at Ha Makoe to visit his sister at Hill Top. He was drinking. The hail storm then started. When it finished, and he was drunk by then, he started off on his way back to Ha Makoe. At the outskirts of Hill Top he met Tselane going uphill from the Mothabisa well carrying "joala". She gave him some. They parted company, she going towards Hill Top and he towards home to Ha Makoe. He then went to bed. On the following day he had a hang over and stayed at home and slept. When he was arrested on an alleged charge of dagga he took M120 from his savings to pay the fine if one was imposed. It was not concealed but in his front trousers pocket. He was asked to become a Crown witness. He refused. Whilst in custody the police beat him up badly and tortured him. They took him to the deceased's grave (he was buried at Qacha's Nek) and told him Jimisi was calling him. They tried everything to drill him to give perjured evidence against the accused, in the same way as they beat and drilled Tselane Ntsokeleng and Kantini, an allegation incidentally that the last three deny.

W/O Mapeshoane (PW11) one of the investigating officers stated that the accused when he arrested, when charged and cautioned, said they will only speak in Court.

To detail all the variations and discrepancies in the testimonies of the three accomplice witnesses, at the Preparatory Examination, at the trial, and inter se would I think be an enormous task, but nevertheless it ought to be undertaken if only in a general way. Amongst these may be mentioned : the number of meetings held, when, with whom, who was present, and who said what and to whom: how much reward was each to get, from whom, when and where was the promise or promises made: who was present at Al's shop on Xmas day at dusk and thereafter: whether Al stocks liquor in his shop or not: whether when the accomplice witnesses entered Al's shop, the deceased was lying

down tied hands and feet, squatting on his heels but propped up or seated upon a chair or stool with only his upper chest showing: whether there were three lamps lit or one: whether the deceased's mouth was gagged or not: whether those present were drinking or not drinking or some drinking and others not: whether when a person called at the shop to buy who turned the person back: whether or not before A8 entered the scene the sound of a vehicle was heard: whether or not A9 hit deceased with a stick on the head behind the counter: whether as the deceased was being overpowered, he gave much little or no resistance: whether he cried loudly or just moaned, who of the accused persons held the deceased: who of the accused held which of the deceased arm(s) or leg(s) and on which side of the body did they stand: whether when the surgery started, there was no blood, little blood, or much blood coming out: who of the accused passed the boiling water and to whom: who of the accused poured the water over the wounds occasioned by the severed organs as they were being cut: who applied a hot iron on the wounds: why, if the small tongue of the deceased was cut out from above his throat did not Kantini see this part of the operation: whether, when the severed organs were cut, they were put in one jar or two jars: whether the jar or jars were of glass or transparent plastic: who of the accused persons carried the naked body of the deceased and put it in the main public area of the shop: whether when the deceased was carried into the main area one or two blankets were used, who fetched them, and from which part of the shop: what severed parts did Ntsokeleng and Tselane see when the body was laid: whether blood was oozing or not oozing: whether and if so what precisely did A1 say after the killing when deceased's body was laid on the floor: who of the women accused helped in the scrubbing: was there or was there not too much mess on the floor: what items of clothing did the deceased have under his overalls: to whom of two of three women accused were those handed after they were bundled up: was there or was there not a small bottle of liquor passed round for everyone to have a sip: whether or not before or after the body was taken out/^{A9}demanded to have the deceased's stick: how, if the body was returned to the shop, Tselane and Ntsokeleng did not see it specially when Ntsokeleng says she and Kantini saw Tselane to the gate of A1's compound: to which South African resort after the killing did A6 suggest Ntsokeleng and Tselane should go, Durban, Johannesburg or Natal, and where

/was

was the suggestion or suggestions made.

I would like to refer to two or three matters before I deal with the submissions.

During cross-examination of the prosecution witnesses several questions were asked on matters that we heard nothing or little about from the accused who testified and/or those who called witnesses. I will mention the story put to Tselane that there was bad blood and some "trouble" between the deceased and A9 before Xmas. She denied knowing anything about that. It was then suggested to her that the deceased and A9 had fought at the Mothabisa well on Xmas day and she was present. She denied that. It was also suggested to her that Ntsokeleng was present as well at the time and she denied that. It was further suggested that A9 hit deceased on the arm with a stick and injured it. She says she knew nothing about that. It was further suggested that Tselane stole deceased's watch and A9 robbed him of his money. She denied that. That story was not put to Ntsokeleng in cross-examination nor was it put by senior counsel to A9 (who was defended by Mr. Mlonzi) when he was invited to cross him. A9 was simply asked if he knew anything about deceased's photographs or watch and he replied in the negative. When A3 was called to testify he said nothing in chief about the deceased's watch or photos, but in cross-examination he disclosed that Molefi the deceased's father came to him during the search and showed him the deceased's watch and photos given to him by Tselane but says he did not take them from Molefi and suggested that it is better if he takes them to the police instead. This story Molefi had denied. It was put to Molefi that at the Preparatory Examination when giving evidence he was wearing the deceased's watch and this he denied saying it was his own watch that he was wearing.

It was put to Molefi deceased's father that deceased used to get lost "in caves" but we heard nothing about that from anyone. In any event the deceased was seen drunk and asleep fully clothed at Mothabisa and could not have gone to a Tsoelike cave naked and mutilated himself there.

It has also been suggested to Tselane that she passed a message to Mpoetsi (A1 and A8 sister) through one Tebello with whom she was staying at Qacha's Nek when she was giving

/evidence

evidence at the Preparatory Examination that her (Tselane's) conscience was pricking her for having falsely implicated her brothers in the deceased's murder. We have heard no such evidence from either. Tselane denied ever knowing Mpoetsi and at first Tebello both of whom were brought into the well of the Court, but on further questioning Tselane admitted Tebello was a member of her own clan and she thought that counsel was referring to the time since her arrival in Maseru for the trial. Tselane may or may not have understood but I will assume that she lied on this point. However she denied ever passing such a message to Mpoetsi and there were two other witnesses to the murder besides Tselane.

Mr. Weinstock concentrated his attack on the evidence of Kantini, Tselane and Ntsokeleng; on Mapuleng who (if her evidence were to be believed) affords corroboration that at any rate A1 was at the shop at dusk on Xmas day 1980 and not asleep in his house, and on Molefi Seroke the deceased's father, whose evidence, if believed, tends to show that A1's words and conduct at the scene where the body was discovered on 10th January 1981 and A3's words and conduct from inception up to and including the date of the discovery of the body is not consistent with innocence but with guilt.

