

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

1. TEBOHO MOHAJANE
2. TOKELO MACHACHAMISE

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice
T.S. Cotran on the 10th day of October 1984

The two accused, Teboho Mohajane and Tokelo Machachamise, are indicted before me on a charge sheet that contains two counts (two other counts having been withdrawn before plea), one count of murder and one count of housebreaking with intent to steal and theft. Teboho will be referred to as A1 and Tokelo as A2. The accused pleaded not guilty to both counts.

A. The Case for the Crown:-

Part I

John Babu (P.W.1) and his wife Annamaria (P.W.2) were teachers at Motsekuoa Roman Catholic Mission School in the district of Mafeteng. They occupied a mission house with their children. At the time material to these proceedings, that is to say the 15/16th July 1982, John Babu and his wife had a guest staying with them, Sajan Abraham (P.W.3) a nephew of the Babus who was also a teacher. Sajan however was stationed in Semonkong in the mountains and was visiting them during a vacation period. He occupied one room and John Babu and his family occupied another room. The geography of the area can be found in the rough sketch Exhibit A drawn at the request of

/the Court

the Court during the early part of the trial. The admissibility and general accuracy of the sketch was accepted by defence counsel. Brother Koloti (not Kolotsi apparently), now dead, lived in the mission campus across the main Mafeteng-Maseru road which separated the staff houses and the school buildings from the mission buildings proper. Brother Koloti's quarters were in the mission buildings some 150 paces away (estimated) from the Babu's residence which had a fence on the side of the main road. Brother Koloti was the caretaker and supervisor of the mission under Father Gilbert. His duties consisted of, inter alia, looking after the teachers, their houses, their security and general needs and welfare. It was known that he possessed a pistol similar to the pistol produced in Court Exhibit 8 and that he often went round the houses to check if everything was in order. More about the pistol Exhibit 8 later in this Judgment.

A plan of the inside of the Babu's house can be seen in the same sketch Exhibit A. The Babus owned a car which at night Mr. Babu used to park towards the rear of the house in the position seen in the sketch.

In the early morning hours of the 16th July 1982 John Babu and his family were waken up by two men who had gained entry by breaking and entering the house through the dining room window (see sketch). The house has electric power. One man entered the Babu's room and another man the room occupied by Sajan. The man who entered Babu's room was described as tall. The lights were switched on by the command of the tall man who appeared to have been the leader. The tall man was armed with a knife of the okapi type (described as a jungle knife), and a panga type knife with a loop at the handle which he had slipped into his wrist, a crowbar and a torch. The

/other

other man, described as shorter than the first, carried a stick. That does not mean of course that the second man was short. A1 is tall and A2 rather shorter than A1. The two men, according to the Babus and their guest (and there is no reason to disbelieve them) stayed for over one hour, with the rooms in the house lit, rampaging and searching for money and valuables whilst members of the household were threatened and terrorised. Both men wore hats but not of the type that conceal the face. After finding some R490 from the Babus and their guest Sajan, the taller of the men demanded the keys of the car. John Babu pleaded that the car (which was parked outside in the position seen in the sketch) should not be taken. He had put the car keys on top of the TV set in the lounge. The tall man found them. Sajan and John were tied up and all were locked up in John Babu's bedroom. The two intruders made their way to outside the house. Mrs. Babu puts the time at around 3.15 a.m. The Babus and Sajan heard the engine of the car idling and thought the gear was being manoeuvred to a reverse position for there was no way to drive it forward. Whilst thus cooped up in the room something was happening outside. The lights in the room were switched off but the shorter of the two men appeared at the window and indicated that the lights be switched on. The three witnesses (John Annamaria and Sajan) are agreed that there was the sound of footsteps from the region where Mr. Babu's car was parked, of persons being in a hurry, of someone shouting "Rush Rush", of shots being fired, followed after a short period of time by further shots. There was silence after that although the engine of Mr. Babu's car was still heard to be idling. Babu and his family, and Sajan, after freeing themselves of belt shackles, and finding a duplicate key to get out of the room, made their

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way to Father Gilbert's quarters (in the mission compound) via the main door after Sajan got out of a window and saw the main door keys hanging in the keyhole from outside. Father Gilbert and Brother Koloti were connected by intercom but there was no response when Father Gilbert attempted contact. Father Koloti was not in his quarters. A group led by Father Gilbert which consisted of staff and students at the mission together with John Babu and Sajan returned to the house. This is what they found:-

1. Brother Koloti dead or dying from a wound in the head in the maize field at the back of the house (see sketch Exhibit A).
2. John Babu's vehicle tampered with. The lock and window were broken. What looked like blood was on the front seat of the car. Inside or near the car were found a number of items, which need not all be enumerated now, but which included a panga Exhibit 3 a knife Exhibit 4 and a crowbar Exhibit 2.
3. Also in or near the car was a canvas school bag Exhibit 5, of the type carried by children to store papers pencils rubbers books or a snack. On the school bag was written the name "Flory Tekete". Mrs. Annamaria Babu, like her husband John, taught at the Motsekuoa Mission School and one of her pupils name was Flory Tekete.

