

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

1. DINGANE TSABANE
2. CHURCHILL MATEE

J U D G M E N T

Delivered by the Hon. Mr. Justice Sir Peter Allen
on the 16th day of June, 1988

The two accused are each indicted on two counts of murder and robbery. The first accused Dingane Tsabane (A.1.) is a 36 years old mine worker and the second accused Churchill Matee (A.2.) is a 34 years old mine worker. It is alleged that on the night of 5/6 August 1985, that is almost three years ago, the two accused fatally assaulted one Lebethane Ntlhakeng and then broke into Fraser's shop at Koro-Koro in Maseru District and stole money and various items from the shop.

The testimony of five witnesses who gave evidence at the Preparatory Examination was admitted at the commencement of the trial.

This incident started at 8.00 a.m. on Monday, 5 August 1985, outside Fraser's shop at Koro-Koro. The witness Pesbo Makhaba (PW6) started that he was then

/walking ...

walking past on the road when he saw an old acquaintance waiting outside the shop. He said this person was A.2 whom he had known since 1981 as Churchill Malunga.

The manageress of the shop, Selloane Ramohai (PW5) came to the shop at that time with a shop assistant called Puleng Qhala (PW10). They opened the shop and both of them noticed A.2 when he entered the shop. Puleng said that she served him and sold him some biscuits and sweets. He then went away.

At 5.00 p.m. Ramohai (PW5) and Puleng (PW10) closed the shop. Puleng said that they counted the cash left at the end of the day. It came to M5,738.76 and this money was locked into the safe by the manageress (PW5).

At 5.30 p.m. the nightwatchman reported to the manageress for night duty. He was the deceased Lebethane Ntlhakeng who was aged about 70 years. He was wearing a blanket over his overalls and a balaclava hat. The manageress Ramohai gave him a shotgun (exhibit 2) which belonged to Frasers and two rounds of ammunition. According to W.O. Mpopo (PW3) of CID Headquarters, who is responsible for keeping a registry of all firearms licenced in Lesotho, the shotgun licenced by Frasers is a 12 bore Baikal Serial no. X05122 (exhibit B). Ramohai confirmed that that was the number of the gun which she gave to the deceased. Qamako Mohau, the storeman, (evidence admitted) also gave the number of the gun.

/The manageress ...

The manageress and Puleng then secured the windows and door of the shop. The shop door was in fact a double door which had four padlocks on it; one of them being for the burglar alarm. It seems that the arrangement was that the manageress kept one of the door keys and the key for the lock on the burglar alarm. The other two door keys were kept by the storeman Qamako who worked in the storeroom of the shop. He lived further away in the village. The manageress and Puleng then went home to the staff quarters which they shared, about 60 metres away from the shop.

The house had several rooms, one of which was occupied by the manageress and her mother, 'Matseotsa, and the manageress's twin children who were then aged about six months. Her husband was away working in the mines. Another room was occupied by Puleng (PW 10) and her younger sister, Matseliso Qhala (PW9). These rooms were opposite each other with a passage in between.

Also in Koro-Koro there was living a man called Matsoapo Saana (PW4) who was a frequent customer at Frasers shop. He was a self-confessed stock thief and an accomplice in the present case. He said that he had known A.2 since 1982. Like Pesho (PW6) he also knew A.2 as Churchill Malunga.

At around 6.00 p.m. that evening A.2 came unexpectedly to the home of Matsoapo together with A.1, who was then not known to Matsoapo. The latter was with his wife and mother but the three men moved into

/another ...

another room to talk. A.2 introduced A.1 as Dingane Tsabane and said that they had just come to greet Matsoapo on their way to Mokema.

At about 9.00 p.m. A.2 told Matsoapo that the real purpose of their visit was to steal money from Frasers shop at Koro-koro. A.2 was carrying a hammer and A.1 had a sword (exhibit 1). Matsoapo replied that he was not used to stealing money. A.2 said that he knew that Matsoapo was normally a stock thief but he suggested that it was better to steal money and get rich quick. They discussed it for some time and eventually persuaded Matsoapo to join in their enterprise. A.1 told him that he used his sword against people when stealing from them and A.2 said that his hammer was for breaking into places so as to get money. Matsoapo asked A.1 to leave the sword behind, but he refused. Matsoapo then picked up his poplar stick (exhibit 8) which he said he usually carried with him and they set out for the shop at around 10.00 p.m.

When they approached the shop Matsoapo said that there was a night-watchman who probably knew him so he could not go any nearer to the shop. They looked for the nightwatchman but could not locate him. They then moved about 200 metres from the shop and sat down and waited. At around 2.00 a.m. (now 6 August) they approached the shop again and walked along a wall of the shop in single file with A.1 leading, then A.2, then Matsoapo.

