

IN THE HIGH COURT OF LESOTHO

In the matter of :

REX

v

'NAUOA KHACHA

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice  
T.S. Cotran on the 23rd day of November 1982  
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The accused before me 'NAUOA KHACHA is indicted upon a charge of murdering Mpholo Mojaki (the deceased) on or about 4th December 1979 at or near Zakaria's in the district of Butha Buthe. The particulars read that he did so jointly with other persons unknown but whilst acting together.

On the 4th December 1979 the deceased, a shopkeeper and trader, left Libono village driving his van, accompanied by Khahliso Ramosebi, (PW1) related by clan to the deceased and at the material time working for him as a shop assistant, to purchase goods for his shop from Butha Buthe. That was sometime during the morning.

Having made his purchases, the deceased and Khahliso set off driving back home. They had to pass Lepatoa village but did not intend to stop there. That was sometime during the early afternoon. Khahliso testifies that the van was stopped by a man who, for convenience I shall call Mr. X. He was in the middle of the road at or near Lepatoa village bus stop. The deceased parked his van by the roadside. Mr. X was joined soon afterwards by another man carrying a gun, who for convenience I shall call Mr. Y. From the description of their clothes Khahliso concluded they (i.e. X and Y) were soldiers of the PMU (Para Military Unit). They asked the deceased and Khahliso about their names and their relationship to each other which they gave. They searched the vehicle and threw the groceries on the ground. They asked the deceased for his passport, tax receipts, drivers permit, and trading licence. The deceased produced all these, which were perused and then returned. The deceased and Khahliso were told to stand side by side on the edge of the

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road. Y asked X to "go and call others". After sometime the accused and another man, who for convenience I shall call Mr. Z, in what the witness thought were civilian clothes, arrived together with X. Amongst the groceries on the ground was a bottle of brandy. The accused remarked that he can finish the bottle in one gulp. He did not, however, do so. Z who came with the accused asked the deceased his name. The deceased gave it whereupon Z replied "I have been looking for you and found you today". The deceased asked why he was being treated in this fashion and X, Y or Z (it is not clear who) but not the accused replied "You will learn why later. You will be taken to Butha Buthe and you will answer there". The witness Khahliso picked up the groceries and stood some seventy yards away (pointed) waiting for the bus since the groceries that were unloaded were heavy and she had still some distance to get home. She did however notice the accused, deceased, and another man, who could have been either X or Z, get into the van cabin, and one man, the one holding the gun, who could be Y, get onto the back of the van. The van which was open, i.e. with no canope, passed her by and stopped on the road towards Phamong village 300 yards away (pointed). The accused was driving. The bus arrived. The witness boarded it, got home to Libono, and informed deceased's wife of what happened.

Masetefane Lerotholi (PW2) lives in a small village called Bochabela. The villagers draw water from a well nearby situate in a depression, and having organised a Letsema (working party) for the following day, she had gone to draw water. She testifies that on her third journey, after having collected the water in a container which she placed on her head, and whilst on the road leading to the village she saw the accused driving deceased's van, with deceased and another man next to him and one man at the back. The accused raised his hand in a greeting gesture and continued driving whilst she proceeded home, poured in the water she had collected in a larger Sesotho jar, and was on her way back to the well for the fourth time which she said would have been her last trip. This was mid afternoon.

Approaching the well she testifies that she saw the deceased's van parked on a slope off and below the main road. Further below by the stream, and not very close to the van, she saw the accused, the deceased, and two other men both the latter with guns. One of these two men wore a blue blanket

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and the other a brown blanket. Accused held a sjambok. She saw accused and the other two men assaulting and kicking the deceased. They were urging the deceased to get up and run. He did so but with difficulty. The man with the blue blanket went in front of the deceased, looked him in the face, ordered him to raise his hands, aimed the gun at him, and shot. The deceased fell. The witness says she picked up her can and fled to her mother-in-law's house to inform her what happened. As she was fleeing she heard another shot. Later whilst at her mother-in-law's she saw accused and the other two men with the guns emerge from the depression and take a westerly direction.