W/O Polanka of Morija Police was at the scene of the crime early that morning. In addition to the items already mentioned he found a spent bullet head (Exhibit 12) a plastic rope (Exhibit 10) cans of bully beef and cigarette packets (Exhibit 6) a screw driver (Exhibit 7) a brown hat (Exhibit 9) and a blanket (Exhibit 11). John Babu testifies that "after two or three days" he found in the area where the body of Brother Koloti was lying three empty bullet shells (more correctly fired cartridge cases) which he handed to the Morija police. W/O Polanka testifies that these three shells (Exhibit 1) were handed to him by the "Indian" a couple of days or so after the 16th July.

The weapons, viz, panga Exhibit 3, the knife Exhibit 4 and

/crowbar

crowbar Exhibit 2 were identified as weapons similar to those carried by the taller of the two robbers. Mr. and Mrs. John Babu and Sajan did not see a pistol or a school bag with either of the robbers when they were inside their house.

The post mortem on Brother Koloti (by Dr. Hess whose report - Exhibit B - and evidence as it appears at the Preparatory Examination were admitted in terms of s.273 of the Criminal Procedure and Evidence Act 1981) shows that he died of brain damage from a bullet that entered the "upper hemisphere" of the head making a 5 cm wide wound, exiting below the right ear, with an 8 cm wide wound. The doctor saw the track of the bullet that caused the fracture. There was no projectile in the head. The doctor thought that Brother Koloti was shot "from a high position or that he might have been lying down". This evidence I accept.

The owner of the school bag Flory Tekete and her father were called to the scene and interviewed the same morning. Francis Tekete (P.W.7) the girl's father identified the bag then and there. He testified that A2 is the son of his first wife's (since deceased) brother and is well known to him because their parental home, Thabana-Morena, is the same. In April 1982 A2 came to his house in Motsekuoa and sought hospitality and accommodation in order to be near Maseru because he (A2) said he was seeking employment on the mines and had to make frequent visits to the recruiting agency and his home village was not so close by. A2 remained with Francis doing odd jobs until the 10th or the 12th June 1982. One night, without notice, he left the house, taking with him, amongst other things, his daughter's school canvas bag (Exhibit 5) which contents A2 had emptied and scattered in the room he was allotted to occupy. Francis Tekete reported to the police A2's disappearance with

/his

his property, not only because the items were of some value, but also because a few days previously the police came to his house to interview A2 and he (Francis) gave his house as A2's abode and address in case he (A2) was wanted. Francis felt obliged to tell the police that A2 was no longer his guest.

After the incident Brother Koloti's quarters were searched for the pistol that he was known to possess. It was not found in his premises.

Part II

On the evening of 19th July 1982, Mrs. Medina Rajab (P.W.9) who with her husband operated a shop at a village called Setorumane, was having supper with him in her kitchen, when an employee reported that some person had called in, wanting to buy petrol. The time was about 9.30 p.m. Mrs. Rajab left her kitchen (her husband remained there) to go to the sitting room to reprimand two employees for allowing a stranger into the house at that hour of night. The sitting room was lit with candles and a burning fire was on. She became aware of the presence of two men unknown to her. She first met one of them face to face and he was holding a pistol. She testifies that this man was A1 who appeared the leader. The other man tied up her two employees on A1's order. There was a demand for money by A1 from Mrs. Rajab and her employees. Mrs. Rajab adds that she told A1 that her employees would not have money but she will get them some and deliberately engineered an altercation to make her voice more audible to attract her husband's attention. This ruse succeeded and it alerted Mrs. Rajab's husband (who was still in the kitchen having supper as previously stated) and he came with his pistol and shot at A1 who returned the fire, both missing their target. She says A1 made off through the door (which was opened for them to enter) followed

/by her

by her husband. The second man who had tied the employees was tackled inside the sitting room by Mrs. Rajab herself and the two employees who had, in the meantime, managed to free their hands. They were joined by her husband, who had returned after vainly chasing A1. That second man, who was struggling to get away, assaulted her with a stick or knobkerrie. However, although that second man was hit on the head with a spade and was fighting against her and three men and was injured, he managed to flee but minus his blanket his shirt and his boots.

