C. of A. (CRI) No.2 of 1985

IN THE LESOTHO COURT OF APPEAL

In the matter between

LAWRENCE PHASUMANE	First Appellant
MASUPHA MASUPHA	Second Appellant
BOFIHLA ADORO	Third Appellant

and

REX

HELD AT MASERU

Coram

SCHUTZ, P.
ODES, J A
MILLER, J A

JUDGMENT

Odes, J. A

The Appellants in the above matter are three of four accused who were charged in the Lesotho High Court with the crime of robbery committed on the 23rd December, 1983 when it is alleged that they, together with a fourth accused brought a motor vehicle belonging to the Lesotho Bank and containing M153,456.62 in cash to a halt and robbed the occupants of that amount at gun point They are also alleged to have stolen the motor vehicle in question, a pistol and two trunks in which the money was deposited all of which was the property of the Lesotho Bank

The Appellants were respectively designated as Accused 1, 3 and 4 at the trial. For the sake of convenience and in order to obviate any confusion which may arise I

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prefer to retain the designation of the Appellants which they respectively bore in the Court a quo The original second accused disappeared from the scene before judgment was given.

An appeal has been noted against the conviction of the Appellants on various grounds some of which have not been argued before us No appeal has been lodged against the sentences of the Appellants who were respectively sentenced to 12, 10 and 8 years' imprisonment for their alleged participation in the robbery.

At the previous session of this Court, Counsel for the Appellants had taken the point that the record which has been prepared for this appeal was incomplete. After hearing argument on that point, the Court postponed the Appeal to this session and ordered basically that the representatives of the Crown and the Appellants furnish, by the 31st May 1986, a written report on the areas of the record upon which they were unable to agree after perusing the record, the Judge's and their own notes. They were directed to specify the extent of their differences and to state the reasons why they were unable to reach agreement on those portions of the record.

The representatives have not complied with this order and have in fact placed nothing whatever before this Court to indicate the areas and extent of disagreement. Neither party has chosen to produce its notes in relation to disputed areas of the record. We are therefore totally unable to gauge the nature, extent and more important, the materiality of any omitted portion of the record.

The basis of the submission by Counsel for the Appellants is that the record which has been placed before this Court

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is incomplete and that there is no way of knowing whether the omitted portions were material or not He contends that this defect is fatal and that the convictions and sentences should therefore be set aside.

It should be noted that the trial was heard over a period of several days and that the record of the proceedings runs into approximately 850 pages. The proceedings were recorded on tape and were then transcribed It is true, as indicated by Counsel for the Appellants, that there are portions of the record which the transcriber has labelled as "inaudible". At p.301 the note made on the record is that the passage following immediately thereafter is "totally inaudible from 1 2.5". There is no indication before us what this passage embraces i.e. whether the inaudible portion is extensive and/or covers material evidence or whether the omitted portion is in fact insignificant or contains evidence which is either immaterial or does not operate prejudicially against the Appellants. In the light of the order made, one would have expected that had the passages in question contained material omissions, the notes of either party or the Judge would have reflected them

There are also random passages in the record where a question put or an answer given are reflected as "inaudible" where the transcriber has been unable to hear what was said but in none of the passages can it be said that the general trend and flow of the evidence being furnished have been materially interrupted.

One also finds in certain passages in the record where the tape has given difficulty to the transcriber that typewritten notes have in fact been incorporated in the record.

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The origin of the notes was stated to be those of the presiding Judge. What is significant about these notes is that they often overlap portions of the record which have in fact been taped and transcribed and the accuracy of the notes taken when compared with the overlapping evidence transcribed from the tape, is impressive. It appears therefore that where significant portions of the tape have been inaudible the type-written notes have been inserted to replace the portions which the transcriber was unable to hear and transcribe. As indicated earlier, the Appellants have not placed anything before us to indicate that their notes on the passages in question contain material omissions

It cannot be sufficiently emphasised that the need for full and proper records of the proceedings of lower Courts is a pre-requisite to the exercise by a Court of Appeal of its duties and functions. Generally speaking, this Court (and indeed any Court exercising Appellate jurisdiction) cannot adequately fulfil its task unless it has a complete record of precisely what has transpired in the Court whose proceedings it is required to scrutinise. The greatest possible care must therefore be taken in the recording and transcription of the evidence adduced at a trial. The rationale for requiring a full and complete record of the proceedings is to ensure that an appellant is given a just hearing on appeal. The desire to obviate a failure of justice has induced the courts in the Republic of South Africa to set aside convictions and sentences on appeal where records have been lost or destroyed or contain defects which cannot be rectified. In S. v Marais 1966(2) S.A. 514 (T) Claassen, J (with whom Rabie J - as he then was - concurred) expressed himself as follows at page 517A-B

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" If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice "

In the Marais case, supra, several dicta-tapes and certain important exhibits had been lost and attempts to obtain the best available secondary evidence of the lost evidence and exhibits had proved unsuccessful

Where the records of the proceedings or material parts thereof have been lost and could not be reconstructed from the best available secondary evidence, the Courts have set aside the convictions and sentences in question (S v Whitney & Ano. 1975(3) S.A. 453(N), S. v Phukungwana 1981 (4) S A. 209 (B), S. v Orchard 1982 (1) PH H4 (C), S. v H. 1981 (2) S.A 586 (SWA), S. v Mokubung 1983(2) S.A. 710 (O)).

