

IN THE HIGH COURT OF LESOTHO

In the matter of.

REX

v

TSABO PHATE
NTAKA SEPOKHO
SEEKHE MAKEKA
KALI MAKHELE
MOKHACHANE NTLHAKANA
MOKOTLA KHATI
'MAENGINE SOFONANE
MOSEBETSI SOFONANE
'MAMOOKHO LEPHEANE
TSOKOLO MAJORO

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P. Mofokeng
on the 11th day of May, 1984

The ten accused are charged with the crime of murder. It is alleged that upon or about the 7th day of June 1982 at or near Maholi in the district of Qacha's Nek the said accused did one or the other or all of them unlawfully and intentionally kill one 'Manepo Sephelane. To this charge the accused have pleaded not guilty.

The main Crown Witness is 'Mamonyamane Lefata. She is about 38 years of age and lives in the Qacha's Nek district at the village of Ha Mapote. She knew Accused No.1 about a year prior to the killing of the deceased. She knew Accused No.2 who lives in the same village with

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her. In fact they are neighbours. She knows Accused No.3. She knew him before then. They live in the same village. She knows Accused No.4 to be Meeno's son: she did not know his name and she pointed out his father in Court. In fact the father was in Court and he stood up. They did not come from the same village. She knew Accused No.5. He comes from Rapase's: he was present at the killing of the deceased. She knew Accused No.6 Mokotla, who was present at the killing. He comes from Rapase. She knows Accused No.7 'Maengine who comes from Mapote's village. She knows Accused No.8 Mosebetsi who comes from Mapote's village was present also when the deceased was killed. She knows Accused No.9 'Mamookho. She was present when 'Mamokete was ritually murdered. She comes from Linakeng Ha Rapase. About Accused No.10 she says he was present when the deceased was ritually murdered but she did not know his home. Before then he used to see him at her village at Mapote's.

On the 1st June 1982 Accused No.2 invited her to his house. He told her that somebody wanted to strengthen his shop and had said he should look for someone with whom to do so. He said the author of this was Accused No.1. She asked how this was to be done, and he said it had to be a pregnant woman. She said she had not seen a pregnant woman. Then Accused No.2 said he had seen his niece at Linakeng: he said it was 'Mamokete. He then should look for people who were going to kill the deceased. He had not found any and he was going to look for them. She said she would also join. She said she was destitute, and he

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said he promised the payment of R2,000.00. Accused No.2 said he was going to recruit people. He said he would talk to Nzemeni, Motimpana, Mosebetsi, 'Maengine and all these people he mentioned lived at Mapote's. They parted. The following day they met at Accused No.2's place. He had called her. He told her that he had got those people. He said he would cross over and tell Accused No.1. The witness saw him cross-over.

She saw him the following morning when he called her. He told her that he found Tsabo present and that he heard that he had found his people. He told her that on the evening of the 2nd and it was on Wednesday in the week, they would go and meet at Nzemeni's home. That is herself, Nzemeni, 'Maengine, Motimpana, Mosebetsi and Accused No.2. They met at dusk. When they arrived Accused No.2 told them that he had been to Accused No.1 who said they would meet at Qaa on the Thursday. He said Tsabo had said he would give them R2,000.00. They agreed. It was on the 3rd of June 1982 when they went to Qaa. The following day they left for Qaa, they were Nzemeni, Motimpana, Mosebetsi, 'Maengine, Ntaka and herself. It was in the afternoon. Mosebetsi and 'Maengine left first and Ntaka and Motimpana, and the witness left last and went down the valley. Nzemeni left alone. They sat in the cave which is just above the footpath. When the witness arrived she found Mosebetsi, 'Maengine, Nzemeni, Ntaka then Motimpana arrived, shortly thereafter Tsabo arrived, that is Accused No.1 he was with Accused No.4 only. They greeted them. He asked them whether they had heard about his message from Accused No.2.

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They said they did. He said he would give them R2,000.00, when they had completed the work of ritual murder. He requested Accused No.2 to go and get his other people at Linakeng Ha Rapase's. Ntaka agreed, that is Accused No.2. Accused No.2 said he was already intending to go to Mohlapiso's where he had been sent by the Committee. This was on the 4th and it was a Friday, it was Leabua's committee, Ntaka was taking a letter there. They dispersed. The following day Ntaka left on the Saturday. She did not see him, on the Sunday morning. When she saw him, it was the 6th. He called her. He told her that he had got those people at Linakeng who were sought by Accused No.1. He said he would cross over to him to inform him. They parted.