Mrs. Rajab had a brother, also a shopkeeper, at Ha Phohleli, some 18 Km away from their own house cum shop at Setorumane reached by motor car in about 25 minutes. Mr. and Mrs. Rajab drove to his house cum shop. He is Mr. Thabo Surtie (P.W.6). They informed him of what happened. Whilst he drove to their shop cum house in Setorumane to investigate, Mrs. Rajab and her husband proceeded to Roma where there is a hospital and a police station. Mrs. Rajab told her brother Thabo that one of the robbers was tall and dark wearing a brown hat and a red skipper and a pink blanket and held a pistol and the other person, the one who had assaulted her and was in turn himself hit with a spade, was described as shorter and having an injury on the head and had been stripped of his blanket, shirt and boots.

Thabo Surtie testifies that he attempted that same night to track the two persons who attacked his sister's home in Setorumane and assaulted her. He says that after his sister and her husband returned home from Roma (where a report was made at the police station and she received treatment at the hospital) at about 2 a.m. (that would be the 20th July 1982) he noticed a camp fire in the veldt and suspected that it could have been made by the robbers and tried to find them with the

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assistance of two employees and his brother-in-law who had in the meantime returned from Roma. On their approach the fire was extinguished and shots were fired in the direction of the two employees when they attempted to get closer. This fire was returned by Thabo. The veldt was scanned by means of Mr. Rajab's van head lights but nothing was seen. The witness Thabo says he and Mr. Rajab his brother-in-law decided to split, he (the witness) to his home and his brother-in-law to Mokema. Thabo Surtie says that his house cum shop is 20 paces (pointed as from the witness box to the stoep outside Court No.1) from the village bus/taxi rank. He got home at 4 a.m. and went to sleep but directed an employee to stay awake and to watch from a window the bus/taxi rank for anybody suspicious. He surmised that the robbers may want to find their way to Maseru.

At 6.30 a.m. Thabo Surtie says he was waken up by his employee. It was dawn. Thabo testifies that he saw two persons, one wearing a red skipper and one without a blanket or a shirt (naked from the waist upwards) or boots. The first one was trying to cover the other with his pink blanket, i.e. one wrapping the other person. The two men answered the description given to him by his sister. He saw them board a taxi-a coaster. He adds that he rushed to the driver and whispered that two of the passengers who had just entered his taxi had assaulted his sister the previous night. Thabo thought the two men might get suspicious so he changed the subject of the conversation with the driver to one about petrol, and told him to proceed with the passengers to Ha Mofoka. Thabo himself followed the taxi in his own Chevrolet Ascona. He was with an employee. Thabo signalled the taxi driver by flashing his lights to stop and the driver did so. He says that he went to the man with the red skipper and said "give me that gun". That

/man

man was A1. A1 replied "which gun?". Thabo says he repeated to A1: "surrender that gun". A1 stood up and held Thabo by the throat. A man behind A1, one of the passengers, pulled a pistol from A1's waist and handed it to Thabo saying "These people are terrorists". The pistol was minus its magazine at the time. A1 was overpowered and in his pocket Thabo found the magazine of the pistol. The magazine was empty of bullets. The man without blanket or shirt or boots was also overpowered. Both were at the back seats of the taxi which was not full when this happened.

It is necessary to cut a long story short because A1 is not being tried for a crime committed at Setorumane on the evening of the 19th July 1982 but for murder and housebreaking committed at Motsekuoa in the early morning of the 16th July 1982. A1 and the other man with him were removed from the coaster/taxi by force and dumped in the boot of Thabo Surtie's Ascona. Thabo says he was taking them to Roma but whilst his vehicle was in motion they managed to open the boot and jump out. Thabo and his employee stopped their vehicle and chased A1 and the other man. The other man received further injuries when he fell down. A1 and the other man were eventually apprehended, overpowered and again put into the boot and driven to Setorumane where Mr. and Mrs. Rajab have their house cum shop. Thabo Surtie expected to see the Roma police there already because they had informed his sister and brother-in-law, when they reported the incident to them during the night or earlier that morning, that they will be on their way to the scene soon. They were not. Mrs. Rajab identified A1 repeating to her brother that he (A1) was the person who held the pistol and exchanged fire with her husband and the second man was the person who had hit her with the knobkerrie on the head, and who in turn was hit on the head with a spade but escaped

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leaving his blanket shirt and boots. The man is not A2 who is before me in the dock. Thabo testifies that he asked A1 about the pistol and he said that he got it in a dagga deal in Motsekuoa or from a person in Motsekuoa. A1 and the other man had received a thrashing in the coaster and another one when they jumped out of the boot. The villagers of Setorumane gave A1 and the other man a third beating. Both were conveyed to Roma Police Station. The cumulative beatings were obviously severe because the other man (who had earlier been also beaten at Mrs. Rajab's) succumbed to his injuries the following day and A1 spent several weeks, if not months, under treatment in two hospitals. The pistol (Exhibit 8) and magazine seized from A1, were handed to Roma Police by Thabo.

