

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v.

1. TEBOHO LEONARD MOHOLOBELA
2. THABISO MICHAEL MOHLOKI

J U D G M E N T

Delivered by the Hon. Acting Chief Justice J.L.
Kheola on the 24th day of June, 1986

The accused, Teboho Leonard Moholobela and Thabiso Michael Mohloki, are charged that on the 30th January, 1985, at or near Mafeteng Reserve in the district of Mafeteng, they, acting in concert, did one or other or both of them murder Mashea Moshabe, Mahao Mohapi and Peete Leluma.

The second count reads as follows:

That:

"In that upon or about the 30th day of January, 1985 and at or near Mafeteng Reserve in the district of Mafeteng, the said accused, acting in concert, did one or other both of them, acting unlawfully and with intent to kill, shoot and injure the following,

1. Tsokolo Mojela
2. Malebo Nokana
3. Tseliso Mosetoane
4. Lephole Lephole
5. Mampho Maketsi
6. Mabataung Mokotjo
7. Mosebatho Mabatla
8. Matsika Mabatla

The third count reads as follows:

/That....

That:

"In that upon or about the 30th day of January, 1985 and at or near Mafeteng Reserve in the district of Mafeteng the said accused acting in concert, did, one or other or both of them, unlawfully and intentionally injure a passenger bus "Teboho No.7 BUS SERVICE" - the property or in the lawful possession of LIPHOTHA MOSAE, by shooting the said passenger bus with intent thereby to injure the said LIPHOTHA MOSAE in his property."

The accused pleaded not guilty to all the charges but their counsel, Mr. Khaone, made the following formal admissions:

1. The identity of all the deceased mentioned in count 1 is admitted by the defence;
2. At the material or relevant time the accused were members of the L.P.F.;
3. Teboho bus is the property of Zakhura and was in the lawful possession of Liphotha Mosae (P.W.11) at the time of the ambush;
4. On the evening of the 30th January, 1985 Teboho bus was ambushed;
5. The causes of death of the three deceased persons were extensive lacerations of vital organs as shown in the post-mortem examination reports which were handed in by consent without calling the doctor who made them to give oral evidence (Marked Exhibits "A", "B" and "C");
6. Dr. Ayasi Agweni who performed the post-mortem examinations of the bodies of the deceased is a qualified medical doctor;
7. The eight (8) whose names appear in count 2 were injured at the time of the ambush;
8. The two rifles before Court were the lawful issues to the accused as members of L.P.F.
9. The bus was damaged during the ambush.

/The.....

The post-mortem examination reports handed in by consent read as follows:- Ex "A" (in respect of Marashea Moshabe) death was due to extensive lacerations of both lungs with respiratory distress (ii) Haemorrhagic shock.

Ex. "B" (in respect of Mahao Mohapi) death was due to extensive lacerations of the right and the left ventricles and haemorrhagic shock.

Ex. "C" (in respect of Peete Leluma) death was due to multiple bullet wounds on the brain and extensive destruction of both cerebral hemishperes.

Bazil Norman Young is a warrant officer in the South African Police Force. He is employed as an examiner of firearms, ammunition and tools, attached to the Forensic Ballistics Section of the South African Criminal Bureau. He claims to have been trained in the microscopic identification of fired bullets, cartridge cases and toolmarks. He has 16 years applicable experience.

On the 17th June, 1985 he received by hand from detective Mpopo a parcel containing the following:-

- "(1) 1 x 7,62 x 39mm "AK 47"
Assault Rifle
No. 2L15173
WITHOUT MAGAZINE
- (2) 1 x 7,62 x 39mm "AK 47"
Assault Rifle
No. 2L17615
WITHOUT MAGAZINE
- (3) 23 x 7,62 x 39mm FIRED CARTRIDGE CASES
- (4) 2 x 7,62 x 39mm SPENT BULLETS
- (5) 1 x 7,62 x 39mm SPENT JACKET
- (6) 1 x 7,62 x 39mm MILD STEEL CORE."

/He.....

He examined the rifles 4(1) and 2 and found them to be in good working order and he also fired cartridges therein for test purposes. On microscopic examination he found that-

- "(1) THE FIRED CARTRIDGE CASES 4(3) WERE FIRED IN THE RIFLE 4(2)
- (2) DUE TO DAMAGE AND THE LACK OF SUFFICIENT MARKS USED FOR IDENTIFICATION PURPOSES, IT WAS NOT POSSIBLE TO DETERMINE WHETHER THE EXHIBITS 4(4) (5) AND (6) HAD BEEN FIRED FROM THE RIFLES 4(1) - (2) OR NOT."