Mr. Weinstock highlighted the following :-

1. Accomplices

(a) Tselane and Ntsokeleng testify that the plot to kill the deceased was hatched in November 1980. This date was crucial to the success of the Crown case but their evidence cannot be true because A2 (who originally allegedly approached Tselane) was still on the mines in the Republic of South Africa as his passport Exhibit E clearly shows. The passport stamps state A2 was discharged on 5th December 1980 and entered Lesotho on the 11th December 1980, which former date was verified by W/O Mapeshoane (PW11) who was dispatched during the proceedings to the Mine in Rustenburg and personally checked the records with the mine official concerned and if Tselane says she "usually" bought from A2's shop, and if A2 says he only opened it on the 16th December 1980, Tselane has committed herself to a

lie if the shop had been going only for 10 days for the dates do not add up. The Crown was in position to check the date of the issue of A2's shop's licence from the Qacha's Nek authorities and this they failed to do. Ntsokeleng joined Tselane in this.

(b) The accomplices do not say the same thing about the plot for there is irreconcilable conflict between Tselane on the one hand, and Kantini on the other, on whether the plan was to be executed on Xmas day, the latter saying he went to A1's shop at dusk to inspect as a matter of routine whilst each of the two women (Tselane and Ntsokeleng) say something different.

(c) Kantini's evidence of seeing A4 in the morning mixing drinks with A1 is in direct conflict with that of Mosala, deceased's brother who says he saw Taole in the shop not A4, and if the plan was to catch deceased when he went for his "Xmas present" to A1's shop why was he not caught then and there? Furthermore if there was a plan to give the deceased a "doctored" drink he would have been given the small quarter bottle which had the powder and tablets and this did not happen which is consistent with the large half full bottle being given by A1 as a loan not as bait as claimed by the Crown.

(d) The following discrepancies were major :

- (i) Deceased's position when the accomplices entered.
- (ii) Tselane not hearing the sound of a vehicle arrive and not seeing a vehicle at all whilst Kantini says the opposite and Ntsokeleng contradicting herself.
- (iii) Deceased being gagged with a cloth not confirmed by Tselane and Ntsokeleng and Kantini himself mentioned it for the first time only at the trial.
- (iv) The events as described by Kantini to have taken place on the 26th December in dumping the body could not be true because according to Ntsokeleng he was with her in bed that night and did not leave his room.
- (v) Kantini brings in a rope to lower the deceased's body into the hollow for the first time at the trial. This could not have been omitted by mistake or error because he was asked a specific question about this subject at the Preparatory Examination and he said he did not remember if anything was used to lower the body.

/((e).....

(e) The following matters remain inexplicable :

- (i) Kantini was in a good position to observe the operation and he could not have missed the part that resulted in the extraction of the small tongue.
- (ii) If Kantini and Ntsokeleng accompanied Tselane to the gate of the compound after the cleaning was done and then went straight to bed as Ntsokeleng says they did at Al's servants quarters, when was the body returned to the shop, and how is it that Ntsokeleng and Tselane did not see the exercise?
- (iii) The existence of a ditch or a hole in the shop was not supported by Tselane and Ntsokeleng, and if there was a hollow under old removed floor boards or planks and replaced later with new ones the Sgt. (Det/Sgt Putsoane whose evidence as it appears at the Preparatory Examination was admitted) who did the inspection and drew the sketch (Exhibit J) would have noticed it and that in any event the Sgt did not remove the planks to see how deep is the hollow.

2. Mapuleng's evidence was supposed to corroborate the accomplices that Al was present at his shop at dusk not asleep at home but :

- (a) there is conflict as to who turned her back,
- (b) at the Preparatory Examination she said she noticed no lights and at the trial she contradicts herself as to whether the shop was lit or not lit,
- (c) it is impossible for a person to remember what he or she bought from a shop on Xmas day a year previously as she maintains she did, when Al evidence is to the effect that he was in hospital in Qacha's Nek during Xmas of 1979. It was within the Crown's power to check on the hospital records to prove him wrong.
- (d) she could be mistaken on the date.

3. Molefi Seroke is a liar and has misled the Court over a number of matters and tailored his evidence to fit with Ntsokeleng's and Tselane's :

- (a) the second "dream" of Tselane in which she implicated Al with the murder was not mentioned by him at the Preparatory Examination.
- (b) that A2 returned in November before his son the deceased and this has been proved wrong.
- (c) he implicated A3 by attributing to him words which he did not utter, and by suggesting that he took no action over his son's disappearance whereas he admitted in cross-examination that

/A3 did come

A3 did come on Sunday and A3 has sworn he informed his superior chief and the police and would have given Molefi a letter when finding the shoe if he had only waited. He also lied against A1 and A3 as to what they said at the river.

Mr. Weinstock sums up the case for the defence not by contesting the law as outlined by Mr. Peete but by the latter's contention that the evidence of the accomplices was demonstrably superior in spite of its many defects and in spite of some lies by Kantini (including an inference that he may have falsely implicated A10, A11 and A12 who have been discharged) and some lies by Tselane and Ntsokeleng, by reason of the sheer force of the sequence of events and the surrounding circumstances which cannot be taken in isolation but cumulatively. The defects, Mr. Peete had added, did not detract from the accomplices testimony, for if drilling or conspiracy (by the accomplices against the accused) there was, one would expect their evidence to be more uniform, and when compared with the accused persons (and their witnesses evidence) the latter are seen to have demonstrably concocted their alibis. Mr. Weinstock protests that the case for the Crown depended on three persons, Tselane a wicked and callous woman who was prepared to kill her own lover for R400 and prone to implicate innocent people as is shown by her denial of knowing Tebello her relative, by Kantini a man prepared for one hundred, pounds or rands matters not, to kill an innocent fellow villager, and Ntsokeleng who was in no better position morally; and against this rot stand nine accused persons two of whom called impeccable witnesses (including A8's chief and the wife of a Reverend) to give evidence of alibis - (even though there was no onus on them to do anything) which must result in the Court holding that what was said by the accomplices was a product of their own imagination or an invention entitling all the accused, including those who did not give evidence, to an acquittal.

I am satisfied that a crime of murder has actually been committed to comply with the requirements of s.239 of the Criminal Procedure and Evidence Act 1981. That of course is not enough.

The law on accomplices has been dealt with in our Courts in Lesotho on many occasions (see ~~for example~~ Tsiu Letloha v. R

/HCTLR

HCTLR 1963-1966 12; Tumahole Bereng v. The King and Lerotholi v. The King 1926-1953 HCTLR p. 123 and 149) but the best summary I am able to find is in a judgment of Leon J (in a full court) in S. v. Van Vreden 1969(2) SA 524 at 531 G-H and 532 A-F. It has to be repeated here if only to emphasise, if emphasis is needed, the awesome task I am about to approach.