/As they ...

As they came near to the gate they heard foot-steps approaching and the nightwatchman came into sight. A.1 struck him on the head with the sword and he fell down crying out, "What do you want from me?" A.2 took away his gun (exhibit 2) and Matsoapo recognised the old man as being Lebethane, the deceased. He was still crying out so A.2 hit him on the head with his hammer saying that he was making too much noise.

Matsoapo took hold of A.2 and pushed him away saying, "What are you doing? Are you killing him?" A.2 replied, "Shut up, I am now finishing him off." The old man was bleeding from the head and trying to stand up. A.1 told Matsoapo to hold the deceased so that they could tie him up. A.1 produced some rope and tied the old man's hands and feet while Matsoapo held him. A.1 removed the deceased's balaclava hat while Matsoapo took off the deceased's shoes and socks. A.1 used one sock to gag the deceased and he was then covered with his own blanket. A.1 then put on the deceased's balaclava. The deceased was still moving about slightly and making faint noises.

The three men moved down to the staff house where the manageress and the shop assistant were living. A.2 was carrying the nightwatchman's gun. They found the door locked and went round behind the house to look for a window. There was one high up on the wall of the house. A.1 told A.2 to give him the gun and Matsoapo gave him a torch. A.1 shone the torch into the room, which happened to be the room occupied by

Puleng (PW10) and her sister Matseliso (PW9). Puleng woke up first when she heard a noise at the window. A torch was being shone on to her and she could see a man at the window pointing a gun at her. She screamed. "Jo oe!" This woke up Matseliso.

The man said, "Shhh, shut up, I will shoot you if you scream again." He then told the two women to get out of bed and stand with their hands up. Puleng was told to come to the window and open it, but the frame was fastened firmly with nails, although the glass pane was missing. A.1 told them to get back into bed and cover themselves with blankets. They did so.

A.1 was too short to get up through the high window so he stood on A.2's shoulders and climbed through the window and jumped into the room. A.1 again warned the women not to scream otherwise he would shoot them. He added, "It is no use to scream as we have killed your father and I am wearing his hat." Puleng understood that this was a reference to the nightwatchman and she noticed that A.1 was wearing a balaclava similar to that which she had earlier seen worn by the deceased. A.1. asked Puleng if she had a gun and whether there was a telephone in the house and whether she was the manageress of the shop. Puleng answered no to each question. He then asked where the manageress was and she told him that the manageress was in her bedroom in that same building. A.1 ordered the two women to go out of the room and show him to the room of the manageress. They went into the passage and A.1 opened the front door and let in A.2 and Matsoapo.

/Matseliso ...

Matseliso then knocked on the door of the manageress's room and called out, "'Matseotsa, 'Matseotsa," the name of the mother of the manageress Ramohai (PW5). The old lady asked, "What is it Matseliso?" and the girl replied, "It's nothing." It was not a very sensible reply but perhaps not altogether surprising as this witness did not appear to be very bright mentally.

One of the men said, "Open here, we are preparing to shoot." The old lady inside started to scream and the men forced open the wooden door and entered. There was a candle lit in the room and Ramohai (PW5) jumped out of bed and went to her children. A.2 demanded her gun and she replied that she did not have one; it was with the nightwatchman. A.1 said, "I've taken that one. I want yours. I've already killed him. Can't you see I have his hat on?" Ramohai repeated that she had no gun. When asked if there was a telephone in the house she said that there was none. She was then told to hand over the keys of the shop. She replied that she did not have the keys as they were kept by the storeman Qamako. She handed over the safe keys and Puleng produced two of the door keys.

They put three of the women and the two children into Puleng's room and the two accused left Matsoapo with his stick to guard them. A.1 and A.2 took Puleng and the keys up to the shop. A.1 still had the gun. On the way they passed the spot where the deceased was lying on the ground under his blanket. One of the men said to Puleng, "You see your father where we have killed him." She could see no movements from the deceased and he was completely covered with his blanket.

At the shop Puleng used one key to turn off the alarm on the door. The other key was used to unlock one of the padlocks but she did not have the keys for the remaining two padlocks. When the men demanded the keys she explained again that they were with the man Qamako. They became angry and said that there must be spare keys, but Puleng denied this. A.1 took the hammer and hit her on the lower back with it. They took her back to the house and told Ramohai to hand over the spare keys. She replied yet again that the only other keys were with the man in the village. A.2 said that the women would "pay with their heads" if the accused could not get Frasers money.

