

IN THE HIGH COURT OF LESOTHO

In the matter of

R E X

v

VINCENT MONAHENG MUSETSE THEBE

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 4th day of June, 1984.

The accused, a 21 years old youth, is summarily charged before me with the murder of one Mokhachane Mokhachane (hereinafter referred to as the deceased) in that upon or about the 31st day of December, 1982 and at or near Maqhaka in the district of Berea he unlawfully and intentionally killed the deceased.

Thirteen (13) witnesses were called to testify in support of the Crown case. Although no witnesses were called on behalf of the defence, the accused himself gave evidence on oath. Two (2) witnesses were called by the court.

It was common cause that the accused was a traditional doctor although not yet in possession of a licence authorising him to operate as such. It was also not disputed that on the evening of 31st December, 1982 which was a New Year's eve, the deceased disappeared from his home village, Maqhaka, and his dead body was on 3rd January, 1983 found on the plateau of Maqhaka mountain. The body was transported to the mortuary at Queen Elizabeth II hospital in Maseru where a post mortem examination was performed by P.W.2, Dr. Choi, a medical practitioner with some 35 years experience.

The evidence of P.W.2 was to the effect that on examining the body, he found that the deceased's genital organs i.e. the penis, the scrotum and both testicles were completely missing. The edges of the wound caused by the removal of the genital organs were very clean and from that he concluded that the deceased had been castrated by the use of a sharp instrument and the absence of the genital organs could not, therefore, have been the result of an animal bite.

There were blood clots on the wound thus suggesting that castration was done before the deceased was completely dead. The body had also multiple contusions. It has developed numerous blisters due to its high stage of putrefaction thus making it difficult to detect any other external injuries (if any). Internal examination of the body revealed no fractures of the bones.

P.W.2 formed the opinion that deceased's death was due to loss of blood as a result of castration and multiple contusions.

It may be pointed out from the on set that I find no good reason why the evidence of P.W.2 that the deceased's death was due to loss of blood resulting from castration and multiple contusions should be doubted. I am prepared, therefore, to accept it as the truth.

The question that immediately arises is how the deceased sustained the injuries that brought about his death. In this regard the court heard the evidence of P.W.3, Moitsepi Thobe, the younger brother of the accused.

It is perhaps significant to mention at this stage that P.W.3 was about 11 or 12 years of age and declared an accomplice witness. It is necessary, therefore, that his evidence be treated with caution for as Hoffman puts it at page 416 of his invaluable work, South African Law of Evidence (2nd ed.).

"The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others."

3/ The need for

The need for caution in dealing with the evidence of accomplice witnesses was highlighted in the leading case of Rex v. Ncanana 1948(4) S.A. 399 at p. 405 where Schreiner, J.A. had this to say on the subject .

".....the trier of fact should warn himself . of the special danger of convicting on the evidence of an accomplice, for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime to convince the unwary that his lies are the truth."

P.W.3 who was allowed to testify on oath briefly told the court that on new year's eve 1982, a space gram was being plying at the home of one 'Mateboho in his home village of Maqhaka and many children were dancing and making a lot of noise to celebrate the start of the new year.

He initially said the moon was shining on that night but later changed and said it was a dark night. The evidence of P.W.8, Sekhafa Thebe, was, however, that there was moonlight on 31st December, 1982. A glance at page 11 of Horters' Legal Diary, 1982 will reveal that on 30th December, 1982 there was a full moon. This court can take judicial notice that when it is a full moon the moon rises immediately after sun set. I am, therefore, inclined to believe the evidence of P.W.8 that there was moonlight on the early night of 31st December, 1982.

According to P.W.3, he was with the accused on the evening of 31st December, 1982 when the latter told him that he wanted a person he could mutilate (a re o batla motho ea ka mo retlang). He (PW.3) did not, however, know the meaning of the expression "to mutilate a person." Accused then told him to go and call a small boy by the name of Tlali Makhabesela. He went to 'Mateboho's place where many children were playing but could not find Tlali. He returned to the accused and reported. The accused then told him to go and call another boy called Sanko. P.W.3 returned to 'Mateboho's where he found Sanko and gave him accused's message. Sanko, however, refused to go and P.W.3 again returned and reported to the accused. Accused