The depositions of Tae Nako (PW4 at the preparatory examination) and that of doctor Ewals (PW6 at the preparatory examination) were admitted by the defence in terms of s.273 of the Criminal Procedure and Evidence Act 1981. Nako's evidence (he was also called by the Court to testify mainly about locations and distances) was that he was the village headman of Bochabela responsible to Chief Zakaria of the village bearing his name, which was nearby. According to W/O Moahloli it was 1½ km away. On the morning of the 5th December 1979 Nako was on his way to Ha Zakaria to report on some matters to the chief and noticed that the deceased's van was off the road on a slope towards the well. He went to investigate but found no one. After reporting to chief Zakaria he went back to the scene and found the deceased's body.

Detective W/O Moahloli (PW3) who was second in command in Butha Buthe CID, arrived at the scene with other police officers on the 5th. The van, Reg. No. B0084, was 100 yards below the main road and he could see its wheel marks on virgin terrain. The key of the vehicle was inside the switch but the gear lever was missing. Later he was shown the deceased's body. He knew deceased from before as well as his vehicle. The body was some 50 yards from the vehicle. The officer, who had 18 years service in the CID, testifies that he was familiar with gun shot wounds having investigated a number of similar cases before. He saw two wounds on the head. He thought the wound on the lip, which was scorched, indicated firing at close range and was the entry of a bullet, and the wound on the back of the neck was the exit of a bullet. The officer did indeed find a spent bullet near the body which he took possession of. He

arranged for the body to be taken to Butha Buthe mortuary and attended the post mortem on the 6th December. He did not however conduct further investigations into the case because he was transferred to another district. His superior officer, a Lt. Khosa, was informed about the finding of the spent bullet. He had left it in his office drawer when he was transferred.

Dr Ewals performed the post mortem on the 6th. The deceased had one wound on the upper lip of about 1 cm with "black" around this wound. The "black skin" could have been caused by a "gun shot explosive". There was another large open wound of about 6 cm in diameter at the back side of the neck. Inside the wound "there were many fragments of broken fracture". Inside the mouth there was a wound with many "bones fracture". He attributed the cause of death to fracture of the neck. He did not know whether the shot was fired from close range or not, for he was not an expert, but it was possible that it was fired from a close range according to the condition of the wound.

The accused testifies that Khahliso and Masetefane have concocted their evidence for on that day he was working in his garden situate a little distance from his house in the village of Lepatoa attending to crops and was nowhere near Bochabela well. He had no hand in the deceased's death. His wife Namahlapela (DW1) supported him. They learnt of deceased's death on the morning of the 5th December from the acting chieftainess of Lepatoa. On the same or following day 6th December he took his animals to the cattle post some distance away because the chief had given an order in November to all the villagers that cattle should be taken there. He cannot remember how many days he stayed at the cattle post. He was going and coming back home.

The deceased and the accused are related. Accused says deceased is his father's cousin. I do not think the exact relationship is important suffice it to say that the accused says the deceased supported the BCP (Basotho Congress Party) and I accept that, whilst he the accused supported the BNP (Basotho National Party). I have no evidence of the deceased's political activities other than what the accused says. The accused's activities consisted firstly of belonging to the PVR(Police Volunteer Reserve - see Order 33 of 1970 Vol XV Laws of Lesotho p. 376) in Lepatoa, and secondly he had

allocated a house in his compound to accommodate members of the PMU (Para Military Unit) when they came to the village as a result of the activities of an organisation called the LLA (Lesotho Liberation Army) in Butha Buthe area. The W/O speaks of instability and a number of politically motivated killings at the time with many bodies found in the veld close to the borders. Accused confirms this. Chief Lepatoa himself was killed about a month before the incident giving rise to these proceedings allegedly by the LLA. The accused says the LLA had attacked his own home at night and he was rescued only by the timely arrival of some members of the PMU in a vehicle whereupon the LLA fled. That was before the deceased's death.