Having made no workable plan or preparations for this business the two incompetent accused became more frustrated as they found that they could not get into the shop. They went back and forwards to the house several times. They asked for a saw to cut through metal bars but Ramohai told them that she only had a wood saw. That was no good and they went back and asked for an iron rod. Ramohai said that the metal fencing poles were kept in the shop storeroom which was locked.

They found that the door of the storeroom was made of a corrugated iron sheet, so A.2 bent it outwards and upwards from the bottom. A.1, being the smaller, crawled into the store with his torch and came out with a fencing pole. Puleng was then returned to the house to join the others being guarded by Matsoapo. The women there had lit a glass lamp and

/Matsoapo ...

Matsoapo remained in the passage doorway. Nobody attempted to run away to fetch help.

After a long time had passed the accused came back to the house and again told Puleng to go with them back to the shop. There she found that they had broken the remaining locks and had smashed through one of the double doors. They had also forced open the supposedly burglar-proof bars. A.1 and Puleng went through the broken door into the shop and A.1 gave her the safe keys and told her to open it. She opened the office safe and A.1 removed all the money from it, mostly notes but a few coins. This was the M5,738.76 which Ramohai had earlier locked into the safe. A.1 broke the office window and passed some of the cash to A.2 who was outside on the verandah. The rest of the money he put into his pockets. He then told Puleng to open the other big safe but she refused, saying that the keys were with the manageress, whereas in fact she had them all the time. A.1 was very angry and sent A.2 to fetch the keys. Ramohai told him that she had already handed them over. A.2 then went backwards and forwards twice more asking for the keys until Ramohai said, "Let's go up there and I'll show you the keys". She went with A.2 to the verandah and looked through the window and saw Puleng and A.1 inside the shop. She told Puleng to give her the keys and then showed the first accused which key was for the big safe. A.2 then took her back to the house. Apparently it did not occur to these accused to try all the keys until they found the correct one.

A.2 made two more journeys between the shop and house looking for something but saying nothing. Meanwhile Puleng was told to open the big safe and A.1 removed from it a white canvas bag full of coins which he passed out to A.2 now back on the verandah. A.1 climbed on to the counter and brought down some blankets. He then took a pair of blue canvas shoes similar to exhibit 9 and asked where the radios were. He passed some blankets, some balaclavas, radios and the shoes out to A.2. He next took a pair of khaki trousers (exhibit 4) and a pair of blue jeans (exhibit 5), two shirts and a donkey blanket and a Letlama blanket and passed those out to A.2 also.

There was a yellow cash box (exhibit 12) in the safe with some money in it. Both the manageress and Puleng were able to quote the serial number on the cash box and the number on the key. The cash box number was 610 and the key to it (exhibit 12B) was number 60019. A.1 removed the cash and passed the cash box out with the other items.

The two accused then left Puleng in the shop and they went down to the house again. By then it was about 5.00 a.m. They collected all those at the house and brought them to the shop. There was still some moonlight and Ramohai and Matsoapo both said they saw the deceased lying on the ground under a blanket and various items and bags piled on the shop verandah when they arrived, including the yellow cash box. The women and children were told to go through the broken door

/into ...

into the shop to join Pulehng. One of the accused shook the cash box which now contained coins. He said, "Do you hear that? We are going."

Matsoapo said that he told the accused that he did not want any of the shop property only some money. A.1 gave him a canvas bag with some coins in it but he kept the cash box himself. A.2 said that he was taking a blanket and two pairs of trousers. Matsoapo asked how much money they had taken and A.1 said it was R3,000 which he had already divided up and that there was R1,000 in Matsoapa's canvas bag. A.2 said that if the cash was not divided equally they would do so when they returned to collect the rest of the items which they had left on the verandah. Matsoapo was carrying the trousers, a blanket, the gun and his bag of cash. The accused were each carrying clothes, blankets and radios, and A.1 still had the cash box.

After they had walked for about 200 metres Matsoapo left them to go to his home and the two accused went off together. It was then about 5.30 a.m.

The women came out of the shop as soon as the three men had disappeared. There were various shop goods lying on the verandah. They did not bother to go and try to help the nightwatchman but simply left him lying on the ground. Instead they sent to the home of one Maphathe and woke him up and asked him to take them to the chief. It is not clear why they could not go straight to the chief themselves.

