

IN THE HIGH COURT OF LESOTHO

In the Matter of:

R E X

v

1. MACHABE MOSALA
2. NTOANE MOSALA
3. SHETLENG MOSENYE
4. TANKI RATALANE
5. TSEKISO RAPHANYANE

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 16th day of October, 1989.

The five (5) accused have pleaded not guilty to a charge of murder framed in the following terms:

"In that upon or about the 14th day of July, 1987 and at or near Mantsonyane Ha Mafa in the district of Thaba-Tseka, the said accused one or each or all of them, did unlawfully and intentionally kill Mafa Matete."

It is, perhaps, convenient to mention at this stage that during the course of this trial Miss Moruthoane, Counsel for the Crown, accepted the admissions made by Mr. Maqutu who represents the accused in this trial that the defence would not dispute the deposition of Mohau Matete who was P.W.8 at the proceedings of the Preparatory Examination. In terms of the provisions of S. 273 of the Criminal Procedure and Evidence Act, 1981 the deposition of Mohau Matete became evidence and it was unnecessary, therefore, to call the deponent

2/ as a witness

as a witness in this trial.

By agreement of the parties the Post-mortem Examination Report compiled by the medical doctor who had performed the autopsy on the body of the deceased was handed in from the bar, as exhibit "A". It was likewise unnecessary to call the medical doctor to testify as a witness in this trial.

Seven witnesses were called to testify in support of the Crown case. The five (5) accused were also called to give evidence from the witness box in their defence and another person viz. Monts'i Lekhetho, testified in support of the defence evidence.

In as far as it is relevant, the evidence of P.W.7, D/LSgt Mongaula, is to the effect that he is attached to the C.I.D. On 15th July, 1987 he was still posted at Thaba-Tseka police station when he received a certain report following which he proceeded to Mantsonyane Ha Mafa. He was in the company of Trooper Ramakabatane and one Gerard Tiela who was driving the vehicle in which they were travelling. Both Tpr. Ramakabatane and Gerard Tiela were, however, not called to testify in this trial.

According to P.W.7, he and his party were taken to a sport where they found the dead body of the deceased. That was some distance above the homestead of No.1 accused. On arrival at the spot they found many people, including Mohau Matete and Police officers one of whom was Tpr. Khanyapa alias Silas from Marakabei police post, already gathered at the scene.

P.W.7 examined the body of the deceased for injuries and made notes, at the time, in his notebook from which he was, by consent of the parties, allowed to refresh his memory. The

3/ examination

The examination revealed that the deceased had sustained multiple injuries on the head, jaw, hands and legs. Although he initially told the court that the multiple wounds on the head of the deceased were one on top of the other and he could not, therefore, count them P.W.7 later changed and said he actually noticed more than ten (10) wounds on the head of the deceased.

According to P.W.7 the following articles were then handed to him by Tpr. Khanyapa: A bereta .22 pistol serial number 0316H4N together with six (6) rounds of ammunition, two broken pieces of a "Lebetlela" stick and a balaclava hat. He took possession of the articles and handed in the pistol and its rounds of ammunition as exh 6. The two broken pieces of "Lebetlela" stick were also handed in as exhibit 2.

It is significant that although P.W.7 told the Court that he had sent the pistol together with the round of ammunition to Makoanyane for a ballistic examination and a report was actually made, neither the person who presumably examined the pistol was called as a witness nor was the ballistic report itself made available to this court.

Be that as it may, P.W.7 told the court that he then conveyed the body of the deceased to Mantsonyane hospital from where it was presumably transported to the mortuary at Queen Elizabeth II hospital for post-mortem examination. After the post-mortem examination, he took possession of the deceased's belongings which he handed in together with the balaclava hat he had received from Tpr. Khanyapa, as exhibit 1, collectively. The deceased's belongings were a pink Victoria blanket, a black Seanamarena

4/ blanket,

blanket, a brown bottle neck jersey, a spotted shirt, a pair of trousers, a pair of grey socks and a brown pair of shoes.

The police officer looked for and found accused 1, 2, 3, 4 and 5. He arrested, cautioned and charged them with the murder of the deceased. In his evidence P.W.7 told the court that although at the time of their arrest accused 2, 3 and 4 handed to him three "Kolits'ana" sticks which he took into police custody for use as exhibits at the trial, he no longer remembered which of the sticks was handed by each of the three accused. The sticks were, therefore, simply handed in as exhibit 3 for the first "Kolits'ana" stick, exhibit 4 for the second "Kolits'ana" stick and exhibit 5 for the third "Kolits'ana" stick.

As it will become clear later in the course of this judgment exhibits 3, 4 and 5 are the properties of accused 3, 2 and 4, respectively. It must, however, be mentioned that the police officers have a duty to label with sufficient details of identity the articles they take into their custody for use as exhibits in subsequent trials. For obvious reasons the importance of this duty cannot be overemphasized. According to him, Mohau Mafa Matete lived at Macheseng in the area of Mants'onyane. The deceased was the son of his elder brother. On 15th July, 1987, and following a certain report, he proceeded to Ha Mafa, still in the area of Mants'onyane, where he found the dead body of the deceased lying in the veld some distance above the home of No. 1 accused. He noticed that the deceased had sustained multiple open wounds from the front to the back of the head. There were also an open wound stretching from above the left eye to the temporal region, an open wound stretching from below the left nostril to the left

5/ cheek and

cheek and an open wound on the left leg.