Khahliso (PW1) is related to the accused. The accused's father is the elder brother of her father and she calls him uncle. She had known him for many years. Masetefane is not related to the accused although she had known him for some years. She was not related to the deceased either but had known him for many years as he lived in an adjoining village to her own parents'. The accused confirms his blood relationship with Khahliso. He also knows Masetefane and says he is not related to her. He says that apart from the fact that Khahliso and her father are BCP sympathisers he cited two previous incidents which may have contributed to her false evidence implicating him. In 1978 the accused says he was helping Khahliso's brother to repair a spacegram using a screw-driver which somehow got lost, and he (Khahliso's brother) told accused later that she (Khahliso) had suspected him of stealing it. The screw-driver was eventually found by Khahliso's brother. The second incident, also in the same year happened when Khahliso's father (whom the accused visited) had given him a pipe as a gift but Khahliso's brother told him (the accused) that Khahliso was saying that he stole the pipe from her father. The accused says he complained to Khahliso's father about her false accusations. Khahliso denied that she was a BCP sympathiser and says she was still young (looked in her twenties) newly married and had not made up her mind which party to join. She denied any knowledge of the screw-driver and pipe episodes. Her father, she says, does not smoke a pipe.

The accused attributed Masetefane's false evidence to purely political motives for there was no personal animosity. She had denied that she was either a BCP member or a

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sympathiser. She is a woman in her early forties and had spent many years in the Republic. The accused says he knows that she is a BCP supporter because he had seen her going to the house of Moshe or Moses, a BCP activist, wearing BCP colours and chanting BCP songs.

The accused says he does not possess a Sandringham blanket brownish in colour with purple stripes or patches, (this is how the two witnesses described what he was wearing on that day) nor does he own a sjambok, and had never driven a vehicle.

The accused's home is some 300 yards (pointed) as the crow flies from the spot where Kahliso and the deceased were stopped by X and Y at Lepatoa bus stop. The little hamlet of Bochabela (70 tax payers) and the well near which the deceased and his vehicle were found is stated to be (by Nako) one hour on foot from Lepatoa (the accused's home) half an hour on horseback, and some five minutes by motor car. Some houses of Lepatoa can be seen from Bochabela. I have no reason to suspect major inaccuracies in Nako's evidence as he had been a headman there for forty years. He knew that Malefetsane had organised a "letsema" for the 5th December but did not know that she had been drawing water in preparation for the event on the 4th December. The well is used by Bochabela villagers. It is some 150 yards (pointed) across the main road from the village as the crow flies although villagers have to follow a circuitous and longer route and cannot reach it in direct straight line.

Masetefane had testified that at least two other persons may have witnessed the beating and or the shooting. One was Manthabiseng, who was in front of her on the road that leads to the well. Masetefane adds that as she was about to make her descent (the vehicle was not yet within her sight) she saw Manthabiseng running away. When the shooting started she saw one Seabata Tsoeu, an elderly man of He Zakaria village, herding his cow on an adjoining hillock. He was in a position to see. He too left his cow behind and fled.

It is conceded by counsel for the Crown and counsel for the defence that the accused's fate depends entirely on the credibility of the two ladies as opposed to the accused's and his wife's. There is no onus on the accused to prove anything, and if at the end of the day, the Court entertains any doubt about the veracity of the testimonies

of the Crown witnesses, the accused is entitled to an acquittal. That correctly summarises the law.

Mr. Cilliers for the defence submitted, however, that even if the Court comes to the conclusion that the accused was present at the well when the man in the blue blanket shot the deceased dead, the Crown has not adduced evidence from which the Court can infer (beyond reasonable doubt and within the test laid in R. v Blom 1939 AD 188) that the accused had made common cause with the killer to render him guilty of murder, and the only verdict that the Court can bring is one of an assault. Mr. Kamalanathan for the Crown submits that if the two ladies were believed, the nature of the defence is such that the Court must infer that the accused made common cause not merely to give the deceased a beating but to kill him.

Mr. Cilliers attacks the two lady witnesses on a number of grounds. He submits that they were politically motivated in favour of the BCP and must have been got at, either through pressure from the family, or from the party, to falsely implicate the accused a well-known supporter of the opposite party. He says that apart from that, the episodes of the screw-driver and the pipe demonstrate that Khahliso had the tendency of fabricating accusations against the accused and her evidence against him on this charge is the last of a series. He submits further that the other witness Masetefane betrayed her bias when the Court, of its own motion, indicated that it wishes to call Manthabiseng and Seabata as Court witnesses, because when Masetefane was asked for the details of how they could be traced she volunteered the information that both have fled the village since the incident. The Court did in fact initiate steps through Crown Counsel to find their whereabouts but was informed that they no longer lived in the village.