The chief sent for some village men including Mareka Motseki (PW8) who was the relief nightwatchman

/who worked ...

who worked in the week-ends. He was about 72 years old. They went to the shop with the women and Mareka removed the blanket from the deceased and found that he had been tied up with a rope around his head down to his hands and then his feet. This rope was removed. There was a poplar stick lying on the ground near the deceased. Mareka identified the stick as exhibit 8. He saw that the deceased had a deep injury to his head and he had been bleeding. He was still alive and breathing slowly. In spite of the severe head injury the deceased somehow managed to stand up and staggered to the bus with the help of Mareka. When they reached Q.E.II Hospital at Maseru he was put on to a trolley because by then he was unconscious.

At the hospital Dr Matšela (evidence admitted) said he examined the deceased and took a skull x-ray which showed a fracture in the frontal region. A prescription for treatment was prepared but apparently the deceased died shortly afterwards without recovering consciousness.

Meanwhile Matsoapo (PW4) had reached his home and found that his family was still asleep. He went to a donga near his house and hid the blanket, two pairs of trousers and the shotgun. He took the bag of cash into his bedroom and counted it. He found that it was all in coins and he only had a total of M200 instead of the thousand that he had been promised. He told his wife where he had obtained the money and she did not like it. She refused to use it and so he bought some mealie flour with it.

Two days later, on 8 August 1985, Dr. Nonkosi Tlale (evidence admitted) performed the post mortem examination of the deceased who was identified to him by the deceased's son Ntlhakeng Ntlhakeng and his grandson Tsokolo Tsieng (both of whose evidence was admitted). The post mortem report (exhibit A) shows that there was a 6 cms long laceration on the left side of the head (parietal) above the ear. Under this was a longitudinal fracture of the skull from front to rear of the head. There were fragments of bone which had pierced the brain causing bleeding and damage to the brain tissue. This injury was the cause of death.

Later that same month a special unit of military intelligence was operating in that area under the command of Warrant Officer Hlophe (PW2). He said that they were on counter-insurgency duty hunting for guerillas or terrorists. One of the suspects whom they were after was A.2 who was known to W.O. Hlophe as Churchill Matee. They had followed him to his home at Peka where they arrested him. They searched his place and interrogated him. Among other things they were looking for hidden firearms.

In the course of being questioned A.2 told them that they should go to see Dingane (A.1) at his home at Kolonyama. W.O. Hlophe took A.2 with him and they went to see A.1. While they were searching around the place A.1's wife was seen trying to hide a yellow cash box in a donga. They asked her what she was doing and she said that her husband had told her to hide it.

/W.O. Hlophe ...

W.O. Hlophe asked the two accused what they knew about the cash box and A.2 said to A.1, "Speak the truth as we are already under arrest." But A.1 just said that the cash box was his. W.O. Hlophe seized the cash box (identified in Court as exhibit 12) and the key (exhibit 12B). The Warrant Officer was still asking them about guns and A.2 mentioned that one Matsopapo had a gun and that he also should be arrested with them. A.1 agreed with this. W.O. Hlophe did not know anything about this man until his name was mentioned. As he was not able to connect the two accused with insurgent activities he decided to take them to the C.I.D. office in Maseru. He handed the two accused over to the police with the cash box and the information about Matsopapo. The cash box contained coins to the value of M135.05 (exhibit 13).

W.O. Hlophe stated that, at that time, he had heard of the incident at Koro-Koro but his main concern then was to find and arrest guerillas. The two accused apparently co-operated when he was interrogating them because they wanted to show that they were not involved in guerilla activities. From the information obtained from them the Warrant Officer decided that it was a police matter, which was why he took them to C.I.D. and handed them over.

The police investigating officer in the Koro-Koro incident was Lieutenant (now Captain) Letsunyane (PW1). He had managed to lose his notebook for that period. In addition he had not drawn a sketch plan of the scene and he failed to hold any identification parades. On 22 August 1985 he found the two

accused already in custody at Maseru C.I.D. office. Presumably this was shortly after they had been brought in by W.O. Hlophe.

Capt. Letsunyane cautioned them and told them that he was investigating a murder and robbery at Koro-Koro. On the following day he and two other police officers went with A.1 to Koro-Koro to search an open space near a village. They were looking for a home-made sword which A.1 had told them could be found there. They searched around but did not find it. Then they came across a herdsman called Nako 'Nau (PW7) who was herding goats and sheep. On being questioned he told the police that he had picked up such a sword which he found on the veld a few days before while out herding. He said he had taken it to his home at Tholong Ha Mapeshoane near Koro-Koro.

In Court 'Nau recognised A.1 as having been with the police on that day. 'Nau explained that he had taken the sword to his home and had left it outside the house by a pile of stones. He told PW1 that there was nobody at home and he himself could not leave his animals. He then gave them directions so that they could find the place and retrieve the sword.