A1 and Mrs. Rajab's husband exchanged pistol shots in the Rajab's sitting room in Setorumane. According to Mrs. Rajab (and Thabo) her husband's pistol is different from the one seized from A1. There is evidence that the Roma Police collected some cartridges from or near the house of the Rajabs when they eventually arrived (on foot) to investigate but W/O Polanka testifies that when he went to Roma Police Station on the 21st July 1982 he was handed the pistol Exhibit 8 and its empty magazine and only one shell. Thabo and Mrs. Rajab saw more than one shell in the latter's house. Those seen must have come from two pistols, Exhibit 8 held by A1 and Mr. Rajab. W/O Polanka did not himself visit Setorumane.

Police action on Part I

The police attempted to trace A2 who had allegedly taken Flory Tekete school bag (or or about 12th June 1982 which was found in or near Babu's car parked outside his house on the 16th July 1982) first at his mother's home in Thabana-Morena, and when told he had left to Mohale's Hoek where he had a

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sister, at the latter's place. We do not know for a fact, however, who arrested him but we do know it was in August 1982 because an identification parade was held at Mafeteng Police Station in that same month. It was conducted by Station Sergeant Justice Pule Kpanyane (P.W.4) now retired and A2 was the suspect. The witnesses were John Babu and his wife Annamaria. Sajan was not called for the identification parade from his school post at Semonkong. Mr. John Babu picked up A2 as one of his assailants at Motsekuoa. Mrs. Annamaria Babu did not identify the suspect but identified a wrong man, a volunteer.

Police action on Part II

The pistol (Exhibit 8) seized from A1, bears No. 157282.

W/O Polanka testifies that he investigated the origin of this pistol. Sgt. Mpopo, whose evidence as it appears at the Preparatory Examination was admitted, found from his records that it has been officially issued to St. Andrews Catholic Mission (as an institution) at Malealea, also in Mafeteng District. There was no report by the mission authorities at Malealea that the pistol was stolen or missing from them or from whoever was given custody of it. The Rev. Ramontsi (P.W.11) - called by the Court - testifies that he did not know the origin of the pistol Exhibit 8 but that he worked at Motsekuoa Mission, Mafeteng District, between 1980 and 1984 and occupied quarters in the same building as Brother Koloti. He was in fact at the mission the night Brother Koloti was found shot but had heard nothing. He knew Brother Koloti had a pistol and he had seen it. He testifies that it "looks like" Exhibit 8. He did not see any ammunition. Father Gilbert (P.W.3) who was in charge of the mission, did not know that the deceased had a pistol or ammunition, but when the

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deceased's room was searched he found a box or magazine of bullets.

On the 26th March 1983 (see parade form Exhibit C1) Det. W/O Liphamamo (P.W.5) was directed to organise an identification parade at Central Prison Maseru. A1 was the suspect. The witness was Sajan Abraham (P.W.3) the nephew of the Babus who was their guest at the time of the robbery. Sajan, brought from his school at Semonkong, identified A1 as one of the robbers. The same Warrant Officer held another parade on another date, also at Central Prison Maseru, but papers of this parade (form Exhibit C2) are not dated. The suspect was again A1 and the witnesses on this occasion were Mr. and Mrs. John Babu, who were fetched from the Transkei for this purpose. They failed to identify A1 - indeed they identified another person or persons.

On the 19th April 1983 W/O Polanka sent to the Forensic Ballistic Section of the South African Police Criminal Bureau in Pretoria the following articles for examination. These were in a sealed envelope:-

1. The pistol (Exhibit 8) with its magazine, together with
2. 4 fired cartridge cases (Exhibit 1) - 3 handed to him by the "Indians" (The Babus) a few days after the Motsekuoa incident and 1 handed to him by the Roma Police on the 21st July 1982 at the same time that they handed him the pistol Exhibit 8 and the magazine and
3. the spent bullet head (Exhibit 12) found by him at the scene of the crime at Babu's house at Motsekuoa on the morning of the 16th July 1982.

The Ballistic expert sent a report of his findings to the Lesotho Police on the 3rd August 1983. The ballistic tests were made by W/O Bazil Norman Young who testified that in his opinion the four cartridge cases (Exhibit 1) and the spent bullet head (Exhibit 12) were fired from the pistol Exhibit 8

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which was in working order and is "negative with outstanding cases" i.e. it has not figured in any case in Southern Africa i.e. the R.S.A. and the three former High Commission Territories who seek technical assistance in this field from the Republic's facilities. His evidence, which he supported by photographs Exhibits D1 (a) (b) (c) and D2 (a) (b) (c) tallies with his written report Exhibit E. I accept W/O Young's evidence in its totality.