Mr. Cilliers pointed to a number of discrepancies :

1. The colour of the blanket accused was wearing. Khahliso says it was a sandringham brownish with purple stripes at the trial but brownish at the preparatory examination (p.4 line 28). Masetefane said it was brownish at the preparatory examination (p.6 line 5) and only added the purple at the trial and after Khahliso had given her evidence thus indicating they discussed the former's evidence about the blanket overnight.

2. Khahliso says only one of the persons she met carried a gun whilst Masetefane says she saw two each carrying a gun.

3. Khahliso at the trial says there were three persons, including the accused, in the front, and one at the back carrying a gun, but on cross-examination she says there may have been two in the back when they passed her at the bus stop as she testified at the preparatory examination (p. 5 line 9).

4. Masetefane at the trial (and the preparatory examination p.5 lines 28-29) says there were three persons in the van cabin and one person at the back when the vehicle passed her on the road when coming back to the village carrying the can of water on her third trip but at the inquest the magistrate had recorded her as saying that there were three persons in the front cabin excluding the deceased.

Mr. Cilliers finally asks how is it that Khahliso had not protested to the accused who is her uncle at the roadside when the deceased was stopped, why had she not raised an alarm, why had she not gone straight to accused's wife at their house (only 300 yards away) to make a report and waited until she got to Libono?

I do not find the discrepancies material. It should be remembered that the two lady witnesses were interviewed firstly by the police (Lt Khosa or men under him at Butha Buthe) who took down their statements not very long after the deceased was killed, and then secondly they appeared before a magistrate who held an inquest in August 1981, that is 20 months after the incident; and then thirdly they appeared again before a different magistrate who conducted the preparatory examination in February 1982, that is 26 months after the incident; and finally before me in October 1982, some 34 months after the incident. I would have been surprised if there had been no discrepancies. Some of the "discrepancies" have been reasonably explained by the two witnesses. Masetefane says she told the magistrate at the preparatory examination that the accused's blanket had purple stripes to the predominant brown and that he failed to record it. She denied discussing the case overnight with Khahliso. At the inquest the magistrate recorded that there were 3 persons excluding the deceased whilst she said she told him including the deceased for if it had been otherwise

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they would have asked her to describe what the fifth man was wearing. Khahliso says she might have said there were five persons three in front and two at the back, but explained that the incident happened a long time ago (which is true) but she was sure one, at the back, held a gun, and this she could not have forgotten. She also says she was frightened and confused which is quite understandable, and she did not know accused's wife well enough to make the first report to her, and I think she could hardly have done so if accused was involved in the kidnapping of the deceased.

The other "discrepancies" are more apparent than real. When the deceased's vehicle with Khahliso on board was stopped at Lepatoa it was early in the afternoon. When the vehicle was seen by Masetefane in the depression near the well of Bochabela, it was later in the afternoon. Indeed we are unable to say, if the men, apart from the deceased and the accused that Khahliso saw in deceased's vehicle, were necessarily the same men that Masetefane saw near the well for sometime must have elapsed between the first sighting at Lepatoa bus stop and the second and third sightings of Masetefane of the vehicle once when passing her on the road, and then when she saw it at the well.

Now there is no possibility, in a case like this, of mistaken identity, and it does not appear to me important what colour of blanket accused was wearing for the accused is Khahliso's uncle and she had known him for many years and is known to Masetefane as well as they met in drinking places and were acquainted with each other.

They both said they had not made up their mind to join any political party, but even assuming they were BCP sympathisers, the question that must be asked is whether they have gone to the extent of bringing a completely innocent man and a low ranking member of the BNP and put him where they said he was. If they were "got at" by party and family one would have thought that they would try and implicate someone higher up in the hierarchy. In addition the accused was on visiting terms with Khahliso's parents. It is said that blood is thicker than water. She gave her evidence in a candid and straightforward manner, did not exaggerate the role accused played at the bus stop and I exclude entirely the suggestion that she was concocting a story. Masetefane's evidence was also most impressive, she was forthright, and certainly not shaken in cross

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examination. The fact that she heard that Manthabiseng and Seabata had fled does not indicate bias. She too collected her children and went back to her parental home and so did Khahliso.