She said she knew that the deceased would be killed on Monday the 7th. Ntaka said Accused No.1 had mentioned the said date. This was to take place at Maholi. Accused No.2 had requested 'Mamookho was to leave with her from Linakeng at a place called Phuthing Ha Lesala. They were to arrive at Maholi in the afternoon about mid-afternoon. On Monday Mosebetsi and 'Maengine left first. The instructions were that they should not follow the same path. Nzemeni then left. These were the people who were going to stop 'Mamokete at Ramotsamai's. It is near Maholi. Accused No.2 and Motimpana then left. The witness then followed. She went down the valley. Accused No.2 and Motimpana went along the river. Witness went round the slope. He, accused No.2 and Motimpana crossed a stream called Pitsane. They walked until they got to /Ramotsamai.

Ramotsamai. They found 'Maengine, Mosebetsi, Nzemeni and the deceased. They were seated. When they arrived, the witness and her company greeted. Thereafter Accused No.2 said it was late they should go. He was addressing all of them. He said they should go to Maholi. Deceased asked where they were going and Ntaka, Accused No.2 said she would see where they are going. Deceased said: "by the way, it is said you killed people in Johannesburg." When this was said they were still where they had found them seated. Accused No.2 handcuffed her on both hands, and he pulled her. At that juncture they were near Maholi. A distance estimated at about 250 metres away. Accused No.2 pulled the deceased towards Maholi from where she had found her seated, while the deceased resisted and refused to go. The handcuffs had a chain in the middle. Accused No.2 is a village policeman. She saw the handcuffs before going to the deceased. They were on the right side of Accused No.2's hip. When the deceased asked about Accused No.2 having killed people in Johannesburg she was already handcuffed. Accused No.2 pulled her, Nzemeni whipped her with a switch called joabasile (waddle) tree on the cuffs or legs. The witness speaks of a thin stick similar to exhibit 1. She was still being pulled by Accused No.2. They followed them, that is, they followed the deceased, Accused No.2 and Nzemeni. Those following were: the witness herself, 'Maengine, Motimpana, and Mosebetsi. When they were about to reach Maholi there appeared

/Accused No.1

Accused No.1 and Accused No.4 (Mcono's son) when they were about to descend to Maholi Accused No.3 appeared and Accused No.10, Mokotla (Accused No.6), Thabo Bota (D.W.) who is not among the accused. When they got to Maholi, Mokhachane (Accused No.5) arrived.

'Mamookho also. These people came from Linakeng direction. Thereafter they were all there Accused No.1 said it was late we should proceed. Deceased never screamed. She appeared frightened when she was handcuffed. However, Tsabo said they should proceed. When Tsabo said we should proceed, the deceased was still held by Accused No.2 and Nzemeni. There were no homes nearby; it is a valley. First the watchmen were appointed they were 'Mamookho on the Linakeng side and on the Mapote it was Mosebetsi. They were appointed by Accused No.1 who said 'Mamookho you look for people who come from Linakeng, Mosebetsi should look for people from Mapote's. They were to do this still with us. They were to do that still being part of the group. 'Mamookho left and went to Linakeng side Mosebetsi went to Mapote's side. They were on a higher terrain each on his or her side where they could see clearly. It was said if Mosebetsi saw people from his side he should communicate that to 'Mamookho who will then inform us, she will throw a stone. After they had gone Accused No.1 said gentlemen come closer. To the two remaining women he said they should also come. It was the witness and 'Maengine. When they got there he said women should undress the deceased. He was requesting, they did as requested. However the deceased was not undressed completely; she