Inferences:-

From the events of the 15th July 1982 at Motsekuoa and the events of the evening of the 19th and morning of 20th July 1982 at or in the areas of Setorumane and Ha Phohleli the following inferences can be drawn:

1. That the robbers who had broken into and entered the Babus home were disturbed, soon after they locked up the Babus and their guest in a room, and made their way to outside the house, by the appearance on the scene of Brother Koloti.
2. That the pistol, Exhibit 8, was in the custody of Brother Koloti. It had come into his possession through his connections with the mission.
3. That he had it when he went on his rounds as a matter of routine, or to investigate a commotion he may have heard at the Babu's house, and stumbled head on with the robbers.
4. That Brother Koloti was not likely to have committed suicide by shooting himself because according to the medical evidence the bullet that killed him entered the "hemisphere" of his head from top and exited below the ear from which it follows that Brother Koloti probably challenged the robbers, who took from him the pistol and shot him dead probably when crouching or kneeling or lying down.
5. That the two robbers, after shooting dead Brother Koloti, made their escape in great haste abandoning some of the weapons seen with them (by the Babus and their guest) inside and many of their belongings, not seen in the house, but which they may have had under their blankets or kept outside.

/It is

It is the submission of the Crown that:-

1. A1's possession of the pistol Exhibit 8, his oral explanation to Thabo Surtie that he got it at Motsekuoa, the ballistic expert's evidence that the bullet head and 3 empty shells (found at the Babu's compound on the morning of 16th July 1984 not far away from the body of Brother Koloti) were fired from that pistol and the identification by Sajan Abraham of A1 on the 25th March 1983 as one of the two robbers who broke and entered the Babu's home is prima facie evidence that he or his accomplice shot Brother Koloti dead.
2. The theft of the Flory Tekete's school bag by A2 and its finding outside the Babu's house after the robbery together with the identification by John Babu (P.W.1) of A2 at Mafeteng Police Station in August 1982 and Sajan's identification of A2 at the Preparatory Examination is prima facie evidence that A2 was one of the two men (A1 being the first) who broke and entered the Babu's home on the 16th July 1982 and killed Brother Koloti.

B. The case for the defence:-

A1 and A2 admit that they are known to each other since they come from the same village but both deny that they broke and entered the Babu's home on the 16th July 1982 or that they shot Brother Koloti.

A1's evidence will be briefly summarised:- At the material time in July 1982 he was employed by one Fusi, a smuggler of dagga. On the 15th July 1982 he assisted Fusi to transport 4 bags of dagga from the mountains to a house, owned by one Motsamai, and rented by Fusi, at Borokhoaneng. He slept there. On the 16th July in the morning whilst he and Fusi were at a petrol station to fill the tank and he learnt that his aunt at Ha Tlali was sick. He told Fusi (and his associate) that whilst he will help them take the four bags of dagga across the border to R.S.A. he can go with them no further. The job of carrying the bags across the Caledon was accomplished at 5 p.m. on the 16th. He recrossed to the Lesotho side of the

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border and returned to the house rented from Motsamai by Fusi and slept the night of 16/17 there and went to see his aunt in the morning. He spent two days with his aunt and in the morning of Tuesday 19th July 1982 (sic) he met at Ha Mokuoane a man, a stranger, who had three wounds. It was a chance meeting. The stranger was not wearing a blanket and had no shoes though he had a shirt. A1 says he asked that man "What happened to you?". The man replied that an Indian called Thabo had assaulted him, shot him, and hit him with an object because he (Thabo) refused to pay him (the injured stranger) money owed to him and that he (the stranger) was now on his way to Maseru. A1 says he took pity on the injured stranger and lent him his blanket. At the bus stop an Indian (A1 was referring to the witness Thabo Surtie) arrived and greeted them. Passengers were boarding the coaster bus and he sought help from them to put the injured stranger inside. He found him a seat and the bus started off on but approaching Gideon's, it was stopped by the same Indian driving a white Cressida. The Indian (the witness Thabo) came to him and asked him (A1) what he had done to his sister, that is, the witness Mrs. Rajab. A1 says he replied that he did not know her and had nothing to do with her. Thabo hit him and he hit back until they were separated. He did not have a pistol nor did he tell Thabo that he got the pistol in Motsekuoa. A pistol, like the one exhibited (Exhibit 8) was taken, not from him, but from the stranger he had lent his blanket to. He denied the magazine was in his pocket. He heard - but only at the Preparatory Examination - that that man had died. He himself was badly beaten up and spent many weeks at Queen Elizabeth II hospital and then transferred to Mafeteng hospital where he stayed a month. He adds that at Central Prison Maseru,

/some time

some time in 1983, he was put in a parade and an Indian (Sajan) identified him. However he was the only person in the parade wearing a red skipper, he had been taken from the cells alone for the parade and on his way he saw the Indian sitting in his car, and the Indian saw him. A1 implies that the police prompted the Indian to identify him. The two other Indians (i.e. John Babu and his wife Annamaria) did not identify him but pointed to another person. That parade was arranged on a separate occasion and, he says, was properly held because the police did not isolate him to the identifying witnesses as they had done with the other Indian Sajan.