Mohau Matete further told the court that after the police had examined it, he and other people accompanied the body of the deceased from the scene of crime up to the mortuary at Queen Elizabeth II hospital. The body sustained no further injuries whilst it was being transported from Mants'onnyane Ha. Mafa to the mortuary.

As it has already been pointed out earlier, the post-mortem examination report was, by the consent of the parties, handed in, from the bar, as exhibit "A". According to exhibit "A", the body of the deceased was identified by Mohau Matete before the medical doctor who performed the autopsy at Queen Elizabeth II hospital on 20th July, 1987. This is confirmed by MOhau Matee, P.W. 8 at the preparatory examination proceedings, whose deposition was, as mentioned earlier, admitted in evidence in terms of the provisions of s.273 of the Criminal Procedure and Evidence Act, 1981.

The external findings of the medical doctor were that the deceased, a young African male aged 40-43 years and in good nutrition had sustained the following injuries: a laceration on the right parietal scalp, a puncture wound on the left cheek and a contusion on the left cheek. According to the medical report, on opening the skull a laceration was found on the right parietal scalp. There was also a depression on the left parietal area resulting in a subdural haematoma.

From these findings the medical doctor concluded that death was due to intracranial bleeding resulting from the head injuries.

6/ It is worth

It is worth noting that according to exhibit "A" the medical doctor who performed the autopsy had observed only three wounds on the head of the deceased. No mention was made about any injuries on the other parts of the body e.g. the legs. This is in conflict with the evidence of P.W.7 who told the court that he noticed ten (10) or so open wounds on the head, and some other injuries on the legs, of the deceased. The testimony of P.W.7 is, in this regard, corroborated by the unchallenged evidence of Mohau Matete according to whom the deceased had open wounds on the legs and his head was full of many open wounds from the front to the back. Indeed, No. 1 accused himself told the court that he alone delivered more than four or five blows on the deceased's head with exhibit 2 which even broke into peices in the process.

I am inclined to reject as false the medical report that the deceased had sustained only three injuries on the head and find that the truth is in the evidence of P.W.7 corroborated by Mohau Matete that the deceased had, in fact, sustained far more than three open wounds on the head. I am fortified in this finding by the evidence of No. 1 accused himself who as it has already been stated, told the court that he had hit the deceased at least more than four or five blows on the head with the stick - exhibit 2.

However, it seems to be common cause that the deceased died at the spot where he was assaulted and sustained the head injuries. I am prepared, therefore, to accept the conclusion reached by the medical doctor that the deceased died as a result of the head injuries, whatever their number.

That being so, the salient question for the determination of this court is whether or not the accused are the persons who inflicted the head injuries upon the deceased and, therefore,

7/ brought about

brought about his death. Very briefly stated, in this regard the court heard the evidence of P.W.1, Mahlomola Semoli, who testified that in 1986 two of his cattle went missing from his home in the district of Mafeteng. They were a black cow and a black with some white spots ox. The cow was pregnant at the time of its disappearance. He reported his loss to the police.

On the day in question, 14th July, 1987 and following a certain information P.W.1 proceeded to Marakabei police post. He was in the company of P.W.2, Manyekenyane Semoli, and another person who was, however, not called as a witness in this trial.

It is common cause that on the same day, 14th July, 1987, the deceased who was the Chief of No. 1 accused also came with the latter to the police post where the black with white spots ox was found and identified by P.W.1 as one of his cattle that had gone missing from his home. It is further common cause that the police at Marakabei had on a previous occasion seized this ox together with a donkey from No. 1 accused on a suspicion that they were stolen property and, therefore, not in his lawful possession. When P.W.1 identified it as his property No. 1 accused also claimed the ox as the property of his brother who had left it in his possession.

It is further common cause that on 14th July, 1987 only the donkey was released to No. 1 accused. The ox remained in the custody of the police and No. 1 accused was instructed to go and fetch his brother whom he had claimed to be the rightful owner of the ox. The accused then returned home, driving the donkey.

According to P.W.1, whilst at the police post with No. 1 accused and the deceased, the latter had explained that when he first saw it in the possession of the accused the ox was with

8/ a black cow.

a black cow. The cow had by then two calves. It was then agreed that he (P.W.1) and his companions could go with the deceased to Mants'onyane ha Mafa to see if they would identify the animal alleged to be in the possession of No. 1 accused as his (P.W.1's) missing cow. That was, however, denied by No. 1 accused who told the court that after he and P.W.1 had disputed the ownership of the ox he left the police post and the alleged explanation by the deceased was never made in his presence.

It is significant that P.W.1 told the court that taking into account the period when his cow, which was pregnant at the time, went missing from his home, it ought to have had two calves as alleged by the deceased. It must, however, be remembered that in his own evidence, P.W.1 told the court that the cow went missing in 1986. Assuming the correctness of his evidence in this regard it seems unlikely that in 1987 the cow could have given birth to two calves unless, of course, they were twins which fact P.W.1 himself, however, denied. This court is entitled to take a judicial notice that a cow is pregnant for nine (9) months before giving birth to a calf. It is unlikely, therefore, that from 1986 to 1987 P.W.1's cow could have given birth twice. In my view P.W.1 is not being honest with the court on this point.

In any event, the important thing is that the accused denied that the explanation made by the deceased was made in his presence. The deceased is no more. For obvious reasons he could not be called as a witness in this trial. Nor is there a suggestion that the explanation allegedly made by the deceased was a dying declaration and, therefore, admissible as an exception to the rule of hearsay evidence. Even if the deceased had made the explanation he is alleged to have made by P.W.1, I would disregard it as hearsay

evidence on the grounds that it was not common cause that the explanation was made by the deceased in the presence of No. 1 accused nor was it proved to have been a dying declaration.