4/ told him

told him to go and call the deceased but informed him that it was one Tsotang and not the accused himself who was calling him. P.W.3 returned to 'Mateboho's place while accused waited at a cattle kraal belonging to one 'Mathabiso in the village. He found the deceased and told him that Tsotang was calling him. This was confirmed by P.W.8 who testified that on the evening in question he, Molefi and the deceased were on their way to 'Mateboho's when P.W.3 came to them and told the deceased that Tsotang was calling him. The deceased then went with P.W.3 to a person who was leaning against a kraal. He did not identify that person. P.W.8 and Molefi who had been following P.W.3 and the deceased waited for them next to the gate of one Hlalefang. While they waited, the deceased called out and told them that they could go and he would join them later. P.W.8 and Molefi then left and continued on their way to 'Mateboho's. That was the last time P.W.8 saw the deceased alive and the next thing he learned that the dead body of the deceased had been found on the plateau of Maqhaka mountain.

I see no reason why the evidence of P.W.3, confirmed by that of P.W.8, that he went to the deceased and according to accused's instructions told him that Tsotang was calling him should be doubted. I accept it as probably the truth. I am also prepared to accept the evidence of P.W.8 confirmed by that of P.W.3 that the letter did in fact go with the deceased to a person who was waiting at 'Mathabiso's cattle kraal. However, the question still remains whether the person waiting at the kraal of 'Mathabiso was the accused or Tsotang. P.W.3 said that person was the accused and not Tsotang. The accused, however, denied that he was anywhere near that kraal at the material time and the person leaning against the kraal could well have been Tsotang.

P.W.7, Tsotang Motseki, testified that in 1982 he was working as a plumber in Mafeteng. He was the deceased's relative and very much fond of him. He used to meet the deceased and often gave him presents. That Tsotang and the deceased were so intimately fond of each

other may well be the reason why P.W.3 was told to inform the deceased that he was called by Tsotang and not the accused himself.

According to him, although he had come home at Maqhaka on 30th December, 1982, P.W.7 had to go back to his place of work in Mafeteng at about 6.00 a.m. on 31st December, 1982 and could not return until after a month due to the exigency of his work. He could not, therefore, have been leaning against the cattle kraal of 'Mothabiso at Maqhaka on the evening of 31st December, 1982.

That P.W.7 was at work and not at home on the evening of 31st December, 1982 was confirmed by P.W.10, Malofetsane Thebe, the father of the accused himself. He also told the court that the accused and P.W.3 were sleeping together in one of his huts at Maqhaka. On the evening of 31st December, 1982, they were both not at home until about midnight when he heard the accused knocking at the door of the hut in which he (P.W.10) was sleeping with his wife. Accused was asking for the key of the hut in which he and P.W.3 normally slept. Their mother told accused that their hut was not locked as their sisters were sleeping in there. Their sisters normally slept with the wife of P.W.12, Tseliso Thebe, the elder brother of the accused, when he (P.W.12) was not at home.

P.W.10 also confirmed that on the night of 31st December, 1982, many children were playing in the village to celebrate the start of the new year and he was not particularly disturbed by the accused and P.W.3 coming home late.

I accept as the truth the evidence of P.W.7 confirmed by that of P.W.3 and to a certain degree, P.W.10 that he was not and could not have been the person leaning against the cattle kraal of 'Mathabiso at Maqhaka on the evening of 31st December, 1982. There is no doubt in my mind that P.W.3 was testifying to the truth when he said the person leaning against the kraal was not Tsotang but the accused.

According to P.W.3, when the deceased came to accused at 'Mathabiso's cattle kraal, the accused requested him to assist him to fetch his dagga from the plateau of Maqhaka mountain and promised to give him M2 as a reward. The deceased agreed and they (i.e. P.W.3, the accused and the deceased) left for the plateau of Maqhaka mountain. When they came to a place called Mabetseng on top of the mountain, accused said he was feeling cold and P.W.3 and the deceased should gather some wood to make fire. P.W.3 and the deceased then proceeded to gather fire wood which they carried to where the accused was waiting.

At one time whilst the deceased had taken his bundle of fire wood to the accused and he was still gathering some more wood, P.W.3 heard as if something was falling over the cliffs. He did not, however, know what it was. When he brought the wood he had gathered to the accused, the latter told him that they should go round to the bottom of the cliffs. He followed the accused and when they came to the bottom of the cliffs, P.W.3 noticed the deceased who pleaded: "K, please help me I am broken" or words to that effect. "K" was a nickname by which the accused and the deceased usually called each other. When the deceased thus pleaded with him, the accused went to him, placed a small tin on the ground before getting hold of him by the neck and stabbing him on the back with a sharpened iron rod. P.W.3 got shocked or frightened by the sight of what the accused did. He moved backward and hid behind a rock.