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had been made to sit down the witness removed her jacket with stripes and spread it behind her, that is exhibit 2. 'Maengine took her petticoat off, that is by unfastening it at the shoulders and pushing it down. Then Accused No.1 said gentlemen come together. The witness says all was done in accordance with the instructions of Accused No.1. The deceased was still in a sitting position and being held by Ntaka and Nzemeni. Ntaka held her by the right hand Nzemeni held her by the left arm she was still handcuffed she was not crying, she had bowed her head down. Accused No.1 then said men should come together Accused No.2 and Nzemeni made her lie down all the men came closer. Tsabo came and stood astride over her, he took out a knife with a brown handle the witness did not notice who was holding the deceased where but they held her, we were just standing aside with this woman 'Maengine. Accused No.1 took another knife from his pocket he came yet closer and took a white plastic from his pocket (trousers' pocket) he handed it to (Mcono's son) Accused No.4. He came closer to the deceased and plucked out the left eye then the right eye; he was putting them into the plastic handed to Accused No.4. He cut the mouth on the left lower lip - part of it - he cut off a nible of the left breast he was putting them in plastic bag. He said the watchman on the Mapote side should come down that is Tsabo Accused No.1. He then said the witness should go there. As the witness did so Mosebetsi came down to Maholi, they exchanged places with him. When the cutting went on she was about five paces from the
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deceased. It was before sunset; it was in the afternoon. While she kept watch nothing happened where she was. She did not spend long time there. She returned. Accused No.1 then said we should not stay long we went down to Maholi with 'Mamookho. When she got to Maholi she said they were carrying the deceased and all the people she had left were still there the deceased was dead. When she went to the observatory point she was still breathing; she was no longer handcuffed. She was not present when she was unhandcuffed when the cutting and plucking out were done she was still handcuffed the jacket was still there she did not notice where it was. She said the men carried her by the legs and by the head. She did not want to deceive by saying which men held where because all the men held. The body was put under the cave the shoes were still there at the cave; she found them already there. The cave is not far from where she was killed. It was about 3 or 4 paces away. After she was placed in the cave Tsabo said that all was over. The pieces of flesh were carried by him in the same plastic bag. He further said we should not disperse he wanted to address us. He said the person who disclosed this is up to him or her. He said you of Mapote you are going to get your reward from Ntaka and Nzemeni. He did not say anything about those who came from Linakeng. That is all he said to them. Thereafter they dispersed, it was late but the sun was on the mountain tops. They dispersed in different directions. She did not get her reward. Nzemeni is not here; he is dead. Under cross-examination by Mr. Sello she said she

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was 38 years of age but she had forgotten when she was born she only read as far as the old Std. 1. She had forgotten her birthday; she was never taught: she did not know the year, month nor the date when she was born. She did not even know the date when she was giving evidence in Court. She had nine children, she was not sure how old is the eldest, the youngest she did not know her age. The second born was born in 1958 another in 1961 she had forgotten the months she only knew the years. Another child was born in 1964: she didn't know the month nor the date. She has a husband. She had forgotten all about other children as to when they were born. She stays together with her husband. He used to work in the mines but he is back at home. He is a peasant; he owns a few sheep obtained from his daughter's s dowry, seven when she knew them. There are no cattle; he does not have three cattle nor eighteen sheep. She said she was giving evidence for the first time. Nobody had told her anything. She was arrested in 1982 it was before Christmas. She was at Mohale's Hoek. It was the first place where she was kept. She was working for a police-woman. She was paying her. Before then, she was taken to Qacha's Nek and spent a month there. There she stayed at the charge office. After a month she was taken to Mohale's Hoek where she stayed at the charge office for eight months. She then went to stay with this policewoman. She knew the policemen who arrested her but not their names. They were outside Court the witness brought them in. They were two
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policemen detective trooper Samakhoana and detective trooper Manka. I do not hear those names for the first time I had only forgotten them. They took her to Mohale's Hoek. At Mohale's Hoek, she spent eight months; she requested that she be allowed to work, she was allowed. She slept at her place of work. "She saw to it that I did not escape". She did not escape. When she came to give evidence in this Court, the police fetched her from that house. While she was at Qacha's Nek she was asked questions she doesn't remember how many times but she was questioned practically everyday. On the first day she told them what she had already told the Court. They wrote it down. The police were those who were in Court. They read it back to her. They asked her to sign. It took much shorter time because it was a statement she already knew. "The second day they asked me the same thing they wrote it down and I signed." This did not happen everyday she said some days were excluded such as Saturdays and Sundays. Then some Sundays they would ask her. On each occasion the police would be writing down and she would sign. At Mohale's Hoek she was not asked any questions. "I was staying there. I was at the charge office unless I had forgotten." The police never said they would charge her with the death of the deceased. At Qacha's Nek they said they were charging her with the deceased's death. It was while she was signing when they arrested her. They did not tell her why they did so. "They told me the first day after I signed my statement. I knew all along that I was accused." She knew all along that she /was an