Be that as it may, P.W.1 went on to testify that after No. 1 accused had left the police post, presumably for his home at Mants'onnyane Ha Mafa, he, P.W.2 and their companion also left the police post in the company of the deceased for Mants'onnyane Ha Mafa where they were going to have a look at the black cow allegedly in the possession of the accused. They all travelled in a public bus which they disembarked next to Yeats' shop at Mants'onnyane. They then walked from the shop to the deceased's home at Ha Mafa where they were going to spend the night so as to be able to inspect No. 1 accused's stock on the following morning, 15th July, 1987. In fact P.W.1 told the court that whilst they were on the way to Mants'onnyana the deceased had suggested that the best thing would be to inspect the animals of other people in the village because if they were to go directly to his animals No. 1 accused would fight them.

Again, the alleged suggestion was clearly made in the absence of No. 1 accused by the deceased who, for obvious reasons, cannot testify in this trial. Nor is there evidence that when he made the alleged suggestion the deceased was anticipating death. The alleged suggestion is, in my opinion, inadmissible hearsay evidence.

The evidence of P.W.1 is, in all material respects, corroborated by that of P.W.2, Manyekenyan Semoli. I shall return to their evidence later in the course of this judgment.

As it has been stated earlier, No. 1 accused gave evidence in his defence and his story as to what happened after he had left Marakabei police post is slightly different. According to him, No. 1

10/ accused was

accused was holding in his hand a plastic rope and a book in which the earmarks he and his brothers used on their animals were written as he drove home his donkey. When he crossed a certain river next to the village of Ha Mathew the deceased, P.W.1, P.W.2 and their companion, who was not called as a witness, also came to the river. P.W.1 then approached him and in an unfriendly manner demanded to see the plastic rope he was carrying in his hand. The accused refused with the rope because of the unfriendly manner in which P.W.1 demanded it. They then walked together for a distance of about eleven (11) paces whilst P.W.1 was still insisting to have a look at the rope with which he (No.1 accused) refused. P.W.1 then suddenly delivered a blow with his stick on the accused who warded it off with his hand. The blow landed on the earmarks book which dropped to the ground in the process. No. 1 accused ran away leaving the donkey and the earmarks book at the river.

As he ran away, No. 1 accused was chased by P.W.1, P.W.2 and their companion. The accused then noticed No. 5 accused at the top of a hillock. He ran to No. 5 accused from whom he borrowed a stick with which to defend himself from his assailants. As No. 5 accused had no stick to lent to him, No. 1 accused left and and continued running away. He, however, called at the deceased and asked him to bring along his earmarks book from where it had dropped at the river. The deceased, who, for reasons already mentioned could not testify before this court, replied that he did not see the book.

As he was running away, No. 1 accused was called by Monts'i Lekhetho who said he should run to him for rescue. On arrival to him, Monts'i Lekbetho asked No. 1 accused why those men were chasing him. Whilst he was explaining to Monts'i Lekhetho why he was being chased, P.W.1, P.W.2 and their companion approached them.

11/ They were followed

They were followed by the deceased. For fear that P.W.1 and his party would assault him, No.1 accused left Monts'i Lekhetho and stood some distance away from him.

Whilst Monts'i was talking to P.W.1, P.W.2 and their companion in an attempt to persuade them not to chase No.1 accused in the manner they were doing, No. 5 accused arrived driving the donkey which No. 1 accused had left at the river. He passed next to where Monts'i Lekhetho was talking to P.W.1, P.W.2, their companion and the deceased. He came to where he (No.1 accused) was standing some distance away.

Both No. 1 and No. 5 accused then drove the donkey in the direction towards their home at Ha Mafa in the area of Mants'oniyane.

When they were at a place called Thoteng, which is about one mile from the village of Ha Mathew or the place where they had left Monts'i Lekhetho talking to No. 1 accused's assailants and the deceased, No. 1 and No. 5 accused noticed the deceased and the companion of P.W.1 and P.W.2 coming running straight after them. P.W.1 and P.W. 2 were themselves running in the veld, clearly in an attempt to intercept them from in front. When they realised that they were being chased No. 1 and No. 5 accused left the donkey they had been driving and took to their heels. They outran their pursuers till they arrived home in the village of Ha Mafa.

The evidence of No. 1 accused was, in all material respects corroborated by that of No. 5 accused save that the latter told the court that on the afternoon of the day in question he was returning from Yeats' shop in the area of Mants'oniyane. He had

been sent for shopping at the shop. Although he forgot what articles he bought he had spent altogether an amount of M50 at the shop.

If it were true that No. 5 accused went to the shop where he used the amount of M50 for shopping I find it strange that he does not remember even one of the articles he bought. He is, in my view, not being honest with the court on this point.

According to him, when he approached the river on his way home from the shop, No. 5 accused was following No.1 accused. Because he did not wish to walk home in the company of No. 1 accused, he sat down on a stone before crossing the river. Whilst sitting on the stone, he noticed three strange men coming to, and walking with, No.1 accused. The deceased was then next to a bridge some distance away. No. 1 accused walked for a distance of about ten (10) paces together with the three strangers before one of them attacked him with a stick.

No.5 accused denied, therefore, the evidence of No. 1 accused that he was approached by only P.W.1 with whom he walked for a short distance (about 11 paces) before the latter attacked him with the stick. However, No. 5 accused confirmed that when he was attacked with the stick, No. 1 accused ran to him chased by the three strangers. When he could not obtain a stick from him, No. 1 accused continued running away pursued by the three strange men.