A2 says that on the night of the 15/16 July 1984 he was at his parental home at Thabana-Morena not in Motsekuoa. Whilst it is true that he had stayed with Mr. Tekete and his family up to the 12th June 1982 he did not steal his daughter's school bag. It must have been stolen by a herdboys or by staff of Fraser's (working under Francis) who had access to the room. The Indian (John Babu) did identify him at a parade in Mafeteng Police Station in August 1982, but he, John Babu, was prompted by the police because they paraded him (A2) alone within sight of Babu beforehand. The female Indian (Babu's wife) did not identify him. He says only he and another volunteer wore blankets. She identified the other blanketed man. He implies that the police told the Indian female the suspect wore a blanket but since two wore blankets she picked up the other man.

A1 called no witnesses.

A2 called his mother who testified that her son was at home on the night of 15/16th July 1982.

It is the submissions of the defence that:-

(a) There is nothing improbable in the accused

/persons

persons denial of complicity in the housebreaking and the murder.

- (b) The identifying witnesses were not satisfactory.
- (c) Alternatively that even if A1 and A2 broke into the Babu's home, there was no evidence who of the two accused shot and killed the deceased, and as the deceased's appearance at the scene was not actually foreseen, common purpose was not established and neither can be held guilty of murder.

The Court's assessment of the witnesses:

John and Annamaria Babu:

Two of the victims of the attack, viz, John Babu and his wife, were very badly affected by their ordeal and Mrs. Babu says she was ill and on medication. Their doctor recommended that they leave Lesotho to forget the incident. They packed their bags and found another job in the Transkei apparently in January 1983. The Babus were honest witnesses in their description of events but the fact of the matter is that Mrs. Babu's inability to identify A2 at Mafeteng in August 1982 (shortly after the robbery) and Mr. and Mrs. Babu's inability to identify A1 at the Central Prison Maseru (albeit this was after the lapse of some time) must materially detract from Mrs. Babu's assertion at the Preparatory Examination and in my Court that she was sure A1 and A2 were the two robbers, and from Mr. Babu's assertion at the Preparatory Examination and before me that A1 was the second robber.

I propose to ignore this aspect of their evidence entirely but shall now proceed to analyse the legitimacy of Mr. Babu's evidence of his identification of A2 at Mafeteng. It is certain that Mr. Babu's memory is hazy about the date of the parade because we have it from Sgt. Pule who conducted the parade that it was in August 1982 which, at most, was 6 weeks after the

/incident.

incident. This date is supported by Annamaria Babu who said it took place before they left for the Transkei (which parade she attended and failed to pick up A2) indeed even by A2 himself who gives the same month of August 1982. Now the conditions of identification at the time of the robbery were extremely favourable because electric bulbs were on, because the robbers spent over an hour and because there was no effort at concealing their features. A relatively short period of time had elapsed since the incident and the faces of the robbers must surely have been fresh in Mr. John Babu's mind. John Babu was wrong in March or April or May of 1983 at Maseru Central Prison. It can of course be argued from Mrs. Babu's alacrity in August 1982 in Mafeteng to point the wrong man and for Mr. and Mrs. Babu's alacrity in March-May 1983 at Maseru Central Prison (before the Preparatory Examination commenced) to point to the wrong man or men, and their subsequent somersault at the Preparatory Examination (and at the trial) that they were "sure" about A1 and A2 that both have taken leave of their conscience and were prepared to implicate any person faintly resembling any of the two robbers they had seen. With regard to Mr. Babu's identification of A2 at Mafeteng I have given the matter the most anxious thought. I do not accept the suggestion made by A2 that the witness was prompted by the police to point him out. If that was the case I see no reason why they should not have done likewise with Mrs. Babu. If Mr. Babu was not prompted and he did not really know the face of his man the odds of his picking up the right man (there were 9 in the parade including A2) were 11.111% not high odds perhaps though higher than backing up one number at the game of roulette where the odds of its coming up are 2.703%. In my opinion John Babu's identification of A2 was

/safe

safe and reliable.

Sajan Abraham:

This witness struck me as a far more observant and reliable witness than either Mr. or Mrs. Babu. He was not too emotionally affected by his experience. He saw no reason for example to leave Lesotho and is in fact still teaching in the country. He was of course not called to identify A2 at the Mafeteng parade in August 1982 (which was a serious omission) but his evidence before me, viz, that he recognised A2 as one of the robbers when he saw him in the precincts of the Court premises and then in the dock when he gave evidence before the magistrate at the Preparatory Examination (on 21st June 1983) even though that was almost a year after the robbery sounded most convincing. He had after all identified A1 on 26th March over 8 months after the robbery and I have no reason to suspect that his evidence is not reliable on A2 or is tainted by the trait that manifested itself with the Babus who seemed to have picked up in parades persons that they were unsure of. I also reject entirely the suggestion, or the implication, that the police brought A1 into view of Sajan before he was actually called to the parade in Maseru Central Prison.