What emerges from these cases is that it is not every defect in the record which results in a conviction being set aside. The absurdity of requiring such perfection in a record is self-evident. The setting aside of the conviction, it seems to me, follows upon the satisfaction of a two-fold requirement

(a) The omitted or lost evidence must be material, and

(b) The defect cannot be cured by reference to the best available secondary evidence or cannot be settled

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by way of admission or in some other manner (see S. v Collier 1976(2) S.A. 378 (C)).

I find the approach of the Courts in the Republic of South Africa a salutary one which ensures that justice is done to the appellant but which at the same time prevents non-material defects in the record from being utilised as a basis for setting aside a conviction. I can see no objection in law or in logic for not adopting that approach in this country.

What constitutes a material defect in the record must depend upon a consideration of the facts of each case. Clearly the inability to reconstruct material passages in the evidence of an important witness could cause prejudice to an appellant with a concomitant risk of a failure of justice. On the other hand the failure to record isolated answers or questions, particularly in a lengthy record such as the present, might not prejudice the appellant at all. Once again the question is one of degree. It is clear to me from the manner in which the record has been compiled in the instant case that where the inability to hear what was said was of any substantial nature, the notes of the presiding Judge have been inserted therein. The only reasonable inference to draw from this modus operandi where the type-written notes have not been inserted at those passages where the transcriber has recorded an inability to hear what was said, is that the latter passage was not of any lengthy duration nor of importance Moreover the failure of the parties, despite the Court Order, to place before us anything at all to indicate the nature, extent or materiality of the defective portion of the record suggests that the passages in question did not contain material evidence Had the Appellants' or the Crown's notes revealed

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such omissions, I am satisfied that the notes to that effect would have been placed before this Court. While I reiterate the importance on the part of those responsible for preparing the record to strive for perfection I am nevertheless conscious of the fact that such perfection cannot always be attained. In a record of this length I have come to the conclusion that the omissions to which Counsel for the Appellants has drawn our attention are not such as to prejudice the Appellants in this case. I am accordingly not persuaded that the portions of the record and defects therein are such as might result in a failure of justice should such convictions in the instant case not be set aside.

I proceed to deal with the argument of the Counsel for the Appellants in regard to the merits of the appeal.

The main thrust of the argument of behalf of the Appellants was directed at the evidence adduced by MOTHIBI who was the main Crown witness and an accomplice of the Appellants and the second accused It was argued on behalf of the Appellants that the evidence of this witness should have been rejected by the learned Judge. Because the acceptance of this witness's evidence was in fact central to the conviction of the Appellants, it is necessary for me to detail the evidence which was adduced by him. It should also be noted at this stage that there is no real dispute that the robbery in fact took place but the burden of the Appellants' argument relates to the identity of the participants at that robbery, each of the Appellants denying that he was on the scene at the time.

At the time of the alleged robbery on the 23rd December, 1983 MOTHIBI was the chief teller at the Lesotho

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Bank. By reason of the fact that he and Accused 1 had worked together for 2 years at Barclays Bank and had become friends, he knew Accused 1 well. MOTHIBI conceded that he had only come to know Accused 2 and 3 through the robbery and did not therefore know them very well. He stated that he had seen Accused 4 for the first time on the day of the robbery and again thereafter. The events leading up to the planning and execution of the robbery commenced, according to MOTHIBI with a meeting which he had had with Accused 1 at the Airport Hotel early in December, 1983. Accused 1 had raised the topic of the possibility of a robbery and had suggested that the Lesotho Bank's money be taken at T.Y. some time before Christmas. MOTHIBI expressed interest in the scheme Some days later (which day was fixed as after the 14th December) Accused 1 met the witness again at the Airport Hotel, this time arriving with Accused 2. They sat in the vehicle of Accused 1 outside the hotel and discussed arobbery which was to take place before Christmas and which would necessarily have to involve further participants. They decided that 5 persons should be involved. Accused 1 was to recruit two other participants and because he was a member of the para-military force it was anticipated that he would enlist the aid of two soldiers. On the following day they met once again at the Airport Hotel where Accused 1, 2 and 3 arrived. MOTHIBI was told that Accused 3 was one of the soldiers whom Accused 1 had managed to recruit. At this meeting the participants decided that the robbery was to take place on the 21st December. In fact the robbery did not materialise as planned because the pay day for the soldiers at Mafeteng was scheduled for that date and it was feared that Accused 2 and 3 would be recognised. MOTHIBI then met Accused 1, 2 and 3 on the same day at 7.00 p m. when it was decided, instead, to hold up the Lesotho Bank's