No.5 accused further confirmed the evidence of No. 1 accused that the latter was called by Monts'i Lekhetho who asked him to run to him for rescue. He (No. 5 accused) then went down to the river and drove the donkey which No. 1 accused had left behind.

Whilst he (NO.5 accused) was driving the donkey No. 1 accused's assailants passed him on the way and joined the deceased who was walking ahead of him. He continued driving the donkey until he passed next to where NO. 1 accused's assailants and the deceased were talking to Monts'i Lekhetho. That was at a ridge next to the village of Ha Mathew. No. 5 accused further told the court that he passed about only four (4) paces from where Monts'i Lekhetho was standing and talking to No. 1 accused's assailants and the deceased. There was no reason, therefore, why Monts'i Lekhetho could have failed to notice him and the donkey. I shall return to the evidence of No. 1 and No. 5 accused later in this judgment.

As it has already been stated earlier, the defence called D.W. 2, Monts'i Lekhetho, to testify in support of the evidence of No.1 and No.5 accused. D.W.2 told the court that at about 4 p.m. on the day in question, 14th July, 1987, he was coming from his place of work and on his way home at the village of Ha Mathew when he noticed No. 1 accused being chased by three strange men. He called at No.1 accused and asked him to run to him for rescue. The accused obliged and informed him that his pursuers were chasing after him for having allegedly stolen their cattle.

D.W.2 tried to persuade No.1 accused to wait with him, assuring him that he would tell his assailants to stop chasing him about. However, No. 1 accused refused, saying he was afraid because his pursuers were going in the company of the chief (deceased) who had done nothing to stop his assailants from chasing him. D.W.2 then

14/ advised No.1

advised No. 1 accused to run to the chief's place and the latter complied.

When he was about 12 paces from him (D.W.2) No. 1 accused called at the deceased and asked him to bring along the earmarks book which had dropped at the time he was assaulted at the river. The deceased, who, however, could not testify in this trial, replied that he had not seen the book, No. 1 accused was talking about. The accused then continued on his way home and that was how he (D.W.2) parted with him on that day.

Thereafter the three strange men who had been chasing No. 1 accused came to him (D.W.2). They were P.W.1, P.W.2 and another person who had not given evidence in this trial. When he questioned them as to why they were chasing after No. 1 accused P.W.1, P.W.2 and their companion explained that the former had stolen their cattle. D.W.2 advised them to go to the chief's place where the matter would be resolved rather than chase No. 1 accused in the veld. P.W.1, P.W.2 and their companion agreed and left in the direction towards the chief's place. Thereafter the deceased who had been following behind also came to him but denied any personal knowledge as to why No. 1 accused's assailants were chasing him about.

The evidence of D.W.2 that when he talked to the deceased P.W.1, P.W.2 and their companion had already passed gives a lie to the evidence of No. 1 and No. 5 accused that the deceased was in the company of P.W.1, P.W.2 and the other man when D.W.2 talked to them. I must also say I find unconvincing the evidence of D.W.2 that the deceased was as indifferent, as he wants this court to believe, to No. 1 accused, his own subject, being chased around by P.W.1 and his companions.

Be that as it may, D.W. 2 told the court that after he had spoken to him, he then walked with the deceased to his house in the village of Ha Mathew where he stayed and chatted with him for about 15 minutes before the latter left and continued on his way home at Ha Mafa. D.W.2 actually took the deceased half way and returned to his house when they were outside the village of Ha Mathew.

D.W.2 categorically denied to have seen either No.5 accused or the donkey he was allegedly driving in the vicinity of Ha Mathew on the day in question. He told the court that if it were true that No. 5 accused had passed driving a donkey next to the spot where he was talking to No. 1 accused's assailants he would have definitely seen him and the donkey.

It must be borne in mind that P.W.1 and P.W.2 had, on one hand told the court that they had neither met nor assaulted No. 1 accused at the river on the day in question. On the other hand No. 1 and No. 5 accused claimed that P.W.1, P.W.2 and the third person had met and assaulted No.1 accused at the river where he even left his donkey which No.5 accused subsequently drove to the spot where D.W.2 was allegedly talking to P.W.1 and his party. However, the testimony of D.W.2 gives a lie to the evidence of both No.1 and No. 5 accused that the latter was seen driving the donkey or was, indeed, anywhere in the vicinity of the village of Ha Mathew at the material time.

There is also a discrepancy between the evidence of No. 1 accused and that of No. 5 accused as to what exactly

happened when No. 1 accused came to the river. Whilst No.1 accused told the court that he was approached by only P.W.1 with whom he walked for some distance before he attacked him with a stick. No. 5 accused testified that No. 1 accused was approached by all the three strangers i.e. P.W.1, P.W.2 and their companion with whom he walked for some distance before he was attacked with a stick.

Having regard to this and other discrepancies in their evidence I am not convinced that No. 1 accused, No.5 accused and D.W.2 were testifying to the truth when they said No. 1 accused was assaulted or chased by P.W.1, P.W.2 and their companion at the river next to the village of Ha Mathew. In my view, the truth is in the evidence of P.W.1 and P.W.2 that from Marakabei police post they and the deceased boarded a bus in which they travelled to Yeats' shop at Mantsonyane from where they walked to the village of Ha Mafa and they neither met nor assaulted No. 1 accused in the manner described by the defence evidence.

It is common cause that on the evening in question, 14th July , 1987, No. 1 accused was seen arriving in the village of Ha Mafa. After a while P.W.1, P.W.2 and their companion also arrived in the village walking in the company of the deceased.