was an accused. She was arrested before Christmas 1982 but did not know the date. She made a statement the following day after her arrest. "I got there on a Saturday and on a Sunday I was asked. I told them what I told the Court. They said that they were arresting me after I signed it. I had made a mistake when I said that they arrested me after I signed. They asked me to make a statement which they read back to me I signed it, it was a Sunday. I meant that the other Sundays they would ask me. I stated that I don't know the date because I was confused. I am not confused today." When you get confused you forget, she said. "I remember when deceased was killed. It was on the 7th of the sixth month." She knows it because it happened in her presence. She knows Nzemeni who committed suicide it was a Sunday she could not remember the date nor the month nor the year. She was told when she got to Maseru that she was no longer going to be charged with the murder of the deceased but to give evidence. "It was on the 6th of February, it was on a Monday. It was the first time I learnt. I was kept from the other accused I was not arrested with them." She requested the police to go and work she did not know she was going to be a witness. They only told her that they got a letter at Mohale's Hoek from Sgt. Letsie, he told her that he was going to make her a state witness. It was after she was released from the charge office. "This was the third month after my arrival at Mohale's Hoek. It was because of this knowledge that I requested to be released to go and work. They refused me to go home. They told me that I

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was still under charge even though they were going to use me as a witness. I was afraid to go home because of what I had done, but I am not afraid to go home after the case is over if the Court says I should go. I have not told the police a lie, I was not afraid of my people back home lest they discovered that I have lied." She was not afraid all along and that is why she remembered the day Sgt. Letsie said she would no longer be charged but become a witness. She is still afraid even now because of the deceased's death. She did not make a statement anywhere except at Qacha's Nek. She did not make a statement last year. "If anybody said I did he would be wrong. I was asked about the death of the deceased I explained. They read it to me and I signed. When I said I had forgotten they never reminded me I reminded myself. On some occasions I forgot but nobody did anything." It was put to her that one Mokotla Khati Accused No.6 would say that the witness wrote on cardboard papers (two pieces of cardboard papers) and gave them to awaiting trial prisoners and it's where the witness is alleged to have said or written that she had been given a list of the names of the accused and that of Mcono's son. She denied that she ever wrote to this accused nor said these things on those papers, and that she had mentioned the names of Thabo and Motimpana: that is Accused No.6 knew nothing about the death of the deceased. She said she had never written a letter of that sort. That she advised him in order to save him from the police assault he should implicate the people whose names she had handed
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over, she said she had never written such a letter to him. He says he took those cardboard pieces and gave them to the police, she said she knew nothing about this. She says before deceased was killed Accused No.2 invited her to his house, it was on a Monday it was on the 30th it was the 6th month 1982 it was during winter month. She did not tell her husband about what Accused No.2 had said because Accused No.2 had said she should not tell anybody. She repeated she could not tell her husband because they were told to keep everything secret. He did not tell the police about shout from the rocks by Nzemeni "My husband heard with his own ears." She was not shocked when she heard that Accused No.2 wished to kill his own child for money, she never thought of these things. "I was happy for the reward I was promised because I was destitute" she says. When Accused No.2 had spoken to her she did not know how many people were going to be involved. She never got the money from Accused No.2. She had expected him to come to her as he had done before. She was prepared to wait until the money was brought to her and she was waiting as she betrayed to kill the deceased. Accused No.2 told her that a person had been obtained namely 'Mamokete and he was going to tell Accused No 1 about it. He had told him because they had previously discussed this matter. On the second occasion they met at his home as usual he reported that he had informed Accused No.1. He said he was going to look for others, that was the first time she knew that there were going to be other people who were going to be invited. That same day they

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met at Nzemeni's place it was a Wednesday her husband was not present. He came in the morning from a circumcision school. It was here that they were told to go to Qaa on the 3rd it was a Thursday and they went. Mosebetsi does not live very far from her and so does Motimpana. The day they went to Qaa she did not see Nzemeni, he was working. She saw Mosebetsi and 'Maengine she was at her home in the forecourt sitting. She was watching as it was in accordance with their plan. They were to meet at Qaa. She watched them because they would be the first to go, 'Maengine is the wife of Mosebetsi. Motimpana left with Ntaka. "I saw them leave it was per arrangement, I then left alone. We had arranged not to go together. They took different routes but leading to the same direction. They arrived together with Accused No.2 and Mosebetsi. I am sure of that. I did not arrive first. Accused No.1 and Mcono's son arrived. Accused No.1's home is at Seapa's. He has got his home right there as well as the shop. If he says he lives at Sekake I would not agree. Mcono's son worked at Tsabo's shop and lived there. I know because that is where we do our shopping. If he says he works at Qacha's Nek camp and lives there I would say that I don't know. I know him to be living at Seapa's. At that time he was at Seapa's, I am quite sure of this. " Qaa is very far from Qacha's Nek. If one left on foot at sunrise, one would arrive at that place where they were at 6 00 p.m. When Accused No.1 and Accused No.4 arrived it was in the late afternoon when the schools closed. She knew Mcono's son before then. "I am not mistaken