Rampharoane Mohloki (P.W.2) testified that at about 5.00p.m on the 30th January, 1985 the accused and one man who was a stranger to him arrived at his home and invited him for some drinks at Bongalla Restaurant. He accepted the invitation. When they arrived at the restaurant they (accused) bought two bottles of beer which the four of them shared amongst themselves. From there they went to the bus stop and accused 1 said he had no money and that the driver of Teboho bus No.7 owed him some money. Accused 1 said all these things when Teboho bus was leaving for Thabana-Morena. They left the bus stop ahead of the bus and walked in the direction of Thabana-Morena. When they came to Lesotho Bank buildings accused 2 lay on the side of road. He was still holding his rifle similar to the two rifles exhibited in Court (Ak 47 rifles). He, like accused 1 and the stranger wore sandringham blankets. Accused 1 and 2 were wearing balaclava hats. Accused 1 held a rifle similar to the ones before Court and the stranger had a small gun. After passing Lesotho Bank buildings accused 1 and the stranger (whose name he later learnt was Matete) left him (witness) behind and accused 1 got into Teboho bus where it had stopped. Matete stood in front of the bus while accused 2 was still lying on the side of the road about 10 to 12 paces from the bus.

Matete started firing at the bus with a rifle and the witness did not count how many times he fired but it was many times. He (witness) ran

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away as soon as Matete started shooting at the bus. He started shooting at the bus while accused 1 was still in the bus. P.W.2 says that he ran away and when he looked back he saw accused 2 coming behind him. He waited for him and they walked together until they came to the home of accused 2. He left him there and went to the home of Mrs. Mohloki. He did not ask accused 2 about the shooting because he was frightened. A short while after he had been at Mrs. Mohloki's place accused 2 arrived and bought liquor for R4-00. Accused 1 and Matete arrived after the liquor had been bought and they drank it with all the people in the house. From 'Mamohloki's place they proceeded to 'Matsolo's place; on the way they met some soldiers who asked for their particulars. They remained at 'Matsolo's home until about midnight when Matete just vanished and the witness never saw him again until the day of the trial.

Under cross-examination P.W.2 revealed that he was arrested and interrogated by the police about the ambush of the bus. He admitted that about three days after the ambush he was confronted with one of the accused and was crying when he was confronted with him. He denied that he cried because the police had assaulted him. He cried because he was frightened. He did not see accused 2 shoot at the bus but he got the impression that the shooting came from firearms more than one. He said that accused 1 was outside the bus when Matete started shooting at the bus and was wrong in his evidence in-chief when he said he entered into the bus. He admitted that he has a bad memory because he had forgotten that accused 1 was outside the bus when the shooting started. He forgot because even now when he is giving evidence before this Court he is still frightened. He says that accused 1 and Matete were standing in front of the bus and he saw accused 1 aim at the bus with a big gun. However, he does not know when and how Matete took the big gun from accused 1 and started shooting with it. At Mrs. Mohloki's place he never asked his friends why

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they shot the bus because he was frightened and there were many people in the house. But he got a chance to tell Mrs. Mohloki and one Khasu about the shooting of the bus that evening.

P.W.2 denied that at the time of the shooting of the bus accused 2 was at the traffic circle accompanied by one Cairo Retselisitsoe (D.W.3). (The traffic circle is about 1 kilometre from the spot where the bus was ambushed).

The third witness called by the Crown is 'Manthethe Lineo Mohloki who claims to be related to accused 2. On the afternoon of the 30th January, 1985 accused 2 arrived at 'Matumeleng's place and bought some beer. He was wearing a balaclava hat and brown sandringham blanket similar to the one before court. She denied that that evening she met P.W.2. In other words she is saying that the allegation by P.W.2 that he told her about the ambush of the bus that evening is not true.

The fourth Crown witness was Tsietsi Hlobotsi. He told the Court that on the 30th January, 1985 he came to Mafeteng for shopping and travelled in Teboho No.7 bus. His home is at Malumeng. Having finished his shopping he returned to the bus stop and waited for his bus for the whole day. The bus was at the garage for service. While he was waiting for the bus at the bus stop he saw two young men going up and down the bus stop area. One was wearing a black sandringham blanket and a grey balaclava hat while the other wore a brown sandringham blanket and a brown balaclava hat. The two young men carried rifles on their shoulders and as they were wearing blankets only muzzles of the rifles were appearing near their necks. The witness said that the two AK 47 assault rifles before Court and the two sandringham blankets and two balaclava hats before Court were similar to the ones he saw on the 30th January, 1985. The two young men had covered their faces with their hats leaving only the eyes and the ridges of their noses. He saw their chins when they

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drank beer from the tins they were holding in their hands as they moved about the bus stop area.