Now, returning to their evidence, P.W.1 and P.W.2 told the court that it was their first time to come to the village of Ha Mafa on the evening of 14th July, 1987. As they entered the village they were following a footpath allegedly leading to the home of the deceased in the village. When they passed behind certain kraals still on the foot-path they were attacked by dogs. They ran away and, at the same time, struggled to chase away the

dogs.

dogs. A group of men, amongst whom they clearly identified No. 1 accused, then chased and threw stones at them.

As they were running away from their assailants and the dogs, P.W.1 and P.W.2 heard three gun reports. They did not know who had fired the shots. They, however, had the occasion to look back and notice that No. 1 accused and his party had caught hold of the deceased whom they were belabouring with sticks whilst he was lying on the ground.

According to P.W.1 and P.W.2, they and their companion ran to a certain house in the village and reported what had happened to them and the deceased. They received no help and had to proceed to the chief's place where they reported to P.W.6, 'Mampoi Matete. This is confirmed by P.W.6 who told the court that one of them even claimed to have sustained a wound on the head whilst trying to come to the rescue of the deceased. However, this was not mentioned by P.W.1 and P.W.2. Assuming it is their companion who told P.W.6 that he had been injured by the accused then he was not called to testify in this trial and what he he allegedly told P.W.6 is inadmissible hearsay evidence.

As they were shocked by what had happened to them and the deceased, P.W.1 and his party decided to return immediately to Marakabei police post rather than spend a night in the village of Ha Mafa. They slept in the open veld and reached the police post only on the following day, 15th July, 1987. After reporting to the police officers at Marakabei police post what had happened to them and the deceased, P.W.1 and his party returned to their home in the district of Mafeteng.

The evidence of P.W.1 and P.W.2 that when the deceased was assaulted by No. 1 accused and his party they ran to a certain house in the village was, in a way confirmed by P.W.5 'Mapetlane Petlane, who told the court that on the evening of 14th July, 1987 she was from a place called Ha Toka and on her way to her house in the village of Thoteng, alias, Ha Mafa. She was carrying a window frame on her head. When she crossed the footpath leading to the chief's place she noticed a man who was wearing a pinkish blanket. He was carrying a yellowish plastic back and walking along the footpath.

As she crossed the footpath, P.W.5 was on the upper side of No.1 accused's homestead which was down below. When she first noticed him, P.W.5 did not recognise who the man in a pinkish blanket was. He was, however, coming up the footpath leading to the chief's place and could have passed No.1 accused's homestead by a distance of about 200 yards.

After she had crossed the footpath, P.W.5 heard gun reports from behind. She looked back and noticed that the man in a pink blanket was then running fast chased by dogs, No.1,2,3,4 and 5 accused, all of whom she knew very well as they lived in the same village as she did. As the man in a pinkish blanket was running away chased by the five accused and the dogs P.W.5 recognised the voice of No. 1 accused shouting: "Strike him on the legs." The man in a pink blanket and his pursuers were then running at the flat stones above the home of No. 1 accused. She noticed the man in the pinkish blanket falling to the ground and being belaboured with sticks by No. 1,2,3,4 and 5 accused.

It is worth noting that although she claimed to have had no difficulty in identifying P.W.2,3,4 and 5 as they lived in the same village as she did, P.W.5 was unable to identify the man in the pink blanket as the deceased, her own chief, who also lived in the same village as she did. In my view, the basis on which P.W.5 relies to have identified No.2, 3, 4 and 5 is unconvincing. It must also be borne in mind that at the time she says she identified accused 2, 3, 4 and 5, P.W.5 was carrying a heavy load on her head and had just heard gun reports. She was not, therefore, in the best position to identify the accused as she claims she had. Although she may have identified No. 1 accused by his voice, I am not prepared to accept P.W.5's story that she positively identified accused 2,3,4 and 5 as she wants this court to believe.

Be that as it may, P.W.5 told the court that she got so frightened by the sight of what No.1 accused and his party did to the man in a pink blanket that she immediately dropped down the window frame she had been carrying on her head and ran away screaming. She ran to the nearest house which belonged to one 'Mampote. She arrived there simultaneously with three strange men (presumably P.W.1, P.W.2 and their companion) who made a certain report. As they appeared very frightened and many people in the village were also screaming, P.W.5 did not follow what report was made by those three strange men. She, however, learned from 'Mampote that the person whom No. 1 accused and his party had been brutally assaulting was the deceased, Chief Mafa Matete. She herself subsequently went with other villagers to the spot where she had seen No.1 accused and his party assaulting the man in the pink blanket. She actually identified the man as Chief Mafa Matete who was then dead.

Returning to their evidence No. 1 and No. 5 accused told the court that as they entered the village of Ha Mafa on the evening of 14th July, 1987 it was towards sun set. They parted company next to the home of P.W.3, 'Malehola Motsiba. On the instructions of No. 1 accused, NO. 5 accused went to his house to obtain a stick with which to fight P.W.1, P.W.2 and their companion, if and when they came to assault No. 1 accused at his home. On arrival at his house No. 5 accused found his grandfather, with whom he stayed not in. He was afraid to return to No. 1 accused's place and so he stayed at his house until his grandfather came home. On arrival his grandfather told him that he had just reprimanded No. 1 accused for assaulting the deceased.