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vehicle at a roadblock which they would set up on Friday 23rd December whilst it was on the road between Moruthoane and Morija. Accused 2 was made responsible for obtaining uniforms and appropriate road signs. MOTHIBI then informed them that he would be seated on the front left hand side of the bank's vehicle and that the armed security guard who would accompany the vehicle would be seated immediately behind him. On the morning of the 23rd December MOTHIBI and another teller collected the money to be transported and placed it in separate trunks. MOTHIBI's was marked "TY Agency" and "Teller No.1 TY Agency". The trunks were locked in the boot of the vehicle, which then set off. On the road to Morija, the bank personnel in the vehicle came upon Accused 1 to 4 waiting at a roadblock between 8 and 9 a.m. Accused 4, wearing a soldier's uniform in camouflage with a hat, pointed a firearm at the vehicle as it approached. The driver spoke to him and informed him that this was a bank vehicle but Accused 4 told him to park the vehicle at the side of the road. Accused 4 and 2 then approached the vehicle, Accused 2 also being in uniform but wearing dark glasses. Accused 2 and 4 were at the driver's side of the vehicle while Accused 3 approached the left hand side and spoke to MOTHIBI and the security officer Khanyapa who was sitting in the rear of the vehicle on the left hand side. Accused 3 was dressed in brown clothes normally worn by soldiers or police and was also wearing a brown cap which MOTHIBI identified before the Court. Accused 3 then ordered the occupants to get out of the vehicle for the purpose of a search. The security guard was ordered to hand over his firearm in order to check its number. Accused 3, armed with a small firearm, asked one of his colleagues for a pen and walked towards Accused 4 in order to get one. When MOTHIBI

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looked into the vehicle he saw that Accused 1 had already moved into the driver's seat behind the steering wheel. Accused 1 was wearing the same camouflage uniform as Accused 2 and 4 but in addition, wore a balaclava cap MOTHIBI however could recognise his facial features because only his mouth was covered. After Accused 3 had gone to fetch a pen from Accused 4, he fired a shot into the air. Thereafter Accused 2 gave instructions that the occupants of the bank's vehicle run into the field. A second shot was fired, followed by further volley whilst they ran. The 4 accused then took off in the Bank's vehicle, and drove in the direction of Maseru. MOTHIBI next met Accused 1 and 2 on the 27th December at a friend of his in Thamaes. The arrangement which was made before the robbery was that the money stolen would be kept at Accused 3's home and when matters had quietened down around March they would meet again MOTHIBI met Accused 1 again on the 30th December at 7.30 a.m. in the street in Kingsway and Accused 1 suggested that they meet that evening at the Airport Hotel. The witness proceeded to the hotel that evening where he met Accused 2. The latter said to MOTHIBI "Gentlemen, we shall meet". MOTHIBI went into the hotel and found Accused 3 and 4 drinking at the bar. At that stage Accused 1 was not to be seen. The witness went to look for him and found him at the bar door. The two of them proceeded to the toilet of the hotel where Accused 1 informed him that they had divided the money and that his (MOTHIBI's) share of the spoils was R26,000. The arrangement was that Accused 1 would bring MOTHIBI's share to him on the 9th January at the university. MOTHIBI was arrested on the 7th January. He attended two identification parades, one at the Maseru Central Prison where he identified Accused 3 and 4 and one at the Central

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Charge Office where he identified Accused 2.

MOTHIBI was cross-examined at length by representatives of the four accused. His cross-examination extends over 150 pages of the record. Despite this, it is significant to note that apart from a statement put to him that Accused 3 had only learnt of the robbery later, it was never put to MOTHIBI that the other accused would deny participating in the robbery nor what their versions would be. Not one of the cross-examiners had suggested to MOTHIBI a possible motive for implicating any of the accused. The cross-examination in fact established that Accused 1 was a good friend of this witness and had actually helped MOTHIBI with certain difficulties which MOTHIBI was experiencing on the domestic front

It is clear from the judgment delivered by the learned Judge in the Court a quo that he was fully alive to the dangers inherent in the evidence of an accomplice. He referred inter alia to the well-known case of R. v Ncanana 1948 (4) S.A. 401 (AD) which has been frequently followed by the Superior Courts of Lesotho. His approach to the evidence of MOTHIBI manifests an appreciation of the cautionary rule and the dangers of accepting the evidence of an accomplice which was uncorroborated or which did not implicate the accused. Perhaps the most lucid statement of the cautionary rule and the application thereof is to be found in the case of S v Hlapezulu 1965(4) S.A. 439 (AD) at 440 where Holmes, J.A. expressed himself as follows

> " It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effects of the following factors. First, he is a self-confessed criminal.

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> second, various considerations may lead him falsely to implicate the accused, for example, the desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit. Accordingly, even where Section 57 of the code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the Trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him ..."