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about him." If he had left Qacha's Nek on foot he would not be there at that time unless he had travelled by vehicle. It was Tsabo who suggested that the deceased would be killed on a Monday and it would take place at Maholi. She denied that she was reciting facts in as much as what she was telling the Court was what had happened in her presence. After his arrival on the Sunday Accused No.2 informed the witness that people would have to go and ambush the deceased he said Nzemeni, Mosebetsi and 'Maengine that they should stop her at Ramotsamai. Accused No.2 told her the date of the killing would be on a Monday again as this had been said at Qaa. "He had to tell me," then the witness said she had made a mistake when she said the decision to kill the deceased on Monday was raised at Qaa. She heard this from Accused No.2 on the Sunday. 'Mamookho never stopped the deceased, she did not know the reason. On a Monday she had to go somewhere alone as per agreement with Accused No.2. They should go separately, take separate routes. She saw others leave. Accused No.2 left with Motimpana. She was the last to leave. When they got to Ramotsamai she found the others. They were sitting down. Deceased did not scream because she was panting until everything was finished. Accused No.2 held the right hand and Nzemeni also held her. The dress and petticoat were removed to below breasts. She said if she did not mention that the deceased was unhandcuffed in her presence it must be a mistake. She was unhandcuffed when she was undressed until she died. If I said when Accused No.1 cut her she was still handcuffed it is a
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mistake. She refused to say that she was in difficulty because of the demonstration which would advise her. She did not notice who had removed the handcuffs because she was frightened. All the men stood around her and obstructed her view. She said her head rested on the jersey and she lay down. She bled but not very much from each socket, no blood spread. It was a gentle flow, on the mouth there was not much, but went down the chest and downwards. The blood from the eyes flowed to the ears. The blood flowed to a dress. The blood from the mouth flowed to the jacket. When the nipple was cut she saw it removed, there was no blood which came out. She saw the areas where the blood came from. Motimpana did not do anything as he said he was sick. They live in the same village with him. He was present though on the day of the killing because "we went with him he said he felt sick on the way. He was in the company of Accused No.2. When he arrived at Ramotsama's he complained of a pain on the waist. Thabo Bota was not ill, he was present but did not know what he did because all the men were told to come closer. The persons from Linakeng who did something were Mokhachane, Seekhe, Mokotla, Tsokolo, they were all present from Linakeng. When Accused No.1 had finished he said the watchman from Mapote's should come down and I should remain at a place. I was present when he cut whatever he was cutting. When I left to be a watchman these people were waiting for Mosebetsi to come down. I am sure that they had finished. As I walked towards where Mosebetsi was, they were standing. Mosebetsi came down

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and he got to them He got to them but it is out of view "I did not see him but when I got down he was there, I was not there for a long time 'Mamookho said it was said that I should come down, when I appeared they were standing until I arrived to them They had made the deceased to stand up but I don't know what they were doing to her they made her stand on her feet. I don't know why they did that They then carried her away, Accused No 1 said let her be carried away. She was carried to the cave". At this stage she complained that she was being made to move backwards and forwards to make mistakes. She was then asked to describe various articles the accused wore. She said Thabo Bota wore donkey blanket, the one commonly worn by the police, the colour is darkish, he had on trousers, he had on gumboots, she didn't see the shirt, he wore a blue woollen hat. She went on to describe what other accused persons were wearing. It was then put to her that Accused No.1, 2, 4 and 5 will say they were never at Qaa at anytime she mentioned and she answered by saying that would be a lie It was further put to her they never participated in the killing of the deceased either on the day she mentioned or any other time or at any other place. The answer was "I can't take an oath and tell a lie, they participated." Accused No.4 will say you say he was at Qaa and also he participated, he did not participate at the killing as he was at Qacha's Nek and the answer was just that he was present. Then there was cross-examination by Mr Gwentshe it was put to the witness that Accused No.3 will deny that he

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participated in any meeting where the plot to kill the deceased was discussed. The answer: "He was there at Maholi." He will further say from the 6th of June he was in Maseru and he returned on the 9th: the answer was "He was present when the deceased was killed. The previous day he was at the meeting with us at Mapote's, he arrived at the committee going to attend to his own business." Accused No.3 will say he is not a member of that committee, answer "he can't deny he is a member."