The bus arrived late after sunset and its headlights and interior lights were already switched on. The passengers boarded the bus including one of the young men who was wearing the black sandringham blanket. He later identified him as accused 2. The witness later said accused 2 was wearing the brown sandringham blanket. After boarding the bus accused 2 went to the back seat and the other young man remained outside the bus and said: "Gentlemen, you will find me ahead." The bus left and when it passed near Lesotho Bank buildings he heard a firearm report and one of the windows of the bus was shattered. At this time accused 2 was near him (witness) behind the driver. It was accused 2 who fired the first shot. Immediately after saying that the first shot was fired by accused 2, P.W.4 changed his story and said that it came from outside. When the second shot was fired from outside there was panic in the bus as passengers screamed and ran to the rear of the bus. Eventually they managed to get out of the bus and fled to the police station. Later when they returned to the scene of the attack they found passengers who had been injured during the shooting.

Three days after the incident P.W.4 attended an identification parade at Mafeteng charge office and identified accused 2. At the parade there were about ten (10) all wearing sandringham blankets of various colours. They also wore balaclava hats which were not drawn down to cover their faces.

Under cross-examination P.W.4 admitted that throughout the day and the evening until the shooting took place accused 2 had worn his hat in such a way that his face was covered leaving only the eyes and the ridge of the nose. He never saw accused's face. The witness said that he identified accused 2 because he saw his facial features during the day.

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When it was put to him that he did not see the features because accused 2 had covered his face with the hat, he said he identified him by the white shirt he was wearing. He admitted that he never saw accused 2 shoot while he was in the bus.

Sgt. Tsolele (P.W.5) is the officer who conducted the identification parade at Mafeteng police station. Out of the four identifying witnesses only P.W.4 pointed out accused 2 as the person who had ambushed the bus; the other witnesses either pointed out the wrong people or none at all. She says that she had not been told that the suspects had been wearing their hats drawn down covering their faces and that is the reason why the people in the parade did not cover their faces. It seems to me that this was a grave irregularity because the witnesses were allowed to see the faces of the people in the parade and yet P.W.4 made it clear that during the day until the ambush accused 2 had his face covered with the balaclava hat. At the parade all the suspects and other people taking part should have been made to wear their hats in the same way as the suspects are alleged to have been wearing their hats during the day. Because of this irregularity the identification parade is of no help to this Court and should be ignored.

Motsamai Ramatla is the mechanic who was repairing Teboho bus on the 30th January, 1985. The repair work was completed at about 6.15p.m. He boarded the bus and went to the bus stop where more passengers boarded the bus until it was half full. While the passengers were getting into the bus he saw two men wearing sandringham blanket lying on the benches in the shelter at the bus stop. He did not know the two men. Just before the bus left the bus stop a man wearing cream lumbar jacket entered into the bus and went to the back seat. The man struck a match and lit a cigarette; he struck another match, put out his hand through the window and signalled with the burning match stick. He did all these things when the bus was passing the Lesotho Bank buildings. Immediately after signalling the man

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in the cream lumbar jacket took out a revolver from his pocket and shot at a woman who was sitting next to him (the witness). The bullet hit her on the ear; she screamed.

Ramatla says that when the woman was shot he shouted at the driver and ordered him to stop 'as a person was shooting people.' As soon as the bus stopped he (the witness) tried to get out but saw two men on the ground; the man who was in front of the other started shooting at the bus. As the passengers got out one man was shot and fell down near the bus. Eventually the witness got out and hid himself in a furrow on the side of the bus. The shooting lasted about two to three minutes. After the shooting had stopped he went to the police station.

Under cross-examination he admitted that he did not identify any of the two men who were on the ground when the shooting started because it was dark. He did not see any person wearing a sandringham blanket enter into the bus while the bus was at the bus stop. If the two men he saw lying in the shelter were the accused he would have recognized them because he knows them.

Trooper Pomela (P.W.7) was at Bongalla Restaurant on the 30th January, 1985. He met Matete Nkhethoa who was wearing a whitish lumbar jacket and appeared to be slightly drunk. Immediately after he had met Matete a man wearing a grey sandringham blanket and carrying a rifle arrived. Matete introduced the man to him as Teboho Moholobela (accused 1), he said accused 1 was a soldier and worked in Maseru. Accused 1 and Matete got out of the restaurant. He followed them. When they came outside they stood aside and said that they had a private talk. They were joined by a tall man wearing a brown sandringham blanket. The three men talked to each other but he could not hear all what they said. At last Matete said, "Leave that thing, we will see it later." He did not know what thing they were referring to. They went away. After a

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short while a storeman made a report to him. He went behind the restaurant and saw a bus about 100 yards away and was being shot at with guns. He saw a man wearing a black sandringham blanket come out of the bus holding an AK 47 rifle. As the man was running in the direction of the restaurant Trp. Pomela says that he entered into the restaurant and closed the door. He peeped through the window and saw Matete come out of the bus and follow the man in the black blanket whom he identified as accused 1. They passed near Bongalla shop. After they had passed he came out of the storeroom and when he came near 1515 Restaurant he found Major Thaha and Captain Tumane. He made a report to them.