The Courts of Lesotho have adopted the above approach and have consistently applied the cautionary rule. (Manamolela & Others v R C of A. (CRI) No.2 of 1982 at 11-16

The learned Judge then proceeded to analyse the evidence of the various witnesses and came to the conclusion that there was credible evidence corroborating the accomplice and implicating each of the three Appellants. In regard to Accused 1 he relied on the evidence of one MATABANE who was employed by Accused 2 as a taxi driver and who, on occasion, used to assist Accused 1 by helping to drive his taxi. On the 23rd December MATABANE was asked by his employer (Accused 2) to drive him together with Accused 1 and two other persons whom he did not know along the main road towards Mafeteng. This took place early in the morning shortly after sunrise. He was instructed to drive quickly. After passing Moruthoane the witness was told to stop the vehicle beside the road facing Maseru. Accused 1 and 2

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then instructed one of the two strangers who were sitting in the front of the vehicle next to MATABANE to put on a uniform which was a brown overall and hat which the stranger did inside the vehicle The other stranger who was sitting in the rear of the vehicle also changed into a similar uniform. MATABANE stated that both Accused 1 and 2 changed into a "green soldier's apparel". They left their own clothes inside the vehicle and alighted. Accused 1 gave MATABANE the keys to another vehicle which had earlier that morning been parked at Upper Thamae and instructed him that when he reached that place he should be very careful that no-one saw him. MATABANE was then told to lock the vehicle which he was driving and to place the keys thereof under the mat in the boot. He then left the four men at that spot and drove off as instructed. When he got to Accused 1's home he was stopped by the latter's brother-in-law who spoke to him for a while. As he was about to drive off again he saw Accused 2 come running towards him. He was reprimanded for stopping where he did. Accused 2 told him to get the other vehicle which had previously been parked there and to go to work in it Accused 2 then took the vehicle which the witness had been driving and drove off. MATABANE states further that early in January 1984 Accused 1 had asked the wife of Accused 2 whether she knew where her husband's money was and she replied in the affirmative. Accused 1 then instructed MATABANE to collect the money the following day. MATABANE duly proceeded to the home of Accused 2 and helped the latter's wife dig up a yellow plastic bag which was buried in a yard near her home. When MATABANE arrived home he received a report from his sister as a result of which he met Accused 1 driving a reddish vehicle. Accused 1 asked him whether he had taken out the

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money. When informed that the money had been taken out Accused 1 instructed MATABANE that he should inform Accused 1's wife to telephone him and that MATABANE should threafter meet him at the sewerage place. The witness then proceeded to Accused 2's wife who gave him the money in the yellow plastic bag. He stated that in addition to the money there were also potatoes and something like a lunch box in the plastic bag MATABANE found Accused 1 waiting for him at the sewerage disposal place in the red car and he handed him the plastic bag there The witness himself did not actually see money in the plastic bag but he was merely told that it contained money. MATABANE attended an identification parade in January at the Central Prison where he identified Accused 4 (Appellant 3) as being the person he saw at Accused 2's home on the 23rd December and who accompanied him in the vehicle to Moruthoane. He also saw that person putting on an overall

Further corroborative evidence implicating Accused 1 was found by the learned Judge in the evidence of Mr. and Mrs CINDI who are his uncle and aunt. Mrs CINDI stated that early on the morning of the 23rd December Accused 1 accompanied by a stranger wearing dark glasses came to her home and asked for her husband. She noticed that there were two boxes placed near the wheels of the vehicle in which they had arrived. Accused 1 asked her to store the boxes which he said were tool boxes. Before leaving he told her that she should not inform anyone that she was keeping the boxes at her home. If she said anything Accused 1 warned her that the owners of the tool boxes, namely himslef and "the soldiers" would injure her. When her husband came home that evening she informed him what transpired and together they went to

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inspect the boxes. Both boxes had the word "Chubb" written on them and one bore the words "Teller 1 TY Agency". She identified the boxes before the Court. After they had examined the boxes Accused 1 arrived with the stranger who had been there earlier that day. Accused 1 asked her husband to keep the boxes for them. Her husband asked what the boxes contained whereupon he replied that they contained money belonging to him and the soldiers. Under cross-examination she stated that her husband had asked him what the source of the money was. Accused 1 then enquired whether her husband had not heard about the soldiers' road block and the Lesotho Bank money incident which had taken place during that day. Accused 1 warned her husband not to disclose the existence of the boxes to anybody and warned him further that if he did inform anybody the owners would injure him. On the 28th or 29th December Accused 1 and two strangers came to their home at late dusk. One of the strangers was wearing a soldier's uniform and was armed. Accused 1 called his uncle out. The witness tried to follow but the soldier prevented her from doing so, telling her to go back inside the house and to close the door, which she did. From inside she first heard a vehicle and thereafter a tractor starting up. While these vehicles were idling she heard the sound of something strike metal four times. After Accused 1 and the two strangers had left her husband came into the house looking frightened and confused. She asked him what had happened but he did not tell her. The following evening Accused 1 arrived with three men. Again he called her husband out. She did not know what was happening outside because she was afraid to open the door. After a long silence her husband returned. Accused 1 later called her husband out. He then asked her husband not to tell anybody