The grandfather was, however, not called as a witness in this trial. What he is alleged to have told No.5 accused is therefore, hearsay and of no evidential value. Be that as it may, No.5 accused went on to tell the court that he went to No.1 accused's home long after his grandfather had come home. He found No.1 accused and other accused at the home of No.1 accused who showed him exhibit "6" which he had allegedly taken from the deceased.

No.5 accused denied, therefore, to have participated in the assault on the deceased. This is confirmed by all the other accused, including No.1 accused who told the court that after he had parted with No.5 accused next to the home of P.W.3 'Malehola Motsiba, he went straight to his house where he found No.2, 3 and 4 accused kraaling animals. He told them that he had been assaulted by some men who were still following him. They should, therefore, get their sticks and be prepared to assist him fight those men if and when they came to assault him at his house.

Accused 2, 3 and 4 did get their sticks and waited in front of the kraal next to the forecourt of his lower house. No.1 accused himself took his two sticks and went to wait at the kraal.

Shortly thereafter, No. 1 accused noticed the deceased, P.W.1, P.W.2 and their companion appearing next to P.W.3's home on the lower side of his house, a distance of about 100 yards. They were following the footpath leading to the chief's place. When they approached his homestead the deceased, P.W.1, P.W.2 and their companion left the footpath leading to the chief's place and followed a footpath leading from the village spring straight to his house. They passed on the upper side of his kraal and came to the forecourts of his two houses. The deceased stood on the forecourt of the upper house whilst P.W.1, P.W.2 and their companion stood on the forecourt of the lower house.

No.1 accused had a thought that the deceased and his party might be intending to inquire about something. He, therefore, left his position at the kraal and went to the forecourt of his lower house. When he came to the forecourt, he heard the deceased saying to P.W.1, P.W.2 and the third man : "Hei men, get hold of, and kill that person.. If he overpowers you I shall come to your assistance" or words to that effect.

As the deceased uttered those words P.W.1, P.W.2 and their companion rolled their blankets around their arms and advanced towards him (No.1. accused) with their sticks raised up. No.1 accused also raised his stick and advanced towards P.W.1, P.W.2 and their companion ready to fight back. When they were about 8 paces from each other No. 1 accused's dogs, which had been lying on a heap of straw next to the house, attacked P.W.1, P.W.2 and their

22/ and their

and their companion who then ran away chased by the dogs. No.2, 3 and 4 accused, who had been standing in front of the kraal next to forecourt of the lower house, then threw stones at and chased after P.W.1, P.W.2 and their companion.

In their evidence accused 2, 3 and 4 told the court that the sticks exhibits 4, 3 and 5 were, respectively, their properties. They confirmed the evidence of No.1 accused as to what happened when he arrived home on the evening of 14th July, 1987. However, the evidence of No.3 accused, corroborated by that of No.2 and 4 accused, was that after taking their sticks on the instructions of No.1 accused they went to wait behind the kraal. They, therefore, gave a lie to the evidence of No.1 accused that they were standing in front of the kraal next to the forecourt of the lower house.

Accused 2,3 and 4 confirmed that whilst chasing P.W.1 P.W.2 and their companion they heard gun reports. They did not know who had fired those shots and continued chasing P.W.1 and his party. They chased them until they were in the fields, more than 300 yards away from the village. In fact it was when P.W.1 and his party were at a place called Lekhalong far away from the village, that No.2,3 and 4 returned to No.1 accused's house.

Although the evidence of No.5 accused that he went to No.1 accused's house after accused 2,3 and 4 had returned from chasing P.W.1 and his party was confirmed by No. 3 and No.4 accused, that was denied by No.2 accused who told the court that on their return to No.1 accused's house they found No.5 accused already with No.1 accused. If No.3, 4 and 5 were telling the truth then No.2 accused was obviously not telling the truth on this point or vice versa.

It is clear from their evidence that the contention of the accused is, firstly that No.5 accused took no part in the assault on either the deceased or P.W.1, P.W.2 and their companion, secondly that No.2, 3 and 4 accused only assaulted or chased P.W.1 and his party but took no part in the assault on the deceased and thirdly that P.W.1 and his party could not have run to the house of 'Mampote in the village of Ha Mafa.

The first and second contentions are basically questions of identification. As regards the first contention it is significant that P.W.3 told the court that on the evening of 14th July, 1987 she was outside her house collecting some dry cow dung from her kraal when she noticed No.1 and No.5 accused passing next to her home. When they came to his house No.1 accused was still with No.5 accused. They joined accused 2, 3 and 4. No.1 accused then instructed all the other accused viz. No.2,3,4 and 5 accused to get their sticks and stand in readiness to fight some people who were coming to fight him. According to P.W.3, No.1 accused even told accused 2-5 to stand in such a way that those people might not be aware that they (accused 2-5) were going to fight. This is, however, denied by the accused who, as it has already been pointed out earlier, told the court that No.1 accused merely said the other accused should fight only in the effect of those people trying to assault him at his home.

Be that as it may, P.W.3 went on to testify that in compliance with his instructions all the other 4 accused obtained sticks and stood on the forecourt of No.1 accused's house whilst he himself went to wait at his kraal. Shortly thereafter P.W.3 noticed the deceased, P.W.1, P.W.2 and another man also passing next to her house. They were walking along the footpath leading to the chief's

place. When they were passing behind his kraals, still on the foot-path, No.1 accused went to the three strange men and delivered a blow with a stick on one of them. To that extent the evidence of P.W.3 confirms the evidence of P.W.6 who testified that one of the three strange men had a wound on the head.

According to No.1 accused his dogs then attacked those men who took to their heels. As they ran away those men were chased by the accused who were throwing stones at them. The three strange men ran across the mountain slope while the deceased ran up the mountain in the direction towards his home.