On their way to the charge office the three police officers saw accused 1 and Matete but they decided not to confront them about the shooting of the bus because they were afraid of them. They did not even follow them because they were afraid. They went to the charge office and took a Government vehicle and rushed to the scene of the crime. Three people were already dead as a result of the injuries they sustained when the bus was shot at. Several people had sustained serious injuries and the bus was also damaged. The dead and the injured were taken to the hospital. A search for the accused was launched and for the whole night accused could not be found. On the following morning the accused were arrested at a road block near Lithabaneng. At the time of their arrest the accused were trying to get into a taxi going to Maseru.

Trooper Pomela admitted that the best thing would have been to raise an alarm when he saw Matete and accused 1 leave the scene of the crime. He reported to his superiors but they all did nothing when they saw the suspects. He did not search for exhibits when he came to the scene of the crime because there were other policemen who did that job. On the 31st January, 1985 an AK 47 rifle was found at Phahameng at the

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home of a certain woman whose name she has forgotten. He denied that the accused were arrested by three soldiers and not by him and other policemen who were at the road block. He also denied that at the time of the ambush the headlights and the interior lights of the bus were already on, he says that the ambush took place just after sunset and it was still light. On this point his evidence is in direct ^{conflict} with the evidence of all other witnesses who said that the lights of the bus were already switched on because it was dark.

Sgt. Molikeng (P.W.8) testified that on the morning of the 31st January, 1985 between 5.00 a.m. and 6.00 a.m. he arrested the two accused near Thabaneng Bridge. Accused 2 had an AK 47 rifle with serial No. 15173. He examined the rifle and found that it had not been used recently. There were thirty rounds of ammunition in it. The spot where he arrested the accused was about two kilometres from where the road block was. In other words this witness contradicts Trooper Pomela whose evidence was to the effect that he and others arrested the accused at the road block when they attempted to get into a bus going to Maseru.

Lt Molumo was in charge of a team of soldiers and policemen who went to Phahameng at the home of Selloane Manyeli (P.W.14) and she gave them an AK 47 rifle with serial No. 17615, its magazine was empty. The rifle was identified as the official issue to accused 1. Selloane explained that it was left at her home by one Nkhethoa Matete who is her boyfriend. Lt. Molumo examined the rifle and found that it had recently been used.

Liphotha Mosae (P.W.11) is the driver of Teboho Bus NO.7. When the bus was ambushed near Lesotho Bank the headlights and the interior lights were already switched on because it was at dusk. He heard that some shots were fired from inside the bus. He did not see any of the attackers of his bus.

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The evidence of P.W.12 'Mampho Maketsi is to the effect that on the 30th January, 1985 Teboho Bus No.7 arrived at the bus stop at about 7.00 p.m. She had a few luggages and accused 1 helped her to load them into the bus. As the accused 1 was wearing a blanket she noticed that there was a bud of a gun near his neck. He was wearing a balaclava hat. Although accused 1 helped her to put the luggage into the bus they never talked to each other. Just before the bus left accused 1 got into it and sat on the back seat behind her. He was still carrying a gun under his blanket. When the bus came to Lesotho Bank she heard a firearm report coming from behind her. The bullet hit a woman who sat on the front seat on the ear. There was panic in the bus; the passengers run to the front of the bus but they were met by a shower of bullets from outside. They went up and down the bus till she finally came near the door where she met accused 1. He shot her on both thighs with his gun. She fell outside the bus. After the shooting had stopped she was taken to the hospital.

Under cross-examination she said that when accused 1 helped her to put her luggages into the bus it was at dusk and she could still clearly see an object about 100 yards away. She has known accused 1 for a long time and she never had any quarrel with him. She said that when accused 1 shot her on the thighs he was coming from outside the bus but she had not seen him go out because of the commotion after the shooting started. She denies that there was a person wearing a white lumbar jacket behind her. The only person she saw behind her was accused 1.

'Matsita Mabatla is one of the people who sustained injuries when the bus was ambushed. She told the Court that Peete Leluma (Deceased No.3) was her brother. She and her deceased brother were passengers in the bus. He knew accused 1 very well and saw him help P.W.12 to put her luggages into the bus. After helping her he got into the bus but she did not see where he sat. She is not certain that when the

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bus pulled off accused 1 was still in the bus. When she heard the first gun report from the back of the bus she ran forward in order to get out of the bus. But because there were many people she could not easily get to the door she tried to hide herself under the seats. She saw Peete pass near her, she shouted at him and ordered him to hide on the floor. He apparently did not hear her and continued to go to the door. She rose from where she was hiding and tried to catch hold of him but in vain. When he came to the doorway he was shot by accused 1 who was then outside the bus. She claims to have seen him very well because of the light from the interior of the bus and from 'balls of fire from the bullets.' After her brother had been shot the shooting continued and one bullet grazed her below the left breast and another amputated her left ring finger and her left middle finger.