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that he had kept anything. One of the men with him said that if the police kept chasing them they would devastate their (the witness's) home. The four men then left. The following morning Accused 1 arrived alone, removed certain documents from the boxes and left. Her husband later disposed of the boxes. She stated that the only reason she did not inform the police was because of the threat which Accused 1 made to her and her husband Her husband's evidence supports her in every material respect and his evidence need not be repeated here It should only be noted that in relation to the events which took place in the absence of Mrs CINDI while she was inside the home Mr. CINDI was asked to start a tractor to mask the noise made by a hammer and chisel which they had requested from him in order to open the boxes They in fact opened the boxes and instructed Mr. CINDI to let them have access to one of the rooms in a building which he normally let so that they could lock themselves in while they worked. When they came out of the room Accused 1 gave Mr. CINDI R3,000 for storing the boxes at his home. They then left the boxes at his home and stated that they would bring the other persons with whom they had to share the money the following day. The next day Accused 1 and three others arrived at their home and according to Mr. CINDI, they locked themselves inside the house in the same room as before When they completed their work they left, Accused 1 instructing CINDI to throw the boxes away He could not fit the boxes into his boot and therefore flattened them with a tractor, packed them into the boot and disposed of them.

Mr. CINDI further testified that some days later a red Mazda motor vehicle stopped near him. Accused 1 got

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out, handed him a yellow plastic bag informing him that it belonged to one of the soldiers and instructing him to deliver it to NTHETHE, who was an attorney who represented one of the accused at the trial. CINDI indicated that there were three persons in the vehicle He then delivered the yellow plastic parcel to NTHETHE at his home The latter said that the witness should not inform the police about the parcel he had brought. After his arrest and his subsequent release the witness, accompanied by his wife who was asked to be present, met Accused 1 at NTHETHE's office. The CINDI couple also deposed to an incident involving Accused 1 and NTHETHE referred to above in which they stated in evidence that both Accused 1 and NTHETHE had advised them to falsify their evidence or not to testify against Accused 1. They suggested that Mrs CINDI go to the Republic. It is important to note that in relation to this latter incident no questions whatever were put to either witness by NTHETHE nor was the incident denied on behalf of Accused 1 in cross-examination by his Counsel. NTHETHE did not give evidence at the trial.

CINDI's evidence relating to the handing over by Accused 1 of the yellow plastic bag was in fact corroborated by a witness PHASUMANE who is Accused 1's nephew.

The learned Judge in the Court a quo had the benefit of seeing these witnesses in the witness box and was greatly impressed by the evidence given by Mr. & Mrs CINDI It has been contended that Mr.CINDI should have been warned as an accomplice. CINDI was not in fact an accomplice because he was in no way involved in the commission of the offence. He did however hide the money and received M3,000 for his co-operation, although he states that such co-operation as he did provide was prompted by fear of threatened harm.

CINDI might well have been an accessory after the fact, which called for a cautious approach. From the judgment it is clear that notwithstanding the fact that CINDI was not warned as an accomplice, the learned Judge regarded him as one and applied the cautionary rule to his evidence. That the evidence of an accomplice can be used to corroborate that of another (assuming in Appellants' favour that CINDI was an accomplice) has been firmly established in the Courts of Lesotho. (cf. Lethola & Others v R 1963-1966 H.C.T.L.R. 12 at 16 See also S. v Avon Bottle Store (Pty) Ltd 1963(2) S.A. 389 (AD)). There does not appear to be any suggestion of a connection or conspiracy between CINDI and MOTHIBI the other accomplice in this matter. The witnesses referred to above were all subjected to lengthy cross-examinations and a reading of the record indicates that little impression was made upon them. Counsel for the Appellants has criticised certain aspects of the evidence of MOTHIBI and although his evidence does have certain flaws these do not appear to me to constitute a basis for the rejection of his evidence. There is nothing which suggests that the evidence of an accomplice, in order to be accepted, has to be perfect in all respects. (cf S v Ismail (2) 1965(1) S.A. 452 (N) at 455H, R. v Gumede 1949(3) S.A. 749 (AD) at 758)

As far as the position of Accused 3 (Appellant 2) is concerned, the learned Judge relied upon evidence which corroborated the accomplice MOTHIBI and which implicated the accused in order to justify his conviction. Trooper MOLAPO testified that he was a cousin of Accused 3 who, he said, shortly before the 23rd December 1983, had arrived at his home in order to borrow his soldier's uniform. Accused 3 had furnished him with the reason for borrowing his uniform

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as being the fact that he was to be engaged on operation duty with the task force of the police. The uniform was returned to him early in January 1984. The witness identified the uniform before the Court.