P.W.3 confirmed that as the three men were running away, chased by the accused and the dogs, she heard gun reports. She did not know who had fired the shots. However, after she had heard the gun shots P.W.3 noticed that all the five accused were then chasing after the deceased. As they were chasing him P.W.3 heard No.1 accused shouting that the deceased should be struck on the legs. They chased him till they went out of her view on the upper side of No.1 accused's house. After a while all the accused returned to No.1 accused home.

P.W.3 denied, therefore, the accused's contentions that No.5 accused did not participate in the assault on the three strange men and the deceased. She further denied that No.2, 3 and 4 accused assaulted only P.W.1, P.W.2 and their companion but not deceased. I must say I observed all the witnesses as they testified from the witness box before this court. P.W.3 impressed me as a truthful and more reliable witness than the witnesses I have so far dealt with. I am prepared to accept her evidence as the truth.

The evidence of P.W.3 was, in some material respects, corroborated by that of P.W.4 Lineo Ranyali, who testified that her house is slightly on the upper side of No.1 accused's house. On the evening in question she was sitting on a stone outside her house. After she had heard gun reports she clearly saw the deceased falling down as he was being assaulted with sticks by the accused who were all chasing after him.

The evidence of P.W.4 was, however subjected to criticism on the ground that, whereas in the Preparatory Examination record she was recorded as having told the presiding magistrate that the fight between the accused and P.W.1 and his party had started on the forecourt of No.1 accused's house she has denied it before this court.

It is worth mentioning that P.W.4 is a young girl of about 15 years of age. She appeared rather shy as she testified before this court. There is, in my view, the need to approach her evidence with caution. For this reason I accept her evidence only in as much as it has been corroborated by that of P.W.3 who as it has already been stated impressed me as a more reliable witness.

It is to be borne in mind that the assault on the deceased took place just before sun set when visibility was still good. P.W.3 and P.W.4 live in the same village as accused 2, 3, 4 and 5 do. They, therefore, know each other very well. That being so, it seems to me the question of mistaken identity of accused 2, 3, 4 and 5 by P.W.3 and P.W.4 is very unlikely. Indeed, the accused themselves told the court that they lived peacefully with P.W.3 and P.W.4 in the village. They could not, therefore, advance any good reason why the two witnesses would falsely implicate them in this case.

Although in their third contention the accused wanted this court to believe that P.W.1, P.W.2 and their companion were chased to Lekhalong which was far away from the village of Ha Mafa and could not, therefore, have run to a house in that village, the evidence of P.W.1 and P.W.2 was corroborated by that of P.W.5 that they did run to the house of 'Mampote in the village of Wa Mafa. Indeed, the evidence of P.W.1 and P.W.2 that they ran into the village is in a way, corroborated by P.W.6 according to whom the two witnesses did come to her house and reported that the accused were assaulting deceased. I see no sensible reason why P.W.1, P.W.2, P.W.5 and P.W.6 would all lie on this issue. In my view the evidence is simply overwhelming against the accused. I accordingly reject their story as false and accept as the truth the version of P.W.1, P.W.2, P.W.5 and P.W.6 on this point.

It is again worth mentioning that as it is common cause that the deceased and the accused live peacefully in the village, no good reason could be advanced why the accused would brutally assault the deceased in the manner described by the evidence. In my view, the only sensible explanation is in the evidence of No.1 accused who told the court that at the time his dogs and the other accused started chasing P.W.1, P.W.2 and their companion he was about to join/ⁱⁿthe chase when he heard a gun report. He then looked around and noticed that it was the deceased who was using a firearm. He decided to attack the deceased in self-defence. The other four (4) accused also told the court that they too heard gun reports but decided to ignore them and continue chasing P.W.1, P.W.2 and their companion.

27/ I must say

I must say I find this rather incredible. If they heard gun reports, as I believe they did, a natural reaction for the other accused was to stop chasing P.W.1 and his party and go to the assistance of No. 1 accused.

Although it was suggested, under cross-examination that the accused were the persons who used the firearm which they subsequently planted on the deceased who had in fact, no gun in his possession on the day in question, it must be remembered that P.W.7 told the court that he had sent exhibit 6 to Makoanyane for a ballistic examination and a report was made. He also investigated from the police section of the firearms about the person in whose name the pistol, exhibit 6, was registered. Neither the ballistic report nor the name of the person (if any was found) in whose name exhibit 6 was registered were made available to this court. The only reasonable inference to be drawn from failure to make available to the court all this evidence is that it was not going to support the Crown case. I am, therefore, inclined to accept as the truth the evidence of No. 1 accused that it was the deceased who used the firearm on 14th July, 1987.

There is, however, ample evidence which I am prepared to accept that at the time the shots were fired the accused were attacking P.W.1, P.W.2 and their companion who were innocently walking on the footpath leading to the chief's place. The accused were, therefore, the first aggressors.

Granted that the accused were the first aggressors it seems to me that, in all probabilities, the deceased fired the shots to scare them away so that they might refrain from their unlawful assault

on P.W.1, P.W.2 and their companion. That being so, self-defence cannot avail the accused.

Even if I were wrong and it is held that, in the circumstances, self defence did avail the accused there is evidence that, as he was being chased by his assailants, the deceased was running away and was brutally assaulted with sticks even after he had fallen down and ^{was} lying helplessly on the ground. The story of NO.1 accused that as he ran away the deceased was moving his arm backward as though he would shoot at him is simply unconvincing. If it were the truth, a natural thing for No. 1 accused to do would have been to hit the deceased on the arm that was threatening to shoot. But on his own mouth No. 1 accused told the court that he aimed his blows on the deceased's head. There is no doubt in my mind that as he ran away the deceased was not in any way threatening the accused who, in my opinion, exceeded the bounds of self-defence.