Capt. Letsunyane took A.1 to that place and found the chief and went to search 'Nau's house. He said that it was A.1 himself who found and identified the sword in the forecourt against the wall of 'Nau's house. PW1 stated that A.1 said, "Here it is, I've found it,," and he then gave an explanation to the police. The sword was seized as an exhibit (exh.1) and 'Nau was informed of this later.

/Matsoapo ...

Matsoapo said that, about a week after the Koro-Koro incident, he heard that the nightwatchman had died and he became very worried and frightened. He was thinking about going to report to the police. Before he could make up his mind the police came to him. Capt. Letsunyane arrived with A.1 who had shown him where Matsoapo was living. The village chief was with them. A.1 was handcuffed and he explained to Matsoapo that he had been arrested. P.W.1 asked about the property from Fraser's shop and Matsoapo replied that he had hidden the items and spent the money. He was able to produce only M31.98 (exhibit 6) remaining from the M200. He told them that the other items were hidden in a donga near his home and he took PW1 and A.1 to that place. There he produced the shotgun (exhibit 2), a blanket (exhibit 3), the khaki trousers (exhibit 4) and the blue jeans (exhibit 5). PW1 said that the trousers were wrapped inside the blanket and covered with earth. Matsoapo was then arrested and taken to Maseru C.I.D. office with A.1. At that office Matsoapo said he saw the sword (exhibit 1) which he identified as the one carried by A.1 at Koro-Koro. He also saw A.2 at the office and he said that A.2 told him that he had been arrested on suspicion of being a terrorist.

On 27 August PW1 went with A.2 to his home at Peka. There A.2 instructed his wife to produce a suitcase from which he took a brown balaclava (exhibit 10) and cash amounting M100 (exhibit 11). The blue canvas shoes (exhibit 9) had earlier been removed from A.2 when he was found wearing them. At A.1's home A.1 handed over to P.W.1 two blankets only. One was a green and

/red ...

red Victoria blanket (exhibit 7) and the other blanket for some unknown reason was not exhibited.

The various items were afterwards shown to the manageress (PW5) who identified the shotgun (exhibit 2) by its serial number as belonging to Frasers, similarly the cash box and key by their respective numbers (exhibits 12 and 12B). The Letlama blanket (exhibit 3), the two pairs of trousers (exhibits 4 and 5) found with Matsoapo, the blue canvas shoes (exhibit 9) and brown balaclava (exhibit 10) found with A.2 were all identified by the manageress as being similar to items stolen from Frasers. The green and red Victoria blanket (exhibit 7) found with A.1 had attached to it a price tag marked with the following: "506 M39.95". The manageress explained that she had put this tag on and that the figures "506" stood for the date it arrived at the shop, i.e., the 5 was for 1985 and the 06 meant the sixth month. The price shown on it was M39.95. This blanket she identified as definitely from Fraser's stock at Koro-Koro.

Of the four weapons the shotgun was found with Matsoapo, the sword was found at Nako 'Nau's house, the stick was found near the body of the deceased and the hammer was not found at all.

Both accused testified for the defence. Dingane Tsabane (A.1) stated that in August 1985 he was arrested at his home at Kolonyama by soldiers who questioned him about guerilla activities. He claimed that they tortured him because they were trying to find hidden firearms. He knew nothing about any of this. He agreed that the cash box (exhibit 12) was found at his home

/but ...

but he denied that his wife was trying to hide it. He said the cash box belonged to him and that he used it to keep loose coins in for shopping purposes. He claimed that when seized it contained about M350 and not M135.05 as stated by W.O. Hlophe. He said that he could identify the cash box because there was a label on the bottom with the word "Maloti" on it. When asked in Court to show this label he pointed to the front of the box where there was a manufacturer's label with the word "KROST" on it. He said that that label had replaced his. But it was seen that the word "KROST" was also engraved on the cash box key (exhibit 12B). A.1 stated in Court that he was a dagga dealer as well as a miner and he needed somewhere to keep loose cash so he bought the cash box.

On the day after his arrest he was handed over to the C.I.D. at Maseru. He denied that he was taken by Capt. Letsunyane (PW1) to the veld to look for the Sword (exhibit 1) as a result of information given to the police by himself. However he agreed that he was taken there and he said that the police spoke to 'Nau (PW7) some distance away out of his hearing and that he and they then went to a house and found the sword outside. He denied being the one who found the sword there.

A.1 denied knowing Matsoapo at all. He agreed that he was taken by the police to Matsoapo's home at Koro-Koro and that a gun and other items were found nearby in a donga. He said that he and Matsoapo were then taken to Fraser's shop where the items were identified by the manageress and Puleng. He alleged that

/the police ...

the police called on these two women to recognise and identify him and Matsoapo. He did not know of any reason why Matsoapo should implicate him.