"I played a small role because I could only take off the jacket, we were many; each person held where he held." The witness denied that she was falsely implicating the accused, the witness was made to repeat that she did not know the accused but he had seen him previously at his village when he had visited a certain 'Mamohau Lefata who lives at Mapote's village and 'Mamohau's brother is Mokotla. It was then said to her, "what would happen if somebody came." The answer was "if somebody came we would hide in the big cave. It was Tsabo who said that it's not the same cave into which the body was placed. It could be 10 to 12 paces away across the stream, it is big but I have never been in it." She did not know why the deceased had been made to stand. She did not see if anything else was being done to her, what she noticed was that she was standing. "Accused Nos. 6, 7, 8, 9 and 10 will say that they were never at Qaa on that day mentioned." The answer, "I never said Accused No.10 was there but the rest were present when Nzemeni committed suicide." But Accused No.2, according to her,

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would seem to have been present because he came to relate to her what Nzemeni had said, and Accused No.2 told her not to worry and the witness was frightened. People asked whether what Nzemeni has said was the truth. She denied, she said she could not tell them, she decided to tell them where she was going to. She knew she was going to be arrested and she was arrested.

The crux of the defence is simply that the accomplice has been kept inordinately in police custody. She was under their custody until she gave evidence in this Court. Some of the accused allege that they saw her at Sekake when they were interrogated. The main complaint by the defence is that during the period that she was illegally detained, she was taught evidence that she would come and recide.

She started off her evidence by rattling the dates on which various meetings took place. She said them with such clarity. However, the first few questions gave her a lot of trouble. She did not know the birth of her own children. Eventually she ended up by saying that she had not come to Court to give evidence about her children.

She deposed, and was supported by the policeman Samakhoana, that she had made a statement. This was written down. She was made to make a series of statements until the police were satisfied. These many other statements she made to the police were not made available to the Court the reason being that they

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were torn. The Court shall never know how the statement developed. That piece of evidence should have been made available to this Court to make the necessary assessment.

There is the question of the burnt marks and the one that penetrated the peritoneum. These are mentioned by the doctor who performed the post-mortem report. The accomplice witness is completely silent about them and she had said that when they had "finished" it was only then she was sent to keep a watch. There is no question that if a fire was made, she would have seen the smoke. She does not say that any of the accused carried an object or objects she saw for the first time. If fire had been made surely she would have also seen the remains thereof. She herself, stated that she was away for a short time and she was called back. Why did she not see these things or some of them? The defence simply says it is because she was not there at all. Perhaps she was afraid to describe the sordid affair in greater details.

It will be recalled that the accomplice witness stated that at meeting which was held at Oaa, it was Accused No.1 who informed the group that the deceased was to be killed on Monday 7th. However, when it was pointed out to her that nothing of the sort was ever said by Accused No.1 in as much as he was not there, she said she had made a mistake. What she had wanted to say was that she had learnt that from Accused No.2 and that was when she met her and he had met Accused No 1.

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Her evidence was full of contradictions even though of minor importance, however, of sufficient seriousness. It conflicts with that of Thabo Bota (former accomplice), who the Crown did not call as its own witness, but was called by the defence. The accomplice while under cross-examination, corrected herself on numerous occasions. Comparing these two witnesses the former accomplice was far superior

It becomes a riddle when the Crown's witnesses contradict each other. The deceased's husband said it was the deceased, herself, during the family discussion who said she would leave for Accused's home. But the accomplice says it was Accused No.2 who told her about the date and later says it was Accused No 1 who determined the day of the killing. Which version is this Court expected to believe? It is not for this Court to speculate which simply means that the Crown has failed to prove this "riddle" of the date of killing to have been initiated by any of the accused. This point exposed the accomplice for what she is. If there had been meetings in which the accused were present, it cannot be true that any of the accused picked on Monday 7th June as the D-day. This matter then becomes crucial as to the credibility of the accomplice witness