The two witnesses testify that they have never seen the accused drive a vehicle before and he says that he does not drive at all. If the two witnesses were acting in concert knowing he does not drive, one would have thought that they would have put him next to somebody else (not in the driver's seat) to make their evidence more watertight.

It is true that the accused gives me an alibi, supported by his wife, and that no onus lies on him to prove it, or anything else, (R v Biya 1952(4) SA 514 AD) and it is sufficient if a doubt is created in the mind of the Court, or that it may reasonably be true, to entitle him to an acquittal. Alibi evidence cannot, however, be considered in isolation of other evidence, the surrounding circumstances, and the demeanour of the witnesses in the box, including the accused's if he elects to enter it. (R. v Hlongwane 1959(3) SA AD 337 at 340 G to 341 B).

There is firstly no difficulty about the identification, for accused is well-known, secondly there is no question of vast distances separating the place or places the witnesses say they have seen the accused and the place or places where the accused says he actually was. Accused's own admission is that the Lepatoa bus stop (where Khahliso saw him) is only 300 yards away from his home and the Bochabela road and well (where Masetefane saw him) is some 5 minutes drive by car according to Nako. In addition he had staying in his compound on the relevant date PMU personnel. It is true that Khahliso was unable to estimate how long it took the man X to fetch him but it is clear that it could not have been a long time.

Thirdly there is the accused's demeanour in the box. He cut a very sorry picture indeed answering the most pertinent questions with evasion. His evidence about the screw-driver and pipe did not have a genuine ring of truth, his conduct in leaving his home on 5th or 6th December to go to the cattle post after he learnt the deceased was found shot dead on the 5th not so far from his own home (and deceased was a fairly close relative) does not lend credence to his

assertion of non involvement in his death, and his insistence that he remembers precisely his movements on the 4th, but not other dates when, if he had no hand in deceased's death, he had no cause to remember, convinces me beyond any shadow of doubt and within the totality of the evidence that his alibi is false and his wife's support, quite clearly in this instance, does not improve upon it.

There is no doubt that the onus lies on the Crown to prove common intent to murder but Mr. Cilliers submits the evidence of Khahliso at the bus stop discloses no common purpose (on accused's part) to commit murder because .

1. The accused was fetched from his home by X and arrived at the bus stop where deceased was being held with another man Z.

2. The words the accused uttered were to the effect that he is able to drink the bottle of brandy in one gulp and that proves nothing: it was the other man Z (who came with him and X) who said words to the effect "I have been looking for you for a long time and today I have found you". In other words the identification of the deceased as a BCP supporter, who may have had a hand in the disturbances prevalent in Butha Buthe, including perhaps the slaying of Chief Lepatoa, was not laid by the accused himself for surely he knew very well where the deceased lived and had his cafe; it was surely not difficult for the accused to trace the deceased or to give information as to where he could be traced well before he was stopped at Lepatoa.

3. The last thing that Khahliso heard before being ordered to pick the groceries and go was the deceased protesting at the way he was being treated and demanding to know the reasons. It was either X or Z who replied that he will know the reasons when they got to Butha Buthe. The argument is that if the accused agreed to go he himself was not to know what the others were contemplating. What he knew was that the deceased would be <sup>legitimately</sup> interrogated at Butha Buthe.

4. It cannot be inferred (beyond reasonable doubt) from the accused's conduct in the detention and the driving of the deceased towards Butha Buthe that he had subjectly encompassed deceased's death for he was himself probably under the mercy of (or the command of as Mr. Cilliers put it) of the man or men who held the gun or guns.

5. It is not known what happened between the time

Khahliso saw the vehicle being driven in the direction of Buthe Buthe with the deceased aboard and the time Masetefane saw the events below the well. Accused's role there consisted only of assault on the deceased and from that evidence alone, it could not be irresistibly inferred that he subjectively knew or had made common cause with the man who shot the deceased dead.

Mr. Yamalanathan contends that inferences favourable to the accused must be based on evidence heard and not on speculation. If the Court finds as a fact that he was present the irresistible conclusion is that the accused foresaw that the deceased would be killed.