- "(1) Caution in dealing with the evidence of an accomplice is imperative even where the requirements of section 257 have been satisfied.
- (2) An accomplice is a person with a possible motive to tell lies about an innocent accused, for example to shield some other person or to obtain immunity for himself.
- (3) Corroboration not implicating the accused but merely in regard to the details of the crime is no guarantee of the truthfulness of the accomplice. The very fact of him being an accomplice enables him to furnish the court with details of the crime which is apt to give the court, if unwary, the impression that he is in all respect a satisfactory witness.
- (4) Accordingly, to satisfy the cautionary rule, if corroboration is sought it must be corroboration directly implicating the accused in the commission of the offence.
- (5) Such corroboration may, however, be found in the evidence of another accomplice provided that the latter is a reliable witness.
- (6) Where the corroboration of an accomplice is offered by another accomplice, the latter remains an accomplice and the court is not relieved of its duty to examine his evidence also with caution. He, like the other accomplice, has a possible motive to tell lies. He, like the other accomplice is in a position to furnish the court with details of the crime which is apt to give the court, if unwary, the impression that he is a satisfactory witness in all respects.
- (7) Where there is no such corroboration there must be some other assurance that the evidence of the accomplice is reliable.
- (8) That assurance may be found, inter alia, where the accused is a lying witness or does not give evidence.
- (9) In the absence of any of the aforementioned features it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits of the accomplice and the demerits of the accused as witnesses are beyond question.

/(10).....

- (10) When it is said that the merits of an accomplice as a witness must be "beyond question" in order to be accepted as sufficient for a conviction, this does not mean that his evidence must be free from any defects."

The killing of the deceased of course has not been "imagined" or "invented". Looking at Kantini's facial contortions (unless he was a great world actor which in my opinion he is not) and listening to his evidence when describing the events of that Xmas night I can come to no other conclusion except that he was an active participant in and was a witness to the killing. The possibility of his being an imposter can be excluded with confidence. That does not mean that he is in every respect a perfect witness but one thing can be said and it is that he did not minimise the extent of his involvement and his role particularly on the two nights in question: he says he was a member of a plot to kill from the beginning or almost, had helped force the deceased down to subdue him, and later assisted in disposing of his body. He was not immune to lies e.g. that although he knew that the plot involved giving the deceased a Xmas present he was not present at the meeting when Xmas day was fixed for the killing or that he did not know at dusk that the deceased was going to be killed and had simply gone to the shop to check on security as a matter of routine, and was not expecting to see him, or an improvement on his evidence as it appears at the Preparatory Examination e.g. the gag on the mouth and a rope to lower the body and evasiveness on a number of points such as that he had not heard of the word brandy. The grave dangers that exist and the extreme caution that is imperative is his (and other accomplices) changing the venue and implicating an innocent or the wrong person or persons or mixing the innocent with the guilty.

Tselane was dogmatic and adamant about the date of the start of the plot to kill the deceased (she was dogmatic and adamant on almost everything else as we shall see) as was Ntsokeleng, so this matter has to be dealt with first.

I will begin with Kantini's evidence. In chief he puts the date of the plot when he was approached by Al as in the few days before Xmas. In cross-examination he confirmed that the first discussion took place "before Xmas but during the days that preceeded Christmas". It was not some weeks before Xmas,

/but

but during the Christmas weeks, not on Xmas day. In chief Ntsokeleng puts the date of A5's approach as two weeks before Christmas. Tselane says in chief she started her love affair with the deceased "in November" and A1's approach to her was towards the "end of November". In cross-examination questioned about her visit to A5 when the subject was mentioned she replied it was about "middle of November". Since Tselane had already said that it was A2 who had approached her first a few days earlier, that would take us to 12 - 13 November (Mr. Weinstock so put it) as the date of the approach by A2. She then said she was not sure. She said she went to A2 in the 3rd week of November and went to A1 in 1st week of December. She was then asked by the Court if the deceased had arrived at home at the beginning of November 1980 and she answered that he did. Mr. Weinstock then produced A2's passport (Exhibit E) with a stamp showing that A2's mine contract expired on the 5th December 1980 and another stamp that he entered Lesotho on the 11th December through the Transkei she replied that A2 is capable of forging any stamp and bribing passport officials and mine authorities to do anything. Whilst on the face of things A2 passport stamp marks appeared in order it was brought to the attention of the defence and the Crown a day or two later that the date of discharge of A2 from the mines on the passport was not in fact initialled by the mine authorities as deceased's passport was. This resulted in the Crown dispatching W/O Mapeshoane (PW11) to Impala Mine who came back after having perused A2's record, a sheet in the form of a card showing the name of the miner, his number and then blank gaps designed for the initials of an official to be inserted against other items that include the engagement and discharge dates. Those, Mapeshoane says, tallied with the stamps on the passport of A2, though that latter was not initialled for the date of discharge. A mistake in failure to initial the date of discharge is the most reasonable inference and I shall proceed on this basis. All other evidence on this episode must be ignored as hearsay.

The following possibilities arise:

1. That Tselane, whom A2 maintains he does not know at all until he saw her at the Preparatory Examination, concocted (with Ntsokeleng and Kantini) a plot before his arrival and indeed perhaps even before the arrival of the deceased. This theory was put by A2 himself from the witness box and is manifestly an absurd possibility.

/2. That

2. That Tselane and Ntsokeleng were mistaken on the dates. This is more than just a probability because if we examine the deceased's passport we see that he arrived on the 21st November 1980, i.e. at the beginning of the fourth week of November 1980, and he is unlikely to have hopped into bed with Tselane the first day and many days before villagers could have noticed their association. Deceased's father Molefi for example did not know of the relationship. Deceased's passport had no defects and the poor fellow had no interest to forge or falsify anything.

3. That Tselane and Ntsokeleng, but only after A2's arrival, had falsely implicated A2 in the crime. That of course is always a possibility for accomplices are a peculiar breed and his fate falls to be determined, in the final analysis, in the same way as that of A4, A5, A6, A7, A8, (but see infra) and A9, against whom only accomplice evidence exist.