The accomplice's identification of some of the accused is questionable. It is not sufficient to say "I was with accused when we committed the offence" to an answer "how do you know accused so and so " Where
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There are number of accused persons whom the accomplice alleges they all participated in the crime, it is not sufficient to say that they were all present. The witness must go further and say what each one of those accused did. (Rex v Botso Mashaile & Others 1971-73 L.L.R. p. 148). The accomplice, in this respect, gave a very unsatisfactory account of some of the accused and, it would seem, in respect of some they did nothing. According to her evidence, only two people held deceased at any given moment. Then all the men carried her to the cave and yet at the same breath, only two men held her to the cave and she did not see what the rest of the men were doing. She was present and therefore she should have seen.

There is no evidence, other than that of the accomplice, which implicate the accused with the commission. Some of the accused lied but that is not sufficient. Crown failed totally to disprove their alibi. The Crown called only one accomplice when, as revealed in cross-examination, there were three in all. The witnesses were available and the reasons for not calling them remain with the Crown.

When the accused (some of them) did not lie a little their evidence was far superior to that of the accomplice. The false alibi evidence may well be the desperate efforts of an innocent man in trying to bolster up his innocence (Phineas Similane & Another. Swaziland Court of Appeal case 17/1981 p. 18 (unreported)).

/The accused

The accused were further borne out by Thabo Bota. He confirmed the assaults inflicted on him by the police. They were savage assaults. Accused No.5 (Makeka) got injured in front of the very eyes of the police and yet policeman Samakhoana, who was a few feet away, failed to find the source of the injury. It is simple. An incarcerated person, in the hands of the police, owes his safety to them. Suddenly, a small iron tri-pot is found in the room where Accused No.5 was being interrogated when it ought not to be there. It is therefore suggested he had tried to commit suicide. The subsequent events disprove that weak allegation.

A large part of the accused, which included the accomplice, were detained long beyond the statutory requirements. Their incarceration and assaults on them were unlawful. In this respect, Samakhoana (a very weak witness indeed) lied to this Court when he said the accomplice could go home if and when she wanted and that she did not wish to go home because of the "people". She said the police did want her to go home.

When a person is arrested the law prevailing must be complied with. As far as I am aware there is no law yet which allows a Crown Witness to be kept in protective custody. It was therefore, a serious infringement of our law to keep a potential Crown Witness in custody until he has given evidence.

It is perhaps correct as Mr. Kabatsi submitted that one must not look for logic in the commission of

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this type of crime. Nevertheless, it is difficult to understand how Accused No 2 boldly told the accomplice witness that Accused No.1 wished to kill a young pregnant woman and that he had such a person, namely the deceased. There was, according to the evidence, no special attachment between the two. Why should he report practically every step taken by him and Accused No 1? Yet when he is going to recruit more persons, she is informed about it. There is a sudden emergence of trust which springs from nothing. It is baseless. As Accused No.2 said, he was more friendly to her husband than her and would have discussed such matters with him than with her if the occasion had arisen. But there was no such an occasion.

The police witnesses could not produce evidence that the accused who were interrogated "after" arrest were ever warned according to the Judges Rules. Accused person were detained in custody for months on end even though at that stage they were suspects. The problem becomes compounded when the Court is asked to condemn men and women on the unreliable evidence of an accomplice witness. The Court does not convict an accused person on whom ~~un~~fair and illegal methods have been applied. The law is quite clear. Generally speaking, an accused person to whom one reason for his arrest had been explained, is entitled to be warned that if he makes any statement to the police, his statement will be taken down in writing and may be used as evidence against him. Certainly, the so-called third

/degree

degree methods are no part of our law and the investigator should go about his duties on a fair manner. Every accused person expects that he will be very fairly dealt with until his case is disposed off. Yet accused after accused gave a catalogue of assaults which they could not bear. They were supported, on this evidence, by Thabo Bota (ex-accomplice). Why then, one asks oneself, why was the same treatment not meted out to the accomplice witness? Is it perhaps the real reason for keeping her in detention unlawfully, was to learn her evidence by heart. The accused say she was assaulted. The allegation is not far-fetched. She was first kept at Qacha's Nek police station for a week and then transferred to Mohale's Hoek and whilst there detained, she was taken to Sekake Police Station and finally back to Mohale's Hoek. The ex-accomplice and another accused say that they saw her at Sekake's. What was the accomplice witness doing with the police all this time? The defence say she was being taught what to say in her evidence. At one stage of her cross-examination she conceded that she had recited her evidence. She did not wish to be asked many times as that tended to make her depart from the story she knew. The defence's allegation against her cannot be dismissed as wishful thinking.