While at his hiding place, P.W.3 noticed the accused dragging away the deceased by the leg about 7 paces (indicated) away from where he was hiding. As he dragged the deceased passed where he (P.W.3) was hiding, the accused called out "Hey, man come out and let us go". P.W.3 then left his hiding place and followed the accused who was still pulling the deceased. He could see blood jetting up from the deceased and making sound as it dropped to the ground. The blood was making a trail behind the deceased as he was dragged away by the accused. The deceased was pulled to a place called Masaleng where "malothoane" bushes were growing.

7/ He was making

He was making no sound of any sort as he was being pulled away. At Masaleng, the accused threw the deceased over the cliffs. The heights of the cliffs at the bottom of which the deceased was stabbed and over which he was thrown were about 12 feet. After the deceased had been thrown over the cliffs at Masaleng, P.W.3 and the accused left and proceeded to a nearby dam into which the latter threw the tennis shoes which the deceased had been wearing. Accused produced the shoes from the pockets of his overcoat. After throwing deceased's shoes into the water, accused washed his sharpened iron rod. Whilst washing the sharpened iron rod, the accused told P.W.3 not to mention what had happened to anybody. He agreed. They then returned home.

On the way back home, P.W.3 noticed that apart from his sharpened iron rod, the accused was still carrying the tin which he had seen him placing on the ground at the place where the deceased was stabbed. The tin had a lid on and he could not personally see what it contained but the accused told him that it contained the flesh of the deceased. Back at home the accused placed the tin at the kraal and warned him not to play near it. They then went to their house to sleep. I shall return to his evidence in a moment.

As has been pointed out earlier, P.W.3 is not only a young child but a declared accomplice witness whose evidence must be treated with great scrutiny and I am not prepared to accept it save where it has been corroborated by evidence aliunde of a more reliable nature.

It may, however, be pointed out that P.W.3 was in the witness box for 3 days of which 2 were devoted to strenuous cross-examination. Although at the beginning of his evidence, he impressed me as an intelligent witness he clearly broke down towards the end and started saying things that I considered senseless or incredible. Thus, for example, I found it incredible that as the accused pulled the deceased away by the leg, P.W.3 could have seen blood jetting up from the deceased and making sound as it dropped to the ground. P.W.3 had probably heard that when the

body of the deceased was found it had been castrated. He then imagined that the deceased had a large wound on the region of his genital organs and a lot of blood came out from the wound. It may be true that a lot of blood came out from the deceased's wound, but the suggestion that the blood was jetting up and making sound as it dropped to the ground is in my view nothing but the product of P.W.3's fertile imagination which I am not prepared to accept.

As it will be seen later in this judgment, PW.3 later took PW.13 D/Tpr. Seboka, and other police officers to the top of Maqhaka mountain where he showed them a number of places including the spot where the deceased's shoes were thrown in the dam. This was confirmed by P.W.13 who told the court that he was a member of the swimming team in the police force. He and other police swimmers got into the dam and searched the spot pointed out by PW.3 as the spot where the accused had thrown the deceased's shoes. It was in the course of their search that they found one of the tennis shoes which was identified by P.W.9, 'Mathuso Mokhachane, the mother of the deceased, as one of the shoes that the deceased had been wearing on the evening in question. She said the shoes were in fact her own property. On the early evening of 31st December, 1982 the deceased had come home with P.W.8 and Molefi. She served them a meal after which they went to play with other children. When they left the deceased was putting on her pair of tennis shoes. She actually allowed him to use that pair of tennis shoes so as to spare his own pair of shoes for the following day which was a New Year's day. After he had left with P.W.8 and Molefi, the deceased never returned home and the next day she started looking for him but all in vain. She later learned that the dead body of her son was found on the plateau of Maqhaka mountain.

The evidence of P.W.13 further disclose that from the place where the body of the deceased was found on top of Maqhaka mountain, he noticed a trail along which there were what appeared to be blood stains thus suggesting that the deceased who was bleeding was pulled to the spot where his dead body was found.

It may well be true, therefore, that as P.W.3 testified, the deceased who was bleeding was pulled to the spot where his dead body was found and the pair of shoes he was wearing on that evening was thrown into the water.

Coming back to his evidence, P.W.3 went on to say that in the morning which was a New Year's day, he and the accused drove the animals to the veld for grazing. The accused, however, told him to return home for his meal after which he returned to the accused when the latter also returned home. For the rest of the day he did not see the accused until in the evening when he (P.W.3) returned home with the animals.