Tselane who thought it was deceased's destiny to die in the manner he did and could see no other candidate, and who is shocked by nothing in the field of human relations testifies that a few days after the killing she decided to hint to Molefi the deceased's father, who was still engaged in looking for his son, that the latter had, in effect, not drowned, but that he died as a result of foul play. She says she went about it in a round about way and told Molefi that she had dreamt that a child had been thrown "over a precipice" and that that child was his son and a day or two later she gave Molefi even more direct hint that she dreamt that it was A1 who has killed his son. The information that deceased was thrown "over a precipice" came to her (she says after some hesitation) from Kantini on a visit to Ntsokeleng's (it is not clear if the latter was present) but not the exact place where the body had been dumped. Ntsokeleng says that Kantini also told her the body was dumped. Molefi confirms that Tselane spoke to him about the "dreams" (this was before the shoe - Exhibit G - was discovered near the river) and that he passed this information to the police at Qacha's Nek. This must have been between the 30th December 1980 and January 3rd 1981. Molefi, between those dates, seems also to have paid a visit to Qacha's Nek mortuary after the police told him a body of a person had been discovered at White Hill and asked him to go and identify if it was his son as I mentioned previously and he may have told them about the dreams

/then.

then. There is no doubt about the truth of what Molefi relates about the dreams Tselane says she told him, though she says he said that he heard from another source about Al, but this latter remark of Tselane Molefi does not confirm. He says he passed this information on to the police (and I believe him) for there was no reason for the police to call Al on the 3rd January to report on Monday 5th to ask him about the disappearance of the deceased which took place on Xmas day unless it was based solely on the lad Mosala who thought the deceased had bought a bottle from Al (assuming that is, in his youthful mind, he thought of anything sinister) and on that alone it is very very unlikely that the police would have acted.

Tselane says she did not actually have dreams. It follows from this either that she knew for a fact how the deceased died and that Al was the main culprit (she did not name A2 for example who made the first approach) and had some remorse (she admits to have been haunted by the deceased's death once) and was susceptible to weakness however hardened she was or professed to be in the witness box, or alternatively, that she knew nothing, probably heard rumours, and was up to pure mischief (which the Court must consider as a distinct possibility in view of her character) which escalated after her arrest in justifying the rumours to the police (who curtailed her liberty for some five or six months) by implicating all and sundry, or by giving rein to her imagination in order to please the police, and/or with their connivance, to construct a case against innocent persons based on nothing except Al's admitted evidence that he gave half a bottle or so of brandy to the deceased on Xmas day. I will deal with this last aspect when I come to consider Al's evidence and will give reasons why it should be excluded as a possibility, but that it was remorse and not mischief that prompted Tselane to speak to the deceased's father is supported by Ntsokeleng with whom she discussed her qualms. Ntsokeleng testifies she advised Tselane to be firm, and A6 discerning this weakness in her and potentially in Ntsokeleng, had advised them both to leave Hill Top for a while. There is a difference between Tselane and Ntsokeleng as to where this conversation, if there was one conversation only, took place, at the shop or the well, and there is a difference also on the place in the Republic where they were recommended to go, but A6 did not give evidence and

/their

their assertion stands uncontradicted. So Tselane too, like Kantini, could not have been inventing. Ntsokeleng says she also advised Kantini, the spent miner, to leave Al's employ, but he replied he was "already in it" and where were he to go.

Now "dreams" mean little or nothing as evidence to go by. The deceased's body was still undiscovered. The police inquiry from Al must therefore have been routine but once the body was found and the fact of deliberate mutilation scientifically established, the obvious inference is that the deceased was ritually murdered on Xmas day most probably at Hill Top and that Tselane knew something about it. Her apprehension and detention was inevitable. Tselane says she was arrested three weeks after the discovery of the body on Saturday (which makes it 31st January 1981) and began talking a week later according to her evidence at the trial, but three weeks later according to her evidence at the Preparatory Examination. Did she tell them the whole truth, half the truth, or a mixture of lies and truth and did she do so right away or piecemeal? If one may be permitted to draw on one's judicial and legal experience, it is more probable that it was piecemeal, but she says it was not and she told them nothing but the truth.

Ntsokeleng and Kantini do not know the date of their arrest though they say it was during the Easter period. Now these dates were later in time than the deceased's and A2's dates of arrival at Hill Top from the mines, which reinforces my view that however dogmatic a witness may be, in Basotho as perhaps in other societies, even amongst the literate, they are not immune to the frailties of human nature, for memories do fade and too much reliance on dates cannot assume the precision of mathematics which Mr. Weinstock insists this Court should uphold. A2 had been at home for two weeks. Tselane (or rather Crown Counsel when he put the question in chief) use the word "usually" may have referred to the period when A2 opened the shop to the date of Tselane's arrest on or about January 31st 1981. In my view the word used has no significance, certainly it did not so appear to me either at the time or on reflection. Then there is the date of the disposal of the body, whether it was the 26th December or the 27th December, when, according to Ntsokeleng Kantini was out of their room "for a long time". When further asked she said it was the Friday which makes it the 26th. If the body was

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kept, the murderers were more likely to keep it for one rather than two days. Tselane's naivete can be illustrated by her reply that when at about sunset A2 told her that "the person" was already at Al's shop, that she did not know what would happen to him though she knew what that person's "ultimate end" was going to be.

Ntsokeleng was not as forthcoming as Tselane and tended to evade issues and to answer them only when pressed and then not always necessarily truthfully. What was her object is difficult to see but on identification of those involved there was no flinching.

The three accomplices gave evidence of a ploy to lure deceased to Al's shop for his Christmas present. Mr. Weinstock submits that Al did not at any time conceal giving the deceased a bottle and in any event the alleged doctored bottle (the quarter) has not been given to the deceased and he was not caught. This episode, it was submitted, need not have the sinister inference attributed to it by the Crown for it is equally consistent with innocence. That contention must of course be assessed within the context of the accomplices evidence, Mosala's evidence, Molefi's evidence, and Al's own and his witnesses evidence, but it does seem to me, with respect, that the visits of Kantini and Mosala did not take place at the same time that morning for the former speaks of it as taking place after attending to the cow and calf, and further Kantini did not say or imply that the small quarter bottle into which some of the liquor from the large bottle he brought from Al's house was poured was to be given to the deceased. Mosala's visit was clearly later. Whilst it is true that Tselane said she thought the deceased might be caught then and there, Mosala his brother was still in the shop when the deceased left with the bottle. If that was the original scheme, which is doubtful if the object was to sozzle the deceased (for he did have a weakness for alcohol) and he was in fact sozzled when Mateboho saw him at the stream, it could not then be safely executed.

We then come to Mapuleng. None of the accomplice witnesses say they saw her. Kantini's evidence was that Al told him that Mapuleng is coming to buy and it was he(Kantini) who turned her back without seeing her. Tselane says that a

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person was turned back by Al himself. She did not see that person. The discrepancy was not particularly material but the fact of the matter was that this lady once says she noticed no lights (at the Preparatory Examination), in examination in chief at the trial she said she did; and in cross-examination she was confused. Added to her assertion that she remembered calling on Al's shop on Xmas day 1979, that is to say, over two years before the trial, to buy sugar, a common everyday commodity which, particularly amongst the humble community in a rural area, must have been purchased dozens of times, is an assertion which I am not prepared to accept. Her evidence therefore becomes suspect and it must be rejected as corroboration of Al's presence at his shop at dusk on Xmas day.