The evidence of accused 1 is that on the 29th January, 1985 he and members of his platoon arrived at Makoanyane barracks from Mokhotlong where they had been posted. Corporal Khau instructed them to clean their firearms. The work of cleaning the equipment was completed at about 2.00 p.m. Corporal Khau had told them that after cleaning their equipment they would be off duty and were free to get out of the barracks. Each soldier has a locker in which he keeps his firearm and other property. Unfortunately when they arrived from Mokhotlong he found that their lockers had been broken. After the cleaning of the firearms he made a report to Corporal Khau that his locker was broken and 90 rounds of ammunition had been stolen. The stolen ammunition belonged to accused 2 but had been left in his custody when accused 2 left them at Mokhotlong and went to his home because his mother was ill.

At about 6.00p.m. on the 29th January, 1985 accused 1 met accused 2 at Makoanyane barracks and they decided to go to their home at Mafeteng. They took with them their AK 47 rifles because their lockers were broken

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and their senior man, one Polisa allowed them to take them. They slept at the home of Oujane in Mafeteng reserve. On the following day they decided to return to Maseru. When they left their village for the bus stop they met one Retselisitsoe Pheko (D.W.3) who accompanied them to the bus stop. On their arrival at the bus stop no transport was available. They remained at the bus stop for a long time till they decided to go to Bongalla Restaurant. At the restaurant they met Nkhethoa Matete. They stayed outside the restaurant for a short time before returning to the bus stop. They did not see P.W.7 at the restaurant. They remained at the bus stop for some time but there was still no transport to Maseru. D.W.3 said he was going home and accused 2 decided to take him half way. Accused 1 says that he remained at the bus stop with Matete still hoping to get a taxi to Maseru. After accused 2 and Retselisitsoe had left Teboho Bus No.7 arrived. People going to Thabana-Morena got into the bus and he helped P.W.12 to carry his grocery parcels into the bus, but he never entered into the bus. He gave the parcels to the person who was at the door.

Before the bus left he felt that he had to relieve nature and went to a place near Lesotho Bank. Matete accompanied him. When they came to Lesotho Bank Matete said that he wanted to see the new type of rifles that had recently been issued to them. Accused 1 says that when he gave his rifle to Matete the bus was leaving the bus stop and coming towards them. After giving him the rifle he went aside and started to pass water. When the bus passed them he heard a firearm report and noticed that Matete was shooting at the bus and passengers were screaming. He rushed to him and asked what he was doing. Matete suddenly turned to him and pointed the gun at him. He again started shooting at the bus and passengers came out of the bus screaming. Matete ran away towards Zakhura garage. Accused 1 says that he followed him because he did not know what he had in mind regarding his rifle. Matete suddenly turned

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and pointed a gun at him and said that as he had used his bullets they must go to L.P.F. base at Mafeteng so that he could replace his bullets. He then escorted him at gun point but changed his mind saying that he had some bullets at Phahameng at the home of his girl friend. As they proceeded towards Phahameng he saw four motor vehicles with their bright headlights coming towards them going in the opposite direction. After the vehicles had passed he noticed that Matete was no longer behind him. He never saw him again till the case started in this Court.

Accused 1 then went back to the bus stop to look for accused 2. He did not find him there nor at his home. He went to Mrs. Mohloki's place and found him with P.W.2. He did not tell accused 2 and P.W.2 what had happened but deceived them that he had hidden his rifle near a rock. They searched for it but failed to get it. That night he slept with accused 2 at Oujane's place. On the following morning he reported to his father what had happened. He decided to come to Maseru and make a report to his commanders. They went to the bus stop but again found no transport. They decided to come to Maseru on foot but were arrested near Thabaneng bridge.

The version of accused 2 is substantially the same with that of accused 1. Accused 2 says that when he left the bus stop with Retselisitsoe they proceeded towards the circle and met Teboho bus near Jendrel's shop. When they were at the circle they heard a gun report from the bus stop area but they paid very little attention to it. They parted with Retselisitsoe when he (accused 2) met his girl friend. From there he went to Mrs. Mohloki's place and bought some beer. Accused 1 found him there.

D.W.'3 evidence confirmed the defence story in all material aspects.

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There are so many contradictions in the evidence of the Crown witnesses that the Court must approach this case with extreme caution. I shall first deal with the evidence against accused 2. The evidence has shown that his rifle (Ex 1) was not used in the ambush. He may be convicted only if the Crown evidence proves that he was a party to a common purpose to commit the offences charged or if the evidence shows that he used another rifle other than his own. He is implicated in these offences by P.W.2, P.W.4 and P.W.7. P.W.2's evidence is to the effect that accused 2 waylaid the bus but he did not see him fire a single shot at the bus. When the shooting started and the witness started running away he saw accused 2 running and following him. When he caught up with him the witness alleges that he did not ask accused 2 what was happening. He says that he was afraid of him. I find it improbable that P.W.2 would be afraid of asking his own friend what was happening to the bus, more especially because he saw that accused 2 had not shot at the bus. He claims that he did not ask accused 2 because he was frightened. He had no cause to be afraid of his own friend who had apparently taken no part in the commission of the offence.