Some days later, the police came to his home when P.W.13 and other police officers took him to Sefikeng police post where he was interrogated for many days. The interrogation was about his knowledge regarding the death of the deceased. At Sefikeng police post, P.W.3 stayed at the residence of one of the police woman and he was not tortured or illtreated in any way. He initially denied any knowledge about the death of the deceased because the accused had instructed him not to tell anybody what had happened. He, however, eventually decided to tell the truth which was what he had told the court. After he had decided to tell the truth to the police, he took them to Maqhaka mountain where he showed them the various places he talked about in his evidence including the dam into which the deceased's shoes were thrown. One of the shoes was actually found in the dam by the police in his presence.

That the accused was, at the relevant time, contemplating to kill a person was disclosed by P.W.1, Tom Andreas Phatsoane, who testified that on 23rd December, 1982, he was sitting on a hillock next to his village at Maqhaka when the accused came to him and they started chatting. In the course of their chat, the accused asked him what he would use as medicine to strengthen himself. In reply P.W.1 told the accused that he would use a water snake known as "Tlhoare". Accused told him that the water snake "Tlhoare" had no power and could not be used as medicine to strengthen a person. P.W.1 then asked the accused what

10/ he would use

he would use as medicine to strengthen himself. The accused told him that he would use the blood of a human being. The accused encouraged him that they should strengthen themselves so as to become real men. He mentioned that he had in fact once killed a person at a place called Qalaheng in the area of Makatane and on the instructions of his doctor who lived at Molelle's took blood and fat from that person. Accused then suggested to P.W.1 that on Christmas eve, which was the following day, he should assist him to kill a person and if he (PW.1) agreed, he (accused) would protect his home against witchcraft so that no witches could harm his family. P.W.1 agreed and promised to assist the accused to kill a person as suggested. However, when on the following day he met the accused, P.W.1 told him that he had had a bad sleep. He said he had dreamed about some of his dead relatives who threatened to kill him if he went on with the plan to kill a person. However, he told the court that he had in fact not had any such dream. It was only a story he had invented in order to avoid doing what he had promised to do with the accused.

After PW.1 had informed the accused about the dream, the latter advised him to wait for a week and if the same dream did not come back he should then know that it was only the work of witches who were trying to interfere with what they had planned to do. They then agreed that their next meeting would be on Friday of the following week which would be the New Year's eve.

On Friday, 31st December, 1982, P.W.1 was, however, still not prepared to go on with the execution of the plan. In the evening of that day he told his mother, one 'Malebohang Phatsoane, that if the accused came looking for him she should inform him that he (PW.1) was not in. PW.1 then went into the hut used as his bedroom. At about 7 p.m. whilst he was in that hut he heard the accused talking outside. The accused was inquiring about his whereabouts and 'Malebohang told him that he (PW.1) was not in. The accused then left and he (PW.1) slept.

On the following morning, 1st January, 1983, PW.1 did not meet the accused. He, however, learned that the

deceased had disappeared from the village and his dead body was later found on the plateau of Maqhaka mountain.

Accused told the court that the evidence of both PW.1 and PW.3 was nothing but/^apack of lies. In particular he denied to have had a chat with PW.1 during which he planned to kill a person. He also denied PW.3's story about going to Maqhaka mountain and said on New Year's eve 1982 he had gone to a place called Ramoseeka.

I must say I find it rather strange that PW.3 (accused's own brother) confirmed by PW.1 should fabricate a false story against the accused that on the evening of 31st December, 1982 he was planning to kill a person. In my view, the probabilities are high that PW.3 and PW.1 were testifying to the truth on this point and I am inclined to accept their evidence. As has already been pointed out the evidence of PW.10, accused's own father was that on the evening in question both PW.3 and the accused were not at home until at about midnight. He was positive, however, that in the morning they were still at home and he even sent them to return a saddle he had borrowed from another person. According to PW.3, if accused went to Ramoseeka's, it must have been during the day on New Year's day after they had taken the animals to the grazing lands and not during the night when he was with him.

Accused told the court that after the disappearance of the deceased and the subsequent finding of his dead body, the police took him to Scfikeng where he was interrogated for several days about the death of the deceased. He denied all knowledge about it. Whilst at Scfikeng, the police tortured him by not giving him food and insulting him. He was not given food for ten days. He was only allowed to drink water from a tap and while going for water at the tap he used to steal peaches. He was sleeping in a tent with the police and one night he pretended as though he was chasing away a dog when he managed to escape and return home.