Molefi, it is submitted, tailored his evidence to coincide with that of Tselane and Ntsokeleng with regard to his deceased son's arrival and to A2's arrival from the mines. Molefi was attacked when producing his son's passport and it was even suggested that he did so after he heard the significance of the production of A2's passport during the hearing, but Molefi says he set off by bus from Qacha's Nek on the 22nd February 1982 for the trial which did not commence until 2nd March. At that time surely he did not know about A2's passport. Indeed from his demeanour in the box Molefi, when confronted with A2's passport, seemed to have been anxiously casting his mind back to the days of November-December 1980, and though he did say A2 arrived before his son, he also said he may be wrong. I did not discern any lack of candour here. His memory of dates before his son's disappearance was no better or worse than others, unless something extraordinary happens like his son's mysterious and sudden disappearance and eventually finding him murdered. As an example I can cite his evidence about the days he and his family started the search until the discovery of the body.

Molefi is attacked for sometimes saying one thing against A3 and then the other. It arose first from his statement that A3 did not come to Hill Top when he asked for him through Mokhifa on Friday and did not come on Saturday or Sunday. I think Molefi had every right to be anxious about his son for by Saturday afternoon and certainly by Sunday afternoon, it was more or less obvious, except to those involved in the death of deceased, that the theory of drowning in the

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Mothabisa stream was just not on however much the perpetrators of the crime may have tried to perpetuate it. Apart from the unlikelihood of the drowned body going downstream, there was no clue along that stream to suggest it, such as for example the finding of the clothes or anything belonging to the deceased apart from the shoe and that was found on the Tsoelike bank some distance from where the body was eventually discovered and certainly a long distance from Mothabisa, and is indeed consistent with Kantini's assertion (who ever made the suggestion to throw the shoes and to whom) that the purpose was to fake a drowning. Deceased's shoes were last seen in Al's shop when they were packed with other of his clothing. Molefi then said that A3 did come on Sunday and that he misunderstood counsel's question as to whether he was referring to the Friday or the Saturday. It was submitted this was a deliberate lie but I do not think it was. Molefi was attacked on his evidence relating to the shoe found on the 4th January when he said A3 did not seem to "approve" and gave him no letter or messenger to the police. A3 says he dashed to the bus while Molefi says he had to wait for the bus. Whatever the truth is, the Court must assess whether Molefi's evidence on the events from Saturday the 27th December to Monday 5th January were based on fantasy formed in retrospect and ex-poste facto the events when casting his mind back on those days or whether he had some factual basis. A3's disinterest is evident from his own answer to the question as to why he did not take from Molefi the deceased's watch - which the defence suggested Tselane robbed the deceased of on Xmas day - and advised Molefi to take it (and deceased's photos) to the police instead, a story incidentally that is supported by no independent source and is I think a product of A3's imagination and another myth created to mislead like the deceased drowning or his habit of being lost in caves, first to the populace, and then in Court. Molefi says he took the shoe first to Mokhifa and then to A3 in what he terms the "normal channels", i.e. the chieftainship and perhaps did not want to wait. Molefi might be a simpleton but his evidence of A3's dilatory and suspicious conduct is confirmed by his not accepting the police letter addressed to A3 on the 30th or 31st December 1980 when he went to report to Qacha's Nek police and proceeded directly to the highest Central Government authority in the area to complain so Molefi was not imagining. The Court does bear in mind that A3's

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conduct before the discovery of the body may have sprang from laziness or incompetence, but I (and my assessors, chiefs in their own right) discount this as a reasonable possibility: a chief is a peace officer in Lesotho and his duties are enshrined in the Chieftainship Act 1968 (ss 6 and 7). A3 says he informed the police and his superior chief about the deceased's disappearance, but the first information recorded by the former is from Molefi and there is only A3's word that he informed his superior chief.

We now come to the events at the river when the body was discovered. Molefi says A1 offered him a coffin which he refused and A3 wanted the burial of the deceased to take place right away which he also refused. A1 says that he offered to sell a coffin and A3 denied he wanted to bury the deceased but these events have been witnessed by Lesoetsa Lepheane (PW6) already referred to who is independent of the parties involved and one of those who helped lift the deceased's body from the hollow to the top. He was hardly cross-examined because his evidence as it appears at the Preparatory Examination was also admitted, but he confirms a commotion occurred over the coffin and burial involving A1 and A3. As far as one can make out he says A1 offered to donate a coffin "because Molefi said he did not have one" and that "A3 and Molefi" were in favour of the burial although he (the witness) was against. (See s.3 of the Inquests Proclamation on the duties of chiefs). It is very very unlikely that Molefi who showed such persistence throughout would have consented to accept a coffin or to bury his son. He had already sent his uncle Sisimane to call the police who came back with them at about 4 p.m. without any sign of the boy allegedly sent for the same purpose by A3. Mlandeli Simelane (PW7) says he heard A3 say the body should be kept until the arrival of the police. The important thing however, is when he said it and if that was after a fight was about to start, as I think it was, assuming that is, Mlandeli has been candid, and after the attempt at burial failed. Only those who participated in the murder would, in my view, be in favour of it, or in floating, even if it is in the form of a question, that crabs may have eaten the deceased's mutilated parts and a coffin can be had and burial carried out at the river. I do not think A3 is a "lunatic", but if we go back to one version of A1's speech when the deceased's body was laid for those

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present to look at, he said (to some apprehensive participants) that the police were his friends. Tselane also said Al said he would tip the police. What Al and A3 tried to do is consistent with what had been said at the time or soon after the murder.

Furthermore I am bound to ask myself what prompted Al a busy man with a thriving business to proceed to the river some miles away. It could be from innocent curiosity of course like most of the twenty or so men who went there, but it could be the reaction of a murderer who goes back to the scene of the crime from impulse. In this case there was good reason for Al to go because the extent of the decomposition of the body, 17 days after the murder, was vital to distinguish accident from crime. When added to the factors I have just detailed, I can reach no other conclusion except that those factors tend to prove Al's and A3's guilt and afford corroboration of the accomplices evidence. I am not persuaded that the words they uttered and their conduct were equivocal in the particular circumstances of this case.

Molefi has not mentioned Tselane's second "dream" at the Preparatory Examination. A witness, however, answers questions put to him by the prosecutor. The object of a Preparatory Examination (especially when cross-examination is reserved and no statements are made) is to find out if there is sufficient evidence to commit. The only evidence upon which an accused can be convicted or acquitted is evidence heard at the trial and the evidence of witnesses admitted in terms of s.273 of the Criminal Procedure and Evidence Act 1981. A previous statement inconsistent with the evidence given in Court has the object of challenging his credibility and reliability. In a trial there are more questions asked, more probing, and more opportunity of observation and assessment. This can be seen from the volume of the papers at the trial. I am of opinion that Molefi did not trim his evidence to fit in with Tselane and Ntsokeleng and he is a truthful and reliable witness.