P.W.2 does appear to have a very poor memory. In his evidence-in-chief he said that Matete was in front of the bus when he started shooting at it with a big gun and that at that time accused 1 had already entered into the bus. Under cross-examination he retracted from his statement and said he at no stage saw accused 1 enter into the bus. He again claimed that he said accused 1 entered into the bus because he was frightened. At this stage I even remarked that P.W.2 appeared to be very cool and collected. What I meant was that P.W.2 was telling a lie that he did not know what he was saying because he was frightened. He is a person who whenever he found himself in difficulty to answer a question he conveniently claimed that he was frightened. For instance,

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when it was put to him that on the day he was confronted with the accused he was crying because he had been assaulted by the police during interrogation, he said he was crying because he was frightened.

In his evidence before this Court he referred to his fright on several occasions in order to justify his contradictions. I formed the opinion that he is not only a forgetful person but he is also as imaginative as a small child.

Accused 2 told the Court that he was at the traffic circle about 2 kilometres away from Lesotho Bank when he heard the firearm report. His version is confirmed by Retselisitsoe. I found accused 2 and Retselisitsoe to be more credible witnesses than P.W.2. His evidence is contradicted by P.W.4. According to P.W.2 accused 2 was lying on the side of the road about 10 to 12 yards from the bus when the shooting started. He immediately ran away with him. On the other hand P.W.4 says that when the shooting started accused 2 was inside the bus next to him and that it was accused 2 who did the shooting. Surely accused 2 could not be at two different places at the same time. All the other Crown witnesses i.e. P.W.12, P.W.13 and P.W.6 said that the first shot was fired by a person who was sitting on the back seat but P.W.4 says the first shot came from accused 2 who was behind the driver.

P.W.4 struck me as being as unreliable as P.W.2. In any case they contradict each other as to how accused 2 participated in the offences charged. I have a very serious doubt that accused 2 was anywhere near the scene of the crime when the shooting took place. My doubt is further strengthened by the evidence of P.W.7 Trooper Pomela who saw only accused 1 and Matete leave the bus immediately after the shooting. He did not see accused 2.

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As I said earlier in this judgment the Crown witnesses contradict each other. According to P.W.2 the two accused were in the company of Matete when they came to his home. They invited him to have a drink with him at Bongall Restaurant. The four of them went to the restaurant together. According to Trooper Pomela accused 1 was alone when he arrived and found Matete there in the restaurant. Accused 2, described by Pomela as taller and light in complexion, arrived much later when accused 1 and Matete were already outside the restaurant. Trooper Pomela makes no reference to P.W.2 who claims that the accused and Matete arrived at the restaurant together and at the same time.

If P.W.2 was in the company of the accused when they went to the restaurant one wonders why Trooper Pomela did not see him. He also failed to see Retselisitsoe alleged by the defence to have been in the company of the accused when they were at the restaurant.

I shall now deal with the evidence of Trooper Pomela and my impression of him as a witness. I have already said that if he saw the accused at the restaurant he ought to have seen either P.W.2 who claims to have been with the accused, or Retselisitsoe Pheko who was with the accused according to the defence version. The fact that he did not see any of the two people proves beyond any doubt that he did not see the accused at the restaurant. It is probable that as an investigating officer in this case he prepared his evidence from statements of the witnesses he interviewed. As a witness he gave me the impression that he is a policeman who tends to exaggerate in an attempt to give the impression that he played a great part in the investigations of a case. He said he arrested the accused at a road block when they tried to get into a taxi bound for Maseru. The truth turned out to be that the accused were arrested 2 kilometres away from where he was, if he was there at all

/because.....

because Sgt. Molikeng (P.W.8) said the road block was manned by soldiers only, there were no policemen.

Trooper Pomela again said that after the shooting he saw accused 1 come out of the bus and running towards the restaurant. He (witness) entered into the storeroom and closed the door. He peeped through the window and saw Matete come out of the bus and follow accused 1. It was common cause that when Mr. Khaue, counsel for the defence and Mr. Peete, Director of Public Prosecutions, went to the scene of the crime they visited Bongalla Restaurant and went into the storeroom. They noticed that it was impossible to peep through that window. His evidence is again unbelievable that when he, Major Thaha and Captain Tumane saw accused 1 and Matete immediately after they had committed these offences, they decided not to arrest them because they (police officers) were not armed.