Lt Col. LETSIE stated that on the 3rd January 1984 he was given an assignment in respect of the Lesotho Bank robbery. On the 6th January he went to the Central Prison where Accused 3 made a report to him and said that he wanted to show him something. LETSIE then left by motor vehicle with Accused 3 and Col MOSOEUNYANE to the LPF camp. On the way to the camp Accused 3 told him that he had seen Corp. MONARE at the prison and that MONARE had a parcel which belonged to him and which he wanted to recover. At the LPF Camp they found Sgt. MONYANE. Col. MOSOEUNYANE, gave the latter instructions to accompany Accused 3. MONYANE then left with Accused 3 and returned later. After MONYANE and Accused 3 had left, LETSIE and the Colonel went to the Central Prison to see MONARE whose release they secured and with whom they returned to the LPF Camp. On the way back to the Camp they met MONYANE and Accused 3 who, when he saw that they had MONARE with them, stopped their vehicle MONARE got out and spoke to Accused 3 who instructed MONARE to "give the chiefs that bag which I gave you". MONARE agreed to do this and got into LETSIE's vehicle. Upon the return of Accused 3 and MONYANE to the camp, the latter approached the witness and the Colonel carrying two plastic bags containing money Accused 3 was with him and said that one bag came from his wife and the other from MAKEBE. They then asked Accused 3 how much money there was and he replied that there was R3,000 + from his wife's bag and R6,000 from MAKEBE's bag. In the interim LETSIE, MONARE and MOSOEUNYANE had gone to the house of MONARE's brother-in-law

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at Mohale's Hoek in Taung where they retrieved another bag of money (Exhibit 9). This bag was shown to Accused 3 at the LPF Camp and he admitted that it was his. The bag had a combination lock which Accused 3 then opened. When the money in the bag was later counted it contained R8,010. The witness indicated that he knew Accused 3 very well and was in fact related to him. Under cross-examination LETSIE admitted that when Accused 3 called him aside he told him that he had diamonds at his home and that the money he had in his possession was from the sale of such diamonds. However the witness testified that Accused 3 ultimately admitted that he knew about the robbery and that he had stopped the vehicle at the road block. LETSIE also indicated that Accused 3 had told him that he had bought a watch which was found in his possession and a briefcase after the 23rd December.

Sgt. **Monyane** stated that he was a member of the LPF and knew Accused 3 very well. He had been staying in the same house as Accused 3 for approximately 2 years. He supports the evidence given by LETSIE and states further that he accompanied Accused 3 on the instructions given by LETSIE as deposed to by the latter. **MONYANE** then says that once Accused 3 got into his vehicle he gave him instructions to drive to his home and to pick up his wife and Corp. MAKEBE. They drove them to the Palace where Accused 3's wife went to the servants' quarters and returned with a brown bag Accused 3 opened it, removed a whitish plastic bag, requesting that the brown bag be given to his wife and he then left his wife at the Palace. The plastic bag which contained the money was placed between MONYANE and Accused 3 in the vehicle Accused 3 then instructed him to drive to Ha Leqele where Accused 3 asked MAKEBE to fetch something which Accused 3 did not explain. MAKEBE then got out of

the vehicle and returned a short while later carrying a plastic parcel containing money consisting of bound notes. Accused 3 said he had given the money, approximately R6,000, to MAKEBE to keep for him On the way back to the LPF Camp Accused 3 volunteered the information that that was the money which they had stolen from the Lesotho Bank. Col Mosoeunyane gave evidence which supported that of Col. LETSIE in material respects. His evidence related to the return by Accused 3 of the briefcase and the opening of the combination lock thereof. He confirms LETSIE's evidence that Accused 3 had explained that the money found in the briefcase was his share of the proceeds of the robbery. MOSOEUNYANE stated further that he went to recover the other money at Taung as a result of the explanation given to him by Accused 3.

Further corroboration implicating Accused 3 comes from the evidence of KHANYAPA who was the security guard at the Lesotho Bank who accompanied the vehicle held up at the road block He deposed to the events at the road block on the 23rd December and his story is broadly similar in material respects to that given by MOTHIBI, the accomplice. The witness however, was not able to identify all the participants at the road block. He identified Accused 2 whom he had previously known (but, as indicated above, is not an appellant) and Accused 3 (now Appellant 2). He did not identify Accused 4 as suggested by the learned Judge in the Court a quo. He gave evidence of the identification parade at which he pointed out Accused 3 as being one of the participants in the road block hold-up

As far as Accused 4 (Appellant 3) is concerned, the learned Judge relied upon the evidence of Lance Corp. KOLISANG

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who stated that he was a member of the LPF working in the same section as Accused 4. On the morning of the 23rd December Accused 4 was supposed to report for work before 8 a.m. but he never turned up. The witness reported this to his senior (Corp. PAKELA) at 8.00. He stated that he first saw Accused 4 at 3.00 p.m. on that day. In cross-examination Accused 4 put it to the witness that Warrant Officer TUMANE would bear him out that he was at work during the day. TUMANE in fact gave evidence supporting KOLISANG and not Accused 4. Corp. PAKELA also gave evidence stating that he was in charge of the registry in which both Accused 4 and KOLISANG were employed as members of the LPF. He stated that he had reported for work at 7 45 a.m. and did not see Accused 4 He saw him momentarily at 8 05 a m. but he disappeared thereafter and could not be found. He testified that Accused 4 was to come on duty at 6 00 a.m. on the 23rd December but could not be found until 8.05 a.m but that he disappeared within minutes and was only seen after lunch. W/Officer TUMANE deposed to the fact that she too worked in the registry and records department of the LPF at Maseru. She knew Accused 4 who was working in the same section and in fact in the same office. She came on duty at 8.00 a.m. on the 23rd December and did not see Accused 4 at work He was supposed to be on duty but she did not see him at all that morning. She sent out KOLISANG to look for Accused 4 but he could not be found She saw him for the first time that day between 2.30 and 3 00 p.m. within the barracks. She stated further that the duty roster which was kept in the office indicated that Accused 4 was not at work. The entry in the duty roster she said was made by KOLISANG. She denies telling Accused 4 previously that he was at work on that day and she denies further the