This is an important question of law which is not easy of determination. I asked Mr. Cilliers to cite authorities for the proposition that favourable inferences can be drawn outside the ambit of facts as believed. His contention is that the issues are separate but no precedents were cited save Blom supra, on inferences. I must however confess that I have in the course of many years on the Lesotho bench tried several dozen accused persons on charges of murder. On a number of occasions I heard prosecution witnesses testify that the accused spoke and behaved in a drunken manner to the extent that I, as the trial officer, felt at the end of the Crown case, that there was an even chance that the accused may not have formed the specific intent to kill but that there was a case to answer for murder nevertheless, only for the accused to go into the witness box to say that he was perfectly sober. That kind of evidence by an accused did not per se induce me to accept what he says, and resolve the question of intent in favour of the Crown. And on some occasions, on similar prosecution evidence, the accused would go into the box only to testify he was not present at all; and that evidence, if not believed, did not per se induce me to find that specific intent to kill has been proved.

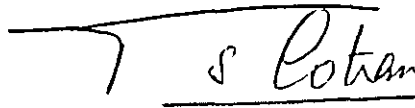
The situation in this case, however, is different for the events below the well witnessed by Masetefane must of necessity throw adverse light on the apparent innocuous conduct of the accused in the events earlier at the bus stop witnessed by Khahliso. Below the well the accused has been seen sjamboking and kicking the deceased in company of two armed men who were doing the same. Common purpose may be formed instantaneously. The witness Masetefane spoke of the men urging the deceased, who was having difficulty,

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whether from physical punishment or fright at the possibility of impending death, to stand up and run. She spoke in the plural. And accused was seen coming out of the depression together with the two men with guns one of whom had shot deceased dead. When added to his entire denial of presence there, no other verdict can, in my view, be brought except one of murder and I so find. This verdict accords with the law as laid in S. v Malinga and others 1963(1) SA 692, and R. v Mashalle and others 1971-1973 LLR p 163.

If however I am wrong, and if, whatever the circumstances, every equivocal piece of evidence, must end up in a favourable inference contrary to the tenor of events and the accused's own evidence then I have no doubt that the accused is guilty of being an accessory after the fact to the crime of murder.

My assessors agree.

  
CHIEF JUSTICE  
23rd November, 1982

For Crown · Mr. Kamalanathan

For Defence · Mr. Cilliers

EXISTENCE OR OTHERWISE OF EXTENUATING  
CIRCUMSTANCES

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Mr. Cilliers did not call evidence on extenuation but he submitted that on the Crown's own evidence these do exist. The accused it was submitted is morally less blameworthy for the following reasons :

1. The accused is a socius criminis not a principal. He did not do the killing. The post mortem report showed no signs that the sjamboking or kicking had contributed to deceased's death. The extent of the accused's involvement was minimal.

2. There was no dolus directus. The accused was invited to come to the bus stop where deceased was held. He did not identify deceased to the soldiers as a BCP active supporter. This was done by someone else. He added that the accused could have believed that the deceased would be taken to Butha Buthe for interrogation. The Court's finding that accused foresaw the possibility of death was not arrived at because he had manifested an intent to kill from inception but rather, that it came about from recklessness of the consequences. The dolus was eventualis.

3. The accused was an ignorant peasant farmer who was accompanied by two people carrying guns intent on mischief and, in a way, if he was not under duress, he was certainly under their influence to do something to show he sympathised with them.

4. There was no evidence of premeditation on accused's part.

5. The political instability in that part of the country at the time, including the murder of his own chief, may have prayed on accused's mind to go along with the killers up to a certain point but no further and found himself helpless thereafter.

Mr. Cilliers cited S. v X. 1974(1) SA 344 especially p. 348.

On the evidence as I believed it accused is definitely engaged in a cover up. He was certainly not candid with the Court but it is not difficult to appreciate that the actual killers may have exerted (and still exerting) upon him pressure to keep his mouth shut. It would be unrealistic, I think, to

take this as an aggravating factor that cancels out the cumulative effect of the points in extenuation raised by Mr. Cilliers.

I am firmly convinced that this is not a case that justifies imposing the ultimate penalty and I accept that extenuating circumstances exist.

My assessors agree.

SENTENCE: 12 years imprisonment.

A handwritten signature in cursive script, appearing to read 'S. C. Cotton', is written over a horizontal line.

CHIEF JUSTICE  
30th November 1982