He was later taken to his home where the police searched it. They seized two blankets which were his personal property. One of these was the Victoria blanket with the Fraser's price tag on it (exhibit 7). He did not say anything in Court about the price tag. He merely remarked that the blanket was dirty and that it had been torn by wire.

He said that he knew A.2 well as they had grown up together in the same district and that A.2 knew his home. He denied having had anything to do with the Fraser's shop incident. He said that he had never been to Koro-Koro and that he knew nothing about the sword (exhibit 1) nor about the nightwatchman being assaulted.

The second accused was Churchill Matee, or Churchill Malunga as some witnesses referred to him. He said that he was a miner and that he too was arrested by soldiers on a Monday in August 1985 on suspicion of being involved in terrorist activities. His home was searched for firearms but they found none. On the Friday he was taken to A.1's home for the same purpose. A.2 said that he told A.1 to give them the guns that they wanted. No guns were found but he saw the yellow cash box brought out from A.1's house.

On the following day, Saturday, he was taken to Maseru C.I.D. office where he saw A.1. but not Matsoapo. He denied being at Koro-Koro on the 5 and 6 August 1985.

/He had ...

He had no knowledge of the events there described by the witnesses whom he alleged were all lying in order to implicate him. He knew nothing about a hammer and he had not been to Matsoapo's home nor had he persuaded him to take part in a robbery. At first he said that he did not know Matsoapo but then he changed his mind and stated that he knew Matsoapo in 1982-83 when they were in prison together. This information regarding being in prison came from A.2 himself and not as a result of being questioned about it.

He was asked about the witness Pesho Makhaba (PW6) who had stated that he knew A.2 and had recognised him outside Fraser's shop at Koro-Koro on the morning of 5 August. A.2 agreed that he knew Pesho because he said, some time before they had been in prison together and had shared a cell there. Again this information was offered by A.2 himself and not as a result of questioning him about it. A.2 insisted that Pesho was lying about seeing him at Koro-Koro. When asked why Pesho should have lied about it, A.2 replied that "it was because we were staying in a cell together." When asked why the witnesses from the shop might be telling lies about him he said that the reason was, "because I do not know the place Koro-Koro."

He said that he had never been to Koro-Koro at all and he repeated that he did not know the place. He complained that there had been no identification parade but, unlike A.1, he did not allege that he was ever taken to Koro-Koro to be identified there by the witnesses.

As to the exhibits, A.2 stated that the blue canvas shoes had been bought by him in Maputsoe in

/1980 ...

1980, five years before the robbery, and that he had worn them only when he was digging. The balaclava (exhibit 10) he bought in 1984. He did not offer any explanation of the M.100 (exhibit 11) seized at the same time as the shoes and hat.

From the evidence adduced by the prosecution I have no doubt that the incident at Fraser's shop, Koro-Koro occurred as they described it. That is that thieves first assaulted and then tied up the nightwatchman who subsequently died of his injuries. And that they harassed and threatened the shop manageress and her assistant in order to obtain the keys and other information about the shop. That they forced open the shop door and stole various shop goods and cash from inside the shop. The attack on the nightwatchman and the threatening of the shop women with a gun in order to carry out the theft quite clearly make this offence into robbery. The subsequent death of the nightwatchman as a result of his injuries make that offence into an unlawful killing and it is necessary to decide whether the killing amounts in law to murder.

The two most important aspects of this case are the identification of the robbers and the weight to be placed upon the evidence of the accomplice Matsoapo Saoana (PW4).

With regard to an accomplice, because his evidence is tainted by his own admission of having participated in the crime there is a danger in accepting his evidence without corroboration. It is necessary first to decide whether he was a credible witness and then, if so,

/whether ...

whether there was any sufficient corroboration of his evidence. In Court this witness gave his evidence in a straightforward and convincing manner. He admitted from the start that he was a stock thief and he described how he had been persuaded to take part in the Fraser's shop robbery. He admitted that he did it for money. He was completely unshaken in cross-examination. He stuck to his version of events and he did not hide or apparently minimise his own part in the affair. There was no evidence from the prosecution witnesses that he offered or threatened any violence to them while he was guarding them. His own account of the assault of the nightwatchman was that the two accused each hit the man, but he did not. In fact, he said he intervened and, if that was so, it may well be that his intervention prevented the old man from being finished off on the spot.