/allegation ...

allegation that she had sent Accused 4 on an errand that morning and that he had asked her permission to use a motor bike to do so. In addition to the above witnesses Accused 4 was also identified by MATABANE, the taxi driver working for Accused 2 and whose evidence has been dealt with earlier in this judgment. It does not appear from the judgment that the learned Judge took this evidence into account.

The three Appellants gave evidence in their own defence, all denying that they participated in the robbery. Accused 1 testified that on the 23rd December, 1983 he awoke at 4.00 a.m., did road work until 6.15 a.m , then washed his car and at 8.00 a.m. brought his taxi to the bus stop at the market in Maseru where he found MATABANE who had in the interim taken his other taxi vehicle, a combi, to that place Accused 1 stated that he had to relieve MATABANE who had been lent to him as a driver by Accused 2. Accused 1 then did some rounds with MATABANE who left at 2.00 p.m. Accused 1 stated that he then drove around on his own from 2 00 - 7.00 p.m. Accused 1 denied all the Crown evidence implicating him in the commission of the robbery. He admitted that he was at the CINDI's home for a funeral in mid-January 1984 but apart from that he had never been to their home. He tells a story of meeting his uncle, CINDI, in the street, flicking his lights for him to stop. When he stopped Accused 1 stated that he gave him the yellow plastic bag containing vegetables telling him to take them home to the children. There is a conflict in this regard in the evidence given by Accused 1 and what was put to the various witnesses. It is important to note that in cross-examination of KATISO PHASUMANE, Accused 1 denied asking his uncle to carry the yellow plastic bag. CINDI also spoke of

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being handed a yellow plastic bag with instructions to hand it to NTHETHE. Accused 1 denied that he gave the parcel to CINDI to take to NTHETHE but significantly did not admit giving the yellow plastic bag containing vegetables to CINDI. Accused 1 stated further that he was arrested on the 16th January 1984 and was interrogated by the police. Col. MOSOEUNYANE is alleged to have assaulted him by pushing a pin into his nail. This was never put to MOSOEUNYANE in cross-examination by his Counsel.

In cross-examination Accused 1 addmitted that he was a good friend of MOTHIBI the accomplice. He admitted that he had not had a quarrel with that witness but could not give a reason why MOTHIBI would implicate him, nor could Accused 1 give a reason for being implicated by MATABANE the taxi-driver. He seemed to suggest in cross-examination that there was a grudge with the CINDIs but was unable to furnish a reason why they should wish to implicate him in the robbery. As indicated before, the CINDIs are his uncle and aunt. It is significant to note that in neither case did his Counsel suggest to these witnesses that they might have a grudge against him. Furthermore the conflict between what was put to MATABANE in cross-examination and what Accused 1 himself stated in evidence as to whether MATABANE assisted him on the 23rd December from 8.00 a.m. to 2.00 p.m. is ascribed by Accused 1 to a misunderstanding on the part of his Counsel. He further admits in cross-examination that he is not good at remembering dates and he is totally unable to remember when in January his grandmother had died nor when in January 1984 he first met Accused 4 at the lawyer's office. These concessions made by Accused 1 in his cross-examination throw considerable doubt on his

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recollection of the minutest details of what transpired on the 23rd December 1983 which by all accounts was a very ordinary day. Why he should have remembered the details of that particular day when he was first asked to recall them only on the 16th January 1984, almost a month after the events, is difficult to appreciate, particularly when he was unable to remember of any other ordinary day.

Accused 3 testified that during the week of the 23rd December 1983 he had been mounting road blocks at night until the 21st. On Friday the 23rd Private NTHOSO came to his house at 8 00 a.m. and said that he was required at the Transport office. There he was instructed by Staff Sgt. MBELE to go on patrol to Mokhotlong but Accused 3 told him that he could not go He stated that he remained at the barracks until 1 00 p m. He denied the evidence of MOTHIBI and stated that the first time he knew of him was in Court He stated that he was arrested on the 4th January 1984 and was interrogated on the 6th when he was asked about the Lesotho Bank money Accused 3 asked to talk to his inter rogator whose identity does not appear from the record. Accused 3 was asked what the money which he gave to MAKEBE was for and he stated that it was not the Lesotho Bank money but the proceeds of the sale of diamonds. He was told by his interrogator that he would be fetched the following day in order to retrieve the money. On the 7th January Accused 3 was taken to LETSIE and MOSOEUNYANE. He had not met the latter before, from which it is inferred that his interrogator was probably LETSIE. They then took him to the LPF barracks when Sgt. MONYANE was instructed to accompany him to fetch the money. His version relating to the pointing out and retrieval of the money is to all intents and puposes exactly