According to P.W.13, D/Sgt Seboka, on 3/1/83, he received a report following which he proceeded to the top of Maqhaka mountain where he found a group of men and a dead body which was identified to him as that of the deceased.

12/ The body was

The body was lying in a pool of blood in a cave. He examined the body and noticed that all its genital organs i.e. the penis, scrotum and the testicles were all missing. The body had several contusion all over. It had blisters due to its advance stage of decomposition. He could see what appeared to be a stab wound on the chest of the deceased. He had the body carried next to the main road from where it was transported to the mortuary at the Government hospital in Maseru where a post mortem examination was performed by P.W.2. The body sustained no additional injuries whilst it was being conveyed from the mountain to the mortuary.

P.W.13 conceded that he subsequently took the accused to Sefikeng where he was interrogated about the death of the deceased. He, however, denied that the accused was ill-treated in any manner. On the contrary the accused was well treated. He slept in the same tent with police and was served the same food that the police officers were eating at their camp. Although he initially did not give satisfactory replies to the police's questions about the death of the deceased, the accused eventually did give satisfactory explanation. On the night preceeding the day on which he was to be taken before a magistrate for remand, the accused pretended to be going to a toilet when he escaped. He was, however, subsequently traced, arrested and brought before a magistrate.

P.W.13 also confirmed the evidence of P.W.3 that while he was with the police at Sefikeng he took him and the other police officers to Maghaka mountain where he showed them various places including the dam into which he said the deceased's shoes were thrown. One of the shoes was found in the dam during the search carried out by himself and other police officers. Later on, the accused also took him to the top of Maghaka mountain and showed him the same places as P.W.3 had shown him.

The accused denied to have ever taken P.W.13 and other police officers to the mountain. He however, confirmed the evidence of P.W.13 that whilst in the police

custody he agreed that he could show the police the penis of the deceased which he had hidden in the house of his elder brother P.W.6, Tseliso Thebe. He actually went with the police to the house of P.W.6 in whose presence he took out from the roofs a piece of flesh which he told the police was the penis of the deceased. This was confirmed by P.W.11 Motsoafa Namantja, the chief's representative who had accompanied the police officers when the accused was taking them to the house of P.W.6. It was also confirmed by P.W.6 himself who told the court that he had just lost his wife and he broke into tears when he realised that the penis of the deceased had been hidden in his house whilst the body of his late wife was lying in that same house. He considered it disgusting that such a thing should have happened.

P.W.13 said after he had taken from the roofs of P.W.6's house a piece of flesh which he said was the penis of the deceased, the accused handed it to the police. The piece of flesh was then taken and sent under the seal of the Commissioner of Police to the Forensic laboratory in Johannesburg, by the police, for analysis.

P.W.4, Captain Welm Gelofse confirmed that she received from Lesotho Police a parcel containing a piece of flesh. She subjected it to expert examination and from the kind of curls of the hair that was growing on it, she was positive that the piece of flesh was from the pubic region of a human being. She was positive that it was not a piece of the flesh of an animal. She handed it in as Exh. 1.

The accused confirmed that Exh. 1 was the same piece of flesh that he had handed to the police. He, however, said although he had told the police that Exh.1 was part of the private parts of the deceased, the truth was that the piece of flesh (Exh 1) he showed to the police in P.W.6's house was not the private parts of the deceased, it was a piece of flesh of a wild animal known as "tatai". He had hunted and killed that animal with a certain Mohlouoa at the cattle post in 1982. He did not, however,

know the surname of Mohlouoa. Mohlouoa was a grown up person and not a boy. The animal "Tatai" was known only by those people who like himself, had been to a circumcision school or were traditional doctors. After killing the animal he and Mohlouoa cut pieces of its flesh for making medicine which was to be administered on their cattle so that they could go home on their own. He carried his piece of "Tatai" flesh very carefully on his person day and night so that it might not be eaten by dogs or mixed with the meat of other animals at the cattle post. He was sleeping with it and as he was not using pyjamas at night he at times found that the "Tatai" piece of flesh had clued on to his pubic hair region of his body and some of his pubic hairs got stuck to it. When he returned home from the cattle post, he contained his piece of "Tatai" flesh in a tin. On arrival at home he took the piece of "Tatai" flesh from the tin, wrapped it in a piece of paper and concealed it on the roofs in P.W.6's bedroom from where he took it on the day he went with the police to P.W.6's house. He handed the "Tatai" flesh to the police. He assured the court that "Tatai" was not a monkey. It was an animal resembling a pig by its long hair that was growing straight. He said the reason why he told the police that "Tatai" flesh was part of the private parts of the deceased was because the police were torturing him by denying him food and insulting him. He wanted to be released so that he could go home and get food. When he was at P.W.6's house, he repeated that Exh. 1 was the penis or part of the private parts of the deceased because he had already committed himself while at Sefikeng police station. The accused told the court that there was no truth in the evidence of P.W.4 that Exh. 1 was a piece of the flesh of a human being from the pubic region.