Al gave evidence describing his movements in detail from the morning of Xmas day to the following day. His articulation however did not have the ring of truth. Take the example - his distribution of sweets to the village children

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throughout the morning. Mosala was there when the deceased came to ask for his Xmas present and Al says he offered him sweets. Mosala was not offered sweets and was not asked if he saw Al giving away sweets and heard no protest from the deceased that he was not a child and wanted liquor not sweets. And if Al, as he says, does not stock liquor, the question must be asked as to why deceased had been sent to Al's shop in the first place. If he wanted to buy some liquor or get it on credit, the deceased would surely have gone or been sent to the shop that stocks it, not to the shop that does not, especially from a shopkeeper, who says he did not know the deceased well, had seen him only when wearing a hat, and had not known about his white spot of hair when everyone else seemed to. A hypothesis that another group of persons from or around Hill Top, unconnected with Al, had in mind the ritual murder of the deceased, on the same day, in the same manner, using the same means, but in a different house or shop, who sent the deceased nevertheless to Al's shop for his Xmas present and made sure not only that he would get it but also anticipating possible detection and arranging in advance, that should this event occur, they will have the perfect defence of laying the murder at the door of Al - the police conniving aiding and abetting - is too remote a possibility and cannot withstand the test of reason and common sense (see S. v. Artman 1968(3) SA 339 at 341 B). The only reasonable inference is that deceased went to Al's shop in furtherance of that particular aspect of the plot and affords satisfactory corroboration of the accomplices trustworthiness on essentials if not on details in addition to Molefi's evidence supported to a large extent by Lesoetsa Lepheane of the events at the river.

Al's circumlocution - in the nature of confession and avoidance - and to my mind the evidence of his two nephews - who securely looked him up not allowing him and his daughters to even use the toilet - which was orchestrated to a fine point - is incapable of belief. No one spending an ordinary Xmas day at home will have his eyes glued to time, apparel, shoes, meals, music, and keys. And no visitors dropping in are likely to remember what Al's nephews allege they remember. If they spent the night there with a two ton truck outside it is strange that Kantini did not see it and stranger still not to have been asked about it at all. Al's nephews were not

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however able to orchestrate their evidence to perfection regarding the morning of the 26th. Limpho says Al left the garden without saying anything and on his return told them that he had gone looking for a person who had drowned and that is why they were waiting before taking their leave, whilst Rasethunyane says Al said before he left the house that he was doing so because he received a message that people were looking for a person and said nothing when he came back. In my view they are liars with an interest and I reject their testimony in its entirety.

Mr. Weinstock raised the point of the police failure to check on the depth of the ditch in Al's shop. I think this was a grave omission but I am not prepared for that reason to reject Kantini's evidence that there was one under the floor boards and that it takes a body and there is evidence Al did not open his shop on the Friday for he was looking for the drowned man in the morning and the afternoon. Kantini says Al showed him the tongue. I do not consider Kantini's failure to observe the removal of the small tongue as sufficient to disregard his evidence. He was not a doctor or medical student intently looking as if with a magnifying glass on an operation performed by a famous surgeon from a hospital theatre gallery. The vehicle was parked about 23 paces (pointed) between the shop and the house in darkness and Kantini had met Tselane and Ntsokeleng at the door of the cafe in the other direction (see D1 of the sketch Exhibit J). I see no impossibility of timing here to enable the men to carry the body back as it could not have taken more than a few minutes either before or after he and Ntsokeleng had repaired to his room. I do not consider the variation on the noise of the vehicle and deceased's position when the accomplices entered (Kantini stood first by the door - see D2 in the sketch Exhibit J and then went behind the counter - whilst Tselane and Ntsokeleng went to the public area of the shop) to be more vital than other variations I referred to earlier in my judgment.

The Court cannot in my view equate witnesses of a murder of this type (Tselane and Kantini having had plenty of drinks before) as if they were music critics going to attend a familiar opera knowing in advance the entries and exists of the actors and the arias. There were thirteen persons - the nine accused, the three accomplices and Taole - in a shop that

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measures overall 15 paces by 10 paces with a long counter (with a show box case on top) leaving some 10 paces by 8 paces for the public with stoves burning hot iron and boiling water, etc.. Most of the variations that had occurred were in relation to details of what must have been a night of sorcery blood and terror. I am satisfied beyond any reasonable doubt that the accomplices were telling me substantially the truth and it is safe to rely on their testimonies. Their evidence was corroborated with respect to A1 and A3 as I mentioned earlier. A1's alibi and A3's alibi (the latter outlined earlier in this judgment) are accordingly rejected as false.

I find no corroboration of the accomplices evidence as far as A2, A4, A5, A6, A7, A8 and A9 are concerned. The M120 found on A9 means nothing and Molefi's evidence of A2's "change of attitude" was clearly formed at a later stage and also means nothing.

The approach that I propose to adopt to alibi evidence (as I endeavoured to do in respect of A1 and A3 against whom I found corroboration of the accomplices evidence pointing irresistibly to their guilt) is to consider those other accused alibis in the light of all the evidence in the case and my impression of the witnesses and the surrounding circumstances and from that totality to decide whether their alibis might reasonably be true (R. v. Hlongwane 1959(3) SA 337(AD) at 341). The vital question here is whether the accomplices can be trusted that they have not implicated the others falsely. A5, A6, A7 gave no evidence though A6's husband (A2) and A5's and A7's employer (A1) did so on their behalf so to speak and they did not give me the opportunity to observe them (as is their right but from which a court may draw an unfavourable inference which I do) whilst A2, A4, A8 and A9 went into the box. I have earlier outlined what they say, but only A8 called evidence and this must now be evaluated at a little length.

A8 (who was arrested in May 1981) testifies he was at Qhoalinyane and could not have been at Hill Top on Xmas day 1980 after 2 p.m.. When charged and cautioned by W/O Mapeshoane A8 says he was not given the opportunity to make a statement or explain. W/O Mapeshoane says on the other hand that he was given such an opportunity but elected to remain silent (or said he will speak only in Court) and that when previously questioned

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about his movements on Xmas day A8 said he was at his home at Qacha's Nek with his wife. Now I do not think there was a misunderstanding about the date of the officer's enquiry for A8 says he knew from his brother A1 about deceased's disappearance on Xmas day and must surely have known about A1's police interview on the 6th January. Mr. Weinstock suggested that the officer lied about A4 and could have lied about A8. Now at p. 57 line 15 of the Preparatory Examination the officer is recorded as having said A4 said he was at A1's home on Xmas day. The officer replied he was not lying and that he told the magistrate that A4 had said he was at home at Mapakiseng. The magistrate noted at p. 58 of the Preparatory Examination when the statement was read over to the officer as follows : My statement reads that A4 said she (in fact he) was at A1 place: "The correct statement should be that A5 said she was at accused one place whereas accused 4 said he was at his home at Mapakiseng". So the officer was not lying. He struck me as a truthful witness and was in fact a member of a fresh investigating team sent from Maseru and I see no reason why he should lie on this point because for him it mattered not where A8 was going to say he was on Xmas night: he was going to arrest him anyway, whilst A8 had every reason to change the venue of Xmas night to take it further away from Hill Top as he could. The fact is that at the Preparatory Examination A8 had exercised his undoubted right to remain silent and I am not prepared to say the W/O was lying when he said A8 exercised his equally undoubted right to remain silent a couple of months earlier when charged and cautioned.