Considering the evidence as a whole, I am satisfied that all the accused did participate in the brutal assault on the deceased inflicting upon him multiple wounds on his head. The question I have earlier posted, viz. whether or not the accused are the persons who inflicted upon the deceased the head injuries and, therefore, brought about his death, must be answered in the affirmative.

The next question that remains for the determination of the court is whether, in assaulting the deceased as they did, the accused had the requisite subjective intention to kill. In this regard the evidence that the accused assaulted the deceased with sticks inflicting, not just one but, multiple open wounds on his head which is a vulnerable part of a human body must not be lost sight of. In assaulting the deceased in the manner described by

the evidence the accused were in my view, aware that death was likely to occur. They, nonetheless, acted reckless of whether or not it did occur. That being so, it must be accepted that the accused had the requisite subjective intention to kill at least in the legal sense.

From the foregoing, it is obvious that the view that I take is that all the accused have committed the offence against which they stand charged. I accordingly find them guilty of murder.

It must, however, be mentioned that only one of the assessors agrees with this finding. The other assessor does not. The finding that the accused are guilty of murder is, therefore, mine and that of only one of the assessors.

B.K. MOLAI
JUDGE

16th October, 1989.

For the Crown : Miss Moruthoane

For the Defence : Mr. Maqutu

EXTENUATING CIRCUMSTANCES

Having found the accused guilty of murder, the court is enjoined by S.296 of the Criminal Procedure and Evidence Act, 1981 to state the existence or otherwise of any factors tending to reduce the moral blameworthiness of their act.

In this regard there was evidence that whilst at Marakabei police post No. 1 accused and P.W.1 disputed the ownership of the black with white spot ox. After the accused had left the police post for his home village, P.W.1 and his party followed him to the village. They were going to inspect yet another animal which No. 1 accused claimed to be his property. I have found, on the evidence of P.W.1 himself, that the animal could not possibly be his property.

There was also evidence that at the time P.W.1, P.W.2 and their companion were running away chased by the dogs, Nos. 2,3, 4 and 5 accused, the deceased fired gun shots. As it has been mentioned in the course of my judgment, the deceased may have done so merely to scare away the accused and stop them from unlawfully assaulting P.W.1 and his companions. However, the accused may well have thought that the deceased was shooting to kill them i.e. he was taking sides on behalf of P.W.1 and his party.

The cumulative effect of all these factors is bound to have provoked the accused. Although it could not have reduced murder to a lesser offence such provocation can properly be considered an extenuating circumstance.

There is no evidence that the accused planned or pre-meditated the death of the deceased. For this reason, I found that the

/accused

accused had intention to kill only in the legal sense. The absence of premeditation of the deceased's death, is a factor that tends to reduce the moral blameworthiness of the accused's act.

In the result, I come to the conclusion that extenuating circumstances do exist in this case. Consequently the proper verdict is that the accused are guilty of murder with extenuating circumstances.

Both my assessors agree.

S E N T E N C E

In mitigation of the accused's sentences the court was invited to consider a number of factors. They were eloquently enumerated by the defence counsel. There is, therefore, no need to go over them again, save to mention that they were all taken into account, especially the fact that accused 2, 3 and 5 are small boys, of about 17 years or so, who have not previously served any term of imprisonment. They, presumably, still entertain the fear of going to gaol. If they were now sentenced to serve a long term of imprisonment, accused 2, 3 and 5 will, no doubt, come to realise that our prisons are not concentration camps where people are tortured and illtreated for we punish people by merely depriving them of their liberty. Once within the four walls of our prisons people are given a human treatment. This may lead the young accused into a misconception that prisons are built for people like themselves. They are certainly not.

There is also the danger that by sentencing them to long terms of imprisonment accused 2, 3, and 5 are going to mix with

/ hard heartend

hard heartend criminals who will influence them adversely so that when they come out of the prison the accused are worse than when they were sent there.

The court has also taken into account the fact that accused 4 is an employee of No. 1 accused. It was not easy for him to disobey the instructions of No. 1 accused that he should take his stick and fight P.W.1 and his party. However, accused 4 is a grown up person and ought to have told No.1 accused that his instructions were unlawful. He did not do so.

Notwithstanding the fact that it considered the factors, to which it was invited in mitigation of the accused's sentence, the court could not turn a blind eye to the seriousness of the offence against which the accused were convicted. It takes a diem view of people who unlawfully deprive fellow humans of their lives. There is, therefore, the need to impose a sentence that will deter the accused from a repetition of this sort of a thing. A sentence that will serve as a lesson to people of accused's mind that the courts of law do not encourage people to take the law into their own hands and kill other people. In the circumstances, the following sentences are appropriate and the accused are accordingly sentenced.

- Accused 1 : 10 years imprisonment
- Accused 2 : 8 strokes with a light cane, to be administered privately by a member of the prison staff.
- Accused 3 : 8 strokes with a light cane to be administered privately by a member of the prison staff..
- Accused 4 : 8 years imprisonment.

/Accused 5

Accused 5 ; 8 strokes with a light cane to be administered privately by a member of the prison staff.

B.K. MOLAI

JUDGE

17th October, 1989.

For the Crown : Miss Moruthoane.

For the Defence: Mr. Magutu.