It is worth noting that the point that the piece of flesh (Exh. I) was portion of the flesh of an animal called "Tatai" killed by the accused and one Mohlouoa at the cattle post was raised for the first time during the defence case and after the crown had closed its case. I personally do not know of an animal called "tatai" and none of my assessors

have ever heard of it. However, the fact that we do not know of an animal called "Tatai" cannot be proof that it does not exist. I may well be true that we do not know "Tatai" because none of us has been to a circumcision school or is a traditional doctor.

The court took the view that whether or not "Tatai" existed could have an important bearing for a just decision in this case. After the close of the defence case, the court directed, therefore, that a Mohlouoa who could have stayed with the accused at the cattle posts be called to testify in this case.

C.W.1, Mohlouoa Sehloho, testified that he was 58 years old. He had been to a circumcision school but was not a traditional doctor. He knew the accused with whom he stayed at the same cattle post about 3 years ago i.e. 1981. He had, however, never hunted a wild animal called "Tatai" or any animal at all with the accused while they stayed at their cattle post. He in fact did not know of an animal called "Tatai" and was hearing of it for the first time. He denied that he and the accused had ever killed any such animal and cut its pieces of flesh for purposes of making medicine to be administered on cattle so that they could go home on their own.

On behalf of the accused, counsel for the defence told the court that although the accused conceded that he had stayed with C.W.1 at the same cattle post that was in 1980. There was another Mohlouoa (not C.W.1) with whom he hunted the "Tatai" in 1982. That other Mohlouoa stayed in a neighbouring cattle post and if he were allowed to go with the police he could find him. The court allowed the accused to go with the police to find Mohlouoa he was talking about and if any such person was found, he would be called as a witness by the court. For that reason, the hearing was postponed for 3 days.

When the hearing resumed after 3 days, the court was told from the bar that Mohlouoa mentioned by the accused was not available. The court then called C.W.2 D/Lt. II Letsunyane who testified on oath that on 19th May, 1984 he and other police officers met the accused at the Central

Prison in Maseru and left in a police vehicle for Mapoteng police station where they were to spend the night on their way to the cattle posts where the accused had said he would find Mohlouoa. The accused was accompanied by one of the prison officers. The party spent the night at Mapoteng police station.

On the following morning, the accused was served his breakfast by the prison officer. When the party was preparing to leave for the cattle posts that morning, the prison officer who accompanied the accused told C.W.2 that the accused wished to say something to him. C.W.2 then called together the officer commanding police at Mapoteng, the Headman of Mapoteng village, all the police officers who were going in the company of the accused, the prison officer and the accused himself. In the presence of all those people, the accused said the following words:

"It is better that we return here because I have deceived my attorney and the court that there is a person called Mohlouoa who could be found at the cattle posts. What I have said was a lie and the best thing is that we return to Maseru."

The police officers tried to persuade the accused that they should at least go as far as the cattle posts so that he could show them the neighbouring cattle post he had mentioned but the accused said he would be troubling them for nothing because after all he knew for certainty that there were no more animals at the cattle posts at that time of the year.

The police then gave up and returned with the accused to the Central Prison in Maseru.

Considering the evidence of C.W.1 and C.W.2, there is no doubt in my mind that the accused's story that there was a wild animal called "Tatai" is false. Accused's story that the piece of flesh, Exh 1, is that of "Tatai" is equally false and the truth lies in the evidence of P.W.4 that Exh 1 is a piece of the flesh of a human being from the public region.