Lies, whether in or out of court, do not in our jurisprudence, constitute corroborative evidence per se against an accused but may weaken or destroy his own (and his witnesses) evidence depending on the circumstances - (Hoffmann South African Law of Evidence 2nd Edition p. 420). The position in England today is that there seems to be a distinction between lies told in court which cannot amount to corroboration and lies told out of court which may - R. v. Chapman (1973) Cr. App. R. 381 - 1973(2) All E.R. 624 - but the proposition seems to have been doubted in R. v. Boardman 1974(2) All E.R. 958 at 963 e-g (see also Phipson on Evidence 12th Ed. para 1642 at pages 692 and 693).

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The officer however did not record (in writing) what A8 said and it may be that A8 when questioned about his movements understood the officer to refer to Xmas Eve not Xmas night. I will proceed to examine the quality of his evidence and his witnesses. He says that after a meal was prepared, friends came to visit him from the afternoon of Xmas day and he remained at home thereafter. A prostitute (who had never seen him before and this sounds true since she was a recent newcomer to Hill Top), one other loose lady, a herdsman cum watchman cum gardener (both of whom knew him from periodic visits) say they saw him at Hill Top sometime after dusk. If A8's evidence were to be believed, it must have been a normal Xmas day spent at home (be it at Qacha's Nek or Qhoalinyane) like most of Christiandom. He says it was - but at precisely when ritual murder was being contemplated at or around Hill Top (not at his brother's Al's shop for he was asleep) but elsewhere in the village he gave the keys of his van (which Kantini is familiar with) to his son Thabiso to take the chief of his village some 3 kilometers away to his home and switched on the van lights, Thabiso taking long enough time over this journey (which the chief was ready to confirm) to enable Mrs. Mokhothu (DW4) and a boy called Lebohang (DW3) (both of whom say they did not see a van) come between 8 - 9 p.m. on Xmas night to ask his permission to park the Reverend Seala's Benz in his compound - the Reverend and his family having chosen one of the holiest days in the Christian calendar to travel from Morija to Qhoalinyane (half the length of the country) almost at the same time when the victim of murder was being mutilated at or around Hill Top. The evidence suffers from the obvious deliberate synchronisation of Al's witnesses on timing perhaps without realising its incongruity. If that day was uneventful, as A8 maintains it was, I cannot imagine him or his chief remembering that the car lights had to be put on his vehicle when his son Thabiso was asked to take the chief home. The chief himself was present in Court at the Preparatory Examination and listened to Kantini's evidence and whilst this fact is not by itself sufficient to exclude or reject his evidence, I am convinced he is not telling the truth and was motivated by a desire to mislead the Court and to save, if he could, one of his prominent citizens from ignominy.

Mrs. Seala did not appear to me to have the conviction

of a woman speaking the whole truth and sadness and incredulity at a friend of hers (and her Reverend husband) being involved in a sordid murder prompted her, I think, to offer whatever help she could short of perjury. She testifies that she saw A8 on Friday the 26th December in the morning hours (by which time, if she is telling the truth of course, A8 could have been at Qhoalinyane giving an account of his trip to look for a daughter who eloped) but she added that Mrs. Mokhothu and Lebohang had told her that when they parked the Benz they saw A8. Lebohang and Mrs. Mokhothu did indeed so testify (with slight variations as to the details of the conversation they had with A8) but fourteen months have elapsed since Xmas 1980 (Lebohang seemingly meeting A8 on only this one occasion) and Crown Counsel's cross-examination was directed towards testing their credibility and veracity. Lebohang says he had no occasion since that Xmas 1980 to recall the events until his mother towards the end of 1981 showed him a "subpoena" which she said only that it was in connection with A8 but he did not ask her "what type of evidence he was supposed to give" until reminded by counsel who interviewed him an assertion which is impossible to believe. Mrs. Mokhothu fared no better. She claims she did not know that A8 was arrested and what for and had no idea why we are all assembled in this Court room. Explaining her appearance she says:

"I received a message which had been written by the wife of A8 that I was required to appear in connection with the vehicle of the Rev. Seala".

This witness had arrived from Quthing district a week or so before she was due to appear in Court in the middle of March 1982. She stayed with the Seala's at Morija and maintains no one ever reminded her of the events of Xmas day 1980 until interviewed by counsel a few days before she gave evidence - an assertion which is impossible to believe. I am not unaware of instances where an innocent accused sometimes lies (and brings witnesses to lie) in order to make the truth more plausible but this is not such an instance and I am of opinion that Lebohang's and Mrs. Mokhothu's evidence is palpably false. If the Sealas did drive all this way on Xmas day I am sure beyond any doubt that Mrs. Mokhothu and Lebohang did not see A8 between 8 - 9 p.m..

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Now, speaking in the abstract, the status, calling or reputation of A1 and A8 (and their witnesses) in the community is certainly more superior than Tselane Ntsokeleng and Kantini. But in criminal law, status, reputation or calling is not necessarily a guarantee of the truth any more than the inferior and sometimes immoral status, reputation or calling of others is not necessarily a guarantee of its falsehood. Superiority in criminal law must be gauged in the context of all the evidence heard and the circumstances surrounding the crime and it is herein that the superiority of the compelling evidence of the humble and immoral in status, though themselves murderers, that, after many days of thought, I hold must prevail. A8's alibi is accordingly rejected as false.

A2's evidence is that he spent the best part of the Xmas day until after dusk drinking at Lioling then repaired to Hill Top, had more drinks at a friend's house there and went home to sleep, but noticed one special star appearing between two clouds in an otherwise cloudy night, that star that moves from East to North. If he was not at A1's cafe that night and was spending an ordinary Xmas drinking himself to full capacity, why, I ask myself, should he decide to look at that particular star on that particular cloudy night.