The defence of accused 2 is that known as alibi. Our law is that the onus is on the Crown throughout the trial to prove beyond a reasonable doubt that the alibi is false (Setenane Mabaso and another v. Rex, C. of A. (CRI) A/4-5/1983 dated the 24th April, 1984 (unreported)). Accused 2 said he was at the traffic circle when he heard the shots. He is blamed for having not reacted by going there to investigate more especially because the gun reports came from the bus stop where he had just left his friend. I do not think that this is a fair criticism of accused 2's reaction because it is known that during the insurgency in 1985 it was not uncommon to hear a sudden burst of gunfire at night and no person could be expected to investigate everytime he heard a gun report.

The explanation given by accused 2 appears to be reasonably possibly true. For this reason the Crown has failed to prove its case against accused 2 beyond a reasonable doubt.

/I now.....

I now come to the Crown case against accused 1. He has admitted most of the allegations by the Crown witnesses but denies that he got into the bus before it left for Thabana-Morena; he also denies that he fired any shots at the bus and at the two passengers (P.W.12 and P.W.13) who claim that they were shot at by him. P.W.12 knows accused 1 very well and saw him enter and sit on the back seat just behind her. P.W.13 also saw him enter into the bus but she is not sure that he was still in the bus when it left the bus stop. P.W.12 says that the first shot came from behind her and the only person who sat behind her was accused 1. During the confusion they moved up and down the bus; she finally came to the door and met accused 1. He shot her on both thighs. Although there was commotion in the bus its interior lights were still on and it was possible for a passenger to see and recognise a person who was near him. P.W.12 met accused 1 at the door and the light in the bus enable her to recognize him. It is not clear when accused 1 left the back seat and managed to get out and come back again. If accused 1 and Mr. Matete had planned the ambush, he would not be affected by the confusion in the bus.

P.W.13 claims to have seen him outside the bus before he shot her. She claims that the light from inside the bus enable her to see him.

In S. v. Mehlape 1963 (2) S.A.29, Williamson, J.A. said;

"The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever snares to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence."

I have thoroughly considered the state of light in and outside the bus at the time the bus was attacked. I am convinced that there was enough light to enable the witnesses to recognize accused 1. I therefore think that this is not a case of mistaken identity. Nor was there any motive shown why the two witnesses could implicate accused 1 falsely.

/Mr. Khaone....

Mr. Khauoe has submitted that the story of accused 1 is to some extent confirmed by the evidence of P.W.6 who said that he never saw any passenger wearing a sandringham blanket enter into the bus. I must point out that not seeing such a passenger is not a denial that such a passenger ever entered into the bus. Such a statement does not rebut allegations of people who saw the passenger. P.W.6 said a man wearing an off white lumbar jacket was the one who shot the woman on the ear with a revolver. There is no doubt that this piece of evidence appears to ^{be} in direct conflict with the evidence of the other Crown witnesses. I do not think that there is any serious contradiction because the man in the white jacket could not have been on the back seat. The witnesses could not be sure that the bullet that hit a woman on the ear came from the rifle of accused 1, or from the revolver of the man in white jacket. I agree that it is surprising that P.W.12 and P.W.13 never saw the man who was wearing a white lumbar jacket. The probability is that he was not on the back seat because P.W.12 saw well that accused 1 was alone on the back seat. P.W.12 and P.W.13 struck me as being very truthful and honest witnesses. The same applies to P.W.6 but I think the man he saw was at a different place in the bus from where accused 1 was.

Accused 1 has given an explanation of how he parted with his rifles. It is not every explanation that an accused person gives that entitles him to an acquittal. He must give an explanation that might be reasonably possibly true. In R. v. M. 1946 A.D. 1023 at p. 1027 Davis, A.J.A. said:

".....the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

I have considered the explanation of accused 1 and have come to the conclusion that it is a false story. If Matete had deceitfully taken his gun and shot innocent passengers in a bus the first thing

/one.....

one would have expected him to do would be to report to the nearest police station immediately, or he would have reported at the L.P.F. base in Mafeteng. He is not just an ordinary villager but a trained soldier. He knew that the AK 47 rifle is a very dangerous weapon. Does he want this Court to believe that he could leave such a dangerous weapon in the hands of a madman, like he claims Matete was, and not report to the authorities i.e. L.P.F. base at Mafeteng and Mafeteng police station but elected to come to Maseru and make the report to his commanders. An innocent man cannot behave like that. If he were innocent he would have either raised an alarm or reported to accused 2 and P.W.2 other than to deceive them by saying that he had hidden his gun near a rock. Accused 2 is his friend and he would have taken him into his confidence and told him what had happened. His behaviour is that of a guilty man who wanted to dissociate himself from the crime he had just committed. It is a lie that he intended to go and report to his commanders in Maseru. He could not do so as he had already failed to tell even his own closest friend, accused 2.