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as related by MONYANE save that Accused 3 denies admitting to him that it was the money from the robbery. Accused 3 confirms the version of LETSIE and MOSOEUNYANE as to their recovery of the bag and the opening of the combination by him. The one difference between the accused's version compared with that of LETSIE and MOSOEUNYANE was that Accused 3 stated that he persisted throughout in telling them that the money came from the sale of diamonds He specifically denied telling either of them that the money was from the Lesotho Bank robbery. He admitted in his evidence in chief that he had been identified by both MOTHIBI and KHANYAPA at the identification parade but stated that these witnesses did so after speaking to a policeman who was present at the parade. He stated that both witnesses came straight to him after the policeman had spoken to them In cross-examination however he stated that he did not know what the policeman had said to them and that the policeman had also spoken to other witnesses who had failed to identify him Under cross-examination Accused 3 could not explain why MOTHIBI had implicated him nor could he explain why KHANYAPA with whom he had worked at the LPF barracks would have similarly implicated him. He admitted that he had borrowed a uniform from his cousin, MOLAPO, but denied that he had used it to commit the robbery. His reason for borrowing the uniform namely to keep his own uniform clean, was singularly unimpressive. He was unable to give a satisfactory explanation why he had not instructed his Counsel to put that reason in cross-examination but instead instructed him to say that it was required for a joint military exercise. Accused 3's story of how he allegedly came into possession of the diamonds and subsequent sale thereof is so fanciful and improbable that it was correctly rejected out of hand by the learned Judge in the Court <u>a quo</u>.

?Accused 4 ...

Accused 4 testified that he was a private in the LPF. On the 23rd December 1983 he went to work at 6.00 a.m. and at 6.45 a.m. went to the mess to eat. He was engaged in his work in the registry and stated that he then went to the mess at 7.15 a m. for about 10 minutes He arrived back at the office after 7.00 a.m. No one was there until 7.40 a m. when LETSIE arrived. He told LETSIE that he was going to wash so that he could have his meals. He washed for 30 minutes and was then instructed by MAHASE to take two letters into town at approximately 7.45 - 8.00 a.m.

He returned to work "about 4 minutes after 8 00" and found Corporals KOLISANG and PAKELA in the office. PAKELA asked him why he had not come to work in the morning to which Accused 4 replied that he had. He then sat down and did his work. Accused 4 stated that W/Officer TUMANE arrived at work at approximately 9 0'clock and found him at work. Accused 4 said he worked in the office until 12.30. He then referred to an incident in February 1984 where TUMANE had said that she was unable to testify that he was not at work on the 23rd December He was arrested on approximately the 4th or the 5th January 1984 and he spent a month at Central Prison He states that Cols. LETSIE and MOSOEUNYANE had interrogated and assaulted him with "something like a stick". He does not remember when the identification parade took place but admits being identified by MOTHIBI and MATABANE who both talked with a policeman before they identified him. He did not hear what the policeman had told them A perusal of Accused 4's evidence reveals that he was most evasive. The reasons furnished by him as to why he was identified by the various witnesses were totally unconvincing. He was unable to explain satisfactorily how the identifying witnesses knew at the identification parade

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that he was a soldier, a fact furnished by him as a basis for their identification of him Like the other accused, Accused 4 was unable to explain why the two witnesses who identified him as a participant in a robbery and who were strangers to him would have implicated him, nor did the witness have any problems with KOLISANG who said that he was nowhere to be seen in the course of the morning of the 23rd December. He also found it strange that PAKELA and TUMANE had given evidence to the effect that he had not been on duty the entire morning. He was on good terms with all these witnesses who worked with him and he found it strange that they should all have given evidence to the effect that they had looked for him throughout the barracks on the morning of the 23rd December but to no avail

The learned Judge in the Court a quo had the advantage of having seen the various witnesses testify in Court and came to the conclusion that the Appellants had made an unfavourable impression upon him. Apart from the demeanour findings which he made, the findings of the Court a quo on the basis of the evidence summarised above seem to be borne out in full measure. I am of the view that the learned Judge correctly rejected the evidence of the Appellants. I can find no fault in his approach to the various witnesses of the Crown and in his application of the cautionary rule to the witnesses whose evidence had to be scrutinised with the necessary care I agree with the Court a quo that there has been a satisfaction of the cautionary rule by corroboration which in fact implicated each one of the Appellants in the commission of the offence. I am therefore not persuaded that the learned Judge has in any way erred in the conviction

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of the three Appellants The appeal of all three Appellants is therefore dismissed.

M. W. ODES
JUDGE OF APPEAL

I agree

W. P. SCHUTZ
PRESIDENT OF THE COURT OF APPEAL

I agree

S. MILLER
JUDGE OF APPEAL

Delivered at Maseru this day of July 1986

For the Appellants Mr. G. Nthethe

For the Respondent Mrs Bosiu