Now A4 suggests that Tselane is a liar for reasons he had mentioned but when all is said and done he is a relation, and to put his name in falsely would have been such a great enormity which even she was hardly likely to do. Blood, it is said, is thicker than water. My impression of Tselane is that she did not care one iota what he or others think of her: she is perfectly capable of looking after herself. She is, however, supported by two other accomplices and I am not able to find a motive to implicate him and A4 has every reason to deny.

A9 position is rather curious but all three accomplices are agreed he was present at A1's shop. All know him well as they do the others except that Tselane did not know A8 from before. A9 says he was not there. I have no doubt that the deceased was murdered in A1's shop and transported to the gorge many kilometers away in the manner described by Kantini which he disclosed to Ntsokeleng and Tselane but not as to the exact place. Some labour was needed for the last kilometer or so - that is clear - and I am of the view that the accomplices were

not falsely compromising him.

There are some imponderables: who, and how, was the deceased finally brought to A1's shop? Did Tselane play a more major role in this than she cared to admit? Was Kantini trying to falsely implicate A10, A11 and A12 and conversely were Tselane and Ntsokeleng trying to protect them? And what about Taole? I do not think speculation is needed for I have to decide on the evidence before me.

I am unable to find a possibility of conspiracy amongst the accomplices to incriminate A1 and A3 and I see no reason to hold that there must have been one against A2, A4, A5, A6, A7, A8 and A9 (S. v. Hlapezula 1965(4) SA 439 (AD) and R. v. Tela 1964(2) SA 436 at 441 E). I find in the confirmation of each other's evidence on identity, when all other circumstances are considered, a sufficient safeguard to reduce the risk of a wrong conviction of the above accused to nil. A2, A4 (I have dealt with A8 already) and A9's alibis (together with A5 A6 and A7 "second hand" alibis through the mouths of A1 and A2) are also rejected as false.

I find all the accused guilty of murder as charged (except that the indictment would have been better framed if the place of the murder had been put "at or near Hill Top" rather than Tsoelike - but no objection was taken) beyond reasonable doubt and convict them accordingly.

My assessors, to whom I have explained the risks and the dangers and the caution required in cases of this nature agree that all the accused are guilty of murder beyond reasonable doubt.

CHIEF JUSTICE
29th April, 1982

For Crown : Mr. Peete

For Defence: Mr. Weinstock(instructed by Mr. Kolisang)for A1 - A8
Mr. Mlonzi for A9

P.S.: Will the Registrar please see to it that in the event of appeal the evidence at the P.E. of Likotsi Seroke(PW7) Mantsoele Seroke(PW8) Paulus Phomolo(PW12) Sisemane Seroke(PW11) D/Sgt Putsoane (PW19) - admitted by the defence - are incorporated in the appeal record, and if so directed by the President, the evidence at the P.E.

/of any

of any witness heard at the trial.

Will the Registrar also note that the evidence of Mrs. Suzan Mokhothu(DW4) was taken in long hand by the Court (and approved as correct by Mr. Peete, Mr. Weinstock and Mr. Mlonzi) and this too should be typed from the original and incorporated in the appeal record.

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EXISTENCE OR OTHERWISE OF EXTENUATING CIRCUMSTANCES

30th April 1982

Mr. Kolisang on behalf of A1 - A8 did not pretend that there can be extenuating circumstances in respect of A1, A2, A3 and A8 but submitted I should take into account the role that A4 and the women (A5, A6, and A7) had played and their degree of participation in the crime.

Mr. Kolisang also said (and I have no reason to doubt his word) that A7 was born on the 26th December 1962 (she did appear to me to be about 19 - 20) so that at the time of the commission of the offence she was one day below her 18th birthday. Mr. Kolisang added that s. 297(2)(b) of the Criminal Procedure and Evidence Act 1981 would apply to her case and she could not be sentenced to death. I accept that.

Mr. Mlonzi submitted that A9's participation was relatively minor and this should be taken into account.

My own initial reaction was that there can be no distinction in moral blameworthiness in a crime of this nature. However Judges cannot divorce themselves from the people amongst whom they live, and I had to, per force, seek the enlightenment of my assessors. It is true that they have no vote either on the law or the facts or on sentence but they do, and must, with their more profound knowledge of the customs and habits of the people, carry persuasive influence certainly on sentence and the existence of extenuating circumstances, otherwise the Judge will be living in a vacuum.

My assessors are able to see a distinction between the leaders of this type of murder and others who towed the line. They explained that there is such great fear of evil witchdoctors which makes some of those approached to participate fall under the magnetism or the spell of the leaders that they are quite unable to extricate themselves. "Liretlo", as this murder is called in Lesotho, fortunately rare, knows no class boundary. Both the educated and the uneducated succumb to a bewildering belief in its efficacy. It is sad and shameful and forms no part of the customs or the history of the Nation. My assessors told me (I have since verified this from Thompson's *Survival in Two Worlds - Moshoeshoe of Lesotho 1786 - 1870* p.42 and 53) that the founder of the Nation had shown mercy to the cannibal tribe of

/Rakotsoane

Rakotsoane that ate his grandfather Peete who was trailing at the rear of a column on his trek from Butha-Buthe to Thaba-Bosiu in the 1820s. However, there was hunger in those days; there is none now.

However I am persuaded that I ought to make a distinction between the leaders and the others. I find extenuating circumstances in respect of A4, A5, A6 and A9. I am not in bad company: Schreiner J.A. in Kgolane & Others v. R. 1960(1) PH.H 110 p.168 at 170 is reported to have said :-

"No doubt, particularly where a number of persons are concerned, one or more of whom are in control and who are in a position to require the obedience of the rest, the moral guilt of the latter may be less than that of the leaders".

SENTENCE

- A1, A2, A3 and A8: Death by hanging in accordance with s. 298 of the Criminal Procedure and Evidence Act 1981.
- A4 and A9: Imprisonment for life.
- A5: 12 years imprisonment.
- A6: 10 years imprisonment.
- A7: To be detained pending the signification of His Majesty's pleasure with a recommendation that the period of her detention should not exceed the term of imprisonment passed on A5.

CHIEF JUSTICE

NOTES ON SENTENCE

- (1) We have made a distinction between A5 and A6 on imprisonment because we have taken into account that whilst A5 is only an employee of A1 and could have gone to her parental home or found another job, A6 must have been influenced or was under some compulsion (even though not pleaded) by her husband A2.
- (2) Under the provisions of s.26 of the Children's Protection

Act 1980 which came into force on 2nd November 1981 (Legal Notice 37/81) a person under the age of 18 cannot be sentenced to imprisonment anymore and detention during His Majesty's pleasure is the only proper way to deal with A7 in the circumstances.

ORDER:

The three accomplices, Kantini, Tselane and Ntsokeleng are granted immunity from prosecution.

CHIEF JUSTICE