The two accused could not suggest any reason why Matsoapo would have lied about them. There was no evidence of any grudge or quarrel between them which might have caused him to drag their names into the affair. In view of all this, and the fact that I was impressed by Matsoapo in Court as being a truthful and convincing witness, I accept his version of the events on that night.

As to corroboration of his evidence; as far as what went on in the staff quarters on that night, Matsoapo's testimony was amply supported by that of the manageress (PW5) and Puleng Qhala (PW10). Considering that it all took place three years ago there were only minor variations between their various versions of events on that night, and remarkably few of those variations in fact. I found the manageress and Puleng to be truthful witnesses and most especially I was
/impressed ...

impressed by the memory and straightforwardness of the witness Puleng.

Matsoapo's version of the incident was further corroborated by the fact that Fraser's shotgun was found in his possession afterwards, which clearly indicated that he had been on the scene as he had claimed. The cash box described by Matsoapo and identified by the two women was found in the possession of A.1 and this linked them both with the affair. The sword which Matsoapo said had been carried and used by A.1 was eventually recovered by the police with the assistance of A.1 himself, according to the police investigating officer (PW1), and I do not doubt him on this point.

As to identification of the two accused, there is no doubt that the best and proper form would have been for the police to have held an identification parade so that the two women from the shop could have been given the chance to pick out the accused (or not, as the case might have been). This was a failure on the part of the investigating officer and no explanation of this was given to the Court.

In the absence of that procedure it is necessary to see whether what identification there was is sufficient in the circumstances. A.2 insisted several times that he had never been to Koro.Koro at all. There is no other evidence to dispute this and so it would seem that the witnesses first identified him in Court, first at the P.E. and then in this Court. There is no doubt that A.2 has a most distinctive appearance. He is a big man, ...

big man, tall and with a deep and easily recognisable voice.

With regard to A.1 it seems that he was taken to Koro-Koro on one occasion in police custody. A.1 alleged that the shop women were asked or told to identify him there, but this allegation was not put to them or to the investigating officer in cross-examination and I find no reason to believe that it was done like that.

The identification of the accused by these two women alone might have raised some doubt since there was a possibility that they could have been honestly mistaken, although they showed no doubt when describing and identifying both accused in Court. However, the witness Pesho (PW6) quite definitely recognised A.2 at the shop on that particular morning and he could hardly have been mistaken about him since they had admittedly shared a prison cell for some time in the recent past. Furthermore, there was revealed no reason why he should have lied about seeing A.2 on that day. It is noticeable that both Matsoapo and Pesho who previously knew A.2 in prison referred to him as Churchill Malunga and A.2 did not deny this name.

In addition there is the shop cash box and the price tagged blanket found with A.1 and the shop's shotgun found with Matsoapo. There is also Matsoapo's own testimony of being with the two accused all that evening and night. And I have already found his evidence to be credible. I do not believe the assertions of the two accused that they had nothing to do with this incident.

/Putting ...

Putting all this together, and considering it as a whole, I am satisfied beyond doubt that there was a sufficient identification of these two accused. I find that the robbery at Fraser's shop was committed by A.1 and A.2 and Matsoapo after they had conspired and agreed together to commit this crime. This association and agreement indicates that they acted together with a common purpose and so the two accused are both liable for the same consequences of their actions on that night.

Of the M5,738.76 takings from the shop stolen on that night, very little was recovered. This was M135.05 from A.1 and M100 from A.2 and M31.98 from Matsoapo, a total of only M.267.03. Of the shop goods said to have been stolen, such items as shirts, blankets, radios and so on have not been recovered. Only one blanket was positively identified because it bore the shop's price tag (exhibit 7). The other items recovered were similar to the shop's goods and some were most probably taken from the shop.

The second count on the indictment against these accused is of the common law offence of robbery. This offence consists of the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from the person of another or in his presence.

There was a theft of the shop property since the cash and shop goods were taken in such circumstances that there was revealed a clear intention by the thieves to deprive the owner permanently of the property.

/Violence ...

Violence was used on the nightwatchman so as to effect entry into the shop without interference. Threats were made to the shop manageress and the shop assistant when the thieves pointed the nightwatchman's gun at them and threatened to shoot them if they did not co-operate. Thus the violence preceded the theft and the threats caused the submission of the shop staff to the actual theft which occurred in their presence. All the ingredients of the offence of robbery were present. Since I have already found that the accused had a common purpose on that night, it follows that both accused are guilty of the offence of robbery.

The first count on the indictment is of the offence of murder. This offence consists of the unlawful and intentional killing of another person.