Francis Tekete:

I have no doubt whatsoever about the truthfulness of his story. He has no axe to grind against A2 a relative to whom he had given shelter and hospitality. Flory's school bag was not stolen by his herdboy or a member of the Fraser's staff, because Francis says he woke up one night on hearing some movement from A2's room but did not give the matter a thought until early in the same morning when he entered the room and discovered the bag missing, the books scattered, and A2 gone

/with

with clothes and boots he had lent him. He had seen the school bag the same night before he retired to bed. I believe Tekete that he informed the police and A2's family. If I may digress here for a moment I ought to mention that whilst the theft of Flory's school bag and its finding at the scene of the robbery connects A2 with the latter, that the inference of guilt must be based on the assumption that A2 had not lent or lost control of the bag between the 12th June 1982 and 16th July 1982. Once it is accepted, and I do accept, that A2 stole the bag, only A2 can tell me whether he had lent it or lost it between the two dates. If A2 tells me, as he does, that he did not steal the bag, I have yet to decide whether it is a kind of lie that strengthens my belief in his complicity with the crimes charged or a lie that an innocent accused would advance because in his mind it sounds more plausible than the truth. Where the truth lies must depend on a number of factors.

Det. W/O Polanka:

The robbers of the Babus must have left many finger prints on the broken window pane, on the electric switches, on the TV set, on the door handles and gear of the Babu's car, on the panga, crowbar, knife, screw driver, the bully beef cans, etc. A2 was arrested not so long after the robbery. Sajan, a vital eye witness within Lesotho and not living a vast distance away was not called for an identification parade at Mafeteng. Motsekuoa and Setorumane were said to be 40 Km apart but certainly there was some suspicion of a possible association between the raid on the Babu's and the raid on the Rajab's because W/O Polanka went to Roma on the 21st July to collect the pistol and one shell. If Thabo is truthful, and I think he is, that A1 told him he got the pistol at Motsekuoa and

/Thabo

Thabo passed this to Roma Police I find it natural that Roma Police should call Morija Police so soon. There was more than one shell at the Rajab's sitting room and there is a break in the chain (though not material in this case) for no one gave evidence of picking up this shell from the Rajab's house and bringing it to Roma. Det. W/O Polanka had the pistol, 4 shells and a bullet head by 21st July 1982 but he did not send them for ballistic tests in Pretoria until March 1983 - over seven months after the event.

W/O Liphamamo:

A1 was in hospital apparently for a long time and a parade or parades could not perhaps be arranged earlier, but when it was possible to make such arrangements, and the task given to W/O Liphamamo, when it was his turn to testify, he had forgotten whether he held one parade in which the Babus and Sajan were the witnesses or two parades one when Sajan was available and another one when the Babus were fetched from the Transkei. It is clear however from the parade forms that two were held and at different times because the volunteers were different and the identifying witnesses, though related, did not even meet each other.

Mrs. Medina Rajab:

This witness is a shrewd and courageous lady. She testifies that A1 held the gun and it was he who had shot at her husband. The conditions prevailing were not as favourable as at the Babus house on the 16th: there were no electric lights in the house for example but it was not dark either: there were candles and a fire. A1 and his companion's sojourn in the Rajab's house was not as long as at the Babus but there is no doubt that she was right, at any rate, about the stature, complexion, and

/apparel

apparel worn by the man who shot. Without her description it was impossible for her brother Thabo Surtie even to venture a guess. Mrs. Rajab saw A1 (and his companion) the following morning after they were apprehended and identified them to all - and sundry - there was no lapse of time to cast doubt on the correctness of her identification.

Mr. Thabo Surtie:

Perhaps the star Crown witness, a man who had demonstrated his resourcefulness, initiative and courage. He did not strike me as anything but a truthful witness. He says A1 had the pistol not the other man who died and saw it being pulled by a passenger from A1's waist. The magazine of the pistol he found in A1's pocket.

A1:

The truth means nothing to him. He is, on his own admission, a dagga smuggler but he could not have been sleeping at the house rented by Fusi on the 15/16 if he was at Motsekuoa. Fusi was made available to him but he was not called. A1 bears no onus of course but the Court is entitled to, and does, draw unfavourable inferences from his lack of candour. He was the leader in the incident at the Babu's home on the 16th July in Motsekuoa and also at the Rajab's home at Setorumane (albeit with another man) on the evening of Monday 19th July 1982. I reject his alibi as completely untrue.