It seems to me that when the accused were arrested between 5.00am and 6.00a.m. on the 31st January, 1985 they were actually running away from Mafeteng, that is why they left so early in the morning and decided to walk a distance well over one hundred kilometres. They merely wanted to get away from the scene of the crime. They knew that by 7.00a.m there would be numerous taxis and buses bound for Maseru but because they were running away they decided to walk.

The Crown proved beyond any reasonable doubt that the two accused went to Mafeteng without any permission from their superiors. They said that they got permission to take their rifles with them from their senior man, Private Polisa. The Crown was allowed to call Polisa after the close of the defence case because that name had been heard for the first time

/during....

during cross-examination. Private Polisa denied that at the relevant time he was still their senior man. He brought a duty register which showed beyond reasonable doubt that in January, 1985 he was on patrol in Qacha's Nek and could never have allowed the accused to take their guns when they went to their homes. This piece of evidence showed that the accused are not creditworthy witnesses.

For the reasons I have stated above I formed the opinion that there is a doubt that accused 2 was involved in the shooting. The Crown having failed to prove common purpose accused 2 must be acquitted. Regarding accused 1 I formed the opinion that the Crown has proved its case against him beyond a reasonable doubt and that he must be found guilty on all counts.

Verdict: Accused 1 is guilty as charged on all three charges.
Accused 2 is found not guilty on all charges and he is discharged.

My assessors agree.

J.L. KHEOLA
ACTING CHIEF JUSTICE

24th June, 1986.

For Crown - Mr. Peete

For Defence - Mr. Khauoe

EXTENUATING CIRCUMSTANCES.

The accused has been found guilty of murder and it is now the duty of this Court to find whether there are any extenuating circumstances. Mr. Khauoe addressed me very brilliantly on the law regarding extenuating circumstances. He referred me to the case of S. v. Sigwahla, 1967 (4) S.A. 566 (A.D.) at p. 569 where Holmes, J.A., considered constructive intent to kill as a possible extenuating circumstance.

I agree that, depending on the circumstances of the case, the moral blameworthiness of an accused person may be reduced if the murder is committed with legal intention known as dolus eventualis as distinct from dolus directus. Although the Court did not specifically make a finding on this point whether the case was one of dolus eventualis or dolus directus, there is no doubt from the evidence that the will of the accused and his companion was directed at the bringing about of death. They indiscriminately shot at people with an AK 47 rifle which they knew was a very dangerous weapon. They did not care what parts of their victims' bodies were hit. Some victims were shot on their heads, others on their trunks with severe damage to the internal organs. The fact that some bullets hit a victim on the thighs does not show that the accused had not intention to kill. It was just by chance that the bullets hit the victim on the thighs.

Intoxication may reduce the moral blameworthiness of a crime or may, depending on the circumstances, aggravate the aspect of blameworthiness, as when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design (S. v. Ndhlovu (2), 1965 (4) S.A. 692). In the present case there is no evidence that the

/accused.....

accused and his companion took liquor with any plan in their minds to fortify themselves so that they could insensitively commit the offences with which they now stand charged.

In S. v. Babada, 1964 (1) S.A. 26 (A.D.) it was held that where an accused person was under the influence of liquor when he committed murder there was no defined degree of intoxication required by the law before such intoxication may be taken as an extenuating circumstance. It is also trite law that the onus rests on the accused to prove on a balance of probabilities that there are extenuating circumstances (R. v. Balla and others, 1955 (3) S.A. 274 (A.D.)). In the present case the accused has not given any evidence in extenuation to enlighten the Court as to whether the liquor he drank that day had any influence on his mind. The Court has to speculate whether the liquor had any influence on the mind of the accused.

The only evidence we have before this Court is to the effect that the accused and two of his companions drank two quarts of beer. There is no evidence as to how the beer was shared and it is impossible for this Court to estimate how many draughts each had. Be that as it may, I formed the opinion that the quantity the accused drank may have had some influence on his mind. During the course of the trial I observed the accused and found him to be a normal person and very intelligent. For him to have behaved in the manner he did on the 30th January, 1985 there must have been a reason and the only reason I can deduce from the evidence is intoxication. There was no motive for the murder. The accused and his companion did not intend to rob the passengers; they had not quarreled with any of the passengers before the bus was attacked. The sudden unprovoked attack of the passengers, most of whom the accused may not even have known, fortifies my conclusion that the accused was under the influence of liquor.

/I find.....

I find that there were extenuating circumstances. The verdict of the Court in count 1 is that of "guilty of murder with extenuating circumstances."

S.J.L. KHEOLA
ACTING CHIEF JUSTICE

30th June, 1986.

Sentence: Count 1:- Fifteen (15) years imprisonment

Count 2:- Two (2) years imprisonment

Count 3:- Six (6) months' imprisonment.

Sentences shall run concurrently.

My Assessors agree.

S.J.L. KHEOLA
ACTING CHIEF JUSTICE.

30th June, 1986.

For Crown - Mr. Peete

For Defence - Mr. Khauoe