The salient question is where did the accused get Exh 1 from. The answer to this question, in my view, revolves on the evidence of the next witness i.e. PW.5, Ntja Mohapi, considered together with the evidence of PW.1 that the accused had asked him to assist him to kill a person on Friday 31st December, 1982; the evidence of PW.3 that on the same evening of Friday 31st December, 1982, the accused told him that he wanted a person he could mutilate and subsequently instructed him to go and call the deceased, inter alia, with whom they proceeded to the top of Maqhaka mountain, the evidence of PW.13 that when it was found at Maqhaka mountain the body of the deceased had its genital organs missing and that while at Sefikeng police station, the accused said he could take the police where he would show them the penis of the deceased; the evidence of P.W.13 supported by that of P.W.6 and P.W.11 that the accused said Exh 1 was the penis of the deceased; the evidence of P.W.4 that Exh 1 was in fact a piece of human flesh from the pubic region and the evidence of P.W.2 that the genital organs of the deceased had in fact been cut away with a sharp instrument.

The evidence of P.W.5, Ntja Mohapi was that he lived at Ramoseeka and the accused was the son of his paternal aunt. Accused used to visit his home. In February, 1983 he was on leave from his place of work in the Republic of South Africa, when one day at about 8p.m. the accused came to his house. On his arrival the accused told him that he had escaped from the police custody at Sefikeng where he had been kept under arrest following his killing of the deceased. He had killed the deceased because he wanted to prepare his medicines. While at Sefikeng, he had pretended to be going to a toilet and then managed to escape and go home. When he approached his parental home he heard the report of a gun and decided to come to his (PW.5's) home. Because of what the accused said he had done, P.W.5 was not happy to have him at his house and so he told him that it would ^{be} better that he left the place.

If the accused had not killed the deceased and only because of the police torture said he had and Exh. 1 was part of the private parts of the deceased, I am unable to find a convincing reason why he told PW.5 that he had killed the deceased for purposes of preparing his medicines. He was then away from the police and there was, therefore, nothing compelling him to deceive PW.5 who is his cousin.

Taking the evidence as a whole I am convinced that the only reasonable inference to be drawn is that the accused is the person who castrated the deceased and Exh.1 is part of the deceased's genital organs which the accused had removed. That answers the question, where did the accused get Exh 1 from. Whether when he was thus castrated the deceased had accidentally fallen or had been deliberately pushed over the cliffs is really immaterial for according to PW.2's evidence which I have accepted, the deceased died as a result of castration which was effected while he was still alive. From the evidence of PW.1, PW.3 and PW.5 I am satisfied that the accused had premeditated and planned the killing of the deceased, when he killed the deceased he, therefore, had the requisite subjective intention.

Moreover, it seems to me that accused's statement to PW5 that he had been arrested following his killing of the deceased amounted to a confession. In terms of the provisions of Section 228(1) of the Criminal Procedure and Evidence Act, 1981.

"Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person, accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person provided the confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto."

PW.5 has testified on oath that on his own accord the accused came to his house and made the confession.

I have no reason to doubt that the evidence of PW.5 is competent evidence proving that the accused made the confession to him. According to PW.5's evidence which again I have no reason to disbelieve, the accused freely and voluntarily told him that he had killed the deceased in order to prepare his medicines. There was no suggestion that when he made the confession, the accused was not in his sober and sound senses nor can it be said that on the evidence the accused was in any way compelled to make the confession.

The accused denied to have come to PW.5's house and made the statement. But I could find no convincing reason why PW.5, a cousin of accused, should fabricate against the accused on this point. It seems to me that PW.5 was testifying to the truth and I accept his evidence.

I come to the conclusion, therefore, that in the circumstances of this case, the confession is admissible evidence. Section 240(2) of the Criminal Procedure and Evidence Act, supra, provides .

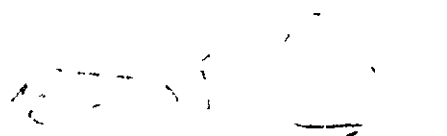
"(2) Any court may convict a person of any offence alleged against him in the charge by reason of any confession of that offence proved to have been made by him. Although the confession is not confirmed by any other evidence, provided the offence has, by competent evidence other than the confession, been proved to have been actually committed."

I have already accepted the evidence of PW.2 that the deceased died of loss of blood resulting from castration and multiple contusions. Considering this and the evidence as a whole, there is not the slightest doubt in my mind that the deceased was brutally assaulted on his private parts by the accused. In assaulting the deceased in the manner described by the evidence, the accused was, no doubt, aware that his act was likely to result in the death of the deceased but acted reckless of whether or not death occurred. Even if I were wrong therefore, in holding, as I do, the accused had direct intention to kill, there can be no

20/ doubt that

doubt that he had at least, the legal intention to kill. That, in my opinion takes care of the proviso in section 240(2) of the Criminal Procedure and Evidence Act, supra. By and large, I am convinced that on the evidence as a whole it has been established beyond a reasonable doubt that the accused has committed the offence against which he is charged. In the circumstances, I have no alternative but to convict him of murder as charged.