In the Swaziland Court of Appeal case of Aubrey Mthembu v Rex, Appeal No. 12/1982 p. 14 Justice Young is reported as having said:

"(a) Mabaso was taken into police custody the day following the discovery of the body, and was then kept in custody for a period

/of

of 18 months. He testified that during that period he was interrogated by the police in each week from Monday to Friday. This evidence was not contested, but even if he was overstating the position, it would seem that he was subjected to a considerable amount of interrogation. It was only after a period of approximately two months that he told the police that Mrs Mdluli and he were involved in the killing of the child.

This feature, that an accomplice is taken into custody and is subjected to lengthy interrogation before he turns King's evidence, is a factor which will inevitably make a Court very much more cautious in accepting his evidence. The danger that he may falsely implicate another in order to minimize his own role, present in the case of every accomplice, is stronger in such a case "

I entirely agree

Again in the Swaziland Court of Appeal case of Phineas Simelane & Another, Appeal No. 17/1981 Judges Isaacs and Mahomed are recorded as follows concerning the detention of a potential witness at page 25.

"... we wish to express our grave and strong disapproval of the apparently persistent practice of detaining potential Crown witnesses for substantial periods of time, without any lawful authority

This is a most distressing practice. We again draw the attention of the authorities to the case of R v Mdluli in April 1982 in the Court of Appeal, when it was stated inter alia that.-

"The liberty of the subject and his right to protection from unlawful arrest and detention is fundamental to any civilized society, based on the rule of law. The Court will zealously defend and enforce those rights. In common with the learned trial Judge I am, indeed, distressed to learn that witnesses are detained in Swaziland for such lengthy periods and without lawful authority as in this case. Such a practice not only infringes the basic right of the subject, but compels a Court to approach with great caution the veracity of the evidence obtained

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in consequence thereof."

Notwithstanding these remarks and the disapproval of this practice expressed in other judicial dicta, it would appear that the practice still flourishes, according to the evidence in the present case. In our view immediate steps should be taken to ensure that it ceases forthwith."

These remarks are apposite in the present case.

It is a serious indictment on all of us if justice is to be allowed the course it has taken in this case. It is something quite contrary to the Basotho sense of justice and adherence to the law. Judge Walter Harragin is recorded as having said, in the case of Motloang Monoane and Others v Rex C of A. (CRI) No.1 of 1966.

" This Court has on at least one previous case commented upon the great delay which had taken place in the prosecution of the case, and it is regrettable that we now have further occasion for comment upon the dilatory conduct of the authorities in prosecution a very important and serious case."

It is often said perhaps that guilty men get away with murder, literally, because unlawful means were adopted in order to obtain a conviction. It is not the conviction or acquittal that matter with the Court. Courts uphold justice and that justice, as so very often said must be seen to be done. The demands of the Court are quite simple: to act strictly within the existing law; fair treatment to all those under police custody i.e. no third-degree methods are to be used to extract information from those in custody. It cannot be said that that is not the position here since accused arrest.

I have not consulted my assessors because the
/circumstances

circumstances are perculiar in the matter. I wrote this judgment while at the hospital, a place where it was highly inconvenient for us to meet and discuss. However, what really matters, in terms of the law, is the judges' opinion. In my view no irregularity has been committed. (See Criminal Law and Procedure through Law Cases by Hon M.P. Mofokeng page 6 where the position in this regard is clearly stated as follows:

"It is not even as if the judge was in any way bound by the opinions of the assessors. In Swaziland, as in India, he must form an independent opinion, and although he will be assisted and influenced by their opinion, he is not bound by them. Section 8 of the Swaziland High Court Proclamation says in terms that the assessors shall give their opinion and such opinion shall be considered by the Court, but the decision shall be vested exclusively in the judge."

I entirely agree with these remarks.

For the above reasons the accused are found not guilty and are acquitted with the crime with which they are charged

J U D G E

11th May, 1984.

For the Crown : Mr. Kabatsi

For the Defence : Messrs Sello, Sooknanan, Gwentshe.