A2:

I do not believe his evidence is true and I reject his alibi.

Mrs. 'Matokelo Machachamise:

Does not really know dates and was not truthful when she says that A2 was at home on the night in question (15/16th July /1982).

1982).

The Law:

A1 and A2 have gone to the Babu's home to rob. Both were armed, A1 more lethally than A2, the arsenal, however, known to both. It was a joint unlawful enterprise.

If anyone of the victims of the original attack resisted or attempted to resist the accused were prepared to use a knife or a panga or stick to get their way or to get away not caring about the consequences. In this case the Indians did not resist, but when the accused were interrupted, one of them, shot the priest who came to the scene, to avoid arrest or make good their escape. The fact that one of the accused persons (or an associate outside) caused the priest's death with his own gun makes no difference to the guilt of all those who are known to have embarked on the unlawful enterprise in the first place provided that each of the accused could foresee the possibility of death. "When two people (or more) embark on a joint enterprise, each is liable for the other's acts done in pursuance of that enterprise to the same extent as the other and this includes liability for unusual consequences if they accidentally result from the execution of the common purpose". Cross & Jones Introduction to Criminal Law 9th Ed. p.394. See also Burchell & Hunt South African Criminal Law (1970) Vol.1 p.352-366.

Mr. Ramodibedi submits that the appearance of the priest armed with a gun was unforeseen, and since one cannot be sure who of the accused, (if either of them) shot neither of them could be held liable for murder. I think that Mr. Ramodibedi is confusing unforeseeability with unexpectedness. There was

/common

common purpose to rob. Those who embark upon it foresee the possibility of resistance. That is the reason why they carry weapons. The use of the weapons is also foreseen. Death of someone is foreseen. The fact that the priest's appearance with a gun was unexpected does not destroy the common purpose. The classic exposition of the law is perhaps that of Holmes J.A. in S. v Madlala 1969 2 SA 637 at 640 F-H (and cases cited therein) in which he is reported to have said:

"It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -

- (a) that he individually killed the deceased, with the required dolus, e.g. by shooting him; or
- (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
- (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S. v. Malinga and Others, 1963 (1) S.A. 692 (A.D.) at p.694F-H and p.695; or
- (d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder."

In this case the accused fall within (c).

Conclusion:

I accept the evidence advanced by the Crown of the identification of A1 and A2 at the scene of robbery at Motsekuoa. I accept that the gun that was used by A1 at Setorumane was the same gun that was used to kill the deceased Koloti a few days previously at Motsekuoa. I accept that the school bag of

/Flory

Flory Tekete was stolen by A2 and he did not lose control of it until the night of the robbery. I accept that the bullet that killed the deceased was a bullet fired from the pistol Exhibit 8. It is possible that it was the bullet head Exhibit 12.

In my view both accused are guilty of murder and of housebreaking with intent to steal and theft as charged.

My assessors agree.

CHIEF JUSTICE
10th October 1984

For A1 & A2 : Mr. Ramodibedi
For Crown : Mr. Peete

Extenuating Circumstances

I am enjoined by s.297(3) of the Criminal Procedure and Evidence Act 1981 to consider if extenuating circumstances exist that justify the Court in passing a sentence other than death.

Mr. Ramodibedi gave a number of reasons why both accused should be spared:-

- (1) The accused persons did not desire the deceased's death.
- (2) There was no premeditation in the act of killing.
- (3) We do not know who in fact shot dead the deceased.

Both my assessors are of opinion that the death sentence should not be passed on either of the accused. For murder they are thinking in terms of life imprisonment or 20 years in respect of A1 and 15 years imprisonment in respect of A2. Their main ground is that the priest was just too unlucky and A1 and A2 were not really after him. This is true but does it make them less blameworthy? I think not. I am not prepared to agree that extenuating circumstances exist in respect of A1. I find, albeit reluctantly, extenuating circumstances in respect of A2 on the grounds that he is less morally blameworthy for the priest's death than A1 because the evidence which I have heard shows that he was the junior partner, and on more than just a balance of probabilities, it was A1 who did the shooting since the pistol was found in his possession a few days later, and A1's behaviour at Setorumane is consistent with his behaviour at Motsekuoa for it shows that he was prepared to use a gun to kill again if necessary and except

/for the

for the grace of God someone could have died at the Rajab's house in Setorumane on the night of the 19th July 1982.

Sentence:

A1: Count. I death in accordance with s.298(1)
of the Criminal Procedure and
Evidence Act 1981.

Count II 10 years imprisonment.

A2: Count I 15 years imprisonment.) Sentences
Count II 10 years imprisonment.) to run
concurrently.

CHIEF JUSTICE

15th October 1984