There is only the evidence of the accomplice Matsoapo regarding what happened when the nightwatchman was attacked first by A.1 with the sword and then by A.2 with the hammer. It seems extraordinary that each struck only one blow and that those two blows were on the same part of the head, the upper left side above the ear. But that is what the admitted medical evidence indicates.

The skull bone fragmented and pierced the brain. This may have been caused by the first blow by A.1 or by the second blow by A.2. There is no way of knowing now. But neither blow resulted in immediate death, though it is difficult to understand how this 70 years old man lived so long after such brain damage.

There is some quite convincing evidence to support the view that the killing was intentional and therefore

murder. The fact that the three men each carried weapons that could cause fatal injuries, i.e., the sword, the hammer and the stick. Secondly the fact that the two accused each struck him on the head which is an extremely vulnerable part of the body. Thirdly that they apparently believed that they had killed him because they told the women in the house that they had done so; though this could have been said by them just to frighten or intimidate the women. Fourthly, the fatal violence was used while they were in the process of committing another very serious crime, i.e., robbery. All this could well be considered to indicate an intention to kill or, at least, a recklessness as to whether or not death would result from the blows they struck. In both cases the offence would be murder.

On the other hand there is the testimony of Matsoapo that he intervened before any more blows could be struck. It is not certain therefore whether there had been any definite intention to finish the old man off on the spot. As it was, he was left breathing and tied up. Clearly the accused were then aware of his still being alive because they tied him up and gagged him to keep him quiet, which they might not have been likely to do if they had thought that he was dead or on the point of dying. It could be argued that they were satisfied with knocking him unconscious and rendering him immobile by tying him up. If they had wanted him dead there was really nothing to prevent them from finishing him off, except perhaps Matsoapo himself.

In the circumstances, therefore, I am prepared to give the accused the benefit of what little doubt

/there is ...

there is in this matter, and I find that there is insufficient evidence of an intention to kill the night-watchman. However, I have no doubt at all that the killing was a very serious and unlawful act in every respect and consequently both accused are guilty of culpable homicide.

One of the Assessors was of the opinion that the offence committed amounted to murder but, for the reasons given above, I have come to a different conclusion. Otherwise the Assessors are in agreement with the rest of the verdict.

Accordingly, on the first count, the two accused, Dingane Tsabane and Churchill Matee are each acquitted of the offence of murder, but they are both convicted instead of culpable homicide.

On the second count both accused are convicted of the offence of robbery.

P. A. P. J. ALLEN

J U D G E

16 June 1988

Mr Mdhluli for the Crown

Mr Mphalane assisted by Mr Kali and Miss Tau
for defence

SENTENCE

The two accused are aged 36(A.1) and 34(A.2). Both are married with young children. Both have been convicted of very serious offences. They are old enough
/to know ...

to know that they should behave responsibly and lawfully for the sake and benefit of their families of which they are the sole breadwinners.

Tsabane (A.1) has three previous convictions for housebreaking (18 months imprisonment each) and one for arson (9 months) which latter is not relevant. These were all in December 1979, six years before the present offences, so I shall not pay much attention to them.

The accused viciously and unnecessarily killed a very old man whom they could easily have over powered and simply tied up without further harming him. Over a period of several hours they intimidated and frightened with a gun several defenceless women. They then stole shop goods and cash only a small part of which has been recovered. I find it difficult to be lenient in these circumstances.

I shall take into account the fact that they have been in custody on remand awaiting trial for almost three years and I have decided to deduct this amount from the total sentence which I have considered to be appropriate in this case.

On count 1, culpable homicide, each accused will go to prison for 8 years. On count 2, robbery, each accused will go to prison for 6 years. These sentences will run concurrently and so each accused will serve a total of 8 years.

P. A. P. J. ALLEN

J U D G E

16 June 1988

I make the following Orders:

ORDER 1:

- A. The following exhibits will be handed over to the manageress of Fraser's shop Koro-Koro:-
- 1) The total cash recovered M267.03 (exhibits 6, 11 and 13).
 - 2) The shotgun (exhibit 2).
 - 3) The blankets, trousers, shoes and balaclava (exhibits 3, 4, 5, 7, 9 and 10).
 - 4) The cash box and key (exhibits 12 and 12B).
- B. The following exhibits will be destroyed:-
- 1) The sword (exhibit 1)
 - 2) The stick (exhibit 2)

P. A. P. J. ALLEN
J U D G E
16 June 1988

ORDER 2:

In accordance with s.236 C.P.&E. Act 1981, the witness MATSOAPO MOITAOLI SAOANA (PW4) is discharged from all liability to prosecution for the offences concerned in this case.

P. A. P. J. ALLEN
J U D G E
16 June 1988