Both my assessors agree.


B.K. MQLAI,
JUDGE.

4th June, 1984.

For the Crown : Mr. Peete,
For the Defence Mr. Ramolibeli.

EXTENUATING CIRCUMSTANCES

The accused has already been convicted of murder and the question which now arises for decision is whether the crime committed by the accused was committed with extenuating circumstances or not. As Schreiner, J.A. once put it in R. v. Fundakubi and Others, 1948(3) S.A. 810: In deciding whether there are extenuating circumstances in a case of murder no factor not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration.

With this statement of the law on extenuating circumstances in mind, the Court was invited to take into consideration two important factors namely that the accused was a traditional doctor who, in all probabilities, had a firm belief in witchcraft, and his youthfulness.

In support of the contention that a belief in witchcraft was a factor to be properly considered in determining the existence or not of extenuating circumstances the Court was referred to the decision in R. v. Fundakubi, supra and cases therein cited.

It must, however, be observed that in those cases the murderers had been actuated by their beliefs that their victims were practising witchcraft by which they had caused the death of their near relatives or families. In the present case there is, however, no evidence that the accused was actuated by the belief that his victim (the deceased) was practising witchcraft by which he had or could have caused harm to the accused himself or his family. The facts in Fundakubi and other decisions therein cited are, therefore, clearly distinguishable from the facts in the present case. That being so, it seems to me that the decision in Rex v. Fundakubi and Others, supra, is no authority that extenuating circumstances exist even where a murderer who believes in witchcraft kills an innocent victim from whom he suspects no harm. To hold the contrary would obviously have far reaching repercussions.

/Indeed,

Indeed, as Schreiner, J.A. indicated at p. 819 of the above quoted decision:

"..... it should not be supposed that the existence of a belief in witchcraft must necessarily and in all cases be treated as an effective extenuating circumstance. The witchdoctor who "smells out" a victim, may escape responsibility for the subsequent murder because it cannot be shown that he has done more than indicate the supposedly guilty person, without having instigated any violent action against him; but where actual incitement to murder is brought home to the witchdoctor, it would not, I apprehend, be right for the jury (or court) to find extenuating circumstances in his favour merely because it was found that he was a firm believer in the dark craft practised by him."

As regards his age, it was common cause that the accused was born on 13th March, 1963. At the time of the commission of the offence on 31st December, 1982, he was, therefore, between 19 and 20 years old. He did not fall within the ambit of the provisions of Section 297(2) (b) of the Criminal Procedure and Evidence Act, 1981 which reads as follows:

"The High Court shall not pronounce a sentence of death by hanging against a person convicted of an offence punishable by death if in the opinion of the High Court that person was, at the time of the commission of the offence under the age of 18 years, but shall instead sentence him to be detained during the King's pleasure, and he shall be detained in such place and under such conditions as the King may direct, and whilst so detained shall be deemed to be in lawful custody."

No doubt a youth of between 19 and 20 years is not a child, yet he cannot reasonably be expected to show the same stability of character, responsibility and self-restraint as a fully mature man. The question is whether youth alone is not a factor to be taken into account for purposes of determining the existence or not of extenuating circumstances. In Rex v. Hugo 1940 W.L.D. 285 at p. 286 Schreiner, J. had this to say on the subject:

"..... youth and extreme old age may be material in conjunction with other factors.

/Once

Once, however, you are dealing with an adult of normal faculty, the fact that he is rather young or rather old can hardly be an extenuating circumstance."

See also p. 365 of the South African Criminal Law and Procedure (Vol. 11) by Hunt where the learned author says:

"youth cannot be treated as an automatic extenuating circumstance."

In the light of the above cited authorities, it seems clear to me that where the accused is not under the age of 18 years, the question of his youth is relevant as extenuating circumstance only when it exists in conjunction with another factor or other factors. On the evidence adduced before this Court in the instant case I am unable to find any other factors taken in conjunction with which the youthfulness of the accused can be regarded as extenuating circumstance.

I come to the conclusion, therefore, that there are no extenuating circumstances and the proper verdict is that of guilty of murder with no extenuating circumstances.

The accused shall be returned to the custody and be hanged by the neck until he is dead.

My assessors agree.



J U D G E.

8th June, 1984.

For the Crown : Mr. Peete

For the Accused : Mr. Ramolibeli.